

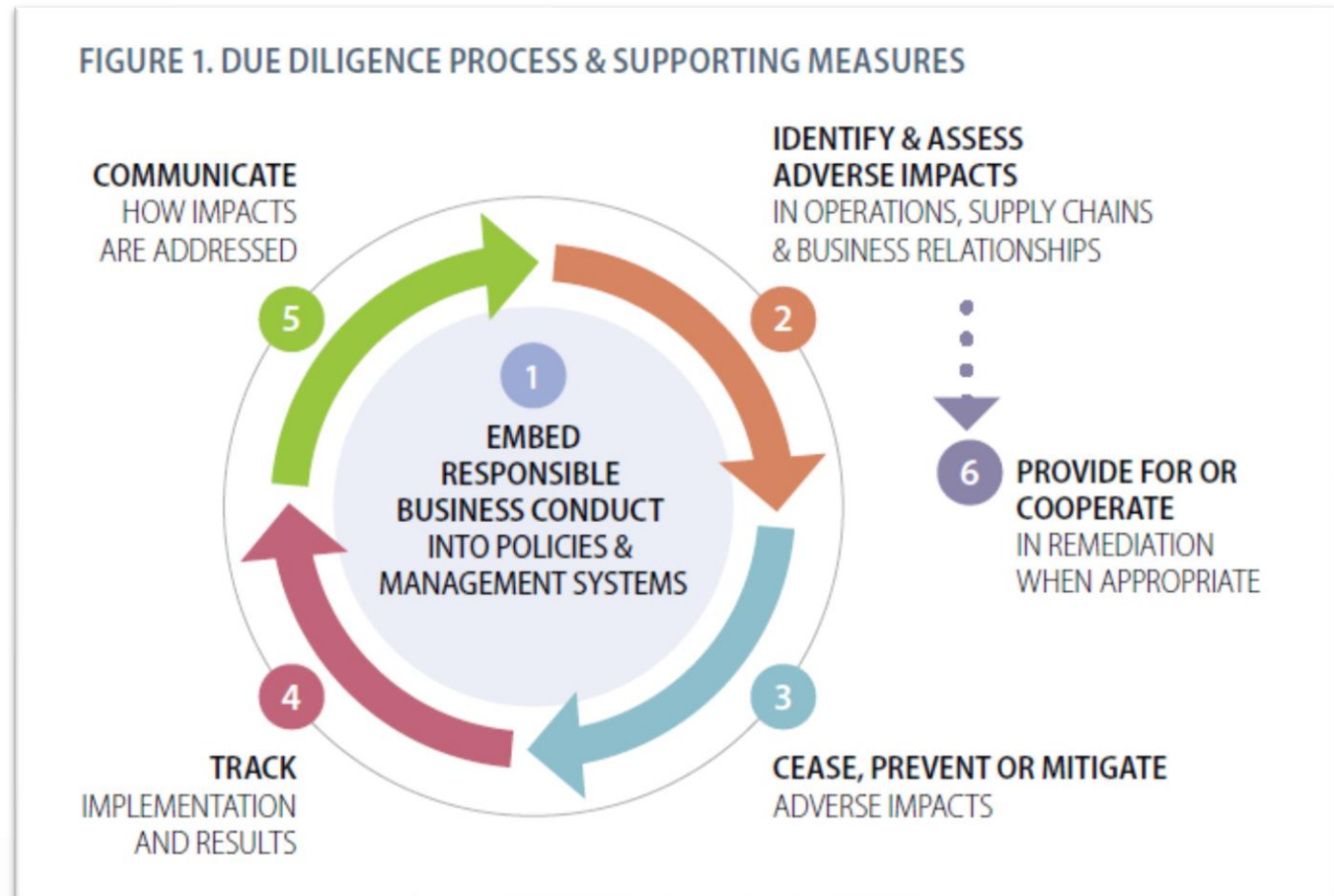
Corporate Sustainability Due Diligence

Anne Lafarre, 28 March 2022, ECGI

What is HR(E)DD?

- UNGPs, Pillar II
- OECD Guidelines (2011) incl. NCP
- OECD guidance (2018)

→ risk based: *severity* and *likelihood*



OECD guidance (2018), p. 21.

Further guidance

- OECD guidance at the sector level
- Multi-stakeholder initiatives

Garments and Textile International RBC SER

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About this agreement

Many businesses in the Netherlands have outsourced their production to other countries. These are countries where human rights, worker health and safety, environmental protection and animal rights may be at risk.

Dutch companies are obliged to avoid these risks under international guidelines and agreements such as the [United Nations' Guiding Principles on Business and Human Rights](#), the [OECD's Guidelines for Multinational Enterprises](#), and the [ILO's fundamental labour standards](#). Under the OECD Guidelines, for example, businesses must investigate the extent to which they could be implicated in human rights, environmental or animal welfare violations. This is known as *due diligence*.

Problems in emerging markets in the developing world are often so complex that there is very little one company can achieve alone. That is why [a broad coalition of partners](#) has signed the Dutch Agreement on Sustainable Garments and Textile. They include industry associations, trade unions, NGOs, and the National Government of the Netherlands.

Commitment

The businesses and organisations that sign the agreement commit themselves to fighting discrimination, child labour and forced labour. They also undertake to support a living wage, health and safety standards for workers, and the right of independent trade unions to negotiate. In addition, they will do everything in their power to reduce the negative impact of their activities on the environment, to prevent animal abuse, to reduce the amount of water, energy and chemicals that they use, and to produce less chemical waste and waste water.

Transparency is a critical factor when it comes to identifying risks and working together to make

About this agreement

- Method
- Complaints and disputes
- Organisation
- Projects
- Clothing- and textile sector
- Press
- Publications

Movement to mHR(E)DD

Call for binding framework to bring along the laggards

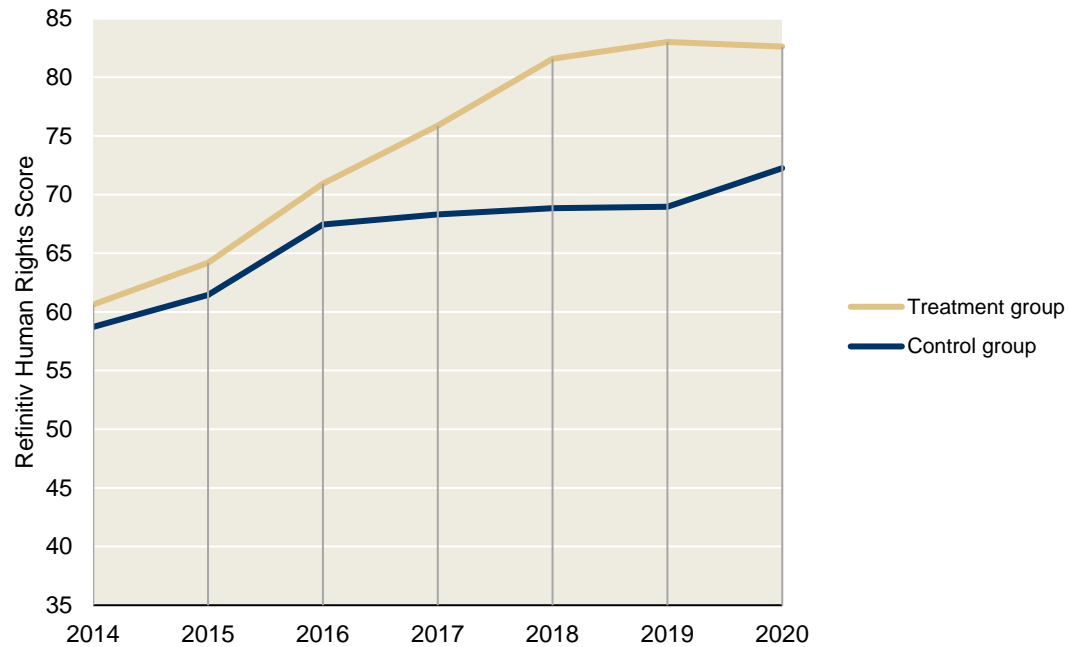
See: EC (2020); SER (2020); NAP Germany (2020)

Binding national initiatives:

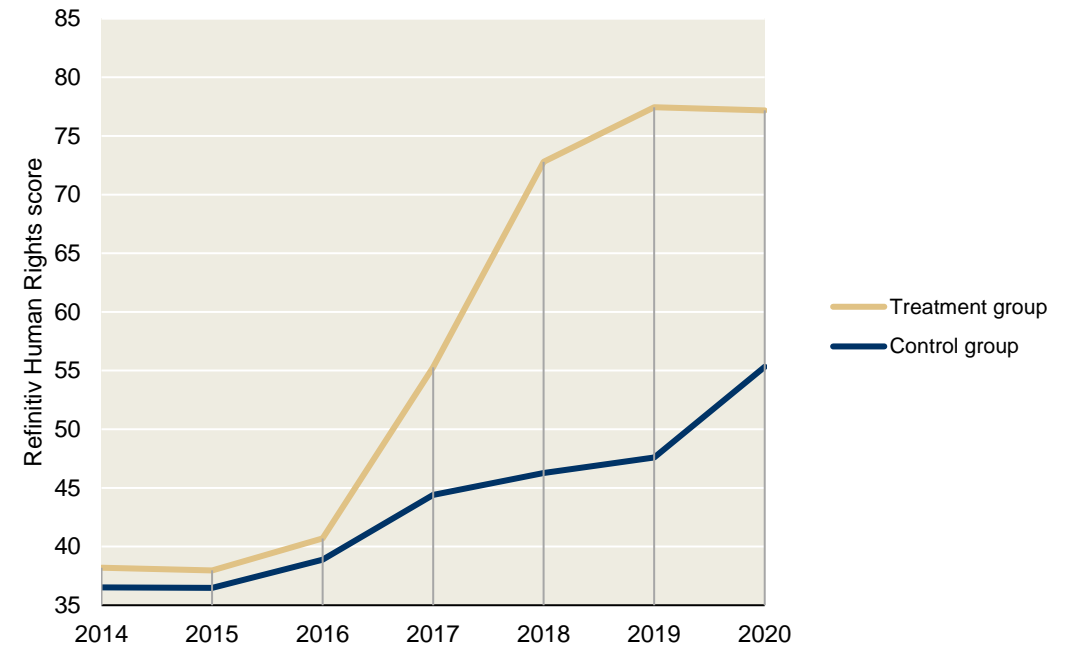
National law	Scope	Size	Enforcement	Topic
French 'Loi Vigilance' (2017)	"established commercial relationship"	5,000 or 10,000 employees	Civil (injunction, liability)	HR, environment
Dutch 'Wet zorgplicht kinderarbeid' (2019)	Full chain	Supplying goods/services to Dutch end-users	Administrative and criminal (fines, sanctions)	Child labour
German 'Sorgfaltspflichtengesetz' (2021)	Full chain but large focus on direct suppliers	3,000 (2024: 1,000) employees	Administrative (fines)	HR, environment
Norwegian Transparency Act (2021)	Full chain	Covered by s.1-5 Accounting Act or meet 2/3 criteria: 50 employees + NOK 70m revenue + NOK 35m balance sheet	Administrative (fines, injunction)	HR

Effects of the French law

Full matched sample



'Laggards' matched sample



Lafarre and Rombouts (forthcoming)

Clear need for a European initiative ...

Preconditions:

1. There needs to be a very close, and preferably full, alignment with the UNGPs and OECD guidelines;
2. The initiative should stimulate a pro-active attitude of companies and no box-ticking compliance;
3. Complementary administrative supervision and civil liability including a 'smart mix' of instruments.

EC proposal falls short

1. Full alignment with UNGPs and OECD Guidelines

Proposal:

'established business relationships' (leverage perspective)

Responsibility should be:

- Focusing on **prioritization** based on **severity** and **likelihood** of adverse impact (risk-based approach);
- Different from liability.

See SHIFT (2022)

'Established business relationship' =
'a business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain'.

'business relationship' =
a relationship with a contractor, subcontractor or any other legal entities ('partner')
(i) with whom the company has a commercial agreement or to whom the company provides financing, insurance or reinsurance, or
(ii) that performs business operations related to the products or services of the company for or on behalf of the company;

2. Pro-active attitude, no box-ticking

Proposal:

Large reliance on contracts including model clauses

Considerations:

- Leverage in a broader sense;
- Including contracts, but also trainings, commercial incentives, collective action to establish leverage, etc;
- Danger of model clauses.

See Gereffi et al. (2005), Locke (2007), Vogel (2010), Castaldi et al. (2022), SHIFT (2022).

*Articles 7(2)(b) and 8(3)(c):
“**seek contractual assurances**”*

*Articles 7(4) and 8(5):
“For the purposes of verifying compliance, the company may refer to suitable industry initiatives or **independent third-party verification**”*

“When contractual assurances are obtained from, or a contract is entered into, with an SME, the terms used shall be fair, reasonable and non-discriminatory.”

*Article 12: **model contractual clauses***

3. Complementary enforcement, 'smart mix'

Proposal:

Lacks emphasis on smart mix, further clarification needed

Considerations:

- Emphasis on learning-process;
- Advisory vs. sanctioning role;
- Focus on administrative supervision, liability at company level.

See SER (2020), Hess (2021), SER (2021), Ruggie (2021), SHIFT (2021), SHIFT (2022).

Article 14: Accompanying measures

Article 17-21: administrative supervision

Including: article 18(4): "Taking remedial action does not preclude the imposition of administrative sanctions or the triggering of civil liability in case of damages, in accordance with Articles 20 and 22, respectively."

Article 22: Civil liability

Article 25: Directors' duty of care

Thank you for your attention!

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