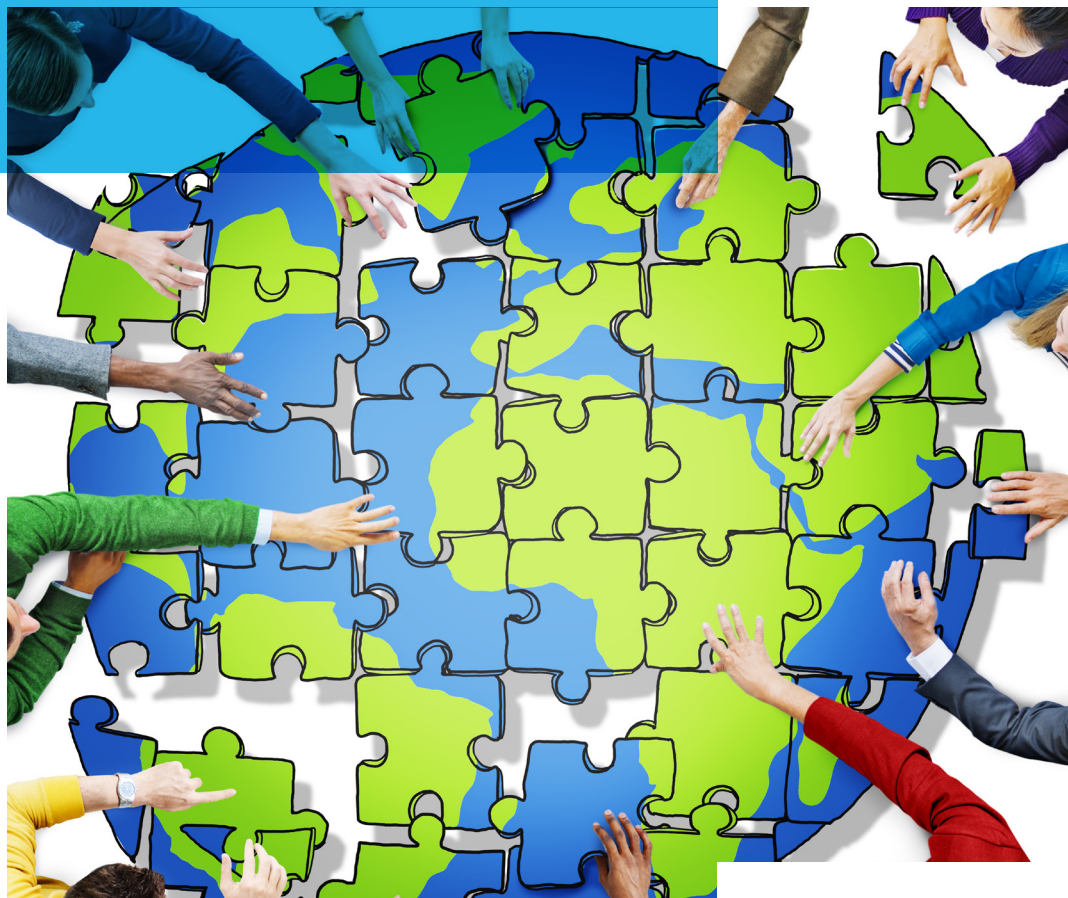


# Effective European due diligence legislation for sustainable supply chains



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TO THE MINISTER FOR FOREIGN TRADE AND DEVELOPMENT COOPERATION

NR.11 - OCTOBER 2021

## The Social and Economic Council of the Netherlands

As an advisory and consultative body of employers, employees and independent experts, the SER aims to contribute to greater prosperity in society by establishing a consensus on national and international socio-economic issues. In doing so, it aims for quality and consensus, in the form of a high level of expertise, combined with a broad basis of agreement and public support.

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Advisory report



# Introduction<sup>1</sup>

This advisory report prepared by the Social and Economic Council of the Netherlands (SER)<sup>2</sup> has been drafted in response to a request for advice from the Dutch Minister of Foreign Affairs<sup>3</sup> and sets out the ambition for European due diligence legislation to foster sustainable supply chains. The recommendations are formulated solely as input for the European policy agenda.

The SER calls upon the Dutch government to use this report to influence the European policy developments in a positive and ambitious way.

## Towards an effective European approach: working together for sustainable supply chain impact

The SER calls for a European approach which puts improving circumstances for people and the environment in the supply chain first and combines smart due diligence legislation with joint action to address prioritised risks at the sector level. This shall enable companies to work on improving circumstances in supply chains together with stakeholders, and help clarify expectations of companies through practical application. The approach builds on the lessons of the international responsible business conduct (RBC) sector agreements that the Netherlands has been working on for the last five years. It further improves upon this by developing a new generation of sector agreements at the European level. The new generation of sector agreements must be complemented by agreements with, and support for producing countries.

## Key principles to develop European due diligence legislation

The SER proposes the following principles for European legislation:

- a level playing field for the European market;
- focus on improving conditions in the supply chain, especially in producing countries;

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1 This text is a translation of the original Dutch text of the advisory report. In the case of discussions about the accuracy of the English translation or interpretation, the original Dutch text prevails.

2 The SER is one of the main advisory bodies to the Dutch government, in which business, trade unions and independent experts work together to reach agreement on key social and economic issues. For more information on the SER, visit <https://www.ser.nl/en>. For more information on the RBC agreements see <http://www.internationalrbc.org>

3 See annex 1 for the request for advice.



- legislation and sector agreements mutually reinforce each other in a race to the top;
- proportionality and limitation of administrative burden through joint action;
- focus on learning and support for companies;
- just and equitable enforcement as final step;
- European supervision and a common assessment framework;
- involvement of and partnership with producing countries.

## Features of international RBC

Globalisation has made it possible for the production of our mobile phones and wind turbines to take place not in Europe, but where comparative advantages make production possible at lower cost. Raw materials and semi-finished products also come from all over the world. This can be beneficial for companies and consumers, and can offer development opportunities for the producing countries; but it also involves risks. It means that a European company that operates internationally can, through its own operations and supply chain, find itself connected to the suppression of trade unions or damage to vulnerable ecosystems. These are often complex situations in emerging markets and developing countries, with limited (if any) protection of human and labour rights and the environment.

At the same time, we expect companies to do business with respect for people and the environment. The leading international guidelines for RBC, namely the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights (UNGPs) and the corresponding due diligence process provide companies with practical guidance to do so. By implementing these guidelines, companies also contribute to the Sustainable Development Goals (SDGs) and to positive impact in supply chains, for example by promoting decent work and climate action.

The promotion of RBC thus has a number of specific features:

- Realising actual positive impact (for example, with respect to deforestation or forced labour) deep in a supply chain is very complex and involves a process of trial and error.
- The OECD Guidelines and the UNGPs provide companies with guidance, which is further specified through sector guidance, OECD NCP statements and sector agreements. Nevertheless, it is still not always clear when a company has done enough to prevent negative impact in the supply chain and further clarification is needed.

- European companies often have limited individual leverage when it comes to improving human rights and environmental standards in the supply chain. Joining forces vis-à-vis (sub-)suppliers is necessary to have a substantial positive impact and to scale up effective working methods.
- The rules that are imposed on companies eventually end up in the physical reality of one and the same (sub-)supplier. When each country applies their own regulations, this becomes unworkable for such suppliers. This situation already exists in, for example, the clothing and textiles, and food sectors respectively, partly due to the large number of different (public-) private initiatives.

This last feature implies that the same rules should apply worldwide and that this should at least be the case at the European level. This is also important for the competitiveness of European companies and a level playing field.

The first three features make the design of effective legislation and associated enforcement more difficult. Legislation and enforcement must simultaneously encourage learning and continuous improvement, and provide clarity about compliance. Moreover, legislation for individual companies as a stand-alone policy measure, does not stimulate collaboration.

## The need for European due diligence legislation

The SER is in favour of European due diligence legislation. There are a number of reasons for this:

- The desire of the business community to take responsibility for preventing RBC risks in the supply chains, and to work on improving conditions for people and the environment.
- Companies leading in international RBC are disadvantaged by the laggards. The OECD Guidelines and the UNGPs reach too few companies and are not complied with sufficiently.
- Organising market power in international supply chains requires collective action that does not come about by itself.
- Various EU Member States have adopted or are (considering) preparing due diligence legislation, resulting in fragmentation.
- European companies should be enabled to conduct their international business responsibly by imposing the same rules on competitors from outside the EU on the European market.

In order to achieve actual improvements in labour and environmental conditions in the supply chain, European legislation will have to address the above-mentioned specific features of international RBC. It also implies that European legislation and European sector agreements need to reinforce each other, as was previously advised by the SER.

## European developments

The European Commission is currently preparing due diligence legislation aimed at preventing adverse impact in the international supply chains of European companies. This legislation is also based on the guidelines of the OECD and UN. In March 2021, the European Parliament adopted, by substantial majority, a legislative initiative report with recommendations to the Commission on corporate due diligence.

Currently, there are different legislative models in Europe. In the policy discussion, particular attention is paid to the French and German models.

The French model (*Loi de Vigilance*) is a mandatory process approach based on the due diligence steps of the OECD and UNGPs. The legislation applies to companies with more than 5000 employees and enforcement depends on legal proceedings initiated by civil society. The German model (*Lieferkettengesetz*) limits the responsibility of companies to the first tier in the supply chain based on a limited number of specific rights and subjects. The law applies to companies with more than 3000 employees from 2023 and more than 1000 employees from 2024. The federal office for economic affairs and export control shall be in charge of supervision and enforcement.

These models do not address the specific features of international RBC, which means that opportunities to foster positive impact and change in the supply chain are missed. It is not clear how the necessary learning process is organised in these models or how the standards are implemented vis-à-vis suppliers. These two approaches target only large companies because of the administrative burden on smaller companies. Addressing adverse impacts in the supply chain is treated as an individual company process. In order to overcome this, the SER advocates a joint European approach, that combines the benefits of due diligence legislation with collective action.

## Key elements of an effective European approach

According to the SER, a joint European approach for sustainable supply chains should be based on the following elements.

There must be uniform implementation of due diligence legislation throughout Europe. This creates a level playing field for companies on the European market. In addition, this makes it possible for (sub-)suppliers to invest in improving conditions in the supply chain in a consistent way, and for European companies to join forces and to organise the necessary market power for collective action.

To the greatest extent possible, supervision should be organised at the European level. This can be done with the help of a European supervisor, European supervision of sector agreements, a common assessment framework, and (where appropriate) implementing acts<sup>4</sup> adopted by the European Commission. Important conditions are that the European supervisor is able to supervise companies in the entire European market adequately and consistently and has sufficient resources. The supervisory framework should foster positive impact and collaboration. Enforcement on the quality of due diligence steps is only possible after clarity has been given to companies covered by the due diligence legislation on what is expected and these companies have had sufficient time to implement the expected actions.

The design of European legislation (including the choice between a regulation or directive) should contribute to the uniform implementation and regulation of ambitious European due diligence legislation.

European due diligence legislation must apply to products and/or services on the European market, including from companies based outside the EU. Effective enforcement for companies based outside the EU is advisable and needs to be further investigated. WTO compatibility is an important concern here. In this context, the EU Conflict Minerals Regulation imposes obligations on companies that import into the EU, but more is needed to establish a level playing field for broad due diligence legislation.

The legislation must follow the UNGPs and OECD Guidelines as closely as possible, including the proportionality concept therein. Since sustainable supply chain impact is key, the legislation must differentiate based on the possibility of impact.

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<sup>4</sup> In accordance with the possibilities offered by Article 291(2) of the EU Treaty (TFEU). Implementing acts are legally binding and ensure that European legislation is implemented in the same, correct, way in all Member States. This power is possible with both EU regulations and EU directives.

This means differentiating based on size and on the risk of adverse impact in the international supply chains. The legislation should therefore apply to a broad group of companies, based on two regimes:

1. *Large companies in all sectors, based on detailed requirements and sector agreements*

In time, the detailed requirements of the due diligence process should apply to all large companies with more than 250 employees active on the European market. These companies can satisfy these requirements by joining European sector agreements and undertaking the due diligence steps and collective action on prioritised risks within the agreements.

For companies with more than 1000 employees, the law should apply in full as from the introduction. This threshold is gradually lowered to all companies with more than 250 employees. This is subject to the condition that the administrative burden remains manageable and is regularly evaluated. Until the threshold is reached, these companies (between 250 and 1000 employees) will be subject to the second regime.

2. *Medium-sized companies<sup>5</sup> in high-risk sectors, based on less detailed requirements and sector agreements*

Medium-sized companies (between 50 and 250 employees) can collectively play an important role in preventing negative impact and creating positive impact in international supply chains. The legislation should encourage this with less detailed requirements, appropriate to the size and context of these companies. Medium sized companies can be exempted from their requirements by joining European sector agreements and undertaking the collective actions on prioritized risks within this framework.

Small companies (under 50 employees and below EUR 10 million turnover) and medium-sized companies outside high-risk sectors are excluded from the due diligence legislation. However, they can voluntarily join European sector agreements and sector grievance mechanisms.

Supervision and enforcement of European due diligence legislation should take place under administrative law. The legislation, supervision and enforcement should be limited to the enterprise. As a result, there is no personal liability of directors. Personal liability is counterproductive because it can lead to cautious behaviour where international RBC requires courage and ambition of directors.

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<sup>5</sup> According to the EU definition for SMEs, a medium-sized enterprise has fewer than 250 employees and a turnover below EUR 50 million or balance sheet total below EUR 43 million; a small business less than 50 employees and a turnover or balance sheet total below EUR 10 million and a micro enterprise less than 10 employees and a turnover or balance sheet total below EUR 2 million. According to the EC, SMEs represent 99% of European companies. See: [https://ec.europa.eu/growth/smes/sme-definition\\_nn](https://ec.europa.eu/growth/smes/sme-definition_nn)

Administrative supervision and enforcement offers the best opportunities to address the specific features of international RBC. It prevents premature disengagement from high-risk sectors and allows the implementation of the legislation to focus on the actual improvement of conditions in supply chains. Criminal law supervision also does not fit with an approach aimed at jointly addressing prioritised risks and continuous improvement. If in the future it turns out that administrative law supervision is insufficient to ensure compliance with the law, the European Commission will need to examine how this can be achieved and reconsider the various forms of supervision and enforcement aimed at the company level (not directors level).

In any case, a non-regression provision<sup>6</sup> must also be part of the due diligence legislation, in order to prevent a reduction of the existing European level of protection of human rights and the environment or existing legislation regarding supply chain liability and (sub)contracting.

The establishment of European sector agreements promotes learning and collaboration. In this way, European market power is used to improve the conditions for people and the environment in international supply chains. Companies that join sector agreements organise actions for improving conditions in the supply chain at the sector level and share the results of their due diligence process in order to do so. The parties to a sector agreement also set up independent monitoring and grievance mechanisms together. They develop *best available techniques* (BATs) for the due diligence process and for addressing prioritised risks of adverse impact in the supply chain. Companies that join the sector agreements must apply the BATs within a number of years.

European sector agreements are preferably multi-stakeholder and a joint initiative of business and trade unions at the European level. Where social partners are unable to reach an agreement, companies can also jointly set up an initiative and apply for recognition. The European Commission's procedure for recognition (see below) will be stricter in this case than in the case of a sector agreement between business and trade unions.

Prioritisation of risks should be based on salience. In doing so, it is important to strive for structural improvement in supply chains. The enabling rights of freedom of association and collective bargaining are crucial to make structural

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6 A non-regression provision means that existing standards cannot be undone.

improvements in working conditions. Therefore, European sector agreements should promote these rights in all sectors.

Recognition of European sector agreements and other equivalent international agreements<sup>7</sup> should be done by the European Commission. The establishment of such agreements should also be supported by the European Commission. Once recognised, companies adhering to an agreement should be subject to a lighter supervisory regime and supervision focuses on the collective level of the sector agreements. The sector agreements do not fall outside the supervision and are not safe harbours. However, the lighter supervisory regime gives a clear and positive incentive to join the sector agreements. In addition to the development of the BATs, companies in sector agreements can jointly develop sector-specific due diligence guidance and assessment frameworks<sup>8</sup>. In principle, these should be adopted by the European Commission. Companies that do not participate in sector agreements should be subject to a stricter supervisory regime and should also apply the BATs that have been developed in sector agreements and have been adopted by the European Commission.

In order to promote the sector agreements, the possibility to implement autonomous framework agreements for RBC at the European level needs to be explored. This is done by analogy with this possibility for European social partners in the social policy area<sup>9</sup>. In addition, companies active on the European market from outside the EU should also have the opportunity to join European sector agreements.

European due diligence legislation should include an obligation to join a recognised independent (collective or individual) grievance mechanism in line with UNGP 31<sup>10</sup> that can issue binding rulings. This enables access to remedy. Such an obligation ensures that companies are open to the concerns of their stakeholders, and it also provides information for the due diligence process. These mechanisms can build on the lessons of existing mechanisms, such as the grievance mechanism of the Bangladesh Accord and the grievance mechanisms of Dutch Agreement on Sustainable Garments and Textile and the Flemish-Dutch

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7 Such as for example, the recently agreed International Agreement for Health and Safety in the Garment and Textile Industry. See <https://internationalaccord.org/home>

8 See, for example, the extensive assessment framework developed by the Dutch Agreement on Sustainable Clothing and Textiles: <https://www.imvoconvenanten.nl/en/garments-textile/news/beoordeling-bedrijven-transparanter>

9 On the basis of Article 155 of the Treaty on the Functioning of the European Union (TFEU).

10 UNGP 31 gives effectiveness criteria for grievance mechanisms, see [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf)

TruStone Initiative in the natural stone sector. These grievance mechanisms should preferably be set up as part of the sector agreements. In sectors where several sustainable supply chain initiatives already exist, the grievance mechanisms can also be established at the European or international level independently of a sector agreement. Existing initiatives can join these mechanisms and thus foster further cooperation. Business and trade unions should also develop a cross-sectoral grievance mechanism at the European level, for sectors where mechanisms do not exist yet. If this is not achieved within a year, the European Commission should set up such a mechanism.

With regards to reporting, coherence needs to be ensured between the proposals for sustainability reporting under the Corporate Sustainability Reporting Directive (CSRD) and European due diligence legislation so that administrative burdens are reduced and the sustainability goals are achieved, including on human rights. The European Commission should encourage initiatives to increase transparency in supply chains.

## The State Duty to Protect

Legal incorporation of enterprises' *responsibility to respect* human rights requires at least commensurate efforts by the European Commission and Member States to fulfil their *duty to protect* human rights. This entails pursuing consistent policies and setting an example. That is expressed, for example, in ambitious implementation of sustainable procurement policy, raising human rights issues and the broad sustainability agenda in consultations with other governments, ensuring policy coherence in the areas of trade, development cooperation, the Green Deal and competition policy, and complementing due diligence legislation by partnerships with producing countries.

## Support and financing

When setting a statutory standard, it is necessary to offer the prospect of meeting that standard by providing adequate support. It is crucial that the due diligence legislation and its implementation provide scope for learning and encourage positive contributions. This includes developing clear guidance, tooling, providing platforms for learning and exchange and facilitating the establishment of European sector grievance mechanisms and sector agreements.



Considerable additional financial resources will be needed to implement due diligence legislation in a way that is going to lead to positive impact in international supply chains. Both government and industry must bear part of the costs involved and a well-founded vision is needed as to which costs can be borne by whom and which financing models offer prospects in this respect. A total cost estimate for the complete policy mix is essential for further discussions.



Annex



## Advisory request

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

The Hague, 30 April 2021

Dear Ms Hamer,

Last year, the Ministry of Foreign Affairs carried out an evaluation of the policy regarding International Responsible Business Conduct (IRBC). That evaluation led to publication of a new policy memorandum in October 2020: *From Information to Obligation: a New Impulse for International Responsible Business Conduct* [Van voorlichten tot verplichten: een nieuwe impuls voor internationaal maatschappelijk verantwoord ondernemerschap].<sup>1</sup> The new policy came about partly thanks to the Social and Economic Council's advisory report *Working together for Sustainable Supply Chain Impact* [Samen naar duurzame ketenimpact].

The government has indicated that it will work towards a well-considered mix of measures to promote IRBC. A key element of that mix is the introduction of a comprehensive due diligence obligation, preferably at European level. With the present communication I wish to request the Council's advice on implementation of such a comprehensive due diligence obligation.

The Dutch government expects all companies in the Netherlands to apply the OECD Guidelines. In October 2020, the government concluded in the policy memorandum that although the approach pursued since 2013 involving a series of agreements [*convenanten*] does represent added value, it reaches only 1.6% of all enterprises. On the basis of studies, consultations, and recommendations from the Council and the Advisory Board on Regulatory Burden (ATR), the government has therefore decided to focus on a well-considered mix of mutually reinforcing

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<sup>1</sup> <https://www.rijksoverheid.nl/documenten/beleidsnotas/2020/10/16/van-voorlichten-tot-verplichten-een-nieuwe-impuls-voor-internationaal-maatschappelijk-verantwoord-ondernemerschap>



measures to promote the application of due diligence by Dutch enterprises in line with the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights. A comprehensive due diligence obligation is a core element of that policy mix because it is considered the most likely means of changing behaviour.

It is expected to be an effective way of encouraging enterprises to act in line with the international frameworks. For further substantiation of this argumentation, I would refer you to Section 4 of the IRBC policy memorandum and the underlying studies, evaluations, recommendations, and consultations.

With a view to increasing impact within the supply chain and ensuring a level playing field, a comprehensive due diligence obligation should preferably be introduced at EU level. Momentum has arisen at that level for development of such an obligation. In June of this year, the European Commission is expected to present its legislative proposal on sustainable corporate governance, which will include a due diligence obligation.

“Building blocks” for a comprehensive due diligence obligation

Primarily with a view to providing input for the EU programme, the government has decided to formulate building blocks for a comprehensive due diligence obligation. This will also ensure that the Netherlands is optimally prepared for the introduction of national mandatory measures as soon as it becomes apparent that Europe is taking too long. Those building blocks are the following:

- a. the scope of the obligation;
- b. the due diligence obligations for enterprises;
- c. the organisation of supervision and enforcement.

With adoption of the motion submitted by Member of Parliament Voordewind regarding a general duty of care in accordance with the OECD Guidelines,<sup>2</sup>

a fourth building block has been added:

- d. a statutory, general duty of care.

In early 2021, the Ministry of Foreign Affairs elaborated the building blocks based on discussions with (legal) experts and supervisory bodies and consultations with stakeholders from the business community and civil-society organisations. Within these building blocks, a number of different scenarios (“variants”) have been formulated. The expected regulatory burden of these variants was calculated by

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2 <https://www.tweedekamer.nl.kamerstukken/moties/detail?id=2020Z24303&did=2020D51010>



Sira Consulting in line with the advice of the Advisory Board on Regulatory Burden (ATR) from September 2020 (see the attached study report).

Variants as regards scope concern all companies, only large companies, companies in high-risk sectors, or a select group of companies. There is also an option for non-EU based companies.

The due diligence requirements for companies concern a detailed variant including all six steps of the OECD Guidelines and a less detailed variant

A positive and a negative variant have been formulated for the general duty of care. With a view to the organisation of supervision and enforcement, options for enforcement under administrative, civil, and criminal law were proposed.

Request for advice

The government wishes to ensure that enterprises operate internationally in a socially responsible manner, thus mitigating and preventing any negative impact of corporate activities on people and the environment abroad. In that connection, it wishes to ensure that the administrative and financial burden of policy is proportionate to the aim of IRBC policy.

The government therefore wishes to request the Council's advice on the design of such a comprehensive due diligence obligation. Specifically, I request the Council to advise as to which variants of the "building blocks", in combination, it believes will be most effective and efficient with a view to the government's aforementioned objective. I would also ask you to take account of Sira Consulting's regulatory pressure study when formulating your advice on the building blocks.

Yours sincerely,

Sigrid A.M. Kaag  
Minister for Foreign Trade and Development Cooperation



## Colophon

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