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**SEER**

# Working together for Sustainable Supply Chain Impact

Futureproof Policy  
for International RBC



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*Futureproof Policy for International RBC*

To the Minister for Foreign Trade and Development Cooperation

This publication is the “ministerial version” of the advisory report, in advance of the official SER publication.

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**Preface**

(to be filled in later)

## Summary

At the request of the Minister for Foreign Trade and Development Cooperation, Sigrid Kaag, the Social and Economic Council of the Netherlands ("SER" or "the Council") has issued an advisory report on the future policy for International Responsible Business Conduct ("International RBC"). The Minister requested the Council to advise on four policy instrument mixes: the "well-considered mixes" for national and international as well as binding and non-binding instruments. She also asked the Council to take account of recent developments at the European level in its report. This summary sets out the main features of the advisory report.

### *Additional efforts are necessary*

Partly because of the COVID-19 crisis, it is more important than ever for companies to identify the most serious risks within their supply chains at this time, so as to prevent and reduce them as much as possible. It is only with consistent behaviour by a substantial part of the market – with employees and civil society organisations daring to address malpractices locally and with governments jointly putting sustainable supply chains on the map – that producers within the supply chain have sufficient incentives and opportunities for structurally improving conditions and for producing with respect for people and the environment. This demands additional commitment to international RBC on the part of the Dutch business community and the Dutch Government in the various policy areas that contribute to sustainable globalisation.

### *Assessment framework*

As the overarching principle for assessing the various policy instrument mixes, the Council applies the extent to which the policy instrument mix for the new international RBC policy, through the implementation of the OECD Guidelines for Multinational Enterprises (OECD Guidelines) by companies, can be expected to generate maximum impact within the supply chain. This involves preventing negative effects and, by extension, contributing to the Sustainable Development Goals (SDGs) and thus to sustainable development worldwide. Whether actual improvement takes place in production conditions within international supply chains also depends to a significant extent on the willingness and ability of producing countries to produce with respect for people and the environment. International RBC can make a substantial and relevant contribution to this. Based on this principle and evaluations of existing policies, the Council has drawn up the following criteria for assessing the policy instrument mixes:

- The widest possible use of mutually reinforcing policy instruments (the "5Vs model" supplemented by *linking* and *increasing influence*);
- Coherent policy, synergy between policy instruments, and application of the same standards;
- Contributing to a level playing field on the widest possible scale, and embedding of instruments at the European level;
- Promoting the involvement of stakeholders and rights-holders in producing countries, including producers;
- Improving access to redress and remedy;
- Increasing insight into the supply chain and the possibilities for the various nodes in that chain to contribute to international RBC;
- Encouraging cooperation so as to increase influence;
- Contributing to dialogue and trust;
- Attention to the learning agenda and to making the impact quantifiable, including the positive and negative side-effects of the policy.

### *Assessment of the policy instrument mixes*

In policy instrument mix 1, the zero option, continuation of the current policy instrument mix is proposed. Various evaluations have shown that this mix does not enable sufficient

progress as regards increasing the impact within the supply chain through implementation of the OECD Guidelines. This is not therefore a promising option. Policy instrument mix 2 comprises instruments to support companies with implementing the (Dutch) Child Labour Due Diligence Act [*Wet Zorgplicht Kinderarbeid*, "WZK"], for example a support centre for international RBC, expansion of the existing policy on responsible government procurement, ensuring greater policy coherence of government measures, and financial incentives for international RBC. Efforts are also being made to improve sectoral cooperation. While this optimisation of current policy can generate greater impact within the supply chain, policy instrument mix 2 does not, nevertheless, comprise sufficient obligatory elements to ensure a level playing field and legal instruments for access to redress and remedy. In addition to optimisation of current policy instruments, policy instrument mix 3 proposes additional comprehensive due diligence legislation. This offers opportunities for greater impact within the supply chain because it also obliges businesses that lag behind as regards international RBC to make efforts in the area of due diligence. This makes it possible to create a more level playing field. In addition, the emphasis on comprehensive legislation can prevent some risks from being forsaken. Policy instrument mix 4 supplements the optimisation of current policy instruments by reinforcing the reporting obligations for companies regarding non-financial aspects of doing business, in that way embedding the OECD Guidelines more firmly. Reinforcing the transparency obligations alone is not, however, an effective alternative to comprehensive due diligence legislation (policy instrument mix 3), although it can complement such legislation. Experience in other countries has shown that merely having reporting obligations in place does not bring about the desired changes in behaviour and leads to a "box-ticking culture".

### *Synergy*

In order to support enterprises effectively in complying with possible legislation, some degree of integration with sectoral cooperation is necessary. This is because the Council has identified a number of difficulties that businesses face in implementing the OECD Guidelines for which legislation does not provide an immediate solution, such as tackling negative impacts and consulting stakeholders. It is therefore important that future international RBC policy, using sectoral cooperation, provides guidance for enterprises and other actors to continue to learn and experiment jointly. A balance will need to be struck between, on the one hand, responsibility on the part of individual enterprises and, on the other, the incentives for enterprises to cooperate on a sectoral basis.

### *Maximum impact within the supply chain requires an ambitious policy mix with comprehensive due diligence legislation*

Because of the introduction of comprehensive due diligence legislation and the synergy this can achieve with sectoral cooperation, policy instrument mix 3 has the potential to achieve greater impact within the supply chain compared to the other policy instruments. This requires that the legislation also allows for better access to redress and remedy and is combined with other elements of a comprehensive policy instrument mix. If this comprehensive policy instrument mix can be embedded at European level, the impact within the supply chain will be correspondingly greater. This will create a "European" variant of policy instrument mix 3 (3E).

Because of the level of scale required to achieve impact, the Council finds that an ambitious European policy mix offers the best opportunities for achieving sustainable supply chains. Momentum has been created for this through EU Commissioner Reynders' agenda, the ambition of the European Parliament, and the German Presidency of the EU. It is difficult, however, to estimate how the other Member States in the European Council will react, and what that will mean for the achievable level of ambition in Europe. In view of these uncertainties about the timeframe and level of ambition, at

least three different routes are conceivable through which the Netherlands can contribute.

#### *Routes to impact*

The first route is to focus Dutch efforts as much as possible on influencing European developments. The second possibility, in addition to the first, is to determine, when a new Dutch (coalition) Government takes office next year, whether sufficient progress is being made in Europe, and if that is not the case to develop Dutch legislation further and include that objective in the Coalition Agreement. The third option is to simultaneously strive to influence developments within Europe and, in the meantime, to develop legislation further in the Netherlands. It is up to the politicians to decide between these various routes.

#### *Optimise existing policy*

Irrespective of the demand for additional policy, it is crucial to implement possible improvements to current policy quickly, and not to wait for the new policy to be implemented. Important elements in this are greater policy coherence within government, and improvement and expansion of sectoral cooperation based on the lessons learned in recent years from the sector agreements for international RBC. It is also important to ensure proper financial safeguards for the agreements during the development of legislation and new forms of sectoral cooperation.

#### *Recommendations*

In order to achieve maximum impact within the supply chain, the Council offers the Government various recommendations (Section 5). Those recommendations concern the following areas:

- Elaboration of the policy instrument mix for international RBC with comprehensive due diligence legislation;
- Intensification of policy aimed at other routes to sustainable globalisation;
- Positioning as regards ambitious European efforts;
- Optimising current policy;
- Strengthening the position of vulnerable groups in the supply chain.

#### *Finally*

Further development of policy is no reason for complacency as regards shouldering responsibility in the day-to-day practice of doing business. The Netherlands continues to lead the way in international RBC. The Dutch business community, trade unions, and civil society organisations aim to work together ambitiously to prevent negative impact and strengthen positive impact within international supply chains. To do so, they need a government that is at least as ambitious, that shows how this can be achieved, that pursues a coherent policy for sustainable globalisation and, that as a partner, continues to invest in sectoral cooperation.

## 1 Introduction

The Dutch Government, representatives of employers' associations and unions, consumers, and civil society organisations expect enterprises to transact business in a way that respects human rights and the environment. This concern for International Responsible Business Conduct ("International RBC") is urgently needed: presently, enterprises can be connected to issues, such as child labour or environmental damage, through their own business activities and supply chain. By acting together, companies, government, trade unions, civil society organisations, and consumers can promote the creation of sustainable supply chains.

Guidelines for enterprises to reduce such negative consequences of their actions have been laid down internationally in the Organisation for Economic Cooperation and Development's *Guidelines for Multinational Enterprises* (the "OECD Guidelines"), and the United Nations' *Guiding Principles on Business and Human Rights* (the "UNGPs"). According to these guidelines, enterprises are expected to identify, prevent, and reduce the actual and potential adverse impact of their activities and to account for how they deal with the risks they have identified, i.e. to carry out due diligence. In this way, enterprises that operate internationally can contribute to sustainable development and to achieving the Sustainable Development Goals ("SDGs").<sup>1</sup>

### *Request for advice*

In 2020, the Ministry of Foreign Affairs evaluated the current policy on international RBC.<sup>2</sup> The agreement to evaluate that policy and to determine whether additional (mandatory) measures are necessary is part of the Coalition Agreement. The evaluation has so far led to the definition of four policy instrument mixes: the "well-considered mixes" for national and international as well as binding and non-binding instruments. According to the Minister, each policy instrument mix could in itself form the framework for future public policy. On 24 June 2020, the Minister for Foreign Trade and Development Cooperation, Sigrid Kaag, requested the Social and Economic Council of the Netherlands ("SER" or "the Council") to provide its advice on these policy instrument mixes.<sup>3</sup> Specifically, the Minister requested advice on the advantages and disadvantages of the various mixes as regards the objectives of international RBC policy. One relevant consideration is whether and how the different elements within each mix reinforce one another. Should the Council wish to express a preference for one of the policy instrument mixes, the Minister would be interested in hearing it.

Ms. Kaag pointed out that the opportunities for European policy regarding international RBC are determining factors for the policy options, and she therefore asked the Council to take account of recent developments at European level and to consider how those developments can play a role. The request for advice therefore comprises three elements:

- Identifying advantages and disadvantages of the various policy instrument mixes;
- Expressing a possible preference for one of the policy instrument mixes (with the Minister stating that the Council may also present an option of its own);
- Taking account of developments at European level.

<sup>1</sup> See in greater detail SER Advisory Report (2019) *Kansen pakken en risico's beheersen: over de samenhang tussen IMVO en SDG's*.

<sup>2</sup> See Dutch Government (2020) *Evaluatie en vernieuwing IMVO beleid*, <https://www.rijksoverheid.nl/onderwerpen/internationaal-maatschappelijk-verantwoord-ondernemen-imvo/evaluatie-en-vernieuwing-imvo-beleid>

<sup>3</sup> The request for advice can be found in Appendix 2. The policy instrument mixes are explained by the Ministry in greater detail in the document *IMVO maatregelen in perspectief. De doordachte mixen: een nadere uitwerking op hoofdlijnen*, <https://www.rijksoverheid.nl/documenten/vergaderstukken/2020/07/10/de-doordachte-mixen-ee-nadere-uitwerking-op-hoofdlijnen>

The importance of international RBC, and therefore of this advisory report, is heightened by the consequences of the current COVID-19 crisis, which is not only a health crisis but also a serious economic one. Economic problems not only have an effect in the Netherlands but also – especially – on our supply chains, where workers are feeling the effects of the crisis directly: many are threatened en masse with dismissal, workplace insecurity, or continue (or are being forced) to work regardless of the restrictive measures imposed due to COVID-19. In many countries, workers do not have access to a social safety net or local authority support packages, which puts the most vulnerable groups of the population, such as young people and women, at acute risk.<sup>4</sup> It is more important than ever for companies to identify the most serious risks in their supply chains at this time, so as to prevent and mitigate them as much as possible.<sup>5</sup>

The COVID-19 crisis is also likely to lead to a rethink of business strategies, with robustness and reliability in production once again being valued higher. It is still unclear, however, to what extent the COVID-19 crisis will also lead to the shortening of supply chains or the regionalisation of production. Should that be the case, it will have to take place in a responsible manner, and it will require additional policy that takes account of the effects on workers in the current production chains. The Council considers it important that the effects of the COVID-19 crisis on international RBC and the effects within the supply chains are monitored effectively.

#### *Overarching principle*

As the overarching principle for assessing the various policy instrument mixes, the Council applies the extent to which the policy instrument mix for the new international RBC policy, through implementation of the OECD Guidelines, can be expected to generate maximum impact within the supply chain. This involves preventing negative effects and, by extension, contributing to the SDGs and thus to sustainable development worldwide. Given that supply chains differ from one another, this will require customisation. A level playing field is needed in order to counter “free rider” behaviour.

#### *Structure of this advisory report*

This advisory report is structured as follows. The Council first makes explicit the background against which it assesses the policy instrument mixes. That assessment framework deals with how the Council views international RBC, what experience has been gained with it, and what the Council believes is needed for further development of international RBC. Section 3 then discusses the various policy instrument mixes, identifies their advantages and disadvantages, and discusses the relationship with sectoral cooperation. Section 4 examines European developments in greater detail. Based on the preceding sections, Section 5 sets out responses to the request for advice and recommendations for policy. Appendix 1 comprises an overview of relevant developments within the EU.

This advisory report has been prepared by the Council’s Committee on International RBC.<sup>6</sup>

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<sup>4</sup> Clingendael (2020) *Covid-19 impact on the value chain*, 22 June 2020, <https://www.clingendael.org/publication/covid-19-impact-value-chain>

<sup>5</sup> SER (2020) *Oproep voor internationaal MVO in tijden van de coronacrisis*, 26 May 2020, <https://www.ser.nl/-/media/imvo/files/oproep-imvo-tijden-coronacrisis.pdf?la=nl&hash=14D15018ECF13816BD466D5D12160FB1>.

<sup>6</sup> See Appendix 3 for the membership of this committee.

## 2 Assessment framework

This section deals with the elements for an assessment framework: how does the Council view international RBC? What contribution can international RBC make to the pursuit of sustainable globalisation and to achieving the SDGs? What lessons have we learned in recent years about the implementation of the OECD Guidelines? What additional policy is perhaps needed for the policy instrument mixes to be effective? And what criteria does the Council apply in assessing the policy instrument mixes?

### 2.1 The contribution of international RBC to the pursuit of sustainable globalisation

#### *Routes to sustainable globalisation*

Globalisation has made it possible for the production of our wind turbines and tablets to take place not in the Netherlands but where comparative advantages make production possible at lower cost. This can be beneficial for the enterprises and consumers concerned and can offer development opportunities for the producing countries; but it also involves risks. This means that a Dutch company that operates internationally can, through its own operations and supply chain, find itself connected to, , the suppression of trade unions, life-threatening working conditions, unlawful takeover of agricultural lands, or damage to vulnerable ecosystems. These are often complex situations in emerging markets and developing countries, where the authorities fail to protect human and labour rights and the environment.

When considering future policy for international RBC, it is important to always keep in mind what our aim is, namely to contribute to sustainable development worldwide. International RBC is one of the ways to achieve this, but it is certainly not the only one and in many cases not the most decisive one. Whether actual improvement takes place in production conditions within international supply chains also depends primarily on the willingness and ability of producing countries to produce with respect for people and the environment. In this regard, we can speak of an international governance and implementation gap.

The Council's advisory report *Duurzame globalisering: een wereld te winnen* [Sustainable globalisation, a world to win] (2008) therefore recommends four additional, reinforcing routes, as illustrated in Figure 1 below:

Figure 1: Four routes to sustainable globalisation and the crucial role of producing countries



These routes are still relevant and form the basis for creating balance and coherence between people, planet and profit, and synergy between aid and trade. The crucial role of the government, alongside that of the business community, is described in greater detail in the *Protect, Respect and Remedy* framework of the UNGPs.

The UNGPs are based on the recognition of:

- The existing obligations of governments to respect human rights and fundamental freedoms, to protect them against violations by third parties, including the business community, and to implement them (**duty to protect**);
- The role of enterprises as special organs of society with special functions that are obliged to comply with all applicable legislation and to respect human rights (**responsibility to respect**);
- The need for governments and enterprises to provide appropriate and effective measures for redress and/or remedy for breaches of rights and obligations (**access to remedy**).

The UNGPs apply to all states and all enterprises, whether or not multinational, regardless of their size, sector, location, ownership, or structure. They form a coherent whole and must be interpreted separately and collectively in the light of their purpose, namely to improve business and human rights standards and practices in order to deliver real results for stakeholders and communities, thereby also contributing to socially sustainable globalisation. The commitment of states to these guidelines means that they must encourage companies with which they do business to respect human

rights and the environment, including through their own procurement policies. States also have an obligation to ensure coherent public policy.

*Additional efforts for international RBC required, and other routes to sustainable globalisation*

The practical implementation of the OECD Guidelines and UNGPs in recent years has consistently shown how crucial the local context in producing countries is. It is only with consistent behaviour by a substantial part of the market – with employees and civil society organisations daring to address issues locally and with governments jointly putting sustainable supply chains on the map – that producers within the supply chain have sufficient incentives and opportunities for structurally improving conditions and for carrying out production with respect for people and the environment. This calls for extra efforts on the third route to sustainable globalisation, via international RBC on the part of the Dutch business community. That is what this advisory report is about (the “well-considered mix” block in Figure 1 above). What is equally important is government commitment to the other “routes” and the coherence and synergy between the various policy instruments (the rest of Figure 1).

When assessing the policy instrument mixes, it is important to identify which mix contributes most to a positive impact in producing countries. The possibilities for upscaling (in order to gain a larger market share and thus greater influence), use of the same standards, and maximum policy coherence are important prerequisites in this regard. It is therefore not merely a matter of an “optimal policy instrument mix” for international RBC, but of an “optimal policy instrument mix” for promoting sustainable globalisation. Governments have a crucial role to play in the pursuit of sustainable globalisation. The Council will examine this broader context in greater detail in the framework of the request for advice on inclusive globalisation that has been announced.<sup>7</sup>

*Importance of trade union rights in the policy instrument mixes*

Improving conditions within the supply chain will only be sustainable if it is embedded within local society and if employees and civil society organisations dare to address abuses locally. The enabling rights of freedom of association and collective bargaining, and the associated social dialogue, are crucial in this respect. It is these rights that enable other rights to be exercised. If employees are strong and united, can make their voice heard collectively, and can negotiate about their rights and conditions at work, there is a good chance that their situation and rights will also improve in other respects. If enterprises are faced with violations of these rights within their supply chain, it is important that they can jointly increase their influence in order to achieve structural changes among suppliers. It is a complex problem for enterprises to raise such issues individually. As such, cooperation with public authorities, trade unions, and civil society organisations is important.<sup>8</sup>

*Relationship between potential negative impact in the supply chain and expected effect of international RBC efforts on the part of companies*

According to the UNGPs, the action to be expected of a company is partly determined by its relationship to a negative effect:

- if a company **causes** a negative impact itself, it must take the necessary steps to eliminate or prevent the infringement and to offer remediation;
- if a company **contributes** to a negative effect together with others, it must cease or prevent its own contribution and use its influence to prevent the remaining infringement by others, as far as that is possible. If this does not succeed, it must reconsider the relationship;
- if a business relation commits an infringement which is **directly linked** to the enterprise’s operations, products or services, the enterprise must use its influence to prevent the infringement from being committed by that relation.

<sup>7</sup> See <https://www.ser.nl/-/media/ser/downloads/werkprogramma/ser-adviesaanvragen-2020.pdf>

<sup>8</sup> Mondiaal FNV, Shift (2019) *Respecting trade union rights in global value chains*.

In addition to clarifying the expectations of companies in the various situations, this threefold division is also important as regards the expected impact in producing countries and assessment of the various policy instrument mixes.

Where issues in the supply chain are concerned, international RBC often involves situations in which there is a direct relationship via suppliers. This means that, in such a situation, a Dutch company can in fact influence the parties that cause or contribute to the negative effect, but cannot itself ensure that that effect ceases. With many issues, it is therefore possible that a company implements the guidelines effectively (whether or not as a result of a well-considered policy instrument mix) but the negative effect still persists. In such cases, increasing one's influence through cooperation with other parties in the sector and in the supply chain—government, trade unions, and civil society organisations—is often necessary in order to make a real difference in the supply chain. When assessing the policy instrument mixes, it is therefore relevant to determine the extent to which the various different mixes promote the necessary cooperation between these parties.

## 2.2 International RBC and SDGs

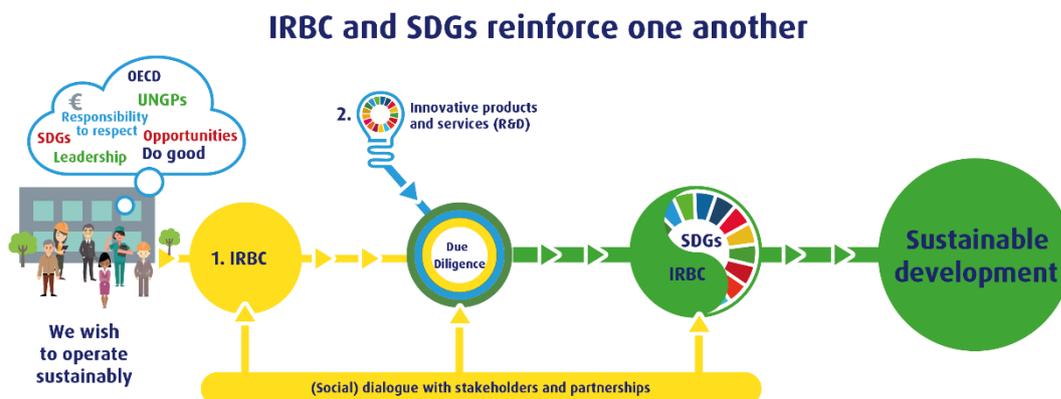


Illustration 1 – Relationship between international RBC and the SDGs

The Council believes that there is much to be gained for all parties by linking the policy for international RBC to the SDGs. International RBC is the basis for companies to make an effective and coherent contribution to the SDGs. The latter provide inspiration and international RBC provides guidance as to how to contribute to the goals. By government and business communicating a comprehensive vision as to the contribution of international RBC to the SDGs, it also becomes possible to cooperate in the producing countries to achieve them. Implementing SDG 17 (partnership) by promoting social dialogue and multi-stakeholder dialogue is crucial in order to achieve the other SDGs.

### Box 1: The financial sector acts as a lever

Through financing and investment choices, the financial sector has an important role to play in accelerating necessary economic and social transitions in all sectors in line with the SDGs. The sector often influences companies in a different way than, for example, government, consumers, or civil society organisations. Through its role in the supply chain, the sector can assist and influence the business community, for example by promoting the use of new technologies or linking criteria for financing or investment to international RBC and SDGs.<sup>9</sup>

## 2.3 Implementation of the OECD Guidelines and UNGPs in practice

As pointed out above, it is important when assessing the policy instrument mixes to bear in mind the following aspects: the effects on producing countries, the possibilities for scaling up, the degree of policy coherence and application of the same standards, and promoting cooperation so as to increase influence.

The great advantage of the OECD Guidelines and the UNGPs is their international recognition and scope. Since the adoption of the UNGPs in 2011, there has been increasing convergence on the basis of these standards. Many of the policy initiatives in the field of international RBC also take this framework as a starting point. This contributes significantly to the possibilities for scaling up.

<sup>9</sup> SER Advisory Report (2019) *Kansen pakken en risico's beheersen: over de samenhang tussen IMVO en SDG's*.

However, there is still a major gap between the international framework and practical implementation by companies in their day-to-day business. The most recent survey by the Ministry of Foreign Affairs shows that 35% of large companies in the Netherlands endorse the OECD Guidelines but that only a limited number of companies complete the six steps of the due diligence process.<sup>10</sup>

In recent years, a great deal of experience has been gained with the implementation of the guidelines, including in the form of sector agreements. This has given us a better idea of what companies encounter in practice when they genuinely embark on the due diligence process. This leads to additional insights for future policy, which are also reflected in various evaluations.<sup>11</sup>

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## **Box 2: The six steps in the due diligence process**

Step 1: Integrate responsible business conduct into the policy and management system; Step 2: Identify and assess negative consequences within activities, supply chains, and business relationships; Step 3: Stop, prevent, or mitigate negative consequences; Step 4: Monitor practical implementation and results; Step 5: Communicate how consequences are being addressed; and Step 6: Take remedial action or cooperate in such action where appropriate.

Human rights risks explicitly concern the risks of negative consequences occurring for third-party stakeholders through an enterprise's own business activities and supply chain. This also requires that those stakeholders be involved in all these steps.

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When implementing the OECD Guidelines and applying due diligence in practice, companies encounter, *inter alia*, the following difficulties. These are linked to the various steps in the due diligence process (see Box 2).

1. *Investing in international RBC is not (yet) sufficiently rewarding.*  
Respect for human rights and the protection of the environment should be a pre-competitive advantage, but in practice that is not the case. Given that many enterprises in the Netherlands and elsewhere do not implement the guidelines, or only to a limited extent, and the market does not price the negative external effects within the supply chain, there is an uneven playing field. Consumers, customers, and government do not sufficiently reward investment in improving production conditions. There are consequently few consistent external incentives to prioritise such investment, and much depends on intrinsic motivation.
2. *Integration within the company requires commitment from top management.*  
Doing business internationally with respect for people and the environment requires integration throughout the enterprise. Commercial and sustainability objectives are regularly at odds with one another. Commitment on the part of top management is crucial in order to involve all departments.
3. *Gaining insight into the supply chain takes time, resources, and trust.*  
It is difficult to gain insight into one's own supply chains and the risks involved, especially beyond the level of the first tier suppliers. There is information for a number of sectors about general risks within the supply chain, but it is often difficult to know what the real situation is with your own suppliers. The results of audits are

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<sup>10</sup> EY (2020) Monitoring project *Onderschrijven OESO-richtlijnen en UNGP's*.

<sup>11</sup> Dutch policy on international RBC has been reviewed on several occasions in recent years by, among others, the Policy and Operations Evaluation Department (IOB) at the Ministry of Foreign Affairs, and the Royal Tropical Institute (KIT), which recently published an extensive evaluation of the IRBC agreements commissioned by the Ministry of Foreign Affairs. The Council published a progress report on the agreements for international RBC in 2018. An independent evaluation was also carried out for the agreement on Sustainable Garments and Textile. In addition, the OECD has assessed the agreement on Sustainable Garments and Textile on its conformity with the OECD Guidelines.

by no means always reliable. In order to make joint influence effective, insight is also needed regarding the various nodes and choke points within the supply chain, the associated price structure, and the possibilities for each of the nodes to promote international RBC.

4. *Further operationalisation and clarification of the guidelines is necessary as regards prioritising the most serious risks.*

The guidelines offer the possibility of setting priorities if necessary. This makes it possible to determine which risks need to be tackled first, based on the severity and likelihood of adverse effects on people and the environment. Given the broad scope of the OECD Guidelines and the lack of specific information, however, it can be very difficult to make informed choices. In addition, many enterprises are used to prioritising risks based on materiality. In order to make the criteria from the guidelines functional in practice, more examples and explanations are needed, preferably from the OECD and the United Nations (UN).

5. *Cross-sectoral issues such as gender equality and freedom of association are still insufficiently emphasised.*

Structural risks such as a lack of gender equality and of freedom of association prove difficult to include in the due diligence process. Addressing these themes effectively requires cooperation as well as knowledge and experience of the complex context. Further operationalisation, sector-specific examples, and clarification of how companies should incorporate this systematically into their due diligence are therefore necessary.

6. *Jointly tackling risks calls for mutual trust, and understanding as well as willingness on the part of other customers.*

As noted above, many issues in the supply chain do in fact involve a link with a Dutch company. However such violations can only cease if the party causing or contributing to them shoulders responsibility. To address these risks, companies are expected to increase their influence by cooperating with others. This requires mutual trust, and understanding as well as willingness on the part of other customers. Those other customers may also be competitors, resulting in a situation whereby companies are faced with limitations caused by competition law.

7. *The effects of efforts in the field of international RBC are difficult to monitor.*

Because Dutch companies are often partly dependent on their suppliers and other parties when it comes to improving production conditions within the supply chain, their own share in this is difficult to measure and monitor. This can be made even more difficult by changes in the risks within the supply chain.

8. *Access to redress and remedy are not yet sufficiently available.*

Much can still be learnt about how to provide effective access to redress and remedy for misconduct in the supply chain. Setting up a low-threshold, safe, reliable, and accessible complaints mechanism is very challenging for an individual company, and collective complaint mechanisms are also still insufficiently effective.

9. *Consulting and involving stakeholders within the supply chain is difficult to organise.*

The guidelines ask companies to enter into dialogue with potentially disadvantaged stakeholders within the supply chain. In practice, that is difficult to achieve without contacts with local trade unions and civil society organisations. Here too, trust plays an important role in the relationship with suppliers.

10. *A lot of time is needed to achieve impact within the supply chain.*

Experience gained with the Agreement on Sustainable Garments and Textile and the Agreement for the Banking Sector shows that enterprises first need several years to understand the guidelines, map out their supply chains, and get their systems in order before they can focus effectively on tackling the most serious risks in their supply chain. The interim evaluation of the Agreement on Sustainable Garments and Textile and the evaluation by the Royal Tropical Institute (KIT) have therefore concluded that three to five years is too short to achieve impact within the supply chain.

The above issues are associated with implementation of the OECD Guidelines and the UNGPs and are therefore relevant for every policy instrument in the mix, which aims after all to promote implementation of these guidelines, including legislation. These issues are not a reason for less effort, but rather an incentive to increase ambition. By

taking account of them in future policy and looking for ways to tackle them jointly, the Netherlands can contribute more effectively to ensuring respect for people and the environment throughout the supply chain.

Based on these lessons from practice, it is important to take the following aspects into account when assessing the policy instrument mixes: contribution to a level playing field, support for companies and clarification of the guidelines, insight into the supply chain, and contributing to dialogue and trust. These issues also emphasise the importance of long-term investment by all parties.

## **2.4 Assessment criteria**

Based on the above, the Council arrives at the following system for assessing the policy instrument mixes:

Overall criterion: Maximum impact within the supply chain through better implementation of the OECD Guidelines by companies.

What does this require?

- The widest possible deployment of mutually reinforcing policy instruments;
- Coherent policy, synergy between policy instruments, and use of the same standards;
- Contribution to a level playing field on the widest possible scale, and embedding of instruments at the European level;
- Promoting the involvement of stakeholders and rights-holders in producing countries, including producers;
- Improving access to redress and remedy;
- Increasing insight into the supply chain and the possibilities for the various nodes within it to contribute to international RBC;
- Encouraging cooperation so as to increase influence;
- Contribution to dialogue and trust;
- Attention to the learning agenda and to making the impact quantifiable, including the positive and negative side-effects of the policy.

There are also a number of more general criteria against which policy instruments can be assessed. Doing so only makes sense, however, once the instruments have been worked out in greater detail. The following criteria have therefore not been included in the assessment of the policy instrument mixes in the present advisory report, but are important for further elaboration of policy:

- (Legal) feasibility and WTO conformity;
- Effectiveness and efficiency;
- Practicability;
- Adaptive capacity of the policy instrument mix;
- Financial aspects;
- The impact on the attractiveness for enterprises to establish themselves in the Netherlands and in third countries – especially countries that cannot meet the requirements of international RBC.

### 3 The proposed policy instrument mixes

#### 3.1 Introduction

##### *Request for advice*

The Minister has requested the Council to advise on the advantages and disadvantages of the various policy instrument mixes with a view to the objectives of international RBC policy, and also to perhaps indicate which mix the Council prefers.

##### *Approach and structure*

Section 3.2 first briefly presents the various policy instrument mixes. Section 3.3 then discusses the possibilities for optimising the existing policy instruments as part of the policy instrument mix. Section 3.4 considers the advantages and disadvantages of the various supplementary policy instruments which accompany the various policy instrument mixes. The various mixes are then assessed in Section 3.5, applying the assessment criteria presented in Section 2. Lastly, Section 3.6 discusses a number of points that are important for further elaboration.

#### 3.2 The policy instrument mixes

##### *Basic principles of the policy instrument mixes*

The composition of the policy instrument mixes proposed by the Ministry is founded on two basic principles:

- There is a mix of binding and non-binding policy instruments at national and international level.<sup>12</sup>
- The model involving informing, facilitating, incentivising, conditions, and obligation (referred to as the “5Vs model” after the Dutch initials for these terms). The government can utilise these policy instruments to change the behaviour of enterprises in a differentiated manner for those lagging behind (by obliging them, for example), for the “peloton”, and for the frontrunners (for example by incentivising or facilitating).

##### *The policy instrument mixes*

In the light of these basic principles, the Ministry proposes four policy instrument mixes (see Table 3.1).

Table 3.1 – The four proposed “well-considered” policy instrument mixes

Elements	1. Zero option	2. Thematic	3. Comprehensive	4. Thematic+ Transparency
WZK				
Comprehensive due diligence legislation				
Transparency obligation				
Government procurement				
Coherence in government policy				
Financial incentives				
Sectoral cooperation (agreements)				
IRBC support centre				
European efforts				

##### *The “5Vs model”*

The Ministry applies the “5Vs model” to elements of the policy instrument mixes as follows:

<sup>12</sup> This is in line with the definition of a well-considered policy instrument mix according to the UNGPs.

- Obligation [in Dutch: **Verplichten**] (WZK, Comprehensive due diligence legislation, transparency obligation, European efforts);
- Conditions [**Voorwaarden**] (government procurement, policy coherence);
- Facilitating [**Vergemakkelijken**] (sectoral cooperation/agreements);
- Incentivising [**Verleiden**] (financial incentives);
- Information [**Voorlichten**] (IRBC support centre).

*Explanation of individual elements as proposed by the Ministry*

- WZK: The (Dutch) Child Labour Due Diligence Act [*Wet Zorgplicht Kinderarbeid*].<sup>13</sup>
- Comprehensive due diligence legislation: an act setting out a best-effort and result obligation for each stage of the due diligence cycle. The act will apply to all large Dutch enterprises and enterprises with an increased risk profile. In the long run, the WZK will become superfluous. There is enforcement pursuant to administrative law with dynamic monitoring focusing on best practices.
- Transparency obligation: European legislation to ensure that enterprises report on their due diligence processes. This can apply to all large enterprises and possibly also to medium-sized enterprises.
- Government procurement: this involves strengthening and expanding existing policy.
- Government policy coherence: conditions for enterprises that want to make use of the range of instruments for businesses. This involves expanding existing policy.
- Financial incentives: existing policy and possible expansion of it (Fund for Combating Child Labour [*Fonds bestrijding Kinderarbeid*, "FBK"], RBC Fund [*Fonds Verantwoord Ondernemen*], IRBC vouchers
- Sectoral cooperation (agreements): current and new international RBC agreements. It is not clear whether the zero option offers room for new agreements, but this scope for new initiatives is explicitly indicated in the other three options.
- IRBC support centre: a central information point which enterprises can approach with questions about compliance with OECD Guidelines and with a comprehensive due diligence obligation. The existing provision of information and financial incentives will be incorporated.
- European efforts: EU-wide due diligence legislation or due diligence legislation for specific sectors.

The zero option involves continuing current international RBC policy and also the obligation to elaborate and implement the current (Dutch) Child Labour Due Diligence Act. Policy instrument mix 2 also contains instruments to provide further support for companies in this area. For example, with focusing on improving and expanding sectoral cooperation, the aim is to tackle other risks within the supply chain as well. Policy instrument mixes 3 and 4 also make use of these policy instruments, but they also involve additional legislation.

*7 Vs: Add linking and increasing impact*

The Council notes that in the 5Vs model presented by the Ministry, the sixth and seventh Vs of linking [**Verbinding**] and *increasing* [**Vergroting**] *influence* are lacking. Cooperation and partnership (SDG 17) are crucial for overcoming problems, jointly influencing producing countries, and thus enabling impact within the supply chain, and learning and evaluating how this can be improved. As the analysis in Section 2 shows, the role of government as a cooperation partner close to the sectors is crucial, given that most of the issues in the supply chain can only be tackled through cooperation.

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<sup>13</sup> The WZK was adopted in 2019. The general administrative order for the WZK still needs to be worked out; this is planned for autumn 2020. See Appendix 2 for the main elements of this act.

### 3.3 Optimising existing instruments as part of the future policy instrument mix

The evaluations by the Policy and Operations Evaluation Department (IOB), the Royal Tropical Institute (KIT), and others show that there is a lot of room for improvement where implementation of the current policy instruments is concerned. Such improvement is also evident in policy instrument mixes 2, 3, and 4. Apart from the assessment of the various policy instrument mixes, the Council advocates in all cases simultaneous optimisation of the current policy instruments in order to increase policy coherence, ensure continuity, and continue to work towards positive impact within the supply chain while complementary policies are being developed. Important elements in that regard are:

- *Greater coherence in government policy and responsible procurement.* In its advisory report *Seizing opportunities and managing risks – the relationship between the SDGs and IRBC*, the Council argued in favour of harmonised frameworks for services and financial instruments to support the business community at home and abroad. The Dutch Government recognises that major steps can still be taken in that regard, both in terms of conditional international RBC criteria within the range of government instruments and in terms of aiming for SDG-related results.<sup>14</sup> It is important that government procurement policy contributes to making international production chains more sustainable by developing a coherent strategy at three levels: awareness, encouragement, and innovation. In this context, the OECD Guidelines also set the standard. Given the repeated detection of a lack of policy coherence between, but also within, different ministries, the Council recommends an implementation agenda for eliminating policy inconsistencies, with clear powers and responsibilities.
- *Streamlining the advice that enterprises receive on implementing the OECD Guidelines.* This can be achieved via the IRBC support centre, the National Contact Point (NCP), the Council, MVO Nederland, the EDH, labels, and various other government-supported initiatives. Practical experience shows that the guidelines are sometimes implemented differently, which creates ambiguity. It is desirable to specify the OECD Guidelines and the *OECD Due Diligence Guidance's*<sup>15</sup> in greater detail, partly on the basis of experience gained with the agreements. The NCP's interpretation of the guidelines is leading in this regard. This can form part of strengthening the support centre for enterprises. It should be noted that the Council needs more information on how the government intends structuring this support centre, what is lacking in the current resource facilities, and what additional resources will be made available for this purpose. The support centre cannot simply be positioned alongside the NCP without attention being paid to:
  - the current tasks and mandate of the NCP (including providing information about the OECD Guidelines) and how the IRBC support centre relates to it;
  - how to prevent inconsistency caused by two different bodies perhaps giving different interpretations. At the very least it must be ensured that the NCP, which is embedded within the OECD structure, is dominant when it comes to interpreting the guidelines.
- *Improvement and expansion of sectoral cooperation.* The evaluations of the agreements show that the added value of sectoral cooperation can be increased by, among other things, increasing their reach, focusing cooperation even more explicitly on impact within the supply chain, increasing the involvement of workers, communities and producers in producing countries, and increasing access to redress and remedy. Sectoral cooperation is discussed in greater detail in Section 3.6. In order to jointly exert influence on producing countries and tackle

<sup>14</sup> Dutch Government's response to the Council's Advisory Report *Seizing opportunities and managing risks – the relationship between the SDGs and IRBC*, 10 July 2020, p. 4.

<sup>15</sup> The OECD's *Due Diligence Guidances* provide practical guidance on application of the OECD Guidelines.

specific risks, it is crucial for there to be government involvement in future sectoral cooperation.

- *Financial incentives.* Extending the financial incentives for companies can ensure that international RBC is more worthwhile.

### **3.4 Advantages and disadvantages of additional policy**

Policy instrument mixes 3 and 4 not only optimise existing policy instruments but also involve additional legislation. In determining the difference between policy instrument mix 2, on the one hand, and policy instrument mixes 3 and 4, on the other, the question of whether additional legislation is desirable is therefore decisive. The difference between policy instrument mixes 3 and 4 centres on the choice between comprehensive due diligence legislation and thematic due diligence legislation with a transparency obligation.

The distinction between the policy instrument mixes therefore focuses on four questions:

1. Is additional due diligence legislation required?
2. If so, should this be comprehensive or thematic due diligence legislation?
3. If so, should this be domestic or European due diligence legislation?
4. And how can synergy thus be achieved?

In order to answer these questions, we will first outline the advantages and disadvantages of the various different types of legislation before arriving at an assessment of the different policy instrument mixes.

#### *3.4.1 Advantages and disadvantages of additional legislation*

The advantage of additional due diligence legislation is that it can potentially have greater impact in the supply chain. A more level playing field can also be created by obliging those that are lagging behind as regards international RBC to make an effort to get their due diligence in order. The scale on which the legislation is initiated is important: the larger the scale, the bigger the level playing field. Legislation also obliges companies to look more carefully at the social and environmental consequences of planned projects. Due diligence is explicitly the obligation to carry out an investigation *in advance* as to where, what, and for whom harm may arise from planned intervention. If, for example, an oil pipeline or a new highway is being constructed, a thorough (independent) investigation must be carried out into what this will mean for stakeholders and rights-holders. It is necessary, for example, to investigate what this means for landowners/residents who need to relocate as a result, and how construction interferes with groundwater separation (the flow of water, underground risk of the separated parts drying up).

The potential disadvantages of additional legislation are a greater administrative burden and a reduction of intrinsic motivation within enterprises (namely at the level of the “peloton” and of those lagging behind) due to a “box-ticking culture”. An accumulation of legislation must be avoided and careful consideration should be given to the extent to which certain due diligence obligations for enterprises are already included in, for example, environmental measures or the climate agreement. It is important to keep an eye on these possible disadvantages when further elaborating any additional legislation.

One caveat as regards the above consideration of potential advantages and disadvantages is that much depends on the design and scope of any due diligence legislation. This also determines its feasibility in practice. What additional policy there is to support and incentivise companies is also important. The ultimate goal is for human rights and environmental rights to be respected by implementing the OECD Guidelines, both within the international supply chain and when companies are planning projects. This requires more than just a legal obligation (see further Section 3.6).

One important consideration when designing the legislation involves how supervision is to be organised and improvement of the possibilities for access to redress and remedy. This partly determines whether legislation actually has an impact. It also raises the question of what role sectoral cooperation can play, and how a learning culture can be ensured (rather than a “box-ticking culture”).

Various studies have shown that legislation can be expected to provide companies with a stronger incentive to comply with the OECD Guidelines and the UNGPs.<sup>16</sup> Legislation is expected to contribute to a more level playing field, especially if it also affects the international competitors of Dutch companies. Where some of the problems outlined in Section 2.3 are concerned, however, considerably more will be needed.

If enterprises are to be encouraged to implement the OECD Guidelines in such a way that they actually contribute to improving conditions in the supply chain, other stronger incentives are needed in addition to legislation.<sup>17</sup> This can in any case be achieved by more effectively integrating compliance with the OECD Guidelines into government and corporate procurement policy, and by reinforcing incentives from within the financial sector (such as the green taxonomy; see Section 4.2). As regards the problems for which legislation does not provide an immediate solution – such as tackling negative consequences and consulting local stakeholders and rights-holders – it is important for future international RBC policy to provide incentives for enterprises and other actors to continue learning and experimenting together, in order to find solutions to the problems.

#### *3.4.2 Advantages and disadvantages of comprehensive and thematic due diligence legislation*

The potential advantage of thematic due diligence legislation, for example on child labour, is that it makes an extra effort to eradicate a single social issue. It is questionable whether thematic due diligence legislation does justice to the concept of due diligence whereby enterprises are asked to identify *all* their risks and to tackle any negative consequences according to the step-by-step due diligence plan. It is only on that basis that enterprises or sectors, in consultation with stakeholders, can determine what the priority risks are. In the case of thematic due diligence legislation, on the other hand, other risks may be ignored because of the emphasis placed in the legislation on ticking off a certain theme (i.e. “tunnel-vision thinking”). Tackling all possible priority risks in more comprehensive due diligence legislation can bring about greater impact in the supply chain.

#### *3.4.3 Advantages and disadvantages of European legislation*

European legislation has the advantage that more enterprises are required to implement the OECD Guidelines, which enlarges the level playing field. European legislation also makes it possible to scale up the initiatives for sectoral cooperation to the European level, thus achieving greater impact in the supply chain. However, it also has two potential disadvantages compared to national legislation:

- introducing European legislation can be a time-consuming process, and it is questionable whether Member States can reach an agreement on it;
- it is uncertain whether European legislation will match the ambitions of the Netherlands.

The Netherlands is partly in control of the latter by influencing the European policy process at an early stage. European legislation may limit the scope of Dutch legislation in the same field (unless European legislation explicitly leaves room for Member States

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<sup>16</sup> Andersson Elffers Felix (2020) *Dwingende en vrijwillige IMVO-maatregelen*, p. 6; European Commission (2020), *Study on due diligence requirements through the supply chain*; KIT (2020) *Evaluation RBC agreements*.

<sup>17</sup> Enterprises and industry associations identify the following primary incentives for the implementation of due diligence: reputational damage and investor and consumer demand for a high standard of due diligence implementation (European Commission (2020), *Study on due diligence requirements through the supply chain*, p. 89).

to put more far-reaching measures in place). This is explained in greater detail in Section 4.3.

### **3.5 Assessment of the policy instrument mixes**

This section assesses the options in the light of the criteria set out in Section 2.4 and the advantages and disadvantages outlined above. As explained in Section 2.4, not all of the criteria listed are taken into account in assessing the policy instrument mixes, given that some of the criteria depend to a large extent on further elaboration of the policy.

#### *3.5.1 Policy instrument mix 1 The zero option*

The zero option means the current policy instrument mix. It was noted in Section 2.3 that this mix does not enable sufficient progress as regards increasing the impact in the supply chain through implementation of the OECD Guidelines. This is not therefore a promising option.

When drawing up the zero option, it was also assumed that the government will not introduce any new additional or flanking policy as a result of implementation of the (Dutch) Child Labour Due Diligence Act [*Wet Zorgplicht Kinderarbeid*, "WZK"] in the form of reinforcement or expansion of procurement policy, the range of instruments for businesses, financial incentives, the IRBC support centre, or strengthening sectoral cooperation. As discussed in Section 3.3, it is in any case necessary to optimise existing policy instruments. In addition, it is questionable whether it is desirable or realistic to impose a duty of care on enterprises as regards eliminating child labour within the supply chain, without supporting or incentivising them to do so. Instruments are also lacking to ensure improved access to redress and remedy, and the zero option offers few options as regards creating a level playing field.

#### *3.5.2 Policy instrument mix 2 Thematic legislation*

Policy instrument mix 2 comprises instruments to support companies with implementing the WZK, for example a support centre for international RBC, expansion of the existing policy on responsible government procurement, ensuring greater policy coherence of government measures, and financial incentives for international RBC. Where focusing on improving and expanding sectoral cooperation is concerned, the aim is to tackle other risks within the supply chain as well.

Optimising existing policies can achieve greater impact through implementation of the OECD Guidelines: broad deployment and strengthening of policy instruments aimed at informing, facilitating, incentivising, and creating conditions; greater coherence in government policy; and – by strengthening sectoral cooperation – greater involvement of stakeholders, better access to redress and remedy, encouragement of cooperation to increase influence, a contribution to dialogue and trust, increasing understanding of the supply chain, and greater attention to the learning agenda. What is lacking in the policy instruments, however, is a "big stick" (i.e. an obligation) to persuade companies to commence implementing the OECD Guidelines. This is an obstacle to the creation of a level playing field. Legal instruments for ensuring better access to redress and remedy are also lacking. In addition, this option has a strongly national focus and there is no embedding of instruments at European level (see further 3.4.3).

#### *3.5.3 Policy instrument mix 3 Comprehensive due diligence legislation*

Like policy instrument mixes 2 and 4, policy instrument mix 3 provides for optimisation of existing policy instruments. Policy instrument mix 3 supplements policy instrument mix 2 by introducing comprehensive due diligence legislation that addresses all aspects of the OECD Guidelines. That legislation replaces the thematic due diligence legislation of the WZK. At European level, efforts are already being made to bring in the same kind

of legislation, which will also leave room for sectoral measures. It is also relevant in this context that the Christian Union, Labour, Socialist, and GreenLeft parties submitted an initiative note before the summer recess with proposals for comprehensive due diligence legislation in the Netherlands and the EU.<sup>18</sup>

Given that policy instrument mix 3 provides for comprehensive due diligence legislation, it offers potential for greater impact in the supply chain because it also obliges enterprises that lag behind as regards international RBC to make efforts in the area of due diligence. This makes it possible to create a more level playing field. In addition, the emphasis on comprehensive legislation can prevent some risks from being forsaken. Comprehensive legislation can also promote a learning culture and improve access to redress and remedy as regards all possible risks and the relationship between them, rather than for just a single theme.

The introduction of comprehensive due diligence legislation can also bring about greater synergy with sectoral cooperation. We will explain that synergy in greater detail after discussing the various policy instrument mixes. As a result of that synergy, policy instrument mix 3 – as compared to policy instrument mix 2 – can potentially have a greater impact within the supply chain through implementation of the OECD Guidelines, especially if instruments such as legislation, sectoral cooperation, and the conditions and incentives for enterprises are embedded at the EU level.

This will create a “European” variant of policy instrument mix 3 (3E), in which a combination of comprehensive due diligence legislation and partnerships to increase leverage and learn from each other is introduced at EU level. That variant could further enlarge the level playing field. In addition, there would be a corresponding increase in policy coherence, insight into the supply chain, and the possibilities for ensuring access to redress and remedy and involving stakeholders in producing countries. The level of ambition and the timeframe of European legislation are important points to consider, however. Section 4 explains this European variant of policy instrument mix 3 in greater detail.

#### *3.5.4 Policy instrument mix 4 Transparency obligation + thematic legislation*

Supplementing policy instrument mix 2, policy instrument mix 4 provides for reinforcing the reporting obligations for enterprises regarding non-financial aspects of doing business in order to anchor the OECD Guidelines more firmly. This concerns EU legislation. The Netherlands can lead the way in Europe as a guiding force in the field of integrated reporting, where this is in line with the UNGPs and OECD Guidelines.<sup>19</sup> This may also take place within the framework of revision of the EU’s Non-Financial Reporting Directive (NFRD), the process for which has already commenced. Large companies, the Dutch Accounting Standards Board (DASB), and accountants have already shown an interest in this.

Reinforcing the transparency obligations alone is not, however, an effective alternative to comprehensive due diligence legislation (policy instrument mix 3), but it can complement such legislation.<sup>20</sup> Experience in other countries has shown that merely having reporting obligations in place does not bring about the desired changes in

<sup>18</sup> See <https://www.christenunie.nl/l/library/download/urn:uuid:00e4606b-3255-43e4-bffe-683281f62598/initiatiefnota+tegen+slavernij+en+uitbuiting.pdf>.

<sup>19</sup> Integrated reporting is the summary reporting in which organisations indicate how they operate sustainably and how strategy, governance, performance, and prospects deliver (social) value in the short, medium, and long term.

<sup>20</sup> Reporting is part of due diligence. Whether additional reporting obligations are necessary will also depend on the scope of the comprehensive due diligence legislation.

behaviour and leads to a “box-ticking culture”.<sup>21</sup> One can therefore expect that policy instrument mix 4 will have less impact than policy instrument mix 3.

### *3.5.5 Summary and preliminary conclusion*

This initial assessment of the various policy instrument mixes shows that it is the European variant of policy instrument mix 3 (3E) with which one can potentially achieve the greatest impact in the supply chain and as regards creating a level playing field in Europe. The European aspects of this option are dealt with in greater detail in Section 4. The routes to achieving this option and the role of national legislation are discussed in Section 5.

## **3.6 Further elaboration of the policy instrument mixes**

Once the policy instrument mixes have been worked out in greater detail, there will be more scope for assessing:

- practicability;
- legal feasibility and WTO conformity;
- effectiveness and efficiency;
- financial aspects;
- the impact on the attractiveness for enterprises to establish themselves in the Netherlands and in third countries – especially countries that cannot meet the new requirements of international RBC.

It is currently only possible to test the policy instrument mixes against these criteria to a limited extent because of the level of detail at which the various mixes have been worked out. It is advisable that a good impact assessment be carried out in connection with further elaboration in which these aspects are addressed. Other important matters to consider during further elaboration of the policy instrument mixes are monitoring of impact, synergy between legislation and sectoral cooperation, and resilience and adaptability.

### *Effective monitoring of impact in order to quantify and learn*

Periodic evaluation of international RBC policy is advised. In order to bring about structural improvement in the supply chains, it is important to clarify more effectively the consequences of international RBC policy (both government policy and company policy) in the supply chains in order to adjust it where necessary and make it more effective. In this way a better picture will emerge of which combination of measures will lead to implementation of the guidelines in order to achieve a substantial impact in the supply chains. It is also important to closely monitor the effects of individual policy measures, and to examine the effects of policy measures in other countries, such as the French Corporate Duty of Vigilance Law, and to determine what lessons can be drawn from them (see Section 4).<sup>22</sup> Consideration should be given to issuing an annual progress report that addresses these aspects. This requires greater attention to systematic data collection, baseline measurements, targets, and evaluation when designing and further elaborating the instruments. The IOB and the Planning Offices can be involved in this.

### *Synergy between legislation and sectoral cooperation*

Problems with implementation of the OECD Guidelines cannot be resolved merely by means of legislation but also by offering companies substantive support and customisation and addressing identified risks together with other parties.

<sup>21</sup> PwC (2018), *Strategies for Responsible Business Conduct*.

<sup>22</sup> See also the recommendations of the IOB report *Mind the governance gap, map the chain* (2019), p. 15.

Comprehensive due diligence legislation requires a great deal of company knowledge as to how risks can be prioritised and how the positive contributions to the SDGs can be included in the evaluation of companies.

Sectoral cooperation is one of the ways for companies to increase their influence.

Cooperation means that:

- enterprises can learn from one another about how to translate policy into practice;
- like-minded companies can support one another in tackling negative consequences;
- enterprises can work with government, trade unions, and civil society organisations to tackle problems that they cannot solve on their own;
- greater insight can be gained into the other customers, the nodes in the supply chain, and the possibilities for the various nodes within that chain so as to influence the parties in the producing countries;
- tools can be provided to help enterprises identify potential or negative consequences;
- involvement can be organised on the part of (local) stakeholders and rights-holders;
- access to redress and remedy can be facilitated.

In recent years, a great deal of experience has been gained with sectoral cooperation in the form of the agreements. The evaluations by the IOB and KIT show that, in particular, the longest running agreements for the Garments & Textile and Banking sectors have made a major contribution to implementation of due diligence by the companies involved, especially as regards the first stages of the due diligence process. This has laid the foundation for further work on actually tackling risks in the supply chain in those sectors. The evaluations have also yielded numerous lessons for further improving the approach.

The Council is therefore glad to see that sectoral cooperation forms part of each of the policy instrument mixes presented. The Council emphasises the importance of continuing, optimising, and expanding this approach and continuing to invest in it as part of the policy instrument mix.

In applying the 5Vs model, the Ministry classifies sectoral cooperation under “facilitating”. In practice, sectoral cooperation in the form of the agreements plays a role in several “Vs”, and that role could be reinforced in future sectoral cooperation if the recommendations from the evaluations are followed up.

The processes of drawing up and implementing agreements both provide a great deal of *information* and training regarding the OECD Guidelines and the UNGPs. By making arrangements in the agreement about strengthening incentives for companies and financial support for the joint costs by government and the Council, the agreements play a role in *incentivising* greater efforts for international RBC. In addition, an active role and explicit expectations of government vis-à-vis companies has proved crucial to *incentivising* them to participate in the agreements. By making government efforts explicit in the agreements with respect to the *conditions* set by government (policy coherence and socially responsible procurement), those conditions are specified for the sector in question, and government shows that it is accountable as regards implementation of this policy (for example state participation in the Insurance Agreement, the pilot for socially responsible procurement of natural stone in the TruStone Initiative, awarding of contracts for wind energy in drawing up an agreement in the wind energy sector, etc). Binding elements in the agreements (commitment to the outcome of the NCP procedure, complaints and dispute mechanisms) and in the future (partial) integration with supervision through monitoring mechanisms mean that there is also a relationship with the mandatory elements of the future policy instrument mix.

As noted in 3.2 above, the Council recommends adding to the 5Vs model the two “Vs” of *linking* [*verbinden*] and *increasing* [*vergroten*] *influence*, in line with SDG 17. The role of the government as a cooperation partner close to the sectors is crucial here, given that most of the issues in the supply chain can only be tackled through cooperation. In a number of the agreements, for example, Dutch embassies play an important role – those in Turkey and Bangladesh in the case of the Garments and Textile agreement, and that in the United Kingdom as regards the Metals Sector Agreement – in tackling risks, joint commitment, and increasing outreach. It is important to expand this kind of cooperation in order to achieve greater impact. The seven Vs therefore emphasise the importance of government as a partner in future sectoral cooperation. When further elaborating the policy instrument mix, it is important to investigate different modalities for this.

The question is also how sectoral cooperation, which is based on OECD Guidelines, can be integrated into any legislation so that these elements reinforce one another. In order to support enterprises effectively in complying with possible legislation, some degree of integration with sectoral cooperation is necessary. In this way, enterprises can learn from one another how legislation can be implemented and risks can be addressed jointly. A balance will need to be struck between, on the one hand, responsibility and liability on the part of individual enterprises and, on the other, the incentives for enterprises to cooperate on a sectoral basis. Participation in sectoral cooperation could, for example, lead to a company being given more time to comply with its obligations before the supervisory authority initiates sanctions and the like (after all, the company is showing that it is taking the matter seriously). One more far-reaching option is for the arrangements and monitoring mechanisms regarding sectoral cooperation and certification systems to be validated by the supervisory authority as a recognised scheme, which imposes equivalent requirements to the legislation. Supervision of the party implementing the recognised scheme will then be made more stringent.<sup>23</sup> The question, however, is whether this does justice to the individual responsibility of enterprises, and whether it does not place too much responsibility on the sectoral partnerships.

Reciprocal reinforcement of legislation and sectoral cooperation is conditional on the latter meeting certain quality criteria. For example, recognised forms of sectoral cooperation could play a role in supervision. Recognition should depend on the extent to which sectoral cooperation promotes the OECD Guidelines (as analysed in the OECD Alignment Assessments). The Sustainable Garments and Textile Agreement may be taken as an example (see Box 3). It is relevant here that the OECD assesses the approach adopted in the textile agreement as being international best practice.

It is also important for the supervisory authority to have a clear understanding of the incentives in the various nodes in the supply chain so that it can determine where increasing influence will be most effective. In order to identify these points, it is necessary to analyse how the supply chain is structured. Sectoral cooperation can play an important role in performing and utilising such an analysis with a view to addressing the risks of negative impacts on people and the environment in the supply chain. Given the overarching principle of achieving maximum impact in the supply chains, it is important for the supervisory authority to deploy the available resources where the maximum impact can be achieved. When assessing compliance with the guidelines one must also weigh up what can be expected of an enterprise on the basis of its position within the supply chain.

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<sup>23</sup> An example of this is the regulation on conflict minerals (see Appendix 1).

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### **Box 3: Findings of OECD Alignment Assessment of the Agreement on Sustainable Garments and Textile**

The OECD has examined in detail the extent to which the working method of the Agreement on Sustainable Garments and Textile corresponds with its guidance for the textile and footwear sector. This concerns both the written standards and the way the agreement assesses companies as regards due diligence. An assessment framework has been drawn up for this purpose. The OECD concludes that, by and large, the agreement has incorporated and applied the guidance effectively in the written standards. The OECD mentions the following as being among the strengths of the agreement: attention to preventing issues, customisation for SMEs, involvement of top management, and attention to procurement practice. As points requiring improvement, it mentions shifting attention from internal processes and control measures to addressing risks within the supply chain, improving the involvement of local stakeholders, and access to the complaints and dispute mechanism for those involved in the textile supply chain. Finally, the gender lens in due diligence can be improved.

Taking all aspects into consideration, the written standards of the agreement are 62% fully compliant and 17% partly compliant. Where implementation is concerned, the figures are 40% and 23%, respectively. The difference between written standards and implementation is largely due to the fact that greater coherence is needed in assessments of companies. To remedy this, the guidelines in the assessment framework that are used when assessing companies have been worked out in greater detail.

The Agreement on Sustainable Garments and Textile was rated third in the series by the OECD (after the German Textil Bündnis and the Sustainable Apparel Coalition).<sup>24</sup>

Source: OECD (2020) *Assessment of the Dutch Agreement on Sustainable Garment and Textile*.

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It is also conceivable that the supervisory authority will draw on the experience of sectoral partnerships to formulate minimum standards (dynamic supervision), thus encouraging partnerships to learn from one another's experience.<sup>25</sup> It is important for there to also be scope for bottom-up initiatives, which the supervisory authority may not be immediately aware of in the first instance.

#### *Resilience and adaptability of the policy instrument mixes*

In order to ensure that the policy instrument mixes are and remain futureproof, it is also important to keep track of policy developments and the objectives set out therein. The development of EU policy is also relevant in this regard. This partly determines how the effectiveness of the instruments is assessed. Specifically, the question is now what impact the COVID-19 crisis will have on international supply chains, and what this may mean for national and European policy.

The Ministry rightly notes that improved compliance with the OECD Guidelines and UNGPs during and after the crisis will ultimately lead to a more sustainable trading system and better conditions for people and the environment in the supply chain.<sup>26</sup> A condition for this is that there is also scope to invest in improving conditions deeper down the chain. Fair prices and responsible procurement practices are essential for this.

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<sup>24</sup> The three alignment assessment reports can be found at <http://mneguidelines.oecd.org/alignment-assessment-garment-footwear.htm>

<sup>25</sup> See also C. van Dam & M. Scheltema (2020) *Opties voor afdwingbare IMVO-instrumenten*, p. 112–118.

<sup>26</sup> Ministry of Foreign Affairs (2020) *IMVO-maatregelen in perspectief: De doordachte mixen: een nadere uitwerking op hoofdlijnen*, p. 3.

In order to improve application of the guidelines, it is also important for companies to be able to monitor their supply chain, something that has been complicated by the COVID-19 crisis. As a result of the crisis, it is more difficult to have audits carried out; travel restrictions also apply, meaning that it is not possible to visit suppliers. As a result, it is even more difficult to identify what is actually going on in the supply chains. As noted in the introduction, the Council considers it important for the impact of the COVID-19 crisis on international RBC to be properly monitored.

## 4 The European dimension

### 4.1 Introduction

The request for advice asks the Council to take account of recent developments at European level and to consider how these developments can play a role in selecting one of the various policy instrument mixes. Reference is made in that regard to the announcement by the European Commission of its intention to propose an initiative on sustainable corporate governance in 2021, of which international RBC forms part. The request for advice indicates that this may perhaps be a legislative proposal; that is assumed in what follows below.<sup>27</sup> This section will further explore the possibilities for comprehensive European due diligence legislation, thereby elaborating on the European variant of policy instrument mix 3 (3E) introduced in the previous chapter.

Current EU legislation regarding international RBC and due diligence legislation concerns preventing the importation of certain minerals from conflict zones and illegally harvested timber. Legal obligations also apply regarding reporting by enterprises of the non-financial aspects of doing business.<sup>28</sup>

France and the Netherlands (WZK) have recently introduced legislation that imposes obligations on companies in the area of due diligence, and a number of EU Member States also have plans for such legislation.<sup>29</sup>

### 4.2 Intentions of the European Commission

#### *Intended comprehensive due diligence legislation*

The European Commission has announced that it will launch a new initiative on sustainable corporate governance in 2021.<sup>30</sup> In doing so, it aims to ensure that social and environmental interests are fully integrated into business strategies. EU Commissioner Reynders has indicated that the work of the Commission in the field of corporate governance comprises three components:<sup>31</sup>

1. promoting a long-term horizon in decision-making by enterprises;
2. providing the right incentives for sustainable business models;
3. increasing the accountability of enterprises for harm done to people and the environment.

In order to increase enterprises' accountability for harm done to people and the environment, the European Commission is expected to put forward a comprehensive legal obligation for due diligence in the first quarter of 2021. It has already had various options investigated and is expected to launch a consultation later this year.

The expected legal basis for measures in the field of corporate governance (company law) is the freedom of establishment as part of the internal market. The internal market is one of the shared competencies of the EU. If internal market regulation is indeed

<sup>27</sup> This is based, *inter alia*, on the announcement by EC Reynders in the webinar *Towards Effective Human Rights and Environmental Due Diligence*, 8 June 2020, [https://www.youtube.com/watch?v=Y\\_k8C-OSTIQ](https://www.youtube.com/watch?v=Y_k8C-OSTIQ).

<sup>28</sup> See in greater detail Appendix 1.

<sup>29</sup> C. van Dam & M. Scheltema (2020) *Opties voor afdwingbare IMVO-instrumenten*.

<sup>30</sup> See, for example, European Commission Communication (2020) *Europe's moment: Repair and Prepare for the Next Generation*, COM 45626.5.2020, p. 7.

<sup>31</sup> Speech by EC Reynders in the webinar of the European Parliament's working party on *Responsible Business Conduct*, 29 April 2020.

concerned, then the EU may introduce harmonisation measures, and this may limit the scope for national policy (Article 2(2) TFEU).<sup>32</sup>

*Possible options for due diligence legislation*

The European Commission has investigated a number of options for a comprehensive legal obligation for due diligence:<sup>33</sup>

- legislation applicable to a limited group of enterprises;
- legislation with comprehensive application to sectors;
- legislation containing a monitoring and sanction mechanism. This can apply to a limited group of companies or be broadly applicable within sectors.

In addition, the European Commission has had a study carried out into the extent to which due diligence can be promoted by tightening up legislation on non-financial aspects of doing business. That study concluded that tightening up the reporting obligation will in itself have little impact on better protection of human rights and the environment, because it does not require enterprises to make any substantial effort to draw up and implement a due diligence plan. The study also concluded that the impact of a comprehensive legal obligation also depends on the way supervision and enforcement are organised.

*The intended due diligence legislation is part of a more comprehensive package*

In order to encourage a long-term horizon in corporate decision-making, the European Commission is also expected to introduce a proposal for legislation in the field of corporate governance, perhaps including the obligation for an enterprise's executive board to draw up a long-term plan.

Providing the right incentives for sustainable business models comprises a comprehensive package of measures that touch on the efforts to make the financial sector more sustainable within the framework of the *EU Sustainable Finance Action Plan*, the future *Renewed Sustainable Finance Strategy* and the *Green Deal*. The financial sector can act as an important lever for changes in the real economy. Plans in this area include a possible revision of the transparency obligations for non-financial aspects of doing business, revision of the accounting standards, and further detailing of the criteria for classifying enterprises as sustainable in connection with financing and investing in these enterprises.<sup>34</sup> With regard to the latter, the European Parliament and the European Council have reached political agreement on the "Taxonomy Regulation". Based on that regulation, enterprises that wish to be designated as sustainable must, among other things, bring their activities into line with the OECD Guidelines, the UNGPs, and the fundamental workers' rights as defined by the ILO.

Within the framework of the Green Deal, the European Commission also wishes to improve the functioning of the Emissions Trading System so as to contribute to effective carbon pricing throughout the economy.<sup>35</sup> This can contribute to the system transition to a more sustainable economy. Creating a global level playing field requires a border carbon adjustment mechanism.<sup>36</sup> This must, however, conform to WTO rules. The

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<sup>32</sup> See also European Commission (2020) *Study on due diligence requirements through the supply chain*, p. 231.

<sup>33</sup> European Commission (2020) *Study on due diligence requirements through the supply chain*, p. 239.

<sup>34</sup> See, for example, European Commission (2020) *Consultation document on the sustainable finance strategy*.

<sup>35</sup> See, for example, European Commission Communication (2020) *Europe's moment: Repair and Prepare for the Next Generation*, COM 456, 26.5.2020, p. 7.

<sup>36</sup> In the framework of a new Own Resources Decision, the European Council instructed the European Commission to come up with a proposal for a border carbon adjustment mechanism in the first half of 2021. According to the European Council, this must be in place by the beginning of 2023 at the latest. In addition, the Commission must come up with a proposal to extend the revised Emissions

European Commission wishes every new trade agreement that is concluded to include a separate chapter on sustainable development and the most stringent standards for protection of the climate, the environment and labour, with a policy of zero tolerance of child labour.<sup>37</sup> For supervision, the Commission has appointed a Chief Enforcement Officer.

Partly on the basis of these findings, the following section assumes that the European Commission will propose a comprehensive legal obligation for due diligence and, in line with this, will also propose tighter reporting obligations regarding non-financial aspects of doing business.

### 4.3 Advantages and disadvantages of European due diligence legislation

#### *Potential advantages of European legislation as compared to national legislation*

European legislation makes it possible to scale up the initiatives for sectoral cooperation to the European level, thus achieving greater impact in the supply chain. As CSR Europe proposes, this also requires flanking policy (see Box 4).<sup>38</sup>

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#### **Box 4: Flanking policy**

The success of future EU initiatives depends to a great extent on the buy-in of the private sector, in particular enterprises with long and strategic supply chains. According to CSR Europe, these entities need an EU that supports them in establishing sector dialogues and alliances for human rights and environmental due diligence that can:

- supplement future horizontal due diligence legislation with sector-specific guidelines to make the OECD Guidelines and the UNGPs applicable in practice;
- provide assistance for systematically monitoring risks to people and the environment;
- provide a platform for dialogue and analysis that focus on solutions and collaboration;
- provide advice on coherent policy to increase the impact within the supply chain in the areas of environment, human rights, and decent work.

Source: CSR Europe (2020)

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European legislation also counteracts the fragmentation of legislation within the various EU Member States, thus reducing the administrative burden on enterprises. It also creates a level playing field for enterprises, which harmonises demand from businesses for sustainable production, so contributing to greater impact within the supply chain. This also makes it possible to counter “regime competition” (i.e. whether or not a company decides to establish itself in a given country because that country has – or does not have – due diligence legislation). European legislation also makes it easier to tackle “stragglers” in the interests of enterprises that do wish to make progress.

#### *Potential disadvantages*

As already noted in Section 3.4.3, however, European legislation also has two potential disadvantages compared to national legislation: it can be time-consuming and it is

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Trading System to shipping and aviation (European Council conclusions 17–21 July 2020, EUCO 10/20, point A29).

<sup>37</sup> WTO law does not stand in the way of the EU making arrangements on this with other countries. However, they cannot apply these mutual arrangements to countries which are not parties to the trade agreement.

<sup>38</sup> CSR Europe is the leading European business network for corporate sustainability and responsibility. With its members, associate members, and members of national partner organisations it unites some 10,000 enterprises.

questionable whether Member States can reach agreement on it; it is uncertain, moreover, whether European legislation will match the ambitions of the Netherlands. This is particularly important because European legislation can limit the scope of Dutch legislation.

#### 4.4 Points for consideration regarding legislation

The potential advantages and disadvantages of legislation also depend on its content. Some key aspects are:

- The level of ambition. In order to have an impact in the supply chain and provide the right incentives for international cooperation, European legislation must monitor all the steps in the due diligence process, i.e. including the impact on the ground and, where necessary, ensure that remedial action is taken. It is important that the legislation is in line with the OECD Guidelines and the UNGPs, as the international framework of standards for respecting human rights and the environment. Enterprises and stakeholders will not be helped by the EU trying to reinvent the wheel in this field. That would also lead to inconsistency in the international framework of standards. There is (relative) consensus on interpretation of the OECD Guidelines and a great deal of knowledge and experience regarding their effective implementation.
- The design of supervision, enforcement, and the possibilities for remedy. This partly determines the impact in the supply chain.<sup>39</sup> A condition for redress and remedy is that, it has been demonstrated that an enterprise has failed to comply with its legal obligations and that someone has sustained harm as a result. This therefore means that, in all fairness, enterprises must first be given time to comply with the legal obligations.
- The applicability of the legislation. Which enterprises does the legislation apply to: only large enterprises and companies or also SMEs? If the legislation also applies to SMEs, there needs to be proportionality: what can be expected of a large company and what can be expected of SMEs? Any supervisory authority must also take account of reasonableness and fairness as regards SMEs.
- Alignment with the legislation on reporting on the non-financial aspects of doing business and the sustainability of the financial sector.
- Preventing a reduction in the pre-existing national level of protection of human rights and the environment; preventing a negative impact on existing statutory liability in respect of subcontractors or suppliers.

##### *Level of ambition*

As far as the level of ambition is concerned, it can be expected that – in view of previous resolutions in this area – the European Parliament will wish to set the bar high.<sup>40</sup>

Striving for a high level of ambition also requires early input from the Netherlands to the European Commission. The Ministry of Foreign Affairs' guidelines for European decision-making rightly note that:

Given the great significance of the Commission's proposal in the negotiation process, it is important that such a proposal is as far as possible in line with Dutch ambition. In general, the Commission is open to the views of third parties, including the Member States. After all, it is in the Commission's interest to have sufficient support for its proposal and to ensure that it meets the practical needs of public authorities, enterprises, and citizens. Good contacts with the Commission officials concerned are

<sup>39</sup> European Commission (2020) *Study on due diligence requirements through the supply chain*, p. 23.

<sup>40</sup> See, for example, European Parliament (2016) *Resolution of 25 October 2016 on corporate liability for serious human rights abuses in third countries* (2015/2315(INI)); European Parliament (2018) *Resolution of 29 May 2018 on sustainable finance* (2018/2007(INI)).

therefore indispensable in order to be able to represent Dutch interests in Brussels at the earliest possible stage.<sup>41</sup>

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*Box 5: ETUC welcomes intended comprehensive due diligence legislation, but concern regarding level of ambition*

European and national developments have created an opportunity for a European directive for mandatory due diligence legislation in the field of human rights and international RBC. This should encourage the European Commission to take action.<sup>42</sup>

The European Trade Union Conference (ETUC) therefore welcomes the European Commission's intention to launch a new initiative on sustainable corporate governance in 2021. Commissioner Reynders referred to the French act on the duty of vigilance as a relevant example, being "the most advanced framework in the EU". But although this is a good starting point, it is time to go further and be bolder regarding issues such as the scope and victims' rights.<sup>43</sup>

Source: ETUC (2019) and Social Europe (2020)

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### *Supervision*

Supervision of implementation of European legislation by the *Member States* is a task of the European Commission. It may initiate infringement proceedings before the Court of Justice if Member States fail to implement the legislation on time or correctly.

Based on existing European due diligence legislation in the field of conflict minerals and illegally harvested timber (see Appendix 1), the legislation can be expected to instruct Member States to appoint a competent authority. The latter would be responsible for the enforcement of legislation and the supervision of *enterprises*, with European legislation also including provisions on cooperation between these authorities. In this regard, the powers and sanction possibilities of these competent authorities are important. Where the possibilities for redress are concerned, it is relevant whether, and under what conditions, persons who have sustained harm as a result of non-compliance with the provisions of the legislation can lodge a complaint with the supervisory authority and/or institute civil proceedings.

Another consideration as regards the organisation of supervision concerns the relationship between a possible new supervisory authority and the role and position of the national contact points for the OECD Guidelines. This concerns in particular the role of the National Contact Point (NCP) in dealing with reports from individuals, civil society organisations, and enterprises that have a complaint about a possible violation of the OECD Guidelines, and how this will relate to a competent authority appointed by the Member States to enforce the legislation. It is important to keep the mediation role of the NCP basically separate from the enforcement role of a supervisory authority. Mediation aims to find a mutual solution to an issue on a voluntary basis. It is not aimed at punishment and cannot be mingled up with it, for one thing because that can be at the expense of efforts to find a solution. This does raise the question, however, as to when and in what situation enforcement is required, and what form it should take respecting the role and tasks of the NCP. These are enshrined through Dutch

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<sup>41</sup> Interdepartmental Commission on European Law (2009) *Leidraad voor de onderhandelaar in de EU*, August 2020, <https://ecer.minbuza.nl/documents/20142/1085933/Icerleidraadeu+hoofdstuk1/386e34c4-58b1-64b4-5a55-1eaf3375b318>.

<sup>42</sup> ETUC (2020) *ETUC Position for a European directive on mandatory Human Rights due diligence and responsible business conduct*, <https://www.etuc.org/en/document/etuc-position-european-directive-mandatory-human-rights-due-diligence-and-responsible>.

<sup>43</sup> Social Europe (2020) *Ensuring human rights and sustainability in company supply chains*.

membership of the OECD and the 2014 decree setting up the NCP. When the guidelines were revised in 2011, a provision was included to the effect that recourse to legal proceedings cannot be a reason for an NCP to declare a case inadmissible. It is also important to ensure consistency in application of the standards of due diligence based on the OECD Guidelines (by the NCP) and the European due diligence standards by a supervisory authority.

*European involvement more comprehensive than only due diligence legislation*

European involvement is rightly part of all the policy instrument mixes. That involvement should focus on the comprehensive package of measures proposed by the European Commission for the transition to a sustainable economy, and therefore not just on due diligence legislation as the policy instrument mixes suggest. This can create the right incentives for greater impact within the supply chain. Coherence and consistency within this package of measures is important.

The question of how sectoral cooperation should be integrated into supervision is also important here. This was already discussed in Section 3.5.

#### **4.5. Conclusion**

In the view of the Council, an ambitious European policy mix – one including legislation mandating due diligence and partnerships to increase influence and learn from one another – offers the best opportunities for ensuring sustainable supply chains. This corresponds to the third policy instrument mix (3E), in which comprehensive due diligence legislation in line with the OECD Guidelines and the UNGPs will be introduced at the European level, with the other elements also if possible being embedded at the European level. In view of the uncertainties about the timeframe and level of ambition, Section 5 deals in greater detail with the various conceivable routes whereby the Netherlands can help to achieve this.

## 5 Answers and recommendations

### 5.1 Answers to the request for advice

#### 5.1.1 Advantages and disadvantages of the various different policy instrument mixes

##### *Assessment framework*

In recent years, the Netherlands has gained a great deal of experience with implementation of the OECD Guidelines and the UNGPs, including in the form of sector agreements. This has given us a better idea of the challenges that companies encounter in practice when they genuinely embark on the due diligence process. That is not a reason for less effort, but rather an incentive to increase ambition. By taking account of those challenges in future policy and looking for ways to tackle them jointly, the Netherlands can contribute more effectively to ensuring respect for people and the environment throughout the supply chain.

When evaluating the various policy instrument mixes, the Council proceeded on the basis of the following assessment framework (see Section 2).

Overall criterion: Maximum impact in the supply chain through better implementation of the OECD Guidelines by companies.

What does this require?

- The widest possible use of mutually reinforcing policy instruments (the “5Vs” model supplemented by *linking* and *increasing influence*);
- Coherent policy, synergy between policy instruments, and use of the same standards;
- Contribution to a level playing field and embedding of instruments at European level;
- Promoting the involvement of stakeholders and rights-holders in producing countries, including producers;
- Improving access to redress and remedy;
- Increasing understanding of the supply chain;
- Encouraging cooperation so as to increase influence;
- Contribution to dialogue and trust;
- Attention to the learning agenda and to making the impact quantifiable, including the positive and negative side-effects of the policy.

##### *Optimising existing policy*

Policy instrument mixes 2, 3 and 4 all involve optimisation of existing policy instruments. This can be seen as a form of “no-regrets policy” because it can be implemented independently of the choice of additional policy instruments. It is crucial to implement possible improvements to current policies quickly, and not to wait for the new policy to be implemented.

Important elements in that regard are:

- Greater coherence in government policy so that, *inter alia*, procurement policy, corporate policy in the context of trade missions, and climate policy provide the same incentives for implementing the OECD Guidelines;
- Streamlining the recommendations that companies receive on implementing the OECD Guidelines in line with the sectoral guidance developed by the OECD itself;
- Improvement and expansion of sectoral cooperation.

Where sectoral cooperation is concerned, it is also important to make as much use as possible of the knowledge that has been built up in recent years by companies, trade unions, civil society organisations, and government through the agreements for international RBC. It is also important to ensure proper financial safeguards of the agreements during the development of legislation and new forms of sectoral cooperation.

As regards the proposed RBC support centre, the Council needs more information on how the Government intends structuring it, what information is lacking in the current resource facilities, what additional resources will be made available for this purpose, and how it relates to the current tasks and mandate of the NCP.

*Policy instrument mix 1: The zero option*

The zero option concerns the current policy instrument mix (without optimisation). This mix does not enable sufficient progress as regards increasing the impact in the supply chain through the implementation of the OECD Guidelines. It is not therefore a promising option.

*Policy instrument mix 2: Supporting companies in implementing the WZK*

This policy instrument mix can be seen as an optimisation of existing policy.

Optimising existing policy means that a number of things can be accomplished, thus achieving greater impact through the implementation of the OECD Guidelines: broad deployment and strengthening of the policy instruments aimed at informing, facilitating, incentivising, and creating conditions; greater coherence in government policy; and through the strengthening of sectoral cooperation, greater involvement of stakeholders, better access to redress and remedy, and more attention to the learning agenda. What is lacking in the policy instruments, however, is a "big stick" (i.e. an obligation) to persuade companies to commence implementing the OECD Guidelines and also legal instruments to ensure better access to redress and remedy. In addition, this policy instrument mix has a strongly national focus and there is no embedding of instruments at the European level.

*Policy instrument mix 3: Comprehensive due diligence legislation*

The advantage of additional due diligence legislation is that it can potentially have greater impact in the supply chain and a more level playing field can be achieved by also obliging "stragglers" in the field of international RBC to make an effort to get their due diligence in order.

Comprehensive due diligence legislation is also more in line with the OECD Guidelines and is therefore preferable to thematic due diligence legislation. Thematic due diligence legislation also entails the risk of "tunnel-vision thinking", i.e. ticking off a certain theme without considering other potential risks.

Because of the introduction of comprehensive due diligence legislation and the synergy this can achieve with sectoral cooperation, policy instrument mix 3 has the potential to achieve greater impact in the supply chain by implementing the OECD Guidelines than does policy instrument mix 2. The precondition for this is that the legislation also enables better access to redress and remedy and is combined with other elements of a comprehensive policy instrument mix, including sectoral cooperation, coherent government conditions, and incentives for enterprises. If this comprehensive policy instrument mix can be embedded at European level, the impact within the supply chain will be correspondingly greater. This will create a "European" variant of policy instrument mix 3 (3E).

*Policy instrument mix 4: Thematic due diligence legislation (WZK) + reinforcement of transparency obligations*

Supplementing policy instrument mix 2, policy instrument mix 4 provides for reinforcing the reporting obligations for enterprises regarding non-financial aspects of doing business, in that way embedding the OECD Guidelines more firmly. This concerns EU legislation.

Reinforcing the transparency obligations alone is not, however, an alternative to comprehensive due diligence legislation (policy instrument mix 3), but it can complement such legislation. Experience in other countries has shown that merely having reporting obligations in place does not bring about the desired changes in behaviour and leads to a “box-ticking culture”. One can therefore expect that policy instrument mix 4 will have less impact than policy instrument mix 3.

**5.1.2. Maximum impact within the supply chain requires an ambitious policy mix with comprehensive due diligence legislation**

Further development of policy is no reason for complacency as regards shouldering responsibility in the day-to-day practice of doing business. The Netherlands continues to lead the way in international RBC. The Dutch business community, trade unions, and civil society organisations aim to work together ambitiously to prevent negative impact and strengthen positive impact in international supply chains. To do so, they need a government that is at least as ambitious, that shows how this can be achieved, that pursues a coherent policy along all the “routes” toward sustainable globalisation, and as a partner continues to invest in sectoral cooperation.

The Council therefore advocates, in all cases, for simultaneous optimisation of the current policy mix in order to ensure continuity, increase policy coherence, and continue to work towards positive impact in the supply chain.

The impact of COVID-19 on international supply chains once again reveals the vulnerability of employees and the need to embed international RBC in regular business operations so as to establish sustainable business models throughout the entire supply chain. Whether actual improvement takes place in production conditions within international supply chains depends on the willingness and ability of producing countries to produce with respect for people and the environment. It is only with consistent behaviour by a substantial part of the market – with employees and civil society organisations daring to address issues locally and with governments jointly putting sustainable supply chains on the map – that producers in the supply chain have sufficient incentives and opportunities for structurally improving conditions and for carrying out production with respect for people and the environment.

In the view of the Council, an ambitious European policy mix – one including legislation mandating due diligence and partnerships to increase influence and learn from one another – offers the best opportunities for ensuring sustainable supply chains. This corresponds to the third policy instrument mix (3E), in which comprehensive due diligence legislation in line with the OECD Guidelines and the UNGPs will be introduced at European level, with the other elements also if possible being embedded at European level.

Momentum has been created for this through EU Commissioner Reynders’ agenda, the ambition of the European Parliament, and the German Presidency of the EU. It is difficult, however, to estimate how the other Member States in the European Council will react, and what that will mean for the achievable level of ambition in Europe.

How do we arrive at the desired ambitious European policy mix? At least three different routes are conceivable whereby the Netherlands can contribute to this; they are outlined below.

It will be necessary in the case of all the routes to take account of interaction between the European and the national scope for policy. If the European legislation is based on operation of the internal market, this will limit the options for national policy. It is for this reason that the Ministry of Foreign Affairs also indicates in the request for advice that if it becomes clear that the European Commission is taking concrete steps towards a legislative proposal – for example a public consultation or publication of a legislative proposal by the Commission – that that will not be hampered by a national legislative process.

#### *Maximum European efforts*

The first option is to focus Dutch efforts as much as possible on influencing European developments. Among the EU Member States, it is the Netherlands that has the most extensive practical experience of implementing due diligence; it can draw on that experience to advocate – along with like-minded Member States – an ambitious European policy mix (both legislation and partnerships). Within Europe, this is an additional perspective compared to advocating legislation alone, and it will become stronger if parties from the Netherlands join forces in this regard. The advantage of a European approach is a level playing field for Dutch companies within Europe and the possibility of utilising the political influence of the EU in the producing countries. This makes it more likely that investing in international RBC will be worthwhile and will lead to an impact within the supply chains. By taking this route, the momentum generated in Europe will be utilised to the maximum, and the available time and resources from the Netherlands can thus be deployed as effectively as possible. The disadvantage of this route is that the pace of European developments can still be disappointing, particularly due to disagreements within the European Council.

#### *Maximum European efforts with mid-2021 reference point as "the big stick"*

The second option, in addition to the first route, is to determine, when a new Dutch (coalition) Government takes office next year, whether sufficient progress is being made in Europe, and to lay this down in the Coalition Agreement. Assessment of the progress made should be based on the following criteria:

- the specific steps and pace of the European process and the legislative process;
- the nature of the legal basis;
- the scope of European legislation (which companies are covered by it?);
- the positions and willingness of EU Member States;
- the breadth and depth of the due diligence legislation and the degree of alignment with the OECD Guidelines and UNGPs;
- the possibility and credibility of supervision including the sanction possibilities;
- the possibilities for redress and remedy;
- the incentives for cooperation and the joint exercise of influence.

If progress in Europe turns out to be insufficient, it will be only logical to develop comprehensive due diligence legislation further in the Netherlands. To that end, important factors include a good cost-benefit analysis, support for companies and civil society organisations, further elaboration of interaction with agreements/sectoral cooperation, and alignment with developments in like-minded countries such as Germany and France. The advantages of this route largely correspond to those of the first option. In this option, energy can be deployed until the start of a new government to influence Europe by arguing for an optimal policy mix. If progress in Europe turns out to be insufficient, a "big stick" is available in the form of promoting the implementation of due diligence in the Netherlands through further development of national legislation. A disadvantage may be that it is difficult to determine what constitutes sufficient progress. And further development of national legislation while Europe is lagging behind

will create an uneven playing field for Dutch and other companies within Europe that are bound by national regulations for international RBC.

#### *Simultaneous European and national efforts*

The third option is to simultaneously strive to influence developments within Europe and also to develop national legislation further. If the initiative note introduced by the Christian Union, Labour, Socialist, and GreenLeft parties is converted later this year into a legislative proposal, then the Ministry of Foreign Affairs will be able to use this so as to come up with a proposal that will be available during the term of office of the new government. This will only be possible, of course, if a subsequent Coalition Agreement makes it possible. The advantage of this route is that elaboration of an EU process will already have been initiated and that a low level of ambition in the EU will not mean that the Netherlands has to compromise as regards speed or quality. Further development of national legislation will be a positive incentive for Europe, in so far as it is complementary to the WZK and national programmes in other Member States (France, Germany, Finland, etc.). At the same time, however, it will mean the creation of an uneven playing field for Dutch and other companies within Europe that are bound by national regulations for international RBC. Disadvantages can also be that the available resources and energy are divided across two approaches; it is then justifiable to question whether the maximum effect will be achieved at both levels. Moreover, the brief amount of time before the elections means that the chances of a meaningful national approach being successful are uncertain.

How one weighs up the various routes is a political decision, and depends in part on how one foresees developments in the coming period and the scope for national policy in the event of a European legislative initiative. If greater clarity becomes available about this and about the details of proposed legislation at European or national level, then the Council would be pleased to issue additional advice.

## **5.2 Recommendations**

#### *With regard to the policy instrument mix for international RBC:*

- Intensify international RBC policy by further elaborating a policy instrument mix with comprehensive due diligence legislation, combined with optimising existing instruments and new elements, in line with the routes described above.
- Prepare the Dutch business community for future legislation by being clear about the ambitions of the Dutch Government and about expectations regarding the European playing field.
- When further elaborating legislation, ensure maximum alignment with the OECD Guidelines and UNGPs, also so as to ensure clarity and consistency as regards international standards.
- Encourage the broadest and deepest possible application of these Guidelines: for the broadest possible group of companies (including SMEs) and as deeply as possible at all stages of the due diligence process (including addressing identified risks and contributing to access to redress and remedy). Proportionality as regards SMEs and the various different trade chains is of course important here.
- In the further elaboration of legislation, take account of the points for consideration presented in the present advisory report, including those regarding avoidance of an accumulation of legislation and clarifying the relationship with the NCP.
- Add two more "Vs" to the 5Vs model: *linking* [*verbinden*] and *increasing* [*vergroten*] *influence within the supply chain*. When elaborating legislation, integrate maximum incentives for creating impact within the supply chain (genuine action instead of just checklists to tick off) and for facilitating the necessary cooperation with other parties within the sector, government, trade unions, and civil society organisations.

- When drafting future policy for international RBC, devote greater attention to the gender dimension of the policy by making use of the report on *Gender Dimensions of the UN Guiding Principles on Business and Human Rights*.
- Have the Netherlands lead the way in Europe as a guiding force in the field of integrated reporting, where this is in line with the UNGPs and the OECD Guidelines. This may also take place within the framework of revision of the EU's Non-Financial Reporting Directive (NFRD), the process for which has already commenced. Large companies, the Dutch Accounting Standards Board (DASB), and accountants have already shown an interest in this.
- Explore how to increase financial incentives for companies to comply with international RBC standards. This should also involve investigating how investment in international RBC can be more worthwhile, for example by providing additional investment or support measures for frontrunners.

*With regard to the policy instrument mix for sustainable globalisation:*

- In addition to the efforts for international RBC, also intensify efforts regarding other routes to sustainable globalisation.
- Monitor the impact of the COVID-19 crisis on international RBC and parties in the supply chain, and learn lessons to create robust and sustainable supply chains in which people and the environment are central.
- Seek cooperation with governments in key producing countries, focusing on better enforcement of their own legislation and regulations and the creation of platforms for social and multi-stakeholder dialogue and cooperation.
- Ensure consistency in the various areas of flanking policy, such as trade policy, development policy, competition policy and the internal market, procurement policy, and financial sector policy.
- Create a learning agenda, with scope to experiment and a firm commitment to research, monitoring, and evaluation.
- Invest in comprehensive information and awareness about the international CSR framework and the relationship with the SDGs among Dutch public officials – such as procurement managers, embassy staff, and local government staff – and among companies and consumers.

*With regard to ambitious European efforts:*

- Position the Netherlands within the EU as a country with a great deal of experience in practical application of the OECD Guidelines and the UNGPs and with the necessary social dialogue and cooperation between companies and civil society organisations (including trade unions), and capitalise on this in tools, position papers, information material, trade missions, etc. Cooperate as much as possible with the OECD's Working Party for Responsible Business Conduct, the ILO, and the UN's Working Group on Business and Human Rights, and support their work strategically so that it contributes the maximum possible to the Dutch policy agenda.
- Strengthen the leading position of the Netherlands in making the link between international RBC and the SDGs on the basis of the Council's advisory document *Seizing opportunities and managing risks*. Make this specific for each sector and supply chain; by working on international RBC, the European business community can make the maximum possible contribution to the SDGs.
- Show how European cooperation for sustainable supply chains can be given shape by actively exploring in a number of sectors how sectoral cooperation between a number of like-minded EU countries can get off the ground and facilitating a process towards this. Start with the sectors in which the agreements approach has laid the foundation in the Netherlands in recent years, including garments and textile and the banking sector, and supply chains where a great deal of experience has been gained with sectoral cooperation at international level, such as palm oil, cocoa, coffee, and soy.

- Demonstrate what is possible by investigating – in a limited number of sectors with a number of like-minded EU countries – how stakeholders within the supply chain can be involved effectively (for example by collaborating with the authorities and platforms for social and multi-stakeholder dialogue and cooperation in producing countries) and how access to redress and remedy can be improved. One might also investigate how agreements similar to the Bangladesh Accord and International Framework Agreements can contribute to this.
- Build a coalition of like-minded EU countries to make the above ambitious European efforts possible.

*With regard to optimising the current policy mix:*

- Follow up the recommendations of the IOB and the KIT, and those in the Council's advisory report *Seizing opportunities and managing risks*.
- Make serious efforts to increase policy coherence by attaching an implementation agenda and appropriate powers. In this context, consider giving the IOB a role in the field of policy evaluation.
- Make use of a benchmark such as the *OECD Alignment Assessments* to assess and improve the OECD compliance of government-backed initiatives.
- By means of its own procurement policy, show that the Government takes its own responsibility seriously and rewards the efforts of the business community, and that full application of due diligence as a "launching customer" is possible.
- Develop a vision for the future of sectoral cooperation, based on the lessons learned from the evaluations of the agreements and put those lessons into practice in the current agreements and further sectoral cooperation. Continue to invest as a partner in sectoral cooperation. Ensure proper financial safeguards of the agreements during development of legislation and new forms of sectoral cooperation.
- Collect more information and data regarding due diligence in the supply chain, including so as to monitor progress regarding the SDGs and by developing specific indicators for international RBC.

*With regard to strengthening the position of vulnerable groups in the supply chain:*

- Continue to strive for structural solutions in producing countries and dare to make choices to strengthen the voice of the most vulnerable parties within the supply chain. Ultimately, sustainable impact within the supply chain depends on the possibilities for local communities, workers, and farmers to shape their own development and make their voice heard. This calls for organising local "eyes and ears", who will then continue to raise issues once the independent auditor has left.
- Within the context of sectoral cooperation, prioritise prerequisite trade union rights, social and multi-stakeholder dialogues, support for civil society, and access to redress and remedy. These are indispensable for implementation of successful international RBC policy, and are extremely difficult to regulate at the level of individual companies.
- Facilitate and finance representation, through social dialogue, of supply-chain workers regarding the international supply chain within which they are employed.
- Deploy monitoring mechanisms, especially in this time of COVID-19, to acquire additional information on the situation of workers within the supply chain and the economic impact that COVID-19 has on both producing countries and European countries.
- Tackle barriers of gender inequality within international supply chains.
- Improve access to redress and remedy.

Promoting sustainable supply chains and international RBC is a process that will take a long time. It is therefore important to ensure that there are sufficient people and resources to make the above possible. The Council advises assuming a period of ten years, in line with the deadline for achieving the SDGs and the "Decade of Action" for

the UNGPs. It also recommends drawing up a cost estimate for an optimal policy mix at the European and national levels, and making explicit what choices are made in this respect.

## **Appendix 1 Overview of EU legislation, legislation in EU Member States, and intentions**

### **Section 1 Existing EU due diligence legislation**

#### *Due diligence legislation*

There is currently no comprehensive European legislation in the area of due diligence. There is, however, legislation on the importing of certain minerals and timber into the EU which lays down due diligence obligations. In this appendix, that legislation is discussed briefly with attention to its reasons, scope, elements of due diligence, organisation of supervision and enforcement, and implementation and application in the Netherlands.

#### *Conflict minerals*

In conflict-affected regions, the proceeds from the illegal exploitation of minerals are often used to finance armed groups and security forces. This gives rise to armed conflicts and makes it possible for them to continue. Disrupting the vicious circle between illegal exploitation of minerals and conflict is a crucial element in achieving peace and stability. With that in mind, the EU has established supply chain due diligence obligations for EU importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.<sup>44</sup> These requirements are in part based on the OECD Guidelines and UNGPs. This regulation will enter into force at the beginning of next year.<sup>45</sup>

The obligation for due diligence in the supply chain for conflict minerals comprises the steps of the due diligence process. The regulation also requires an independent audit to be carried out by a third party. Member States are responsible for monitoring compliance with the regulation. Checks are carried out retrospectively, partly on the basis of a manual developed by the European Commission. On-site inspections must be carried out at the importer's premises. The competent authorities in the Member States are obliged to share relevant information with other Member States and with the European Commission. Member States lay down rules regarding infringements of the regulation.<sup>46</sup>

Article 8 of the regulation enables the European Commission to approve a sectoral cooperation scheme as a "recognised scheme" in which participation is equivalent to compliance with the provisions of the regulation.

#### *Illegal logging*

Illegal logging is also a serious problem of international concern. Here, too, the proceeds are often used to finance armed conflicts. In addition, deforestation contributes to climate change, desertification, soil erosion, and loss of biodiversity. In order to prevent imports of illegally harvested timber, the EU has adopted a regulation laying down

<sup>44</sup> Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas. See also SER (2011) *Tweede Voortgangsrappportage Internationaal Maatschappelijk Ondernemen* [Second progress report on International Corporate Social Responsibility] p. 121–125.

<sup>45</sup> Regulation (EU) 2017/821 of the European Parliament and of the Council. Article 20(3) provides that the most relevant articles of the regulation will take effect on 1 January 2021.

<sup>46</sup> In the Netherlands, a legislative proposal was submitted for this on 29 June 2020: see House of Representatives (2019–2020) Legislative Proposal 35506 *Uitvoeringswet Verordening conflictmineralen*.

obligations for operators who place timber products on the internal market, as well as the obligations of traders.<sup>47</sup> That regulation entered in to force in March 2013.

The regulation prohibits placing illegally harvested timber on the market. At each stage of the distribution chain, traders must identify who supplied them with the timber and to whom they themselves supplied it. Operators must exercise due diligence when placing timber on the market. To that end, the regulation provides for a due diligence system with the following elements: information systems to trace the species, origin, supplier, harvesting concession, etc.; a risk assessment procedure enabling the operator to analyse and assess the risk of placing illegally harvested timber or timber products from such timber on the market (with elements including assurance of compliance with applicable legislation including certification, the prevalence of illegal harvesting, the complexity of the supply chain); and risk mitigation procedures such as requiring additional information from suppliers or third-party verification.<sup>48</sup> In order to facilitate implementation of this regulation and to contribute to the development of good practice, the European Commission may recognise monitoring organisations which have established due diligence systems that comply with the requirements of the regulation. The competent authorities designated by the Member States carry out checks on the compliance of importers, traders, and monitoring organisations with the requirements that have been laid down.<sup>49</sup> They must also ensure that infringements of the regulation, including by operators, traders and monitoring organisations, are sanctioned by effective, proportionate, and dissuasive penalties.<sup>50</sup>

*Transparency obligation regarding non-financial information*

For large enterprises (more than 500 employees) that are of public interest, there is an obligation under EU law to report on non-financial information in their management report. Enterprises that are of public interest are to be designated by the Member States. These are enterprises, institutions, or public bodies of such a size or function within society that an improperly conducted statutory audit can have a significant impact on confidence in the public function of the auditor's opinion (especially listed companies, banks, and insurers).<sup>51</sup>

Reporting on non-financial aspects concerns the impact of enterprises' activities, covering at least environmental, social and human resources matters, respect for human rights, and the fight against corruption and bribery. This includes: a description of the company's policy in relation to these matters, including the due diligence procedures applied; the results of the policy pursued; the main risks regarding environmental, social and personnel matters, respect for human rights, and the fight against corruption and bribery; and how the company manages these risks. The European Commission has developed guidelines for reporting on these matters.<sup>52</sup>

<sup>47</sup> Regulation (EU) No 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market, 12 November 2010.

<sup>48</sup> This thus involves steps 2 and 3 in the due diligences process.

<sup>49</sup> For the Netherlands, this is the Dutch Food and Consumer Product Safety Authority [*Voedsel en Warenautoriteit "NVWA"*]. See NVWA (2020) *Import van hout en houtproducten* [Import of Timber and Timber Products], <https://www.nvwa.nl/onderwerpen/import-van-hout-en-houtproducten-flegt>.

<sup>50</sup> In December 2019, the NVWA – in cooperation with the Central Netherlands Police Force and the National Public Prosecutor's Office for Financial, Economic and Environmental Offences – raided six locations as part of an investigation of timber illegally imported from Myanmar, which entered the Netherlands via the Czech Republic. See NVWA (2019) *Investigation into tainted timber*, 4 December 2019, <https://english.nvwa.nl/news/news/2019/12/04/investigation-into-tainted-timber>.

<sup>51</sup> For the Netherlands, see: Audit Firms (Supervision) Act [*Wet toezicht accountantorganisaties*] (2020), in particular Section 1(j) and Article 2.

<sup>52</sup> European Commission (2017) Communication 2017C 215/01: *Guidelines on non-financial reporting*, 5 July 2017.

If the enterprise does not in fact have a policy regarding one or more of the above, the non-financial statement must include a clear explanation, with reasons, as to why it does not do so (i.e. “comply or explain”).

The Netherlands has implemented these guidelines in the Disclosure of Non-Financial Information Decree.<sup>53</sup> The Netherlands Authority for the Financial Markets (AFM) is the supervisory authority as regards reporting obligations.<sup>54</sup>

## Section 2 Existing due diligence legislation in EU Member States

### *France: comprehensive legislation*

France adopted a comprehensive due diligence law in March 2017.<sup>55</sup> This legislation applies to French listed companies and their subsidiaries with more than 5000 employees in France or 10,000 worldwide, as well as the subcontractors and suppliers with which they have a commercial relationship.<sup>56</sup> The enterprises concerned are instructed to draw up, implement, and publish a *plan de vigilance* (see Box 6). It is still too early to assess the effects and impact of the French legislation.

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### **Box 6: Vigilance plan in French legislation**

The French vigilance plan comprises due diligence measures to identify risks of serious violations of human rights and fundamental freedoms, human health and safety, and the environment arising from the activities of the company and those of the companies it directly or indirectly controls, as well as the activities of subcontractors or suppliers with which it maintains an established commercial relationship, if these activities are associated with that relationship.

The plan is intended to be developed in cooperation with stakeholders within society, if necessary as part of multi-stakeholder initiatives within sectors or at territorial level. It comprises the following measures:

1. A risks map intended for identifying, analysing, and prioritising risks;
2. Procedures for regular assessment of the situation of subsidiaries, subcontractors, or suppliers with which an established commercial relationship is maintained, with regard to the identification of risks;
3. Appropriate measures for limiting risks or preventing serious harm;
4. A mechanism for identifying and collecting reports on the existence or occurrence of risks, drawn up in consultation with the representative trade union organisations in that company;
5. A system for monitoring the measures implemented and evaluating their effectiveness.

Source: République Française (2017) *LOI n° 2017-399 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, 27 March 2017.

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<sup>53</sup> Bulletin of Acts Orders and Decrees [*Staatsblad*] (2017), no. 100 *Besluit bekendmaking niet-financiële informatie*.

<sup>54</sup> See AFM (2018) Theme investigation *Niet-financiële informatie in bestuursverslagen* [Non-financial information in management reports] 2017. In that investigation, the AFM found that the Non-Financial Information Decision was not being complied with in all respects. In particular, translation of the policy into risks, results, and KPIs left much to be desired. Personnel and environmental rights are addressed the most, while human rights and anti-corruption and bribery aspects are addressed the least.

<sup>55</sup> République Française (2017) *LOI n° 2017-399 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, 27 March 2017.

<sup>56</sup> This is expected to involve between 150 and 200 enterprises. See p. 60 of Savourey, E. (2020) France Country Report, *Study on due diligence requirements through the supply chain: part III Country reports*, p. 56–95.

The French act has two enforcement routes:<sup>57</sup>

- Firstly, rights-holders can bring a civil action if they consider that a company is not complying with the provisions of the act (for example because they consider that the vigilance plan is incomplete). Rights-holders may be local authorities, trade unions, or NGOs; it is not a condition for them to have been harmed by any negligence on the part of the company. They must first send notification to the company. If the company then fails to take what they consider to be sufficient action within a three months, they may take the matter to court; the court may impose a recurring penalty for as long as the company remains negligent.
- Secondly, a person who considers that an enterprise has failed to comply with its legal obligations and who has also sustained harm as a result can submit a civil-law complaint requesting the court to order that the harm be made good. Enterprises are not directly responsible for harm caused by their suppliers or subsidiaries. The person who submits a complaint regarding harm that has arisen within the supply chain must demonstrate that such harm is causally linked to the absence or insufficient implementation of a vigilance plan by the enterprise or parent company that gave the relevant instructions.<sup>58</sup>

The act does not provide for a monitoring mechanism.<sup>59</sup>

*The Netherlands: thematic due diligence legislation*

In the Netherlands, the Child Labour Due Diligence Act [*Wet Zorgplicht Kinderarbeid*, “WZK”] has been in force since the beginning of 2020.<sup>60</sup> It applies to any enterprise established in the Netherlands or elsewhere which sells or delivers goods or services to Dutch end-users. The enterprises concerned are obliged to send a declaration to the supervisory authority stating that they exercise due diligence to prevent those goods or services from being produced using child labour. Where there is a reasonable suspicion that goods or services have been produced using child labour, the company must draw up and implement a plan of action. An enterprise which purchases goods or services from an enterprise which has issued a due diligence declaration must also exercise due diligence in respect of the goods or services in question.

*In the event of non-compliance, the supervisory authority that is appointed may impose an administrative fine. If it is repeated by the same enterprise under the direction or on the instructions of the same director, the offence may be regarded as an economic offence. Any natural person or legal entity whose interests have been affected by the actions or omissions of an enterprise as regards complying with the provisions of the act may submit a complaint to the supervisory authority.*

The Minister can approve a joint plan of action aimed at ensuring that participating enterprises exercise due diligence to prevent goods or services from being produced using child labour. Such a joint plan of action will be drawn up between participating enterprises, one or more civil society organisations, and organisations representing employees and employers. An enterprise that acts in accordance with an approved plan of action is deemed to be exercising due diligence.

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<sup>57</sup> Brabant, S. & Savourey, E. (2020) *All eyes on France: French vigilance law first enforcement cases*, 24 January 2020, <https://www.cambridge.org/core/blog/2020/01/24/all-eyes-on-france-french-vigilance-law-first-enforcement-cases-1-2-current-cases-and-trends/>

<sup>58</sup> See p. 68–69 of Savourey, E. (2020) France Country Report, *Study on due diligence requirements through the supply chain: part III Country reports*, p. 56–95.

<sup>59</sup> See p. 71 of Savourey, E. (2020) France Country Report, *Study on due diligence requirements through the supply chain: part III Country reports*, p. 56–95.

<sup>60</sup> Bulletin of Acts Orders and Decrees (2019) no. 401 *Wet Zorgplicht Kinderarbeid*.

### *Due diligence as part of legislation*

The French and Dutch legislation discussed above focuses specifically on preventing issues in the supply chain through the exercise of due diligence. Due diligence obligations to protect and respect human rights also often form part of national legislation in the areas of corporate governance, the environment, working conditions, public procurement, and the prevention of bribery and corruption.<sup>61</sup> Based on a survey of relevant legislation in twelve EU Member States, Prof. Robert McCorquodale concludes that:<sup>62</sup>

It is, therefore, very clear that human rights and environmental due diligence is a practice and process that is applied in many and diverse laws across Member States, and is not at all unfamiliar in these national laws. While the terminology may vary, the same aim of having a legal obligation on a company to create and apply a human rights and environmental impact assessment to consider the risk to stakeholders is found in these Member States. Hence, a use of the term "due diligence" in relation to human rights and the environment in any EU legislation would not appear to be a problem for harmonisation within the Member States surveyed.

### **Member States intending to introduce comprehensive due diligence legislation**

A number of EU Member States (Finland, Germany, Italy) have announced – in the framework of their National Business and Human Rights Action Plan (NAP) – that where necessary they intend laying down due diligence obligations regarding human rights in legislation.<sup>63</sup> The new Finnish government's coalition agreement, for example, provides for an investigation of the possibility of legislation, including exploring EU legislation. The German coalition agreement states that if evaluation of the NAP shows that voluntary measures appear to be insufficient, national legislation will be introduced and the German government will press for EU legislation.<sup>64</sup> Evaluation has now in fact taken place and has shown that the targets set in the NAP have not been met. The German government will consider possible further measures, including legislation, later this year.<sup>65</sup>

There have also been parliamentary initiatives for due diligence legislation in Denmark and Austria. In Switzerland – which is not an EU Member State but is part of the European Area – the Swiss Parliament has approved legislation, as an alternative to an earlier public initiative, requiring all large companies to carry out due diligence in the area of human rights and the environment, whereby parent companies can be held liable for subsidiaries. A referendum on this draft legislation will be held later this year. In the Netherlands, the Christian Union, Labour, Socialist, and GreenLeft parties have announced an own-initiative bill for a comprehensive due diligence obligation.

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<sup>61</sup> For a summary overview, see: European Commission (2020) *Study on due diligence requirements through the supply chain: final report*, p. 199 et seq.

<sup>62</sup> European Commission (2020) *Study on due diligence requirements through the supply chain: final report*, p. 212.

<sup>63</sup> In its communication on RBC in October 2011, the European Commission invited the Member States to develop a plan for national elaboration of the UN Guiding Principles.

<sup>64</sup> CDU, CSU & SPD (2018) *Koalitionsvertrag*, p. 158.

<sup>65</sup> Auswärtiges Amt (2020) *Monitoring zum Nationalen Aktionsplan Wirtschaft und Menschenrechte*, 14 July 2020.



MINISTER FOR FOREIGN TRADE AND DEVELOPMENT COOPERATION

Social and Economic Council  
Ms M.I. Hamer  
PO Box 90405  
NL-2509 LK The Hague  
The Netherlands

The Hague, 30 June 2020

Dear Ms Hamer,

The Ministry of Foreign Affairs is in the process of evaluating the policy regarding International Responsible Business Conduct (IRBC). The arrangement to evaluate that policy is part of the Coalition Agreement. This process has led to the drafting of four policy options, the "well-considered mixes". The UN Guiding Principles on Business and Human Rights prescribe a well-considered policy mix comprising both national and international, as well as binding and non-binding, measures. With this letter, I wish to request the advice of the Council's IRBC Committee on those four well-considered mixes, each of which could in itself form the framework for future IRBC policy. In preparation for this request for advice, two presentations on this subject have already been made for the IRBC Committee, namely on 12 March and 14 May 2020.

The Government expects all Dutch companies with international supply chains to apply the OECD Guidelines. It aims, moreover, to ensure that 90% of all large companies in the Netherlands explicitly endorse the OECD Guidelines by 2023 at the latest and announce that publicly, for example in their annual report or on their website. These objectives of IRBC policy are not being changed, but it needs to be determined whether the current policy is in fact effective and whether new measures should be considered. The (Dutch) Child Labour Due Diligence Act ("WZK") has also been adopted. The associated general administrative order still needs to be elaborated. The WZK was taken into account when drafting the well-considered mixes.

In preparation for the well-considered mixes, the advantages and disadvantages of various instruments were investigated. Your committee will receive the reports of those investigations.

Various stakeholders were involved in elaboration of the well-considered mixes through consultations. Specific information about the stakeholder consultations during review of the IRBC policy is available on the dedicated website.<sup>66</sup>

New or additional measures must be assessed against the Integrated Assessment Framework for Policy and Regulation (the "IAK"). I would ask you to include in your advice the questions in the IAK and the official analyses that have already been carried out.

The opportunities for European policy regarding international RBC also play a role in determining the policy options. I would therefore ask you to take account in your advice of recent developments at European level and to consider how those developments can play a role. One important consideration is the announcement by the European Commission of its intention to propose an initiative on sustainable corporate governance in 2021, of which international RBC forms part. The Commission noted in its

<sup>66</sup> <https://www.rijksoverheid.nl/onderwerpen/internationaal-maatschappelijk-verantwoord-ondernemen-imvo/evaluatie-en-vernieuwing-imvo-beleid>

announcement that this may perhaps be a legislative proposal. The European playing field is diverse; the positions adopted by the EU Commissioners and the Member States are relevant here. The European Parliament also plays an active role.

Considering these developments, I wish to ask for your advice on each of the four well-considered mixes. Specifically, I request your advice on the advantages and disadvantages of the various different options as regards the objectives of international RBC policy. If the IRBC Committee wishes to assess the four well-considered mixes in terms of their relative suitability, then I am naturally interested in its findings. One relevant consideration, moreover, is whether and how the various elements within each mix reinforce one another.

The outlines of a new policy can be developed partly on the basis of your advice and that of the Advisory Board on Regulatory Burden (ATR) and the evaluation of the RBC Agreements.

I would be grateful to receive your advice by no later than 10 September 2020. That date is important because the House of Representatives has been informed that options for potential new policy will be clarified before the budget debate.

Sigrid A.M. Kaag

Minister for Foreign Trade and Development Cooperation

### **Appendix 3 Members of the Council's Committee on International RBC**

#### **Independent members**

- Prof. C.J.A.M. (Katrien) Termeer (chair)
- Dr S.R.A. (Steven) van Eijck
- L.C. (Luce) van Kempen
- E.H.Th.M. (Ed) Nijpels

#### **Members representing employers**

- L.A.M.C. (Linda) van Beek (VNO-NCW/MKB-Nederland)  
*Deputy: A.P.M.G. (Ton) Schoenmaeckers*
- H. (Hendrik) Hoeksema (LTO-Nederland)
- M. (Marhijn) Visser (VNO-NCW/MKB-Nederland)
- A. (Arnaud) Cohen Stuart (NVB)  
*Deputy: M. (Maryse) Hazelzet (NVB)*

#### **Members representing employees**

- (Tuur) Elzinga (FNV)  
*Deputy: L.M. (Lucia) van Westerlaak*
- A.P.C.M. (Nic) van Holstein (VCP)  
*Deputy: A.C. (Amerik) Klapwijk*
- M.E. (Marit) Maij (CNV)  
*Deputy: A. (Anne) Dankert*

#### **Advisory members**

- M. (Maria) van der Heijden (MVO Nederland)  
*Deputy: S. (Stefan) Roolvink / P. (Petra) Veeneman*
- W. (Wouter) Kools (VCP Jongerenplatform)
- J. (Joris) Oldenzijl  
*Deputy: Dr J. (Joseph) Wilde-Ramsing*
- C. (Catelene) Passchier (National Contact Point)  
*Deputy: F. (Fred) van Haasteren*
- D. (David) Vermijs
- M. A. (Manon) Wolfkamp (RBC Platform)  
*Deputy: D. (David) Ollivier de Leth*

#### **Ministry representatives**

- H. (Hannah) Tijmes (Foreign Affairs)
- S. (Saskia) van den Brink (Economic Affairs and Climate Policy)  
*Deputy: R.I. (Ruth) Schipper-Tops (Economic Affairs and Climate Policy)*
- M.G.M. (Monique) Bijen (Social Affairs and Employment)  
*Deputy: L.E. (Lydia Elisabeth) Lousberg (Social Affairs and Employment)*
- E.G.R. (Esmée) Ramaaker (Infrastructure and Water Management)

#### **Secretariat**

- A.I. (Alexandra) van Selm
- Dr B. (Bart) van Riel (included for this advisory report)
- S. F. (Sanne Floor) Weesie
- H. (Habon) Mohamed
- S. (Sarah) van Hugte (included for this advisory report)



**SOCIAAL-ECONOMISCHE RAAD  
(SOCIAL AND ECONOMIC COUNCIL)**

Bezuidenhoutseweg 60

P.O. Box 90405

NL-2509 LK The Hague

The Netherlands

**T** +31 (0)70 3499 525

**E** [communicatie@ser.nl](mailto:communicatie@ser.nl)

[www.ser.nl](http://www.ser.nl)

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