

HAVE PRODUCTS BEEN MADE WITH CLEAN HANDS? THE DUTCH CHILD LABOUR DUE DILIGENCE ACT IS A STEP IN THE RIGHT DIRECTION

A.A. DE JONG¹

1. INTRODUCTION

Across the world approximately 152 million children are forced to work.² Child labour is mainly prevalent in the retail and tobacco industries and in tin mines.

Companies generally have little insight into the entire supply chain of their products because of the use of subcontractors. The policy of the Dutch government used to consist of encouraging companies to voluntarily solve issues in their supply chain. As this approach proved to be not effective enough, it was decided to create binding legislation.

On 14 May 2019, the Senate passed the Child Labour Due Diligence Act (“the Act”), which will force companies that sell goods and services to Dutch end users to examine whether there is a reasonable suspicion that goods or services were produced using child labour. The Act will enter into force at a date yet to be determined. The initiator of the Act, A.H. Kuiken (Dutch Labour Party *PVDA*), expects this to be sometime in early 2022.³

In the run-up to the Act, companies are encouraged to draw up an action plan to limit risks and make their business operations “child labour-proof”.

2. BACKGROUND

The elimination of child labour is on the UN 2030 Agenda for Sustainable Development.⁴ The importance of human rights – and their protection – was highlighted after the collapse of the Rana Plaza garment factory in Bangladesh in 2013.

Several other European countries have already passed similar legislation at the national level, including France⁵ and the United Kingdom.⁶ Other countries are in the process of passing such legislation, such as Germany⁷ and the Netherlands.

¹ Ms. *mr.* Anita A. de Jong a labour law lawyer and partner at Hogan Lovells International LLP in Amsterdam (anita.dejong@hoganlovells.com). This article has been written with the legal assistance of working student Daan Koenrades.

² International Labour Organization (ILO), *Global Estimates of Child Labour: Results and trends, 2012-2016*, Geneva, September 2017 p.5. (Children in this context are between the ages of 5 to 17).

³ Report of the meeting of 23 April 2019, Proposal of the MP for the introduction of due diligence to prevent the provision of goods and services produced using child labour (Child Labour Due Diligence Act), 34506, <https://www.eerstekamer.nl/verslag/20190423/verslag>. (This is because detailing several orders in council takes time).

⁴ United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>.

⁵ Loi n° 2017-399, *Devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, 27 March 2017, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id>.

⁶ Modern Slavery Act, 26 March 2015, <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>. England was the first country in Europe to take measures to ban slavery and human trafficking in 2015. The act proved to be unsuccessful due to the lack of enforcement and sanctions and confusion about the obligations to report. New legislation is being developed, which will attempt to solve these issues; Julianne Hughes-Jennett and Peter Hood, *The Modern Slavery Act: stricter reporting requirements on the horizon*, 30 January 2019; See also: Anita de Jong, *Modern Slavery Act: UK Disclosure Requirements and Guidance introduced*, 5 November 2015.”

⁷ *Unternehmerische Sorgfaltspflicht für Menschenrechte*, <https://www.csr-in-deutschland.de/DE/Wirtschaft-Menschenrechte/Unternehmerische-Sorgfaltspflicht/unternehmerische-sorgfaltspflicht.htm>.

At the European level, measures have also been taken to combat child labour.⁸ Major undertakings in Europe have had to report about their corporate social responsibility policy and, if applicable, how they handle human rights violations with which they are confronted in their business operations.⁹

Reference can also be made to the European Regulation laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas. This regulation will enter into force on 1 January 2020. However, although the regulation only applies to the import of specific goods from conflict areas, the adoption of this regulation at the European level has resulted in human rights issues in the supply chains of companies being put on the national political agendas.¹⁰ Moreover, negotiations are currently taking place on a global treaty for the regulation of and liability for human rights violations by international companies operating outside the country of their headquarters.¹¹

3. SCOPE

The Act introduces the obligation for companies to examine through 'due diligence'¹² whether there is a reasonable suspicion that goods or services were produced using child labour at any point in the supply chain. All companies that provide or sell goods and services to Dutch end-users – consumers and companies – fall under the scope of the Act, also foreign companies and companies that only operate online.¹³

Commerce between companies and the mere transportation of goods fall outside the scope.¹⁴ An exception has also been made for current agreements.¹⁵ In an implementing regulation yet to be established, certain categories of companies will be able to receive an exemption.¹⁶

⁸ Regulation (EU) 2017/821 of the European Parliament and Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, <https://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=OJ:L:2017:130:FULL&from=EN>. Reference can also be made to the EU Guidelines for the Promotion and Protection of the Rights of the Child from 2007, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0060:FIN:nl:PDF>.

⁹ Report of the meeting of 23 April 2019, Proposal of the MP for the introduction of due diligence to prevent the provision of goods and services produced using child labour (Child Labour Due Diligence Act), 34506, <https://www.eerstekamer.nl/verslag/20190423/verslag>.

¹⁰ Directive 2014/95/EU, <http://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=CELEX:32014L0095&from=NL>. This directive was implemented in Book 2 Section 391 subsection 5 Civil Code (Bulletin of Acts and Decrees 2016, 352).

¹¹ Legally Binding Instrument to Regulate, in International Human rights Law, the Activities of Transnational Corporations and other Business Enterprises, of which the zero draft was been presented, www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgonc.aspx.

¹² Dutch translation of the English word due diligence, explanatory memorandum, 34506.

¹³ Child Labour Due Diligence Act, Section 3.

¹⁴ Explanatory memorandum, Child Labour Due Diligence Act, Section 3 subsection 4.

¹⁵ Child Labour Due Diligence Act, Section 11. (The act does not apply to the supply of goods and services if the obligation thereto was entered into before publication in the Bulletin of Acts and Decrees and continues until the moment of termination of this obligation, but at least does not continues longer than a period of 5 years following the entry into force of the act).

¹⁶ Child Labour Due Diligence Act, Section 6 and amendment of MPs Van Veldhoven and Dijkgraaf (no. 26), 3 February 2017, explanatory notes. (It involves companies that are operating in a sector with a low risk of child labour, such as bookkeepers, hairdressers and learning institutes. This exemption option prevents companies and regulator from being inadvertently imposed with unnecessary administrative burdens).

4. 'DUE DILIGENCE'

The main requirements of the new legislation are:

1. When importing goods and services from other countries companies must ensure to apply the aforementioned due diligence by examining whether there is a reasonable suspicion that goods and services were produced using child labour. This examination must be focused on sources that are reasonably apparent and accessible to the company. If the examination reveals that there is a reasonable suspicion of child labour, an action plan to prevent this must be drawn up in line with international guidelines.¹⁷
2. Companies must send a notice to the supervisory authority, the Netherlands Authority for Consumers & Markets ("**ACM**"), that they are adhering to the aforementioned due diligence.

5. ENFORCEMENT AND SANCTIONS

Before the ACM can take enforcement measures, a complaint must be lodged with the company first. The complaint can only be submitted by a person or legal person 'whose interests have been affected'.¹⁸ From the explanatory memorandum it follows that a complaint must be substantiated. It should concern a concrete indication that the company is acting contrary to the duty of care.

The company then has 6 months to satisfactorily settle the complaint. If the company fails to do so, a complaint may be lodged with the ACM. A violation of the Act first leads to a binding order, in which the ACM makes it clear which measures the company must take to meet the legal obligations. If the order is not complied with, not properly or not in time, a fine may be imposed.

The late submission of a statement within the meaning of Section 3 subsection 2 of the Act may lead to the imposition of an administrative fine of EUR 4,150,=.¹⁹ Failure to exercise due diligence within the meaning of Section 4 of the Act may lead to a fine of no more than EUR 830,000,= or, in case that it is more, no more than 10% of the company's turnover.²⁰

The director may also face criminal prosecution, if two similar infringements occurred in the five preceding years under his or her leadership. The maximum term of imprisonment for this is 5 years.²¹

¹⁷ These things have to be laid down in further regulations, probably at least in: OESO guidelines and ILO-IOE Child Labour Guidance Tool for Business; Child Labour Due Diligence Act, explanatory memorandum, no 6 34506, p. 13.

¹⁸ The legislator has chosen not to embrace the concept of 'stakeholder' from the General Administrative Law Act. Based on Book 1 Section 2 of the General Administrative Law Act a stakeholder is 'the party whose interest is directly involved in a decision'. The result of this is that the scope of the 'complainant' seems to be broader than a stakeholder.

¹⁹ Dutch Criminal Code, Section 23 subsection 4.

²⁰ Dutch Criminal Code, Section 23 subsection 4.

²¹ Child Labour Due Diligence Act, Section 9 & explanatory memorandum, no.6, 34506, page 20.

6. CRITICISM

Critics assert that it is best to organise child labour legislation at the European level.²² Earlier, the Regulation laying down supply chain due diligence obligations for Union importers of tin among other things was referred to.²³ This European legislation has a limited scope. However, there are initiatives to introduce new, broader European legislation.²⁴

The explanatory memorandum to the Act also refers to the fact that new European legislation is in the interest of a fair competitive position and a European equal playing field.²⁵ Considering the protracted European decision-making process the Netherlands chose to lay down this issue in laws while continuing to stimulate European legislation in this field. Unfortunately, the Act only focuses on one aspect of human rights issues, namely combating child labour.

In addition, the Act contains many vague open standards, making it difficult to establish when companies have met the duty of care, and when companies have taken all measures that can be reasonably expected of them.

Various senators have also raised questions about the feasibility and enforceability of the Act.²⁶ For instance, the ACM has no regulatory competence with respect to companies established abroad.²⁷ Unlike legislation in other countries discussed before, it is sufficient for companies to submit a one-off statement and they are under no obligation to resubmit or update a statement after a certain period of time.

Furthermore, there is the risk that companies cancel contracts with suppliers posing a higher risk of child labour, or no longer offer products or services of these suppliers on the Dutch market instead of actually solving the issues. The Minister for Foreign Trade and Development Cooperation, Mrs. S.A.M. Kaag, has parried this criticism by saying that the government will assist companies in the actual banning of child labour from their supply chain.²⁸

²² Report of the plenary meeting of 23 April 2019, Child Labour Due Diligence Act, https://www.eerstekamer.nl/verslagdeel/20190423/wetsvoorstel_34_506_voorafgegaan, (the GroenLinks group supports arranging this issue at the European level).

²³ Regulation (EU) 2017/821 of the European Parliament and Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, <https://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=OJ:L:2017:130:FULL&from=EN>.

²⁴ European Coalition for Corporate Justice, Position Paper: key features of mandatory human rights due diligence legislation, June 2018, http://corporatejustice.org/ecci-position-paper-mhrdd-final_june2018_3.pdf.

²⁵ Child Labour Due Diligence Act, explanatory memorandum, no. 6, page 8.

²⁶ See footnote 3.

²⁷ Report of the plenary meeting of 23 April 2019, Child Labour Due Diligence Act, https://www.eerstekamer.nl/verslagdeel/20190423/wetsvoorstel_34_506_voorafgegaan.

²⁸ Report of the plenary meeting of 23 April 2019, Child Labour Due Diligence Act, https://www.eerstekamer.nl/verslagdeel/20190423/wetsvoorstel_34_506_voorafgegaan.

7. CONCLUSION

With the arrival of this Act, Dutch consumers will hopefully have more certainty that products were not made in the Netherlands using child labour.

Although specific standards for the required due diligence are yet to be detailed in implementing regulations, companies are advised to start bringing their supply chain in line with the requirements of the ILO-IOE child labour guideline.²⁹

After the entry into force of the Act, companies are required by law to actively investigate their supply chain for indications of child labour.³⁰ Since a voluntary approach has not led to the required results, sanction options will be included in the Act. However, it remains to be seen whether the open standards in the Act provide sufficient clarity to companies and whether the ACM has the right enforcement options to be effective.

It also remains to be seen whether issues such as this one are not best left to the European level and if so, how long it will take before such legislation at the European level will be effectuated.

A global approach³¹ seems to be the best solution for this problem, although this would require the cooperation of even more countries. This is the reason why the Netherlands has opted for an independent, proactive approach to take a step in the right direction.

²⁹ International Labour Organization, ILO – IOE Child Labour Guidance Tool for Business, how to do business with respect for children's right to be free from child labour, Geneva, 2015.

³⁰ See footnote 3, the date of entry into force is still unclear, but is expected to be in early 2022.

³¹ See footnote 11.