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An Update on Proposed Dutch Mandatory Human Rights Due Diligence Legislation – The November 2022 Amended Bill

In March 2021, mandatory human rights due diligence legislation – the Responsible and Sustainable International Business Conduct Act – was introduced in the Dutch Parliament. In November 2022, six Dutch political parties submitted an amended bill to the House of Representatives. The amended bill is intended to, among other goals, align more closely with the proposed EU-wide Corporate Sustainability Due Diligence Directive. In this Alert, we discuss the amended bill, including some of the differences from the 2021 bill and the proposed EU CSDD Directive.

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Subject Undertakings

The amended bill generally has similar activity and size thresholds as the 2021 bill.

An undertaking would have obligations under the Act if it:

- Is a Dutch or other EU undertaking that engages in activities outside the Netherlands; or
- Is a non-EU undertaking engaged in activities or marketing products in the Netherlands;

and it

- Is a large undertaking under the EU Accounting Directive, i.e., it meets at least two of the following quantitative thresholds for the applicable fiscal year:
 - Balance sheet of at least €20 million;
 - Net turnover of at least €40 million; and
 - An average of 250 employees during the year (including part time and agency workers).

The proposed compliance thresholds under the Act generally would be lower than those in the Corporate Sustainability Due Diligence Directive proposed by the European Commission in February 2022 and substantially lower than those in the European Council’s December 2022 negotiating position. The CSDD Directive proposed by the European Commission in February 2022 is discussed in our earlier Alert [here](#).

General Duty of Care

Under the proposed Act, subject undertakings that know or should reasonably suspect that their activities, or those of their business relationships, may have adverse impacts on human rights or the environment in countries outside the Netherlands would be required to:

- Take all reasonable measures to prevent the impacts;
- If the impacts cannot be prevented, mitigate or reverse them to the extent possible and, where necessary, enable remediation; and
- If the impacts cannot be sufficiently mitigated, refrain from the relevant activity or terminate the relationship if it is reasonable to do so.

“Business relationships” would include contractors, subcontractors or other legal entities in an undertaking’s value chain that are linked to the undertaking’s activities, including the financing, insurance or reinsurance of the undertaking.

Human rights and/or the environment would be adversely impacted if the following are present or used (as applicable) in the value chain:

- Restrictions on the freedom of association and collective bargaining;
- Discrimination;
- Forced labor;
- Child labor;
- Changes in the climate that are directly or indirectly attributed to human activity, that change the composition of the atmosphere and that are observed in addition to natural climate variability during comparable periods;
- Environmental damage;
- Unsafe working conditions;
- Violations of animal welfare regulations;
- Slavery; or
- Exploitation.

In an expansion from the 2021 bill, the amended bill expressly lists climate change and violations of animal welfare regulations as adverse impacts.

Due Diligence Obligations

The amended bill defines due diligence as the continuous process whereby undertakings investigate, prevent, mitigate or terminate the potential and actual adverse impacts of their activities and those of their business relationships on human rights and the environment in countries outside the Netherlands, which those undertakings can use to account for the way they tackle those impacts as an integral part of their decision-making process and risk management system, in accordance with the principles and standards of the OECD Guidelines for Multinational Enterprises.

Integrating Due Diligence into Policies and Business Processes

Due diligence policy. Subject undertakings would be required to have a due diligence policy pursuant to which they commit to exercise due diligence in their value chain. The policy would be required to be prepared in consultation with stakeholders, experts and business relationships and include the following elements (this additional detail being new in the amended bill):

- A statement committing to respect human rights and the environment and to conduct due diligence in accordance with the OECD Guidelines for Multinational Enterprises;
- A code of conduct describing the obligations and principles of due diligence that the undertaking's employees must comply with;
- A description of the policy the undertaking has drawn up that takes into account the detected risks of adverse impacts in its activities and those of its business relationships;
- The undertaking's due diligence plan, containing a specific description of how it will comply with the requirements of the Act in its activities and those directed towards its business relationships; and
- A description of the activities the undertaking will terminate.

Undertakings would be required to update the policy annually based on changes in business activities, the value chain, potential and actual risks of adverse impacts and the results of monitoring. The policy would be required to be published on the undertaking's website in Dutch, English and any relevant local language.

Business processes. Subject undertakings would be required to integrate due diligence into management systems and business processes. In an addition to the 2021 bill, responsibility for implementation would be required to sit with a director of the undertaking. Where relevant, undertakings also would be required to include covenants in agreements with business relationships relating to compliance with the code of conduct.

Investigating Potential and Actual Risks of Adverse Impacts

Subject undertakings would be required to annually investigate, collect information on and analyze potential and actual risks of adverse impacts on human rights, climate change and the environment in their own activities and those of their business relationships. This would be required to include:

- Investigating and analyzing the entire value chain;
- Identifying the risks related to the sector, the geography and product- and undertaking-specific risk factors; and
- To the extent reasonably knowable and relevant to the undertaking, collecting information from complaints or reports of stakeholders, experts, international and civil society organizations, the media, national human rights institutions, government authorities, employee representatives, trade unions or business relationships.

Subject undertakings would be required to assess their involvement in the identified actual or potential risks of adverse impacts. For risks involving a business relationship, undertakings would be required to assess the extent to which the business relationship has a due diligence policy addressing the risks.

After investigation, undertakings would be expected to prioritize the identified risks based on their severity and the probability of the potential and actual adverse impacts, in consultation with stakeholders, experts and business relationships.

Addressing Adverse Impacts

Risk action plan. After the identification process, subject undertakings would be required to adequately address identified potential and actual risks of adverse impacts on human rights and the environment. This would include creating a detailed action plan to prevent, mitigate or terminate the risks. If multiple risks are identified, the undertaking would be expected to prioritize the risks to be addressed based on their severity.

Undertakings would be required to publish the action plan on their website in Dutch, English and any relevant local language.

Climate plan. If an undertaking identifies a potential or actual risk of adverse impacts relating to climate change, it would need to develop a climate plan. The climate plan requirement was not part of the 2021 bill.

A climate plan would be required to include objectives to reduce net greenhouse gas emissions by at least 55% in 2030 compared to 1990 levels. This is consistent with the target set in the July 2021 European Climate Law.

Consistent with the requirements relating to risk action plans, subject undertakings would be expected to prioritize their response to identified climate risks and the climate plan would be required to be published.

Termination of business activities. If a subject undertaking's actions to prevent or mitigate adverse impacts are ineffective, the undertaking would ultimately be required to terminate the activity if the undertaking causes or contributes to the adverse impacts. When deciding whether termination is necessary, the undertaking would need to take into account:

- The degree to which the activity is essential to the undertaking;
- The legal consequences of continuation or termination;
- The degree to which the termination affects the adverse impacts;
- Information on the possible negative, social and economic impacts that the termination will have on stakeholders or business relationships; and
- The views of stakeholders, experts and business relationships regarding the termination.

The undertaking would be required to designate a director to be responsible for developing and implementing the termination plan.

Influencing business relationships. If an adverse impact occurs due to an activity of a business relationship, the undertaking would be required to use its leverage to influence the business relationship to prevent, mitigate or terminate that impact.

If the undertaking's actions to prevent or mitigate the adverse impacts of a business relationship are ineffective, the undertaking may need to terminate the business relationship, either temporarily or permanently. In reaching a decision to terminate a business relationship, an undertaking would be required to take into account the same considerations to be taken into account in connection with a termination of its own activities, as earlier described.

Monitoring

Subject undertakings would be required to annually monitor the application and effectiveness of their due diligence policy and associated measures. This process would be required to be overseen by the director designated as responsible for the implementation of due diligence.

Undertakings would be required to implement findings from monitoring into their policy and business processes, action and climate plans and public reports.

Complaints Mechanism

Subject undertakings would be required to ensure that a process is in place to enable stakeholders to submit complaints to the undertaking. The process would be required to be easily accessible and transparent.

Remediation Procedure

If a subject undertaking has caused or contributed to adverse impacts on human rights or the environment, or is directly linked to adverse impacts through a business relationship's activities, the undertaking would be required to provide, enable or contribute to adequate remediation, as applicable.

If a complaint is substantiated, the undertaking would be required to take the following steps, to the extent of its involvement:

- If it caused the adverse impact, it would ultimately be required to terminate the activity causing that impact (taking into account the factors earlier noted) and remediate the adverse impact.
- If it contributed to the adverse impact:
 - It would be required to use its leverage to prevent and mitigate the impact to the extent possible; and
 - It would be required to ultimately cease contributing to the adverse impact and contribute to its remediation.

- If there is a direct link between the adverse impact and the activities of the subject undertaking's business relationship:
 - The undertaking would be required to use its leverage to prevent and mitigate the impact to the extent possible; or
 - The undertaking would be required to ultimately terminate the business relationship, with due regard to the factors earlier noted.

The amended bill contains additional detail not in the 2021 bill relating to potential remediation actions, noting that remediation may be achieved by the following:

- Concrete measures to prevent, mitigate or terminate the adverse impacts;
- Internal or external communications about the adverse impacts;
- Sanctions on the subject undertaking's employees;
- Compensation for the loss and damage suffered by affected persons or groups of persons;
- Financial compensation for the affected community;
- Rehabilitation of the stakeholder; or
- Written apologies to the stakeholder by a director or the undertaking's board.

Reporting

The director responsible for the implementation of due diligence would be required to annually report to the subject undertaking's board on the implementation and execution of the policy.

Subject undertakings would be required to annually publish a report on their policy and due diligence measures. The report would be required to be published on the undertaking's website in Dutch, English and any relevant local language by April 30 of the subsequent calendar year. This timing aligns with the reporting deadline in the European Commission's CSDD Directive proposal.

- Reports would be required to include information on:
 - The results of the risk assessment and prioritization effort;
 - The execution of the action and climate plans;
 - The measures taken to prevent, mitigate or terminate risks of adverse impacts and their results;
 - The execution of and findings from monitoring;
 - Complaints received; and
 - The remediation offered or the contribution made to it.

Enforcement

Enforcement of the Act would be overseen by the Authority for Consumers and Markets. Under the proposed Act, the Authority would be able to compel compliance with the Act and impose a penalty of up to 10% of an undertaking's net turnover.

In an expansion, the amended bill would allow foundations and associations whose objectives are to promote the interests of human rights or the environment to bring civil actions against subject undertakings on behalf of impacted stakeholders. If the party bringing the action puts forward facts that may give rise to a suspicion of a link between the adverse impact and an undertaking's acts or omissions, the burden would be on the undertaking to prove it has not acted in breach of an obligation under the Act.

Status and Effective Date

The Act has not yet been approved. Furthermore, a proposal from the Minister for Foreign Trade and Development Cooperation is expected in early 2023. In addition, the ongoing negotiations involving the CSDD Directive will influence the direction of the Act (and perhaps vice versa).

The amended bill contemplates a July 1, 2024 effective date for the Act, phasing in over a twelve-month period. Subject undertakings would need to comply with the policy and business process implementation requirements within six months, risk assessment and action plan requirements within nine months and monitoring and remediation mechanisms within twelve months. As proposed, initial compliance with the CSDD Directive generally would be later.

If passed, the Act would repeal the Child Labor Due Diligence Act. See our earlier Alert on the Child Labor Due Diligence Act [here](#).

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