

**Letter of 11 February 2021 from the Minister for Foreign Trade and Development Cooperation to the House of Representatives on the implementation of Dutch RBC policy, 'From giving information to imposing obligations'**

I would like to inform the House of the progress made in the area of responsible business conduct (RBC). Since I sent you the policy document 'From giving information to imposing obligations; a new impulse for responsible business conduct' (Parliamentary Paper 26485, no. 337), progress has been made in a number of areas. I would like to inform you of where we stand with respect to sector-wide cooperation, the RBC support office, the elaboration of building blocks for RBC legislation and the latest developments with regard to RBC legislation at EU level. As you know, in the interests of a level playing field and greater policy effectiveness, the government has a strong preference for an EU-wide due diligence obligation. The government is working out the details of the building blocks for due diligence legislation, primarily with a view to influencing the European process. But this also means the Netherlands is ideally placed to impose national obligations should the EU prove slow to act.

I am also taking this opportunity to inform the House about the implementation of the motion by the members Van den Hul and Van den Nieuwenhuizen (Parliamentary Paper 26485, no. 341) on continuing the support to and involvement in RBC agreements and the motion by Joel Voordewind (Parliamentary Paper 26487, no. 345) requesting the government to produce a policy document before the end of its term in office, which sets out the building blocks for future legislation, including a general due diligence obligation for all companies, in accordance with the OECD Guidelines for Multinational Enterprises (OECD Guidelines). At the parliamentary committee meeting on the policy document on 8 December 2020, I also gave two undertakings, namely to inform the House in February about progress on an EU legal framework for RBC, including a new timeframe for appraising developments, and to inform the House on the timeframe for collecting input towards new policy on sector-wide cooperation. In writing this letter I am fulfilling those undertakings.

In addition, this letter fulfils the undertaking I gave during the budget debate on 28 November 2019 to report to the House on the functioning and implementation of the updated RBC strategy for the Dutch diplomatic missions. Finally, in response to the motion by Van Raan et al. (reference 25570-XVII, no. 38), I will address the issue of better safeguarding women's rights and gender equality in RBC policy. This motion resulted from the budget debate of 2 December 2020.

#### Sector-wide cooperation

The policy document 'From giving information to imposing obligations; a new impulse for responsible business conduct' (Parliamentary Paper 26485, no. 337) indicates that the Dutch government will remain a party to the current RBC agreements for the term for which these agreements were concluded and will continue participating in ongoing negotiations. This means the government will continue its financial and other support to and involvement in agreements that are currently being implemented or in negotiation.

The policy document also indicates that the government wishes to continue encouraging sectoral initiatives aimed at conducting due diligence in line with the OECD Guidelines and/or at achieving impact on specific themes or supply chains. Support for sector-wide cooperation is expected to mainly help companies in 'the peloton' and 'the leading group' carry out precompetitive and ambitious collaborative activities in the field of RBC. Sector-wide cooperation can also be a step towards compliance with a due diligence obligation in the future. A renewed sectoral approach is also compatible with initiatives that follow up on RBC agreements that have expired. The conditions and substantive frameworks for this sector-wide cooperation are currently being worked out in greater detail. This involves determining the extent to which sectoral initiatives can be accommodated in existing measures, modalities and financing arrangements, and identifying where additional support is needed, in terms of both setting objectives and providing finance. The framework for sector-wide cooperation will be developed in conjunction with the elaboration of building blocks for RBC legislation and the establishment of the new RBC support office, as there will be significant interaction with the new RBC regulations. In this way the binding and non-binding elements of the new, smart mix of RBC measures will reinforce each other. The support office will play a prominent role in bringing together the initiatives of stakeholders and in the exchange of knowledge and experience.

In accordance with the timeline, input specifically on the design and content of sector-wide cooperation is currently (first quarter 2021) being collected from government parties and stakeholders, including parties to existing agreements, companies and civil society organisations. After all, stakeholders' needs are key when it comes to sector-wide cooperation. The Social and Economic Council (SER) is being asked for its input as well. This input will be used in formulating the substantive and financial frameworks. Discussions with the SER have demonstrated the value of the lessons learned and experiences gained by the SER as secretariat for the current RBC agreements. A framework for financial support will be drafted once the substantive framework is determined. This is expected to be completed at the end of 2021.

#### RBC support office

The policy document refers to an RBC support office as a key component of the policy mix. It will play a key role as 'one-stop shop' with regard to RBC policy, providing businesses with information and support on exercising due diligence. The support office must also prevent fragmentation of services and help limit the regulatory burden on businesses.

Work on setting up this support office has started. There have been discussions about the support office's organisation and structure with parties that have over the years acquired considerable knowledge and expertise on RBC, including trade unions, the Netherlands Enterprise Agency (RVO), the SER, the Sustainable Trade Initiative (IDH), CSR Netherlands and the National Contact Point (NCP) for the OECD Guidelines. Invest International is also involved. With this input, a concrete plan for the support office is currently being drafted. There will also be a general stakeholder consultation in the spring, to incorporate the interests of the support office's target groups and the services that they are looking for.

#### Building blocks for RBC legislation

I gave the House the undertaking to inform you in February about the elaboration of building blocks for RBC legislation. Specifically, a due diligence obligation should comprise three building blocks, and these will primarily be deployed to influence the design of such an obligation at EU level. These building blocks are legislative scope, the requirements to be set for enterprises, and supervision and sanctions. The elaboration of all three has been initiated and they will be completed later this spring, as scheduled.

#### *Building block – Scope*

The OECD Guidelines and UN Guiding Principles on Business and Human Rights (UN Guiding Principles) apply to all companies that do business internationally. In its advisory report 'Working Together for Sustainable Supply Chain Impact'<sup>1</sup>, the SER recommends 'maximum alignment with the OECD Guidelines and UNGPs... [and] the broadest and deepest possible application of these Guidelines for the broadest possible group of companies (including SMEs)'. For this reason, in line with the Voordewind motion (Parliamentary Paper 26487, no. 345), the aim is to arrive at a general due diligence obligation for all companies, in accordance with the OECD Guidelines.

At the same time, the recommendations and research commissioned show that proportionality and feasibility in relation to effectiveness must be taken into account when determining the scope of the due diligence obligation. EU legislation on RBC must likewise be proportional and effective.

Following on from the recommendations of the Dutch Advisory Board on Regulatory Burden (ATR), an investigation is therefore currently being conducted into the regulatory burden of measures that require companies to exercise due diligence. The government hopes this will produce a picture of the regulatory burden costs to companies under a *general* due diligence obligation and a *specific* due diligence obligation on the subject of child labour, respectively. The government's assumption, which we also ask the investigators to adopt, is that any obligation will require companies to carry out the stages of the due diligence process as described in the OECD Guidelines. The investigators have been asked to put the regulatory burden costs in perspective, for example by comparing them

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<sup>1</sup> <https://www.ser.nl/nl/Publicaties/duurzame-ketenimpact>.

with turnover. The results will be delivered in the second half of April, and will be shared at EU level so they can be incorporated in the process of drafting the EU proposal. Furthermore, I have urged the European Commission to have the EU Regulatory Scrutiny Board conduct a full impact assessment.

As you know, there are a number of options for defining the target group for a due diligence obligation.

One is to look at a company's size. I gave you the example of the government's 90% objective, which targets internationally operating companies with 500 or more employees and over €20 million in assets or over €40 million in turnover. This could also be a clear and plausible threshold for the due diligence obligation. This will depend in part on the results of the regulatory burden study. In any event, it is important that the target group be selected such that the obligation has a positive impact in the value chain without putting a disproportional burden on the enterprises to which it applies.

Another option would be to impose an obligation specifically on companies in high-risk sectors. For this, however, it must be possible to demonstrate objectively which sectors and companies fall into which risk categories, and how these risk categories are defined. That makes this a complex approach.

In line with the Child Labour (Duty of Care) Act (WZK), another factor in this definition is the question of whether such an obligation can be imposed on companies that sell their products and services on the Dutch market but are not established here and, if so, how. This also raises the question of whether enforcing such an obligation among enterprises that are not established in the Netherlands is legally possible.

In the first draft of its own-initiative report, the European Parliament's Committee on Legal Affairs (JURI) appears to suggest that no strict definition be applied, but instead to provide for exemptions, for example, for companies of a certain size (such as SMEs) if it can be demonstrated that there are no risks in their value chain or, based on their position in the value chain and their size, these companies would be unable to take additional actions to avoid or address risks. The private members' policy proposal presented by members Voordewind, Alkaya, Van den Hul and Van Ojik 'Against slavery and exploitation – a legal minimum threshold for responsible business conduct' (Parliamentary Paper 35 495, no. 2) also refers to a scope that would cover all companies. In its response to this private members' policy proposal the government rejected such a scope and underscored the great value that it attaches to the proportionality of a due diligence obligation.

#### *Building block - Requirements for enterprises*

The objective of a due diligence obligation is to ensure that companies prevent and/or address risks to humans and the environment in their value chains, and provide transparency on their efforts. This means the six stages of the due diligence process, set out in the OECD Guidelines, need to be embedded in legislation. These six stages are:

1. Embed responsible business conduct into policies and management systems
2. Identify and assess actual and potential adverse impacts associated with the enterprise's operations, products or services

3. Cease, prevent and mitigate adverse impacts
4. Track implementation and results
5. Communicate how impacts are addressed
6. Provide for or cooperate in remediation when appropriate

By embedding these stages, due diligence will become a preventive process, aligned with the risks to humans and the environment that companies encounter. Companies are asked to prioritise the risks and ensure that the process is flexible and can be adapted to the company's current situation when necessary. The study into options for enforceable RBC instruments conducted by the Erasmus Research Platform for Sustainable Business and Human Rights<sup>2</sup> offers useful input for fleshing out these requirements for companies, and we will be using these research findings to this end. The study distinguishes between obligations to achieve a particular result ('results obligations') and best efforts obligations. Having a plan for due diligence is an example of a results obligation, while the study identifies certain other obligations in the OECD Guidelines as best efforts obligations. These do not prescribe that a particular result must be achieved, but that an effort must be made, namely an adequate degree of care must be exercised. For example, is the process of identifying potential adverse impacts conducted in an adequate manner?

In a policy document and a non-paper submitted to (among others) the responsible EU Commissioner, Didier Reynders, I already outlined the need for an EU-wide obligation to be in accordance with the OECD Guidelines and to incorporate the six stages of due diligence.

#### *Building block - Supervision and sanctions*

The precise form of supervision depends on the rules, particularly at EU level, to be imposed on enterprises. It is important that choices concerning supervision and sanctions take account of the principles of proportionality, legal certainty and policy effectiveness.

An option currently being explored with regard to a due diligence obligation is that of enforcement under administrative law. A similar form of enforcement is also provided for in the EU Conflict Minerals Regulation which came into force this year and it is one of the options for enforceable RBC instruments being explored in the study by the Erasmus Research Platform for Sustainable Business and Human Rights. If the administrative law route is taken, enforcement must be structural and systematic, and must respect existing limits on territorial and extraterritorial jurisdiction in matters of supervision. This provides clarity on the applicable standards and enhances legal certainty for enterprises. Exploratory discussions are currently taking place with several potential supervisory authorities. One option being considered in the organisation of supervision is that notifications and/or direct complaints of non-compliance with the due diligence obligation and general duty of care could in the future be submitted to a supervisory authority. Finally, a decision needs to be made on whether, in the event of a violation of the due diligence obligation, a supervisory authority will be able to impose a penalty payment or an administrative fine, and the extent to which such sanctions are desirable.

Further research is also being conducted into the idea of 'dynamic supervision', which is not so much focused on monitoring whether companies make mistakes,

<sup>2</sup> <https://www.rijksoverheid.nl/documenten/publicaties/2020/04/03/opties-voor-afdwingbare-imvo-instrumenten>.

but rather on encouraging them to improve their performance, using examples of good practice by other market parties.

#### *Next steps*

In elaborating the abovementioned building blocks, elements from existing due diligence obligations, such as in the EU Conflict Minerals Regulation, will be used. The Netherlands also periodically exchanges ideas on this matter with policymakers in EU member states where a due diligence obligation is already in place or where one is being developed. Lessons can also be learned from national legislation, such as the Money Laundering and Terrorist Financing (Prevention) Act (WWFT), which also includes a due diligence obligation, albeit one that is not related to the RBC frameworks.

Over the coming months, experts and stakeholders will be closely involved in elaborating the obligation. In March there will be an expert session on the requirements for companies and the various forms of supervision and sanctions. Participation by stakeholders from civil society organisations and the private sector will be invited in early April. The SER and the ATR will also be providing input. The expectation is that the building blocks will be completed in spring – in good time for the Netherlands to exert influence on the Commission proposal.

#### Progress in the EU on RBC legislation

##### *Commission initiative on sustainable corporate governance*

In April 2020, Commissioner Didier Reynders (Justice and Consumer Affairs) announced the development of an initiative in the area of sustainable corporate governance, which would include a provision on due diligence. The Commission's work programme for 2021 confirms that this is a legislative initiative.<sup>3</sup> The expected initiative is currently in the data collection phase. The Commission has asked member states and interested parties to participate in discussions on the initiative and provide input, for example, through a consultation on the Commission's roadmap (inception impact assessment), as well as a public consultation. The Commission is also working on a full impact assessment. A summary of the Dutch government's contributions to these European developments follows in the next section.

Meanwhile, the European Parliament is also working on an own-initiative report on due diligence. The draft report was adopted in the European Parliament's Committee on Legal Affairs (JURI) on 27 January 2021. A plenary vote on the report is expected in March.

Member states themselves are also becoming increasingly active in the RBC policy area. At the end of last year, they jointly called on the Commission to table a proposal for an EU legal framework on due diligence. This is set out in the Council Conclusions on Human Rights and Decent Work in Global Supply Chains,<sup>4</sup> adopted by the Employment, Social Policy, Health and Consumer Affairs Council (EPSCO) on 3 December 2020 under the German Presidency. In these Council Conclusions the European member states also call for a coordinated approach and the launch of an EU RBC action plan in 2021.

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<sup>3</sup> [https://eur-lex.europa.eu/resource.html?uri=cellar%3A91ce5c0f-12b6-11eb-9a54-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar%3A91ce5c0f-12b6-11eb-9a54-01aa75ed71a1.0001.02/DOC_1&format=PDF).

<sup>4</sup> <https://www.consilium.europa.eu/media/46999/st13512-en20.pdf>.

The Commission's announcement to submit a legislative proposal, the vote in the European Parliament on its own-initiative report, and the recent call by all EU member states in the abovementioned Council Conclusions are all promising developments. I would also note that progress on these issues in the EU is on schedule. As promised during the parliamentary committee meeting on the RBC policy document on 8 December, I have taken another look at what would be an opportune time to appraise developments at EU level with regard to a due diligence obligation. For a sound assessment it will be necessary to have the Commission proposal as well as the positions of the European Parliament and the member states. The Commission has indicated that a proposal can be expected in the second quarter of 2021. By summer 2021, a great deal of the relevant and necessary information will be available. Before that time, this information will be far from complete. Summer 2021 therefore remains a logical time to appraise the situation. However, if the Commission does not present an effective and workable proposal in keeping with this schedule, the necessary building blocks will be at hand to introduce binding measures at national level.

#### *Developments with regard to other relevant mandatory measures*

The EU Conflict Minerals Regulation (2017/821) came into force on 1 January 2021. It lays down a due diligence obligation for certain importers of tin, tantalum, tungsten and gold from conflict areas and high-risk areas. A review of this regulation is to take place by 1 January 2023.

Also in the first quarter of 2021, the Commission will present a proposal for revision of the EU Non-Financial Reporting Directive (NFRD). In this regard the Dutch government will advocate maximum alignment with existing international frameworks, such as the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles Reporting Framework and the recommendations made by the Task Force on Climate-related Financial Disclosures (TCFD).

The Commission is also considering including a due diligence obligation in the EU batteries regulation and in EU measures on preventing deforestation, announced for the second quarter of this year. In October 2020 the European Parliament adopted a resolution in which it called on the Commission to present such a proposal, including due diligence measures.

The government emphasises that these various European initiatives, intended to prevent risks in companies' value chains, must be seen as a cohesive package of measures, which is also intended to prevent an accumulation of obligations being placed upon companies. The principle underlying the package is a broad due diligence obligation, supplemented where necessary by existing or new sectoral initiatives.

#### Dutch efforts at European level

As indicated in the policy document 'From giving information to imposing obligations', the government has always actively advocated a European approach to RBC, as it will result in greater impact in the value chain and ensure a level playing field for companies. In this the Dutch government has focused primarily on the European Commission, the European Parliament and on cooperation with other EU member states.

For the purposes of a European due diligence obligation, the Netherlands has provided written input to the consultation on the Commission's roadmap (inception impact assessment) and to the public consultation on the Commission initiative in the area of sustainable corporate governance. In its contributions, the government explicitly informed the Commission of the evaluations and studies carried out under the 'RBC Measures in Perspective' project, as well as the new Dutch RBC policy. In October I spoke with Commissioner Reynders and sent him and other relevant parties within the Commission, the Parliament and the member states a non-paper in which I called for a due diligence obligation as an element of a smart mix of measures at EU level. The Dutch input to both consultations was sent to the House separately (reference 2021Z02607), and you have already received the non-paper (Parliamentary Paper 26485, no. 362).

I have continued to actively advocate coordinated EU policy in the area of RBC, including through an EU RBC Action Plan. To this end, the Netherlands actively contributed to the negotiations on the Council Conclusions on Human Rights and Decent Work in Global Supply Chains, referred to above. The importance of a uniform EU-wide approach to RBC is also something I have continually emphasised in discussions with my colleagues in other member states, including in recent bilateral discussions with Germany, France and Belgium. Talks at political and senior official level show that a European due diligence obligation is receiving growing support among member states.

#### Undertaking to report back on RBC strategy for the missions

In 2019, following up on the motion by members Diks and Van den Hul (Parliamentary Paper 35000 XVII, no. 34), the RBC strategy for the missions was expanded and updated, and distributed to all missions. During the budget debate on 2 December 2019 I gave the undertaking to report on the effectiveness of the strategy based on a study of its use. I follow up on this undertaking below.

The updated strategy defines five key tasks for the missions in relation to RBC:

1. Gather local expertise on the RBC situation in the country of accreditation;
2. raise awareness of RBC among the business community;
3. offer support to Dutch companies with regard to RBC;
4. make support to companies conditional on RBC criteria;
5. address RBC in the country of accreditation.

For each activity, practical tools are offered and examples of good practice are shared.

The goal of the study was to assess whether missions are satisfied with the new strategy in terms of user-friendliness, workability and comprehensibility. This was researched by means of a questionnaire and interviews.

The study revealed that the missions have a well-developed awareness of what RBC is and of their own role in promoting the Guidelines. Nearly 80% of respondents found the RBC strategy for missions clear, workable and user-friendly. The individual missions vary in their level of active involvement, which depends to a large degree on how active the Dutch private sector is in the country in question. A large majority of respondents indicated that in response to the



strategy they had planned or taken additional action, such as organising sessions on RBC for Dutch companies active in their country.

The study also revealed where extra support would be appreciated. For example, a number of missions indicated that they would find it inspiring to learn how other missions have approached the RBC issue. Missions' support in applying the OECD Guidelines will be continued, based on the existing strategy and incorporating the results of the study.

The missions make an important contribution to the implementation of our policy abroad. They are often the first point of contact for Dutch enterprises that have questions about doing business in a given country. Missions are expected to collect relevant expertise on the local context and enter into discussions with local stakeholders and authorities. The strategy provides points of reference for improving their performance in the role of service provider for Dutch businesses around the world.

#### Women's rights and gender equality in RBC policy

On the subject of gender, the House has adopted the motion of Van Ran et al. (reference 35570-XVII, no. 38). I wholeheartedly endorse the position that gender equality and women's rights are subjects requiring attention, and have myself frequently raised them in other contexts. The government is implementing the motion by specifically addressing women's rights and gender equality in RBC policy.

RBC policy is based on the OECD Guidelines and the UN Guiding Principles. Both instruments have developed guidance to help companies conduct due diligence from a gender perspective, and so identify and prevent or address gender-related risks.<sup>5</sup> This is needed, because we know that women and girls are exposed to specific risks in value chains as well as being disproportionately affected by general risks. For this reason, consultations on the new policy document with trading partners in producer countries devoted specific attention to gender.<sup>6</sup> One of the things this revealed was that, although many producer countries do have policies on issues such as gender-related violence, they are not implemented. There has also been research into gender policy at large Dutch companies, including the gender policies of companies in their value chains.<sup>7</sup> The consultation and research helped reveal the difficulties companies have in applying due diligence with regard to gender-specific risks. To help companies in this, women's rights organisation Women Win is developing a package of tools for incorporating gender in due diligence. This package, developed with grant funding, will be made freely available online via the Gender-Responsive Due Diligence Platform. This platform is being developed with relevant stakeholders, and is in an advanced draft stage. Together with the government, Women Win is working on a strategy to raise broad awareness of the platform among companies. The platform will be launched on International Women's Day, 8 March 2021.

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<sup>5</sup> The UN Working Group on Business and Human Rights has developed the 'Gender Dimensions of the Guiding Principles on Business and Human Rights'. The OECD Due Diligence Guidance clearly describes how companies can integrate the rights of women and girls into their due diligence and what situations merit extra attention.

<sup>6</sup> *Verslag van overleg met stakeholders in (risicovolle) productielanden over de toekomst van het IMVO-beleid* (Report of consultations with stakeholders in producer countries, and high-risk countries in particular, on the future of RBC policy).

<sup>7</sup> Gender Equality in the Netherlands – Assessing 100 leading companies on workplace equality, special report October 2020.

