

DUTCH LEGISLATORS PROPOSE HUMAN RIGHTS AND ENVIRONMENTAL DUE DILIGENCE LAW

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Legal Briefings

The landmark proposal forms part of a widening global trend to ensure firms monitor adverse impacts on issues such as human rights and the environment

On 2 November 2022, several Dutch political parties formally submitted an amended bill for the [Responsible and Sustainable International Business Act](#) (Bill) to the Dutch House of Representatives. If enacted, the Bill will make it mandatory for large Dutch enterprises and foreign enterprises doing business in the Netherlands to act with due diligence to avoid adverse impacts on human rights and the environment.

If enacted, the Bill would also operate to replace the Child Labour Duty of Care Act, which was first introduced in 2020 but ultimately not brought into force.

THE WIDER EUROPEAN CONTEXT

Earlier this year¹, the European Commission adopted a [Proposal for a Directive on Corporate Sustainability Due Diligence](#). The proposed draft EU Directive – commonly referred to as CS3D – would likewise require certain companies to carry out due diligence and to avoid or mitigate adverse human rights or environmental impacts. (You can read more about CS3D in our earlier bulletin – [here](#)).

If CS3D is enacted, EU Member States would be required to introduce national legislation on these matters. Since the European Commission first published the draft of CS3D, a number of countries, including the Netherlands, Spain, Austria, Finland, Romania and Belgium have signalled an intention to enact national laws on human rights and environmental due diligence, regardless of the outcome of the EU level project.

PROPOSED CHANGES TO THE DUTCH SUPPLY CHAIN LAWS

General duty of care

The Bill seeks to impose a general duty of care on large Dutch enterprises and foreign entities that engage in activities or market products in the Netherlands. Under this duty, qualifying companies are required to ensure that their activities or those of their business relationships do not have adverse impacts on human rights or the environment in countries outside the Netherlands (**adverse impacts**).

Where the adverse impacts cannot be prevented, the companies must mitigate or address them to the extent possible and, where necessary, enable remediation. If the adverse impacts cannot be sufficiently mitigated, the companies must either refrain from the relevant activity or terminate the relevant commercial relationship (for example, with the concerned supplier) if that may reasonably be expected from them.

The Bill lists examples of activities that would give rise to adverse impacts and therefore require companies to take active steps to avoid or mitigate these impacts. These examples are:

- restrictions on freedom of association and collective bargaining;
- unfair discrimination;
- forced labour;
- child labour;
- climate change;
- environmental damage;
- unsafe working conditions;
- violation of animal welfare regulations;
- slavery; and
- exploitation.

Scope of application

If the Bill is adopted in its current form, the law will apply to large enterprises as defined under [the EU Accounting Directive](#). Currently, this means enterprises which, on their balance sheet dates, meet at least two of the following three criteria:

- Total assets: EUR 20 million;
- Net turnover: EUR 40 million;
- Average number of employees in the financial year: 250.

In comparison to other EU jurisdictions, the threshold requirements imposed under the Bill are significantly lower. For example, the threshold under the German *Lieferkettensorgfaltspflichtengesetz* (Supply Chain Act) is 3,000 employees (1,000 employees from 1 January 2024) and the French *Loi de Vigilance* (Corporate Duty of Vigilance law) 5,000 employees.

The Bill applies uniformly to all enterprises (unlike the EU Proposal which contemplates lower revenue thresholds for enterprises operating in certain high-risk sectors).²

The Bill however provides that the obligations imposed under the Bill may be extended to medium-sized enterprises six years after it enters into force, unless the obligations will place an unreasonable burden on such entities.³

Due diligence requirements

The majority of the substantive obligations imposed under the Bill are stipulated in Chapter 2 [Due Diligence] which comprises seven parts.

Part one stipulates the general requirements with which qualifying companies must comply, including the requirements in respect of the scope of the due diligence processes.

Part two, sets out the requirements to prepare due diligence policies. Among other things, these policies must include a statement in which the undertaking commits to respecting human rights and the environment and to carrying out due diligence in accordance with the OECD Guidelines for Multinational Enterprises.

Part three regulates the risk assessment duties which are imposed on qualifying companies. The duties include the need to undertake specific analysis, assessment, and risk prioritisation processes annually.

Part four sets out the mechanisms which the companies must pursue to address adverse impacts, including preparing and implementing a risk action plan, climate action plan, and ceasing activities where it is not possible to prevent adverse impacts from occurring.

Part five indicates that companies are required to monitor the application and effectiveness of their policies and measures of due diligence annually.

Part six stipulates the requirements in respect of reporting and part seven the duty to develop and implement a remediation mechanism (which must include a grievance and dispute resolution mechanism).

ENFORCEMENT

The Bill proposes to vest certain powers in the Authority for Consumers and Markets⁴ (*Autoriteit Consument en Markt*), including an ability to supervise compliance with the requirements imposed under the Bill, receive and process objections, issue administrative enforcement orders and impose administrative penalties which may be equal to 10 per cent of the company's net turnover. The authority may also issue enforcement orders or administrative penalties to any subsequent purchasers of the company in question. Penalties are however only imposed if the company that committed a breach fails to remedy the wrongful conduct within the period stipulated by the Authority. Finally, the Bill proposes to identify the failure to comply with the reporting requirements stipulated under the proposed law as an offence under the Economic Offences Act (*Wet op de economische delicten*.)

Separately, the Bill expressly proposes to allow third party organisations (which are legal persons) that exist to promote the interests of human rights or the environment (CSO) to bring actions for loss or damage that result from adverse impacts (standing). In addition to standing, the Bill provides that once the CSO puts forward facts that may give rise to a suspicion of a link between a company's conduct and the adverse impact, the company is responsible to prove that it has not acted in breach of an obligation pursuant to this Bill (reverse onus). The Bill, however, does not propose a similar standing or reverse onus mechanism for other claimants who may be affected by the adverse impacts.

It is worth noting that the reverse onus mechanism, is currently being considered both at the EU-level and by specific EU-member states (including Germany). Among other things, there are debates as to whether such mechanisms might involve a distortion of competition in the EU's internal market. The current draft of the CS3D provides that this question is left to each EU Member State's national law. The German Supply Chain Act, in comparison to the Bill, does not currently impose a reverse onus on companies.

CONCLUSION

The Bill is consistent with an international trend towards the introduction of mandatory due diligence obligations. Such laws have been proposed to replace issue-specific regimes, such as those which focus only on child labour, modern slavery, or conflict minerals. Due diligence laws are also intended to complement existing sustainability-related reporting requirements (such as those currently provided under the Non-Financial Reporting Directive (NFRD) which have already been domesticated in various jurisdictions. By focussing specifically on potential adverse impacts in supply chains, the due diligence laws prescribe mechanisms which may enable companies to identify business activities that ought to be changed, promote transparency throughout the process, and ensure that companies are held accountable for their actions and decision.

Certain EU Member States' decision to introduce mandatory due diligence laws at a national level prior to the enactment of the CS3D, might give rise to potential competing approaches and requirements. This could complicate the Commission's efforts to finalise the CS3D initiative.

Both at the EU-level and in the Dutch context, aspects of the due diligence law as well as the mechanisms and requirements which they impose remain controversial. These issues will only be compounded if the laws do not clearly delineate the rights which vest in claimants to institute civil legal actions and stipulate controversial procedural mechanisms such as reversing the burden of proof.

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1. On 23 February 2022.
 2. The initiators of the Bill however made specific reference to the forestry and timber activities, including the Timber Ordinance, and expressed concerns about the need for a proper system of due diligence in this sector.
 3. See clause 4(4)(4) of the Bill. An English translation of the Bill is available online at <https://www.mvoplatform.nl/en/english-translation-of-the-bill-for-responsible-and-sustainable-international-business-conduct/>.
 4. The Authority is established under section 2(1) of the Act Establishing the Authority for Consumers and Markets.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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