EXECUTIVE SUMMARY

What does due diligence entail? (Chapter 2)

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

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

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

Choices between types of enforcement (Chapter 3)

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

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

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

Next to private and public enforcement, criminal law may play an important role in cases of serious corporate wrongdoing. Prosecution is possible both under general criminal law (provisions on anti-

corruption, soil pollution and money laundering) and as an economic crime in case of repeatedly not complying with public law obligations (section 3.2).

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

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

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

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

This analysis only provides a general answer to the question of whether a legislative option promotes or may promote the implementation of OECD due diligence. In order to be able to draw more detailed conclusions, it was considered useful to look more specifically at the six steps of the OECD due diligence cycle and to analyse to what extent the eighteen options affect each of the six steps of the OECD due diligence cycle, assuming that this may differ per step. As this connection between

legislative options and the six steps of OECD due diligence have not been investigated before, this analysis was exploratory in nature. The analysis is included in a table in which the various legislative options and their (likely) impact on the due diligence cycle are identified. It follows from this analysis that mandatory OECD due diligence is likely to have the largest impact on all steps, although this is more doubtful for step 6 (contributing to recovery if a breach of the OECD Guidelines has been or is caused by a company contributed). As is elaborated in chapters 5 and 6, the level of impact also depends to a large extent on the manner in which the legal obligations are formulated and the manner in which they are (publicly) enforced.

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

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

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

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

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

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

Variant A1 (less detailed legislation and only private law enforcement) only scores best in terms of the regulatory burden (section 5.7.2). However, it does not seem useful to consider the regulatory burden in isolation and not in conjunction with the purpose of the legislation. Legislation with a low regulatory burden that does not meet its purpose is a cost item without revenue. What is relevant, is whether the

regulatory burden is proportionate to the objective to be achieved. This is particularly relevant for the question whether legislation should apply to all companies or only to larger companies (section 3.4).

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

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

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

Dynamic supervision (Chapter 6)

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

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

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