

# EU2019.FI

Perspectives Paper

## Business and Human Rights – Towards a Common Agenda for Action

*Finland's Presidency of the Council of the EU, Conference Publication*

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**Shift**



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2 December 2019

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*The opinions and conclusions appearing in the paper do not necessarily represent the position of the Finnish government.*

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## MINISTERS' FOREWORD

The market economy and human rights are both pillars of shared European values. Thus, they are not separate spheres, but reinforce each other. Where human dignity, democracy, equality and rule of law are respected, business can flourish.

Businesses that commit to human rights can benefit enormously, since they herald common values with not only motivated employees and contractors, but with their key partners and customers. They speak the same language.

In trade, there is always a multitude of stakeholders, often from all around the world. They all deserve a voice. We need to build a framework for this ongoing communication.

On 2nd of December, the Finnish presidency, with support from Shift, is organising the conference "Business and Human Rights – Towards a Common Agenda for Action". The conference engages over 30 speakers and 230 attendees, representing decision makers, businesses, civil society and human rights defenders, EU institutions, member states, and the academia.

The purpose of the conference is to offer a forum for constructive dialogue with key stakeholders. Our main task is to forge a path for a more responsible and more strategic EU agenda that combines business and human rights.

The key themes of the conference are state financing for doing business abroad; the role of regulatory measures in improving corporate social responsibility; and the use of collective means to enhance human rights.

In addition, we have invited stakeholders to contribute in writing to the conference topics. We hope that this paper will spur debate, and help us to understand the manifold views on this important topic. Our sincere thanks to all the authors for sharing their ideas.

Sharing ideas is the first step, taking action is another. Our intention is that the Conference will show the way to a joint EU Action Plan on business and human rights.

Before the actual event, the purpose of this paper is to encourage stakeholders to take part in building the Agenda. Everyone is invited, all opinions will be heard and taken into account.

On behalf of the Finnish Presidency we want to thank the Shift team for their commitment in preparing the conference, and Prof. John Ruggie for his involvement.

*Timo Harakka*  
Minister of Employment

*Pekka Haavisto*  
Minister for Foreign Affairs

Helsinki, 29 November 2019

## INTRODUCTION

The Finnish Government has been an active supporter of business and human rights. Collaboration with European and international colleagues and stakeholders has been a core part of Finnish activities. Most recently, there has been an intense national debate about mandatory due diligence, in which both business and civil society has participated. Consequently, it seems timely to raise this to the discussion at the European level.

Business and human rights as a theme is inherently multi-sectoral and interdisciplinary. Therefore, we thank the authors and the organizations they represent for expanding above traditional thinking and discourse. While there is a significant number of authors and organisations contributing, we recognize the number of other actors with unique expertise, whose contributions would have further enriched the discussion but which were not possible to include this time.

At the same time, we also recognize many other initiatives and recent publications; journals, articles, research and online publications carried out by numerous stakeholder in bringing forth relevant business and human rights-perspectives and trends in different countries and regions. We certainly see the need to increasingly make rights-holders and human rights defenders perspectives and voices heard in this debate, and also thank all the inputs we have received in this regard when planning for the conference.

The **14 contributions in this perspectives paper** represent a varied and experienced group of scholars and practitioners, including business associations, actively engaged in the business and human rights space, each offering their unique expertise and vision about the concerns, barriers, and opportunities going forward. The authors were given the freedom to make their ideas visible, and indeed this paints a rich and compelling picture of the issues that need to be considered when moving forward on this agenda.

The **Corporate Human Rights Benchmark**, presents data on corporate performance on respect for human rights, highlighting the fact that while the competitive spirit prompts some companies to improve, particularly those with brand exposure, it does not prompt all. Bold decisions are called for to ensure business is respected across all companies. **BusinessEurope** stresses the importance of a dialogue with the business community as a whole, in particular with representative business organisations and that any EU action to advance implementation of the UN Guiding Principles on Business and Human Rights (UNGPs) must respect the distinction between the state responsibility to protect and the business responsibility to respect.

Mandatory human rights due diligence is a key topic in many of the contributions. The idea that EU-wide mandatory human rights due diligence legislation would create a robust, coherent and predictable system for businesses operating in the EU, is presented by **Amfori**. The contributions by **European Coalition for Corporate Justice** echoes this message, noting that such regulation would enable companies to identify, prevent, mitigate and account for their adverse human rights and environmental risks and impacts. The **European Trade Union Confederation** also notes the importance of covering activities in the companies' supply chains as part of such regulatory measures. **AP2** draws attention to issues that are key for effective human rights due diligence and highlights the need for transparency and adequate data, enabling investors to make informed human rights decisions.

**Claire Methven O'Brien** articulates important concerns regarding abuses of the gravest nature in the production of products which the state is procuring and consuming in vast amounts, such as gloves, surgical instruments and personal electronic devices. **Andy Hall** describes a compelling example on the global dependence on gloves, outlining the links to modern day slavery and asking whether suppliers are exempt from combatting flagrant human rights abuses.

The importance of policy and regulatory coherence is stressed by the **Polish Institute for Business and Human Rights**, while the **Responsible Business Alliance** raises a concern that harmonization and development of frameworks and regulation related to supply chain due diligence could divert critical resources and attention from the urgent need to work collectively. **Social and Economic Council of the Netherlands** conveys that implementing the UNGPs and the OECD Guidelines can make an effective and coherent contribution to achieving the SDGs.

The **European Union Agency for Fundamental Rights** highlights its work in relation to the prevention of human rights abuse, and access to an effective legal remedy for people whose rights are affected. The **Council of Europe** notes that there is a need to increase peer learning and capacity building, and developing coherent policy that will encourage Europe's race to the top in the sphere of business and human rights.

Last but not least, the **University of Oslo** representatives present the SMART-project and planned recommendations relating to reshaping the key elements of the business environment, to ensure business is operating in a regulatory framework that is consistent with the aims of sustainable value creation.

We sincerely thank the authors for these perspectives and bold contributions, which enrich the debate on many levels. In addition to broadening our horizon and offering a good platform for discussions, we hope this publication can offer concrete ideas for the way forward. That it inspires to engage and seek new collective co-solutions. These written pieces are meant to stimulate reflection and lead to conversation and debate - in Brussels and beyond.

*On behalf of the organizing committee,*

*Bruun, Alva, Ministry for Foreign Affairs*

*Piirto Linda, Ministry of Economic Affairs and Employment*

*Wilska, Kent, Ministry for Foreign Affairs*

# STREAMLINING THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS WHILE CREATING THE RIGHT BUSINESS ENVIRONMENT

Amfori



## About amfori

Amfori brings together over 2,400 retailers, importers, brands and associations from across 45 countries representing businesses from all industries, all sectors and all sizes. Human rights due diligence is at the heart of what we do. Via our amfori BSCI, our fully-fledged human rights due diligence framework, we support our members to work towards improving social performance in their global **supply chains**. By providing tools and services at each step of a typical due diligence process, we help our members navigate through their due diligence journey.

## Our recommendations

Approaches to legislating on human rights due diligence are currently scattered across countries and geographies<sup>1</sup>. While some trends and commonalities are emerging among the various laws that have been adopted or that are being considered for adoption, the mushrooming of national approaches is not the most effective and practicable way of supporting companies' efforts in addressing adverse human rights impacts. What is more, as companies' implementation of human rights due diligence still features gaps and challenges<sup>2</sup>, there appears to be room for greater leverage and a more robust **level playing field**.

To achieve impact and scale, we believe that approaches to legislating on human rights due diligence should be streamlined. With the EU being the largest trading block in the world and given the EU's leading role in advancing the sustainable trade and human rights agenda via its trade and investment policy, the EU is best placed to work towards adopting an **EU-wide human right due diligence framework which would create a robust, coherent and predictable system for businesses operating in the EU**. Conducting human rights due diligence<sup>3</sup> should therefore become the licence to operate in the EU market.

The internationally recognised normative frameworks for due diligence that we believe should inform any EU proposals include the International Labour Organisations Core Conventions, the UNGP and the Guidance on Responsible Business Conduct by the Organisation for Economic Cooperation and Development.

We believe that a mixture of voluntary and mandatory instruments advancing the respect for human rights can be mutually reinforcing. In this spirit, we encourage the EU to strive for a smart mix of measures which blends in various policy tools including incentives to reward those companies that go beyond compliance.

<sup>1</sup> In the EU, laws include e.g. the UK Modern Slavery Act, French Duty of Vigilance Law and Dutch Child Labour Due Diligence Law.

<sup>2</sup> See report by the Working Group on the issue of human rights and transnational corporations and other business enterprises [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/73/163](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/73/163)

<sup>3</sup> Human rights due diligence is the process that should be conducted by business enterprises in order to identify, prevent, mitigate and account for how they address their impacts. It should cover the adverse human rights impact that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.

With public authorities' consumption of works and services accounting for an average of 14% of GDP, public buyers have the potential to play an enormous role in advancing socially and environmentally responsible practices. Responsible business conduct (which also entails human rights protection) should therefore become one of the criteria of the EU Commission and its Member States **procurement policies**. In leading by example, EU public authorities should integrate human rights due diligence in their procurement process, both through specific provisions in social clauses of public procurement and through mandatory exclusion provisions for suppliers failing to conduct human rights due diligence. The nexus between purchasing by public authorities and the leverage effect it creates is well documented in the UN 2030 Agenda for Sustainable Development, the UNGP and the EU Public Procurement Directive.

Since adverse human rights' issues might be rooted in lack of good governance, linked to failed states or be of systemic nature, collaboration along the supply chain, with peers and civil society organisations, but also coordination with local governments and international counterparts should continue to be pursued as a complement to other efforts.

## Why is it important

It would be over simplistic to believe that EU-wide legislation can be the panacea for human rights due diligence. However, provided it is supported by a thorough impact assessment and it aims at harmonising the conditions for operating in the EU market, it could help to:

- Level the playing field across all sectors and supply chains and raise the bar of minimum corporate behaviour: by undertaking human rights due diligence across the industry board, beyond specific prioritised sectors or issues, the leverage would be greater.
- Maximise the efforts of all those involved, from governments to businesses and workers alike.
- Streamline approaches, thus cutting down on red tape for business which would no longer be required to adjust its reporting systems to differing requirements.
- Disincentivise "forum shopping", i.e. the practice whereby companies move their headquarters to those jurisdictions where they end up being less regulated.
- Pave the way towards making it easier for investors to decide in which businesses they wish to invest or for civil society organisations, workers and trade unions to conduct better monitoring.
- Enable the EU to make progress towards its international commitments, e.g. the United Nations' (UN) 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals (SDGs).
- Contribute to bringing coherence across policy sectors<sup>4</sup>.

## How should it be implemented

Notwithstanding the fact that all businesses bear a responsibility to prevent and remediate human rights violations, it is crucial that steps be reasonable and commensurate to the capacity, resources and leverage of a given business. This is particularly the case for **SMEs**.

In order to enable companies to thoroughly undertake supply chain mapping and conduct risk assessment without rushing into compliance unprepared, we encourage the EU to consider a **phased approach** to implementation, though in a time-bound fashion (i.e. with clear deadlines in place).

If businesses are doing their job thoroughly and have due diligence systems and processes in place, it is likely they will find issues, gaps and shortcomings in their supply chain. This is part of the due diligence journey and we would encourage the EU to be pragmatic about it. It then becomes essential that any EU-wide due diligence system supports and encourages **continuous improvement** by allowing companies

<sup>4</sup> [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/73/163](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/73/163)

to be transparent about their efforts to remediate, without exposing them to increased risk of litigation, consumer retaliation, or reputational damage.

A proper **monitoring and enforcement mechanism** should be put in place, so that those not abiding by the law are incentivised to play by the rules. Gaps, shortcomings, failures and unpredictable occurrences will always remain a possibility in a company's due diligence journey. As such, due diligence should not be about perfection but rather about having a strategy and procedures in place to identify the root causes of problems, work towards remediation and aim at continuous improvement. What matters is that companies are equipped to responsibly deal with such cases.

Any EU-wide due diligence system would also need to consider the specific risks and differentiated impacts of business-related activities on vulnerable groups e.g. women, migrant workers, children<sup>5</sup>.

Complementary to any EU-wide mandatory systems, **trade preferences and investment policy** should continue to play a role in advancing the protection of human rights both ahead of negotiations of Free-Trade Agreements (e.g. through mandating human rights impact assessments) and after, through ensuring countries abide by their commitments. The EU should continue to lead by example and work with trade partners to advance **responsible and sustainable trade**. Trade and sustainable development chapters are unprecedented tools in ensuring respect for and the advancement of labour standards in third countries.

Lessons learned from current legislative initiatives should feed into the preparatory work and impact assessment leading to a possible EU human rights due diligence system.

## Conclusions

As the leading global business association for open and sustainable trade, amfori is eager to play a contributing role to the ongoing debate surrounding human rights due diligence at EU level. The recommendations in this paper reflect our initial thinking on the matter. We look forward to engaging with EU decisionmakers and other stakeholders, to progressively refining our thinking and to lending our expertise and experience from building, implementing and improving a human rights due diligence programme, amfori BSCI, since 2003.

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<sup>5</sup> See opening General Principles section of the UNGP

# AN INVESTOR'S PERSPECTIVE ON THE IMPORTANCE OF HUMAN RIGHTS DATA

**Andra AP-fonden (AP2), Sandström, Lina and Malavan, Bahar**



In this paper, AP2 aims to draw attention to issues that are key for conducting effective Human Rights Due Diligence, hereinafter called HRDD, and highlight the need for transparency and adequate data, enabling investors to make informed human rights decisions.

Andra AP-fonden (AP2) is one of five buffer funds within the Swedish pensions system, investing in virtually all asset classes all around the world. At the end of June 2019, AP2 had some SEK 367 billion in asset under management, out of which 81 per cent is managed internally.

## **AP2's view on its responsibilities with regards to human rights**

The UN Guiding Principles for Business and Human Rights stipulate corporate responsibility for managing risks associated with adverse impact on human rights. Accordingly, the responsibility to respect human rights applies fully and equally to all business enterprises. AP2 is a government agency but operates in a manner similar to a company and therefore believes it should adhere to the guiding principles for business enterprises.

Furthermore, the UN Guiding Principles stipulate that companies shall have a public policy for human rights as well as an ongoing due diligence process for managing risks to human rights. Companies should also have a remedy process in place. AP2 has concluded that the most severe risks it poses concerning adverse impacts on human rights lie in its role as asset owner and asset manager. Consequently, AP2 is actively engaged in integrating sustainability issues, including human rights, as part of its asset management activities. AP2 is of the conviction that integration of a sustainability perspective contributes to better investment decisions.

## **AP2's implementation of human rights into its asset management**

AP2 utilizes a variety of tools in order to integrate human rights issues into its asset management and HRDD. AP2's commitment to human rights is addressed in its policy for human rights as well as its corporate governance policy.

AP2's HRDD includes risk screening processes of its portfolio companies as well as engagement processes to mitigate its identified risks. Furthermore, AP2 has publicly communicated its work in its recent report on human rights, based on the UN Guiding Principles Reporting Framework. A crucial part of AP2's engagement lies within its efforts to develop capacity-enhancing measures within human rights as well as actively engaging in different collaborations and international initiatives within the field.

An example of AP2's work in integrating human rights into its investment decisions is the development of in-house designed indices in the management of developed and emerging market equities. The indices are based on traditional financial risk factors, alongside specific factors related to sustainability. Through the indices, AP2 assign companies with a solid sustainability profile a greater weighting, while portfolio companies with an unsatisfactory profile will be assigned a lower weighting. The process for the construction of the indices is such that AP2 avoids investments in companies with a high degree of controversies on human rights.

## **Adequate human rights data in order to enhance the HRDD process**

AP2 manages most of its equities quantitatively in-house, involving relatively small holdings in a large number of companies operating across the globe, as well as in multiple sectors. Due to the widespread nature of AP2's holdings, company specific human rights data is vital in order to effectively integrate human rights variables into its investment decision.

The in-house developed indices have been an important step for AP2 in integrating human rights into its investment decisions. Nonetheless, the inadequate availability of data renders it difficult conducting a HRDD fully in line with the UN Guiding Principles.

A HRDD is an ongoing process which includes identifying and prioritizing human rights risks, acting on the risks identified to prevent or remedy negative impacts, tracking performance and communicating its results.

For the HRDD to be effective it needs to be based on risk to people instead of risk to business. Moreover, it needs to include proactive and reactive components to capture and manage both actual and potential impacts that companies may cause, contribute to or be directly linked to. For a global investor like AP2, the probability to be connected to numerous actual and potential human right impacts, in either its portfolio companies or value chains, is high. A solid risk identification and prioritization process, ensuring that the most severe impacts with the highest likelihood of occurring are being addressed first, is therefore crucial.

Today, AP2 experiences practical limitations to its ability to prioritize due to the lack of data needed in the risk identification process. To keep track of the risks within its portfolios, AP2 needs to have an efficient and systematic process in place. Consequently, adequate company specific human rights data plays a significant role in enabling informed human rights decisions.

## **Challenges with current human rights data**

AP2 has encountered several challenges with performing an effective human rights risk identification based on available human rights data. One of the challenges has been finding company specific data that are aligned with the UN Guiding Principles. AP2 believes that many data suppliers within the finance industry holds a risk to business perspective instead of risk to people perspective. AP2 also notices a lack of severity assessment within the data suppliers' findings. Moreover, AP2 finds company specific human rights data often to be reactive in its nature as it frequently is based on incidents and controversies, making it difficult to perform a proactive risk identification.

Another challenge AP2 has identified is integrating the company specific data into context. The possibility of examining company's exposure through their operations and value chain to different sectors and countries would provide a more complete assessment. Due to collaborative efforts, some companies within specific sectors have developed sector specific reporting on human rights, increasing transparency for investors. However, as a global investor there is a need for a broader scope in order to compare companies across different sectors.

A particular difficulty has been obtaining geographic data on portfolio companies' operations, resulting in obstacles identifying portfolio companies operating in geographic areas with high risk. Another challenge, due to the same lack of geographic data and disclosure, has been the assessment of companies' value chains, where companies in general are reluctant to report information regarding their supply chains or customers.

Recognizing these existing practical limitations, investors HRDD are an evolving standard where AP2 believes the key is to push for increased adequate transparency.

# DEFINING BUSINESS' ROLE IN SAFEGUARDING HUMAN RIGHTS

BusinessEurope



## 1. BUSINESS COMMITMENT TO HUMAN RIGHTS

Companies are committed to respecting human rights in their operations and finding sustainable solutions to the complex human rights-related challenges and risks they face. Business acknowledges its moral duty and responsibility to respect human rights, and that managing companies involves daily decisions on how to live up to the growing expectations of their stakeholders. Human rights due diligence is an important part of this, as outlined in the UN Guiding Principles on Business and Human Rights (UNGPs), as well as the OECD Guidelines for Multinational Enterprises (OECD Guidelines).

Business actively engages in practical initiatives on the ground to implement the UNGPs and other standards, alone and in partnership with other organisations. Companies increasingly identify and respond to their human rights risks, for example by embedding a clear policy commitment, conducting human rights impact assessments, actively engaging with stakeholders and affected communities, and providing/participating in remediation processes.

Given the role of business in respect of human rights and in progressing with implementation of the UNGPs, it is important to have a dialogue with the business community as a whole, in particular with representative business organisations.

## 2. BUSINESS AND STATE ROLE: EQUALLY IMPORTANT BUT DIFFERENT RESPONSIBILITIES

Any EU action to advance implementation of the UNGPs must respect the distinction between the state responsibility to protect and the business responsibility to respect. States have to put in place and enforce laws to protect human rights and companies' obligation is to comply with these laws.

This should be a key principle for EU actions regarding companies' obligations in supply chains, including on due diligence. It is not appropriate to give companies the responsibility to fill the legal gap and it does not get to the root of the problem, i.e. where weak government or judiciaries do not enforce national or international human rights laws. Companies can face complex situations and dilemmas when they are choosing whether to invest/do business in countries in which fundamental human rights legislation is not implemented and enforced, whereas in general investment brings benefits to the economy and society and often helps in safeguarding human rights.

## 3. DEALING WITH COMPLEX SUPPLY CHAINS

EU action to advance implementation of the UNGPs must also take account of the fact that large enterprises operate in complex supply chains, often with thousands of suppliers. Therefore, they may not be in a position to ask all suppliers or subcontractors to comply with their standards and to monitor that compliance, in particular beyond first tier suppliers.

Companies should however be encouraged and supported to voluntarily place obligations on subcontractors and suppliers, for example including specific requirements in their contracts and asking them to take similar action with their own suppliers. This has to be done in a way which does not put excessive burdens on small and medium sized enterprises (SMEs) and leaves space to companies to devise solutions which fit their size, sector, operating markets and business model. The EU's approach should allow companies to identify where the risk of adverse impacts on human rights is highest and to focus their efforts and resources there.

The EU should support and promote multistakeholder initiatives which are effective in gradually improving conditions on the ground. Sectoral approaches in particular can be useful, given there are often common challenges. This can be particularly helpful for SMEs, who may not have the same capacity or knowledge to develop and implement detailed plans or policies to deal with human rights challenges.<sup>6</sup>

When companies operate in challenging environments, they face difficulties in acquiring valid information on the concrete situation on the ground, including regarding human rights, or legislation on working conditions for example. Given that information is already available on country situations through the implementation of the EU Action Plan on Human Rights and Democracy, the EU could create a mechanism to ensure that this information also gets to the companies doing or wishing to do business in those countries, for example via the local EU and EU Member States' Delegations. The EU could also provide support for capacity building and training activities of staff of delegations to improve their expertise to help both small local and multinational companies to understand the political and structural framework in the country with respect to human rights, and to help them to deal with challenges they may face in this area.<sup>7</sup> European companies can contribute to improving the human right's track record in third countries through best practices but they cannot replace Governments and domestic legislation.

Despite a high level of engagement of companies in respecting human rights, they are also faced with growing and sometimes overlapping legal requirements at national and EU level increasing their obligations to comprehensively control social, environmental, consumer protection and human rights aspects along the supply chain. Therefore, the EU should also map the current situation in terms of international, national and local obligations on companies.

#### **4. ACHIEVING A LEVEL PLAYING FIELD GLOBALLY ON IMPLEMENTATION OF THE UNGPS AND OTHER STANDARDS**

A major barrier to fully realising the UNGPs is the lack of level playing field, mainly due to governments not enforcing the international human rights obligations they signed up to. The EU needs to continue to encourage EU Member States but also others around the world to progress more rapidly with implementation of the UNGPs. This includes encouraging states to develop stronger legal systems and institutions, which are able to implement and enforce legislation, to increase coordination between government and judiciary and between different government departments.

The European Commission should also try to win over more countries for the OECD Guidelines on the social responsibility of Multinational Enterprises, promoting them as recognised principles for responsible business conduct, including regarding foreign investments. The potential of the OECD guidelines to underpin efforts of states to implement environmental, social and human rights standards should be better used.

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<sup>6</sup> For example, the EU platform on implementation of the SDGs has suggested to create sector and cross-sector platforms to collaborate on issues, for example sustainable supply chains.

<sup>7</sup> This was a suggestion of the CSR sub-group of the EU platform on implementation of the SDGs.

The EU should also do much more to promote actions it has taken, such as those highlighted in the Commission staff working document of March 2019 "Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights" and those linked to implementation of the EU Action Plan on Human Rights and Democracy 2015 – 2019. The action plan has already facilitated human rights dialogues in 40 countries around the world, leading to concrete policy actions, development of national human rights plans and human rights and democracy country strategies. However, further work is needed to monitor the results on the ground and working more with delegations in third countries to develop capacity for implementing the UNGPs.

Creating a level playing field for respect of human rights is equally important regarding multinationals and local companies operating in developing countries. This is an important point in the ongoing discussions on a draft UN treaty on business and human rights. The principle of the UNGPs that the responsibility to respect human rights applies to all enterprises is crucial, also in terms of guaranteeing that respect for all.

## **5. TRADE AGREEMENTS – A LEGITIMATE TOOL TO PROMOTE SUSTAINABILITY AND RESPECT OF HUMAN RIGHTS**

Promoting sustainability and respect of human rights via trade agreements and trade rules is a legitimate objective and the EU now rightly incorporates Trade and Sustainable Development Chapters in every Free Trade Agreement (FTA) that it concludes.

Of course, there is still room for improvement in respect of human rights in business operations in third countries. We therefore believe that sustainable development chapters in FTAs could in the future include this aspect more strongly.

This could include encouraging the State parties to promote, realize and implement the International Bill of Human Rights, the UNGPs and the ILO Fundamental Principles and Rights at Work; for the State parties to agree to engage in mutual peer-learning and capacity-building efforts to promote best practice and the exchange of experiences on this; and for the State parties to commit to report to the UN country peer review mechanism on measures taken and future commitments to address ongoing challenges.

Given that economic growth and one in seven jobs in the EU - i.e. around 30 million jobs - depend on exports, this must not come at the expense of finding agreements with our key trading partners or deter from the core objective of trade. The right balance needs to be found between increasing market access for European companies and promoting sustainability and respect of environmental, social and human rights standards. EU companies wishing to develop through trade and investment in third countries should continue to be encouraged to do so, as this is crucial to the economic and social development of many countries and regions in the EU and in third markets. In general, opening up for trade and investment has allowed third countries to experience strong economic development and people have benefitted from this.

# ARE WE THERE YET? MEASURING PROGRESS ON UNGPS IMPLEMENTATION

## Corporate Human Rights Benchmark (CHRB)



Corporate Human  
Rights Benchmark

The EU's Sustainable Finance Action Plan and the newer and bigger European Green Deal set out a bold vision putting sustainability at the core of business and finance. This agenda is grounded in the Sustainable Development Goals (SDGs) and the Paris Agreement on Climate Change. The SDGs highlight the inextricable linkages between respect for human rights and sustainable development and the UN Guiding Principles on Business and Human Rights (UNGPs) provide the link between that policy ambition of ensuring respect for human rights and the means for business to operationalise it through the practical tool of due diligence.

The EU and European Member States have been global leaders in demonstrating commitment to the UNGPs, having more National Action Plans on Business and Human Rights (NAPs) than any other region. Governments generally start developing a NAP with a "gap analysis" to identify the gaps between current policies and laws and the expectations set in Pillar I of the UNGPs. This approach assumes that policymaking should begin with the "inputs" and only from government. How much more revealing – and useful - this gap analysis would be if it started with "outcomes": identifying how companies domiciled in the territory are implementing and delivering on the UNGPs, with governments then taking action based on the findings.

The Corporate Human Rights Benchmark (CHRB) contributes to the policy making effort by doing just that. CHRB provides evidence about visible trends in corporate respect for human rights. It is the first publicly available assessment and ranking of the human rights performance of large global companies, currently ranking 200 of the largest global companies in extractives, apparel, agricultural product and ICT manufacturing sectors. In addition to detailed evidence across 200 companies, the CHRB, together with its parent, the World Benchmarking Alliance, will be benchmarking 2,000 keystone companies on human rights by 2023, using a more limited set of core indicators. It is complemented by a growing number of "cousins" that are licensing the CHRB methodology to benchmark companies in various European countries – Finland, Germany and Ireland as a start. The findings of CHRB and the national level snapshots provide compelling, if not yet comprehensive evidence being limited in scope, of current policies and processes and trends that can support policy makers in understanding how businesses are – and are not – responding to the policy cues in the UNGPs and the SDGs. The CHRB approach should be built on and used to contribute to evidence-based, transparent and participatory policy making in line with the EU's Better Regulation Initiative.

The CHRB initiative is guided by a unique, multistakeholder collaboration of investors and civil society organisations seeking to create positive change in the business and human rights space, alongside other actors in the broader ecosystem that are driving more transparency across the business and human rights field. In doing so, CHRB is responding to the Sustainable Finance's Action Plan and the Non-Financial Reporting Directive aims to foster transparency about where companies stand in delivering on sustainability. CHRB turns that transparency into rankings to prompt a "race to the top" among business

to improve their human rights performance. Ultimately, CHRB wants to see improved outcomes "on the ground." We are not there yet. Investors are being provided with better data, but this is not yet correlated to investor decisions or the reallocation of capital at scale. Governments are now being provided with data. They too now need to act.

### **CHRB Overall 2019 Results**

The 2019 results, released just two weeks ago on 15 November 2019, paint a worrying picture eight years on from the adoption of the UNGPs:

- **Low scores for the vast majority indicate failure to implement the UNGPs**

The 2019 average score across all 200 companies in the CHRB is 24%. More than half the companies score less than 20% and only 1 in 10 companies score more than 50%. These extremely low scores reveal poor levels of implementation of the UNGPs by the vast majority of companies assessed, which is particularly concerning given that CHRB focuses on the industries with the highest risks of negative human rights impacts.

- **Human rights due diligence is a key weakness for most companies**

Human rights due diligence is fundamental to informing what any business enterprise should do to meet its responsibility to respect human rights. 49% of companies score zero (0) against every single human rights due diligence indicator.

### **The Picture in Europe**

In comparison to the rest of the world, the 44 companies headquartered in the EU perform relatively better than companies in other regions, although this is inconsistent across the EU. The average score for European companies is 38%, compared to 20% for non-European. Of the 24 companies scoring over 50%, 15 are European based. Many of these companies have improved their standing over time, demonstrating that it is possible to make progress on respecting human rights.

Overall, it is clear that while the majority of European companies assessed demonstrate high-level commitments to respecting human rights in general (a finding reinforced by the Alliance for Corporate Transparency),<sup>8</sup> their approaches to human rights due diligence and access to remedy demonstrate significant weaknesses in implementation of commitments in practice. One-third of European companies failed to meet any of the five basic requirements for human rights due diligence, with 55% of companies scoring less than half marks.

With only 44 EU companies split across 15 countries, there are too few scores in CHRB at country level (outside of the UK) to provide commentary on the national level of UNGP implementation. However, the "cousins" benchmarking across a more limited set of core UNGP indicators in Finland,<sup>9</sup> Germany<sup>10</sup> and Ireland<sup>11</sup> all show significant gaps in each country between company approaches and the global expectations set by the UNGPs and relevant governments. For example, in Germany, the study found that **90% of the 20 largest German companies** assessed failed to fully disclose how they manage their human rights risks sufficiently.

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<sup>8</sup> <https://www.allianceforcorporatetransparency.org/report-2018/>

<sup>9</sup> [https://www.business-humanrights.org/en/study-analyses-human-rights-performance-of-50-largest-finnish-companies-using-chrb-core-indicators?mc\\_cid=718838ec75&mc\\_eid=165bb9c5d5](https://www.business-humanrights.org/en/study-analyses-human-rights-performance-of-50-largest-finnish-companies-using-chrb-core-indicators?mc_cid=718838ec75&mc_eid=165bb9c5d5)

<sup>10</sup> <https://www.business-humanrights.org/en/german-snapshot>

<sup>11</sup> [https://www.business-humanrights.org/en/report-assesses-human-rights-performance-of-22-largest-irish-companies-based-on-chrb-core-indicators?mc\\_cid=718838ec75&mc\\_eid=165bb9c5d5](https://www.business-humanrights.org/en/report-assesses-human-rights-performance-of-22-largest-irish-companies-based-on-chrb-core-indicators?mc_cid=718838ec75&mc_eid=165bb9c5d5)

The variety of scores across the various companies in high risk sectors and the prevalence of 'zero scores' in key indicators for most companies indicates that across the EU, the UNGPs are not being systematically or consistently implemented.

### **What Does this Suggest for Europe?**

European companies are (comparatively speaking) at the leading edge but are subject to being undercut by competitors large and small who are demonstrably not disclosing any steps to respect human rights, both within and outside of the EU. Competitive forces are no substitute for a level playing field. Even within the CHRB universe, some companies have resolutely ignored human rights with 20% of companies failing to move from the lowest bands over several years, despite external scrutiny, investor and brand pressure. This shows that while the competitive spirit prompts some companies to improve, particularly those with brand exposure, it does not prompt all. While a benchmark can show the path to improvement, the free-rider problem has not been solved.

The low scores of each new sector added to the Benchmark also indicates that "out of sight, out of mind" is alive and well. As recognised by the EU, transparency can drive change but conversely, those not required to be transparent can escape such pressures. CHRB data shows that companies not under scrutiny do not appear to have felt the pressure to disclose or improve as their peers. The idea that leading companies put pressure on low-performing companies outside of benchmarks to up their game has yet to be demonstrated.

The on average ~6% year-on-year improvement of average scores within the CHRB shows that progress is possible. The leaders show that significant improvements in identifying, addressing and remedying human rights – inside and outside Europe, in operations and in supply chains – is not only possible, it is being achieved and being communicated transparently in a way investors and stakeholders are demanding. While all improvement is welcome, 6% annual improvement is not the bold progress of Europe's new vision.

Europe is a leader in sustainability. The Union is grounded in a strong commitment to human rights. Policy makers have an opportunity to ensure that no-one is left behind when delivering the 2030 agenda and the Paris Climate Agreements, by levelling the playing field for business and human rights. Leading companies within Europe should not be left at a competitive disadvantage by respecting human rights. Expanding the reach of future benchmarks is an option, but other, more immediate and stronger options, including a uniform approach to mandatory human rights due diligence, should be considered to achieve this. The CHRB can play a key role in assessing how companies across Europe are meeting those obligations to respect human rights, providing policymakers, investors and other stakeholders with an important tool to create a baseline and then measure progress over time. But policymakers need to make bold choices, informed by the existing evidence, to maintain Europe's and European companies' leadership in sustainability.

# A REGIONAL RACE TO THE TOP IN EUROPE: A ROLE FOR THE EUROPEAN UNION

## Council of Europe, Human Rights Intergovernmental Co-operation Division, Directorate General Human Rights and Rule of Law (DGI)



In seeking to establish a common agenda for action on Business and Human Rights, the European Union (EU), alongside its member States, is well suited to play a pivotal role in encouraging a regional "race to the top" when it comes to this field, and in particular for the implementation of the United Nations Guiding Principles (UNGPs). A particular challenge that has been encountered is ensuring that such implementation is coherent and contemporary, avoiding fragmented approaches, and helping to build a level playing field and harmonised approach throughout the national and regional spheres.

With this in mind, a "race to the top" would see mutually enforcing approaches, complementary standards, and coherent policy be developed and adopted across States and regional organisations. The EU's role in promoting such a regional race is clear when it comes to its own members, however it is also an important actor globally, and especially as concerns the wider European region encompassed by the Council of Europe.

This contribution will focus on a number of aspects where the EU can promote coherent UNGP implementation across the wider European region, in cooperation with the Council of Europe. In particular three areas should be noted that can help achieve this regional race to the top: the development of a strong network of National Action Plans (NAPs); the implementation and review of coherent standards and policies, and complementary capacity building and peer exchanges.

### **A Strong Network of National Action Plans**

National Action Plans are an essential first step in the implementation of the UNGPs. The Committee of Ministers Recommendation 2016(3) on Human Rights and Business has called on States to develop, publish and share their National Action Plans, and this also featured in the EU Action Plan on Human Rights and Democracy (2015-2019).

While the majority of National Action Plans adopted globally have been by European Union member States, those remaining States should be continually incentivised and supported to adopt and publish their national plans as soon as is practical.

Within this development process, the gained expertise and experience of those existing NAPs is a valuable asset and should be shared and incorporated when it comes to the drafting and design of future action plans. This can help to ensure consistency and develop a shared understanding of the issues faced and the envisioned responses among member States. This encouragement and guidance should also be extended to neighbouring European States through all available channels, whether it be through trade and investment policies, structured human rights dialogues with partner States, and by EU members themselves in their bilateral dialogues.

Additionally, the development of an EU action plan with a specific focus on business and human rights would be a valuable exercise, just as it is for States. Not only to map out and guide its own implementation of the UNGPs, but to provide clear leadership and direction for its member States and to the wider world.

### **Coherent Standards: Following on from Recommendation CM/Rec(2016)3**

The European Union and its member States should look towards developing, and reviewing, coherent standards and policies regarding the implementation of the UNGPs. The European Union has developed several legislative instruments that address a number of issues for this field, such as data protection, victim's rights, and non-financial reporting; while its member States are proceeding with the smart mix of legislative and policy measures to implement the UNGPs at the domestic level. However further initiatives and coherent standards, framed within a common agenda, are necessary both at EU and domestic level.

It is recalled that standards have been agreed at the Council of Europe level, where Recommendation CM/Rec(2016)3 of the Committee of Ministers to member states on Human Rights and Business was adopted to promote effective implementation of the UNGPs across the Council of Europe region, and so provides a foundation for future work in this area. In particular the Recommendation:

- Reaffirms the Committee of Ministers commitment to the effective implementation of the UNGP's at the European level.
- Calls on governments of member States to review their legislation and practice to ensure compliance with the Recommendation, and by reference the UNGPs.
- The appendix contains 70 paragraphs of further guidance and recommendations on implementing the UNGPs. This guidance pertains to each of the Pillars of the UNGPs alongside specific reference to the development of National Action plans.
- Outlines specific protections for workers, children, indigenous peoples, and human rights defenders.

Important to note is that the implementation of this recommendation will be reviewed by the Committee of Ministers in 2021, five years after its adoption. In this review the EU can play a valuable role, highlighting its own developments, and encouraging its members to engage fully in this process. It is also in a position to reflect and advise on the progress made throughout the wider region and to promote the development of a set of shared goals and targets for complementary implementation of the UNGPs across Europe. The outcome of this review can also aid the EU and its members identify a common framework for further legislation, cooperation and capacity building initiatives.

### **Peer learning and exchanges: developing shared expertise**

An important tool for the coherent implementation of the UNGPs are peer learning exchanges and the sharing of national initiatives and activities. The EU has already supported several such efforts, such as the Accountability and Remedy project of the Office of the High Commissioner for Human Rights, and has engaged with and organised multi-stakeholder events to this end. Furthermore, its structured human rights and political dialogues with partner States provide a forum where these topics can be raised. Such peer exchanges should continue and will benefit from the regular involvement of States from the wider European region.

In this regard the Council of Europe's online platform for business and human rights provides a platform for the sharing of national implementation practices, and the Steering Committee for Human Rights (CDDH) is exploring the feasibility of an intergovernmental expert workshop. The active engagement of EU members and institutions in both such exercises will greatly enhance the depth and scope of the expertise to be shared.

Continued peer learning and exchanges will aid to develop practical networks of actors across the region; equipped with mutual understanding and a shared pool of expertise to inform their work within the complementary implementation of the UNGPs.

### **Capacity building: training for legal professionals**

Training and capacity building are also an essential element for seeing effective implementation of the UNGPs, in particular as concerns access to remedy and due diligence. The EU and its members should continue to provide and support such trainings. In this regard continued engagement with the Human Rights for Legal Professionals (HELP) programme can support capacity building and the development of professional networks in this field.

The HELP programme provides training tools to all European legal professionals to enhance their capacity to apply the European Convention on Human Rights and other human rights instruments in their daily work. The HELP Course on Business and Human Rights introduces participants to the existing international legal framework relevant to business and human rights, including the relevant EU law and standards; and notably explores the applicable jurisprudence of the European Court of Human Rights. In 2020 the course will be updated to include practical modules for legal professionals on how to design and implement appropriate remedy procedures and perform human rights due diligence. There is also a handbook published in 2019, which can serve as a resource for legal practitioners and the wide range of necessary actors in this field across government, business, civil society, the media and independent bodies, such as ombudsmen and national human rights institutions. HELP courses can be tailored to the national context and can include cross border events and launches to promote broader networks and shared expertise.

The dissemination of such resources, and an increase in the number of trainings offered for legal professionals or national officials will promote wider professional understanding of the field of Business and Human Rights and enable better coherent implementation of the applicable standards and policies.

In conclusion, the European Union is a significant economic and political actor and stands to provide an influential role in the global implementation of the UNGPs, and in particular it has the opportunity to ensure that the European region is at the forefront of progress in this field. The European Union, in cooperation with the Council of Europe and the wide forum it offers, can support European States in developing the necessary national action plans; policy and standards; as well as peer learning and capacity building; in a coherent and mutually supportive manner that will see Europe engaging in a race to the top in the field of Business and Human Rights.

# EU BUSINESS AND HUMAN RIGHTS POLICY: STILL MORE ‘INVISIBLE HAND’ THAN ‘SMART MIX’

**Methven O’Brien, Claire**

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The terminology of the ‘smart mix’, coined by the UN Guiding Principles on Business and Human Rights ([Commentary to UNGP 3](#)), is now a common feature of responsible business policy discussions.

It refers to an idealised regulatory ecosystem that combines traditional forms of business regulation via legislation and judicially-enforced remedies, on one hand, with incentives, information-based and new governance approaches, such as sector-specific multi-stakeholder initiatives, as well as measures to enhance the role of financial actors in encouraging more sustainable business practices.

The supposed strength of the “smart mix” is that it harnesses corporations’ individual self-steering capacities, the creativity, dynamism, and distributive wisdom of markets, while also correcting for their tendencies to generate externalities antithetical to human rights and environmental sustainability, through the application of democratically-driven mandatory measures.

Famously, the UNGPs, though based on international human rights law, are not in themselves legally enforceable. Making the ‘smart-mix’ vision a reality thus crucially depends on the enactment of binding measures by national – and in the EU’s case, also regional – legislatures, as well as strengthening of scope for remedial action through courts and other adjudicatory bodies.

A vanguard of EU member states is now mobilising to deliver the smart mix’s mandatory dimension. The UK’s introduction of a supply chain reporting requirement via the was quickly followed by the establishment of explicit due diligence requirements under France’s [Loi de Vigilance](#) (2017) and the [Netherlands’ Child Labour Due Diligence Act](#) (2019). Finland’s new government has committed [to enact similar rules](#).

At EU level, however, responsible business policy measures have until now more emulated the ‘voluntary’ character of the UNGPs themselves than provided the legal reinforcement the ‘smart mix’ calls for.

Two Commission Staff Working Documents ([2015](#) and [2019](#)) report an impressively broad portfolio of initiatives, spanning industry sectors and extending beyond the EU to the wider world.

New laws appear amongst these, such as the [Non-financial Reporting Directive \(2014\)](#) and [Conflict Minerals Regulation \(2017\)](#). Yet the Directive’s requirements are so broadly defined, as regards due diligence, that they can scarcely qualify as compulsory, while the Commission’s non-financial reporting [Guidelines](#) likewise remain high-level and non-binding.

How surprising can it then be if reporting under the Directive is inadequate and, as [recent](#) research has shown, fails to deliver the quality or extent of information needed to support a systemic redirection of capital towards sustainably operating companies, in line with the purported goals of the EC Action Plan on Financing Sustainable Growth.

And if recent interventions in the areas of data protection, anti-trust and state-aid have revived hopes for a more muscular defence of individual rights and collective over specific commercial interests by the EU regulator, in the responsible business space, its efforts remain conspicuously limp-wristed.

Here public procurement provides a compelling example. Governments are the largest buyers of goods, services and public works, with public procurement accounting for €1000 billion per year globally, approximately 12% of GDP in OECD countries and 14% in EU member states.

Individual governments are amongst the largest single purchasers worldwide, with corresponding potential to influence business practices across sectors including construction, defence and security, healthcare, ICT, pharmaceuticals, food and apparel.

Under the heading of the state-business nexus, [UNGP 6](#) extends the state duty to protect against business-related human rights abuses to procurement activities. At the same time, the UN [Sustainable Development Goals](#) highlight government purchasing ([Target 12.7](#)) as a condition of the needed transition to sustainable consumption and production, in parallel to the adoption of more sustainable corporate practices ([Target 12.6](#)).

Yet investigations by [journalists](#), [human rights defenders](#) and a growing swathe of [research](#) reveal endemic abuses of the gravest nature in the production of commonplace items of which the state is a mega-consumer, such as [rubber gloves](#), [surgical instruments](#) and [personal electronic devices](#), as well as in 'niche' markets such as those for [naval warships](#) and [diplomatic security services](#).

The EC's [2011 Communication on Corporate Social Responsibility](#) alluded to public procurement under the banner of 'enhancing market reward for CSR'. 'The most socially responsible course of action', the Communication sagely observed, 'may not be the most financially beneficial, at least in the short term.' The EU should, it continued, therefore leverage procurement 'to strengthen market incentives' for responsible corporate conduct.

Yet the 2011 CSR Strategy included no positive measures, at all, to advance this end. On the contrary, it clearly reaffirmed that sustainability criteria should never create any 'additional administrative burdens for contracting authorities or enterprises', while also remaining subordinate to the '[due process' rights](#) of potential suppliers in the public tendering process.

Given this 'spin', it was hardly unexpected that the [2014 EU Procurement Directives](#), in nearly 200 pages of text, should fail to make a single mention the UNGPs. Equally foreseeable, if disheartening, is that EU procurement experts should on this basis [decry](#) the operational relevance of even those few limited and heavily qualified mechanisms the 2014 Directives did introduce (such as [human rights-based exclusions](#) and scope to rely on 'social labels') intended to give public authorities greater latitude to align their buying practices with established human rights principles.

Much public procurement proceeds at municipal level, where budgets and personnel are stretched thin. As a [recent survey](#) confirms, buyers at this level often struggle to navigate complex EU tendering rules that are so intent on achieving market integration that, ironically, they deter businesses from bidding for public contracts at all. Simultaneously, they scotch sustainability goals by discouraging any 'deviation' by government buyers from price-based criteria, in case this triggers litigation.

This explains why, currently, responsible public buyers, with support from civil society, concentrate their efforts in the 'post-award' rather than the 'pre-award' phase of procurement. This entails adding clauses to contracts concluded with a bidder, selected on the basis of other criteria, that subject its performance to minimum labour standards, self-reporting or external scrutiny via social audit, for example.

Where this approach is adopted, its influence can be extended where buyers collaborate to increase leverage over suppliers, capture efficiencies and reduce costs, as shown by the examples of [Electronics Watch](#) and [Sweden's county councils](#), for example.

Yet restricting due diligence requirements only to those companies that win government contracts, rather than all those who do or might contemplate competing for them, at minimum dilutes the power of the public purse to shape market behaviour. Furthermore, if governments do not apply human rights criteria in their own sourcing decisions, self-evidently, this undermines their credibility in calling for businesses to do so.

Most troubling of all, however, is that EU procurement rules should in effect be helping to funnel taxpayers' money directly into businesses and business models predicated on denials of basic human and workers' rights abroad while undercutting decent jobs at home and neutralising the impact of government ODA spending, an [already shrinking pot](#).

Public procurement is no silver sustainability bullet. In line with the notion of the smart mix, it is rather one piece of the needed broader portfolio, which must surely include [mandatory due diligence legislation](#), stronger [human rights reporting requirements](#), [corporate governance reforms](#) and new responsibilities for public and private investors, as well as direct measures to support workers' individual and collective rights including in the context of new employment practices and forms of work linked to the digital economy.

Defining the details of reforms will be as challenging in the procurement field as in any other just mentioned. But if the new Commission is to honour its [parallel promises](#) to increase prosperity, upgrade the European social market economy, uphold respect for common values and the rule of law, finding ways to deliver these together as a coherent package, despite contradictory tendencies in markets and EU law, is a task that is both urgent and essential. To continue relying, as it has done, by contrast, on the invisible hand of the market to deliver 'responsible business' will not only junk the new President's mandate, but jeopardise both the Union's and our planetary survival.

# THE NEED (AND POLITICAL MOMENTUM) FOR THE EU MANDATORY HUMAN RIGHTS AND ENVIRONMENTAL DUE DILIGENCE LEGISLATION

European Coalition for Corporate Justice (ECCJ)



European Coalition  
for Corporate Justice

*"Clearly voluntary commitments are not sufficient; we will have to go further than this".* This is how Commissioner-designate for Justice Didier Reynders referred to companies' voluntary commitments concerning respect for human rights and the environment at last October's Commissioners Hearings<sup>12</sup>. The fact that three different Commissioner-designates were compelled to talk about **corporate human rights and environmental due diligence and access to remedy** shows the clear political momentum around this topic<sup>13</sup>. The incoming European Commission is expected to build upon the groundwork of recent years and in particular to issue a **proposal for EU mandatory human rights and environmental due diligence legislation** during this legislative term.

Addressing human rights and environmental abuses in global value chains remains essential if the EU is serious about implementing the United Nations Guiding Principles on Business and Human Rights (UNGPs). Despite the proliferation of voluntary corporate commitments and codes of conduct mentioned by Mr Reynders, many European companies and companies operating in the EU are linked to countless cases of human rights violations for which they are not held accountable.<sup>14</sup>

The EU's current policy framework<sup>15</sup> concerning the companies' responsibility to respect human rights is both fragmented and insufficient to address persisting governance gaps. Existing legislation addresses only specific sectors or issues (such as the Timber Regulation (2010) or the Conflict Minerals Regulation (2017)) or establishes merely a disclosure obligation for companies, such as the Non-Financial Reporting Directive (2014). Currently there is no set of rules assigning on companies the duty to take actual action in order to prevent and address abuses, or which contributes to alleviating the multiple obstacles that victims of corporate malpractice face when they seek remedy in court<sup>16</sup>.

Overall, this piecemeal legislation triggers the need for a **coherent legislative framework that clarifies companies' duties and establishes a level playing field across sectors**. Such policy development is necessary to make the UNGPs' "smart mix" of voluntary and regulatory measures, at national and international level, a reality. Quoting the UNGPs' author Professor John Ruggie, regulatory "measures that require businesses to meet their responsibility to respect human rights through legislation" respond to

<sup>12</sup> Hearing of Commissioner-designate for Justice Didier Reynders, 2/10/2019. Transcript available [here](#).

<sup>13</sup> Helmut Scholtz (GUE) and Heidi Hautala (Greens) asked the Commissioner-designate for Trade Phil Hogan, [watch it here](#). Manon Aubry (GUE) asked Commissioner-designate for International Partnerships, Jutta Urpilainen, [watch it here](#). Tiemo Woelken (S&D) and Manon Aubry (GUE) questioned Commissioner-designate for Justice, Didier Reynders, see footnote 1.

<sup>14</sup> See [EP report on corporate liability for human rights abuses in third countries \(2015/2315\(INI\)\)](#); and ["Access to legal remedies for victims of corporate human rights abuses in third countries"](#), study requested by the EP legal affairs committee, 2019.

<sup>15</sup> ECCJ "[Policy Evidence for mandatory Human Rights Due Diligence legislation](#)", May 2019.

<sup>16</sup> ECCJ et al, ["The EU's Business: Recommended actions for the EU and its Member States to ensure access to judicial remedy for business-related human rights impacts"](#), 2014.

the “smart mix” principle and, in adopting such measures, states “are doing what we expect governments to do: to govern, and to govern in the public interest”<sup>17</sup>.

Over the past years, legislative developments at national and EU level show that **policy-makers increasingly recognize the need** to complement voluntary measures with regulation.

National laws that embed Human Rights Due Diligence into law (mandatory HRDD), namely laws requiring companies to prevent adverse human rights and environmental impacts while ensuring access to remedy for victims, are progressively emerging, such as the 2017 French ‘Duty of Vigilance Law’<sup>18</sup> and the Dutch 2019 Child Labour Due Diligence Bill<sup>19</sup>. Governments have started to consider legislation in several other EU states such as Germany, Luxembourg and Finland, as well as in Switzerland, an important EU partner.

At European level, the **European Parliament** (EP) has made clear calls for EU mandatory human rights due diligence and corporate accountability in several reports, such as the 2018 Report on Sustainable Finance<sup>20</sup>. The cross-party Working Group on Responsible Business Conduct (RBC WG) launched a [Shadow EU Action Plan on Business and Human Rights](#) before the European elections, calling for EU mandatory HRDD legislation among other reforms of business and human rights-related policies.

Calls for binding regulation and for improved access to remedy in the area of business and human rights have also come from the **Council of the EU**<sup>21</sup> and the **EU Fundamental Rights Agency** (FRA).<sup>22</sup> These calls clearly reflect a growing public demand for legislation by civil society and an increasing number of companies.<sup>23</sup> At the UN, a treaty is being developed to regulate the activities of transnational corporations and other business enterprises in international human rights law. The EU should play a constructive role in the UN backed negotiations following repeated calls by civil society and the European Parliament<sup>24</sup>.

The **European Commission** (EC) seems to have taken note of this growing political momentum. Following the [EC's Action Plan on Financing Sustainable Growth](#) (2018), the Directorate General for Justice and Consumers (DG JUST) commissioned a study on regulatory options for EU human rights due diligence legislation, which is expected before the end of the year. Mr Reynder’s recent intervention at the EP, when he also committed to reforming company law and to discussing corporate human rights obligations along the supply chain, is a promising starting point.

This new Commission comes in at a unique moment: It must respond to the clear public demand for swift action to address our current social and environmental challenges. The EC must follow up DG Justice’s work and initiate the formal procedure towards presenting a legislative proposal for mandatory human rights and environmental due diligence legislation during the new term.

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<sup>17</sup> [Letter from Prof. John Ruggie in response to Swiss business associations concerning the Swiss legislative proposal for a mandatory HRDD law](#), September 2019.

<sup>18</sup> [Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre](#). More information on [Bhrinlaw.org](#).

<sup>19</sup> [Dutch Child Labour Due Diligence Act](#). More information on [Bhrinlaw.org](#).

<sup>20</sup> EP Report on Sustainable Finance, 29 May 2018. For the other reports, see also EP Report on violation of the rights of indigenous peoples in the world, 29 May 2018; EP Report on the EU flagship initiative on the garment sector, 28 March 2017; EP Report on the impact of international trade and the EU’s trade policies on global value chains, 20 July 2017.

<sup>21</sup> [Council of Europe, Human Rights and business–Recommendation CM/Rec \(2016\)3 of the Committee of Ministers to Member States \(2016\)](#).

<sup>22</sup> ["Improving access to remedy in the area of business and human rights at the EU level", FRA Opinion -1/2017, 10 April 2017](#).

<sup>23</sup> [Civil society statement](#) signed by over 100 civil society organisations and trade unions, 3rd October, 2019; [The road from principles to practice. Today's challenges for business in respecting human rights](#), The Economist, Intelligence Unit, 2015. See also: [Companies, Civil Society and Unions call on Finland to adopt mHRDD legislation, 24 September, 2018](#).

<sup>24</sup> Over half million of Europeans have signed a citizen petition calling for binding norms on corporate responsibility to respect human rights at national, EU and UN level. See: <https://stopisds.org/>

## **Features of effective mandatory human rights due diligence legislation**

ECCJ has identified **key features and basic principles for an effective, comprehensive EU mandatory HRDD legislation** that would enable companies to identify, prevent, mitigate and account for their adverse human rights and environmental risks and impacts:

- **Scope:** all internationally recognized human rights and environmental standards would be covered, with some additional standards relating to vulnerable groups or individuals.
- **Companies:** the law should apply to companies who are domiciled or carry out substantial business activities in an EU Member State, regardless of their legal form. At a minimum, the law should also cover small or medium-sized enterprises (**SMEs**) whose business activity bears particular risk of severe adverse impacts on human rights and the environment (e.g. in conflict or high-risk sectors and areas).
- **Nature of companies' obligations:** the law should address companies' responsibility to respect internationally recognized human rights and environmental standards in their own operations, as well as to take measures in order to ensure that these standards are respected in their value chains. In order to meet this responsibility, companies are required to put in place **appropriate due diligence measures**, and to report on their adoption and outcomes.
- **Reach of due diligence obligation:** the obligation to conduct due diligence should extend to adverse impacts caused or contributed to by the company directly or by companies it controls, such as subsidiaries, as well as impacts linked to the company, its products or services by its business relationships, such as its affiliates, agents, suppliers, any business partnership or business association or joint venture.
- **Corporate liability and access to justice:** Companies should be liable for damage caused or contributed to by entities under their direct or indirect control, where these entities have infringed internationally recognized human rights or environmental standards. In this case, control may be determined according to the factual circumstances.
- Companies may discharge their liability if they can prove that they took all due care to identify and avoid the loss or damage. This constitutes a reversal of the burden of proof with the respect to the adequacy of a company's exercise of due diligence.
- The law should allow persons harmed by the breach of human rights or environmental standards **to bring an action against the parent company** to ensure cessation of the violation as well as compensation for the harm that would have been avoided if due diligence had been exercised appropriately.

Only robust and enforceable legislation following the aforementioned elements would address persisting governance gaps and would assure that the EU upholds its fundamental values based in the protection and promotion of human rights. Re-phrasing Prof. Ruggie, the Commission should do what the public is entitled to expect it to do: to govern, and to govern in the public interest.

# FOR AN EU LEGAL ACT ON DUE DILIGENCE ON HUMAN RIGHTS AND SUSTAINABLE BUSINESS CONDUCT

European Trade Union Confederation (ETUC)



ETUC highlights the importance of the introduction of European binding legislation on due diligence, focusing on human rights and responsible business conduct covering also the supply chain.

The ETUC will push for the adoption of an EU directive on human rights due diligence, including labour and trade union rights. The directive should incentivize parent corporations to identify and act upon actual and potential human rights risks or violation in their operations, subsidiaries and chain of subcontractors, in and outside the European Union. **The ETUC also fully supports a legally binding treaty on multinational companies and human rights currently under negotiation within the UN.<sup>25</sup>**

## **The need for a European binding legislative initiative on due diligence. Why we need to act**

### **- The status quo does not deliver**

Today, corporations operate across borders. Complex corporate structures and supply and subcontracting chains make it difficult to attribute responsibility to parent companies for human rights violations as well as for negative social and environmental impacts in their global operations.

Despite the UN Guiding Principles on Business and Human Rights, currently there are no obligations at EU level for companies to apply due diligence mechanisms for their supply chains – except for very particular sectorial situations (e.g. conflict minerals). The current situation is characterized by a patchwork of different and diverging voluntary frameworks and by the absence of judicial or quasi-judicial bodies that can interpret and monitor the relevant international instruments in this area.

The reliance on a voluntary approach to promote business respect for human rights has proven insufficient and does not incentivize multinationals to adopt a due diligence approach: the establishment of effective preventative mechanisms by companies to avoid human rights violations and negative impacts in their operations (including in their supply chain) is not widespread nor based on effective and comparable processes. There is no real culture of compliance and the voluntary nature of CSR initiatives leaves too much freedom to multinationals to choose what suits them best independently of what society, workers and the environment require.

The absence of clear legal standards establishing companies' duties, of dissuasive sanctions, and liability, as well as effective access to justice for victims of corporate malpractice have furthermore produced accountability gaps. Victims of human right violations or of negative impacts of companies' activities are too often left without adequate remedies and companies are not made accountable for human rights violations and negative impacts in their activities.

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<sup>25</sup> ETUC Position on a United Nations Treaty on Transnational Corporations <https://www.etuc.org/en/document/etuc-position-united-nations-treaty-transnational-corporations>

**The current situation is insufficient and unacceptable**, since violations of human rights and workers' rights, including the right to bargain collectively and information, consultation and participation rights continue to take place in multinationals' operations and in their supply and subcontracting chains.

The current situation is also negative for businesses and for investors. The absence of legal certainty and clarity is a first significant disadvantage. Furthermore, the diverging rules and frameworks create a fragmented situation in the internal market which makes compliance for companies more complex and difficult. The status quo is characterized by unfair competition between companies, especially to the detriment of SMEs, without the necessary level playing field.

## **A European binding legislative initiative**

A European legally binding instrument would provide for the necessary upwards convergence and guarantee the respect of human rights and social and environmental standards, leading to sustainable business conduct and strengthening compliance culture. Companies' operations should be based on a responsible and sustainable approach in the areas of human rights, environmental and social impacts, anti-corruption, tax and corporate governance matters. A European legislative initiative on due diligence would constitute an important step in ensuring that companies' operations are more sustainable and in establishing accountability for the impact of their operations. It would furthermore ensure a better environment for businesses and investors, based on harmonised rules, legal certainty and fair competition.

Effective prevention should be key to an EU initiative on due diligence. Building upon the UN Guiding Principles and the OECD Guidelines, due diligence should be defined as the process "to identify, prevent and mitigate actual and potential adverse impacts [...] and account for how these impacts are addressed". The actual and potential negative impacts refer to the impacts with which companies "may be involved either through their own activities or as a result of their business relationships".

## **Human Rights Due Diligence at national level**

A possible EU binding legislative initiative on human rights due diligence would build upon international instruments and standards, other EU legislative instruments and national (legal) frameworks.

Interesting legally binding Initiatives have been developed and discussions have been ongoing at **national level** in recent years. The most important and ambitious one is the French corporate duty of vigilance law of 27 March 2017, which establishes an obligation for large companies to establish, implement and publish a vigilance plan to identify and prevent human rights and environmental impacts resulting from their activities, from the activities of the companies they control directly or indirectly and from the activities of subcontractors and suppliers with which they maintain an "established business relationship". In case of a breach of the obligations, when harm occurs, companies can be held liable and will have to compensate for the harm that would have been avoided were the obligations properly fulfilled. The French legislation constitutes an important reference and source of inspiration. Similar legislation is currently considered in different European countries.

## **EU Trade Policy**

The EU must promote the inclusion of strong social provisions on workers' rights, decent work and wages, sustainable development and environmental protection in international trade and investment agreements. Ratification and implementation of the eight ILO Core Labour Standards as well as compliance of up-to-date ILO conventions and instruments such as the Forced Labour Protocol and ILO Conventions on health and safety at work must be a pre-condition for entering in EU trade negotiations. However, if a partner country has not ratified or properly implemented these conventions, it must demonstrate through

a binding roadmap how this will be achieved in a timely manner. ILO up-to-date instruments must be included in all EU trade agreements in a manner that makes them effectively enforceable.

An independent trigger mechanism in case of violations is necessary, for example through the setting up of an independent labour secretariat as part of trade and investment agreements' institutional machinery. Under current arrangements, the ETUC insists that the Commission must properly and seriously follow up the complaints raised by trade unions. In any event, the possibility of economic consequences must be available as a last resort in cases where violations are demonstrated. Violations of labour rights covered by an agreement must be open to prosecution under its dispute procedure irrespective of whether they are directly related to commercial exchanges.<sup>26</sup>

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<sup>26</sup> ETUC Resolution for an EU progressive trade and investment policy <https://www.etuc.org/en/document/etuc-resolution-eu-progressive-trade-and-investment-policy>

# Business and human rights: Access to remedy – ways forward

## EU Agency for Fundamental Rights (FRA)



"Business and human rights" includes two essential components: the prevention of human rights abuse, and access to an effective legal remedy for people whose rights are affected. In 2017, the European Commission requested FRA to collect evidence on access to remedy in business-related human rights abuse in order to identify possible actions the EU could take in this area to improve the situation. The Agency conducted both desk research to identify incidents of abuse and interview-based fieldwork to examine the availability and effectiveness of different complaints avenues.<sup>27</sup>

FRA's findings will be published in two parts: firstly, in a focus paper published today<sup>28</sup> (2.12.2019) which provides examples of business-related human rights abuse identified through the desk research, referring to the types of industry sectors involved and complaints mechanisms used. Secondly, the comprehensive findings will be presented in 2020 in a separate report, which will provide guidance to the EU on measures needed to improve access to justice in this area.

From our previous work in this area (2017 Opinion on *Improving access to remedy in the area of business and human rights at the EU level*<sup>29</sup>) and ongoing research, two issues stand out as most crucial for effective access to remedy in cases of business-related human rights abuse: the "burden of proof" and the issue linked to "legal standing".

### Facilitating the burden of proof

In several Member States, the rules on the burden of proof seem to constitute a major barrier for persons who claim an infringement of their rights. Such a claim in most legal systems requires individuals to prove that they are directly affected by a business's action, and to establish various levels of causality (including links between parent companies with subsidiaries or affiliate firms). Providing such proof is often almost impossible; especially when the supporting documentation is in the possession of a company accused of the alleged infringement. This adds to the perceived imbalance in the equality of arms in favour of businesses.

Disclosure – an obligation to release documents and other information by a business entity in a legal dispute – can be a very useful mechanism, as it can ensure equality of arms between the relatively powerless claimant and large business.<sup>30</sup> However, in most European legal systems this is not available or available only in a very limited way. FRA's research shows that even where it exists, there are potential risks that claimants will not ask for relevant documents as they are unaware of their existence. The court may also exercise its discretion not to order the disclosure. In many continental systems, courts cannot order the disclosure of documents unless they are explicitly specified by the party, which – as evidence shows – is often not possible for the claimant to know and in reality, the potential effects of this measure is limited. Moreover, in relevant systems covered by FRAs' research, the burden of proof remains on the claimants, even where there is limited disclosure of documents.

<sup>27</sup> <https://fra.europa.eu/en/project/2018/business-and-human-rights-access-remedy-improvements>.

<sup>28</sup> FRA (2019), Business-related human rights abuse reported in the EU and available remedies, Focus paper.

<sup>29</sup> FRA (2017), [Improving access to remedy in the area of business and human rights at the EU level](#), Opinion 1/2017, 10 April 2017; this Opinion was requested by the Council of the EU, see: Council of the EU, Council Conclusions on Business and Human Rights, 10254/16.

<sup>30</sup> FRA Opinion 1/2017, p. 38.

A general duty to disclose documents across the EU would therefore enhance claimants' possibilities to access an effective remedy, as FRA suggested in its 2017 Opinion, while a harmonised approach would improve predictability and uniformity. In the short term, the EU could consider the establishment of clear minimum standards on how, what and when business must share information with claimants. Reducing evidentiary obstacles could be achieved by lowering the required level of proof. For instance, EU-wide criteria specifying a certain level of evidence that would suffice to shift the burden of proof from the victim to the company would be helpful to prove that a parent company has control over a subsidiary or sufficient links to business entities through its supply chain. Under EU law, such a shift in the burden of proof already exists in certain areas - for example, in EU non-discrimination legislation, where once a claimant establishes an initial case based on the facts, a presumption of discrimination arises, and the responding party must prove that discrimination did not occur.<sup>31</sup>

In 2017, FRA noted that, "*the EU should assess how, what and when evidence can be accessed from business in cases of business-related human rights abuse in the EU Member States. The EU should also facilitate the development of clear minimum standards on how, what and when business should share information with plaintiffs.*

*The EU could also encourage the Member States to ensure a rebuttable presumption requiring a certain level of evidence. In this case, the burden of proof would be shifted from a victim to a company to prove that a company did not have control over a business entity involved in the human rights abuse.*"(FRA, Opinion 1/2017, [Opinion 3](#))

## Facilitating legal standing

For civil justice, legal standing is the gateway for accessing justice. Most often, rules for standing restrict the ability to pursue a particular claim to the individuals who have actually suffered the harm in question or their direct representatives.

Legal standing relates closely to collective redress and representative action – where a group of claimants can come together or where, for example, a representative organisation can bring a claim. Yet FRA research shows that such a collective representation is not available in many systems or is very limited – either to only certain types of claims, or only following very complicated procedural rules. Existing options are often limited to violations of consumer rights. Experts have criticised the lack of provisions in domestic legislation for a collective redress mechanism that offers a realistic avenue to financial compensation. Legal standing for non-governmental organisations (NGOs) is often limited, and experts point to difficulties for an NGO to be recognised as a "qualified organisation" with legal standing to file collective redress claims. Experts also highlight the challenge of NGOs' limited resources, and the high financial risks they undertake in taking on litigation. In some jurisdictions, legal standing for environmental associations in administrative proceedings are considered to be an effective way towards preventing further harm in the field of consumer protection, but experts point to limitations such as only being applicable to selected factual situations rather than to all environmental authorisation decisions.

In previous work, FRA has argued that wider legal standing rules, which allow claims related to the same dispute to be handled in one single proceeding, can avoid many different individual proceedings. From the perspective of right to an effective remedy, it is a useful way to facilitate access to remedy, especially in those areas in which individuals face particular difficulties regarding costs or procedural rules. Such broadened rules lead to procedural economy with beneficial results in terms of costs and time not only for claimants and defendants but also for the court system and therefore for public resources in general. Collective redress enables victims to pool resources, mitigate risk and to balance the equality

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<sup>31</sup> FRA Opinion 1/2017, p. 39.

of arms. Representative standing is important and similar in its advantages to collective redress. The EU has used this option in the area of non-discrimination law as well as GDPR, which enables qualified entities to lodge complaints on behalf of individuals not only when they are mandated by data subjects, but also independently of this mandate, if provided by national law.<sup>32</sup> Another example can be found in EU secondary legislation related to the Aarhus Convention, requiring national courts to recognise claims brought by NGOs affected or having an interest in the environmental decision making procedures.<sup>33</sup>

In its 2017 Opinion, FRA encouraged the EU to “provide stronger incentives to Member States to provide for effective collective redress in cases of business-related human rights abuse. Legal standing should include representative action by not-for-profit bodies, organisations or associations, which act in the public interest and whose statutory objectives are to protect and assist victims of business-related human rights abuse. Such organisations should include national, non-national and international, as well as National Human Rights Institutions.” (FRA, [Opinion 1/2017](#), [Opinion 2](#)).

The FRA's upcoming report in 2020 will formulate suggestions on how best to overcome these and other obstacles identified through its research in order to make access to justice more effective in this area. The report will also present examples of good practices aimed at mitigating negative impacts of business on human rights, including those that stimulate positive impacts.

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<sup>32</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, Article 80.

<sup>33</sup> FRA Opinion 1/2017, pp. 36-38.

# STAMPING OUT MODERN DAY SLAVERY FROM EU GLOVE SUPPLY CHAINS

## Andy Hall, Migrant Rights Activist

Back in 2014, Finnwatch and I discovered [forced labour](#) and exploitation of migrant workers from Bangladesh, Cambodia, Myanmar and Nepal [toiling away](#) in gloves factories in [Malaysia and Thailand](#).

Whilst there have been some limited [improvements](#) since then, modern day slavery in basic hygiene and medical products factories utilised by EU hospitals, laboratories, universities and food counters remains systemic.

In 2018, an estimated [268 billion gloves](#) were used globally with an annual increase of 15% predicted. Ensuring a continuous supply of gloves, mostly manufactured in labour-intensive factories in Thailand and Malaysia, is vital for maintaining public health and ensuring food safety.

Yet does this global dependence on gloves as well as other hygiene and medical products tainted by modern day slavery mean suppliers are exempt from combatting egregious rights abuses?

In late 2018, the Guardian published an [investigative report](#) revealing forced labour from high recruitment fees and debt bondage at Top Glove, the world's largest glove manufacturer in Malaysia. Partly in response, the former UK Prime Minister Theresa May [stated](#) to the International Labour Conference in June 2019: '*The UK is piloting an innovative new programme that will improve responsible recruitment in parts of our public sector supply chains that pass through Asia. And the more nations that subscribe to this approach, the more effective it will be.*'

A UK led pilot on responsible recruitment is a hopeful sign. But more effort is needed from demand and supply sides. EU member state public procurement bodies should ensure the price they pay for gloves ring-fences responsible recruitment costs that cannot then be passed onto job seekers. Worker-driven social monitoring that empowers workers to watch over recruitment processes should be utilised to ensure this really results in workers not paying for their jobs.

Yet still little evidence of such pragmatic approaches to socially responsible public procurement and responsible recruitment exists in the EU. In August, I interviewed migrant workers eking out a living in the largest Malaysian rubber glove industry factories to seek to prove this point.

Still 1,000s of migrant rubber glove workers were arriving from impoverished villages to Malaysia in debt bondage with passports confiscated. Some reported paying up to US\$5,000. This is despite claims from rubber glove manufacturers and buyers to have implemented [fair](#), [ethical](#) or [responsible](#) recruitment policies as far back as 2015.

Many workers I interviewed claimed that they still did not have possession of their passports and were unable to resign. Given change of employer is not allowed in Malaysia, resignation would mean workers become irregular and at greater risk of exploitation from corrupt officials and unscrupulous employers. Or they would have to return home after paying various penalties to companies, indebted and with a loss of face.

Driving responsible recruitment forward is a priority in the rubber manufacturing industry to ensure workers recruited in the future do not have the same exploitative experiences as those already arrived. But workers who are now suffering debt bondage and forced labour must also be reimbursed for fees they

have paid and have their passports returned.

Despite global awareness on forced labour in rubber manufacturing, my monitoring in Malaysia still shows few workers have been paid back any of the recruitment related fees and costs they paid initially, with two notable exceptions.

More concerning in revealing the hypocrisy of private and public sector actors committed to the so-called "fight against modern day slavery" is, however, that lack of remediation to situations of debt bondage has actually worsened workers situation. This is because workers reported as a clear response to the media's attention on the rubber glove sector reduced working hours to comply with social audit standards and thus less earnings to pay off debt.

A 2018 pledge by the UK, Australia, New Zealand, US and Canada to apply responsible recruitment and remediation principles to public procurement supply chains remains theoretical. Likewise remediation requirements imposed by Principle 22 of the UN Guiding Principles on Business and Human Rights on rubber glove companies and on their global customers, both private and public sector, remain unfulfilled.

Most employers and buyers don't ensure realistic recruitment costs and related expenses are covered. Multinational companies continue to claim a commitment to responsible recruitment but don't acknowledge the increased costs for them and their suppliers. Nor do they want to pay these costs. As a result, sustainable levels of profit required for responsible recruitment practices cannot be made by recruitment agencies without also charging workers.

Responsible recruitment can also be enforced contractually between private sector or government buyers and their suppliers. However, such social compliance issue rarely features in contracts or codes of conduct. Where responsible recruitment is contractual, negotiations between buyers and suppliers on a purchase price taking into account recruitment costs and production timelines that don't undermine responsible recruitment processes are often absent.

As a result of this limited private sector and government commitment, it's entirely predictable that responsible or zero-cost recruitment is not being achieved and workers remain in debt bondage, forced labour and modern-day slavery in our public and private procurement supply chains, including in rubber gloves factories.

Without significant engagement and commitment to change, migrant workers will continue to pay the costs of their unethical and exorbitant recruitment. Likewise, companies and governments will continue to be complicit in funding a long and unregulated chain of recruitment agencies, sub-agents and brokers whilst ensuring corrupt payments continue to be made to government officials as well as kickbacks to company HR staff who are paid to take on workers.

What's more, unless there is a genuine commitment by manufacturers, suppliers and public and private sector buyers to pay a living wage to workers, media exposés and campaigns will only see workers facing reduced working hours, less earnings and in some circumstances as in Malaysian rubber gloves, more severe debt bondage and forced labour.

**There are three ways in which the EU, as the largest trading block in the world, can signal commitment to change.**

**Firstly**, the EU and its member states could adopt legislation that makes it mandatory for companies to prevent and address human rights violations like forced labour in their operations and supply chains. Such legislation could ensure companies are held accountable when they neglect their responsibility to respect human rights and remove existing legal hurdles for victims to access justice and remediation.

The EU already has conflict minerals and timber products due diligence regulations. These require companies placing tantalum, tin, tungsten, gold and timber in the EU market to demonstrate to enforcement authorities that these products have not been sourced from conflict areas, endangered species and have been harvested legally.

Such regulatory action could be broadened to other industries including rubber manufacturing and medical supplies. The fines for non-compliance are reasonably dissuasive and competent authorities can be efficient at tracking importers of these products thanks to customs data made available to them.

Government agencies could thus require companies importing for instance rubber gloves to demonstrate they have proper due diligence in place to prevent forced labour from debt bondage. This could start with those companies with the highest volumes of imports who may well not be the highest profile companies

Going still further, as with the recently enacted French loi de vigilance legislation, an EU Directive imposing mandatory due diligence on all companies in all industrial sectors to prevent rights violations in their supply chains is an idea already discussed and supported in many civil society, business and government circles.

**Secondly**, public procurement (or buying of works, goods or services by public bodies) accounts for over 14 % of EU GDP or 14% of 18.8 trillion dollars at 2.6 trillion dollars. Multiple billions could be stirred towards more sustainable suppliers by nudging and incentivising companies to strive to compete for the most sustainable supply chains.

For this reason, the EU could also amend public procurement directives and make it mandatory for procurers to take into account social responsibility issues such as labour and human rights in purchasing decisions.

Taking irresponsible recruitment practices that lead to forced labour as well as the need to pay a living wage into account when spending public funds is regarded as voluntary by many public purchasers right now. For this reason, most continue to make purchasing decisions based on cheapest price only without considering human rights implications.

The EU could also go further and make social evaluation criteria "legal." Influential EU procurement experts still maintain that applying social evaluation criteria in public procurement tenders "[artificially narrows competition](#)".

Given the possibility of formal complaints against public procurement agencies by unsuccessful bidders, it's not surprising so few tenders try to implement award criteria based on human rights due diligence, even if human rights experts have started to [contradict this view](#).

**Thirdly**, taking the UK Government's pilot on responsible migrant worker recruitment in the rubber manufacturing sector in Malaysia as a positive development, the EU could likewise use the Malaysian or Thai rubber glove industry as its own pilot for sharing best practices in ensuring protection of worker rights amongst public procurers. This could highlight leaders like the Swedish local authorities and stimulate action amongst other member state procurers.

If there is no action from the EU and its member states, the end result will continue to be rubber gloves tainted with forced labour at your local hospital or health centre and in your supermarkets and schools. This must and should stop.

# The lack of policy coherence – an underestimated challenge

Beata Faracik, Polish Institute for Human Rights and Business



Polish Institute  
for Human Rights  
and Business

Compared with efforts aimed at development of the new UN Treaty on Business and Human Rights and discussions focusing on the need for the EU-wide regulations concerning mandatory human rights due diligence, **the lack of policy and regulatory coherence** – is much less 'sexy'. And yet, as pointed out by the EU Horizon 2020 funded Sustainable Market Actors for Responsible Trade Project (SMART)<sup>34</sup>, it is exactly the lack of policy and regulatory coherence together with insufficient/low awareness and attitude of individuals responsible for developing but also putting legislation into practice (via e.g. public procurement) and addressing or removing legal 'hot spots', that is often the key obstacle to ensuring respect for human rights in business context. One, for numerous reasons, difficult to address.

On the one hand, to tackle it, one needs to divert from the narrative that a single piece of legislation at the international level will provide solution for insufficient efforts by business enterprises globally to ensure corporate responsibility for human rights in their every day practices. Thus its attractiveness as an advocacy tool is limited.

On the other hand, concrete, targeted actions by States are necessary to tackle the lack of policy and regulatory coherence, which at present often results in companies facing conflicting regulations and expectations, which in turn prevent them from implementing concrete efforts that would improve respect for human rights. Undertaking a thorough National Baseline Assessment (NBA), or at the least gap analysis, engaging and consulting various stakeholders groups in the course of this process to ensure it identifies the real obstacles, is the first step in the right direction. If an NGO can conduct a comprehensive assessment of the legal barriers in access to remedy in cases of business-related abuses<sup>35</sup> so should be able to do public administration. Once the 'narrow necks' or hot spots are identified – undertaking legislative efforts to eliminate them – is potentially the most effective path. Yet it requires what is currently lacking in many states and at the European level, i.e. a political will.

Situation is exacerbated by the fact that in many of the countries, including EU member states – majority of the public administration officers has either no or, at best, low awareness of what impact the work of their institution has on business and human rights, and how their institution can play a role in improving – or worsening – situation for people. Even though already 8 years have passed since the UNGPs adoption, in many of the countries we are still in the early days of awareness raising among public administration. And without understanding of the challenges, it is difficult to find the right solutions.

Additional challenge stems from the fact that it is not obvious that the institution tasked with overseeing National Action Plan (NAP) on Business and Human Rights implementation has a position strong enough to ensure that all relevant organs and institutions are covered by the NAP and that they deliver on the

<sup>34</sup> SMART Project ([www.smart.uio.no](http://www.smart.uio.no)) was delivered by the 25 institutions strong consortium, of which PIHRB was a part.

<sup>35</sup> See e.g. Bartosz Kwiatkowski (ed.), Miłosz Jakubowski, Agata Langowska-Krok, [Basic analysis of the current situation in Poland regarding access to remedy in cases of business-related abuse](#), PIHRB Report Series 1/2017.

commitments inscribed in the NAP. An example of consequences is unfortunately easy to find. In 2018, Ministry of Agriculture of Poland – which earlier deemed the NAP development process of no relevance to its scope of competencies - put forward a bill, later adopted by the Parliament as an Act of 13 April 2018 amending the Act on social insurance for farmers and certain other acts (Journal of Laws of 2018, item 858). The Act introduced a new type of employment contract, aimed to capture specifics of seasonal agricultural work. Yet, by explicitly stating that such contract does not constitute employment within the meaning of the Labour Code in combination with it not being covered by regulations concerning civil law contracts, effectively left workers entering into it without the protection of the minimum wage/minimum hourly rate regulations or regulations concerning restrictions on the daily or weekly working time, thus allowing employing people below the standards provided for other types of contracts, despite the fact that it is hard physical work in often difficult conditions. Ministry's participation in the NAP development process would have at the least increase chances of the second reflection before moving forward with the legislation that undermines workers' rights.

Lack of policy and regulatory coherence is a problem existing both at the national and international level. Yet, in case of the European Union, in specific situations it could be solved at the European level with positive impact on situation in all Member States – as long as there was a sufficient political will to do so - by either amending existing regulations or ensuring such their interpretation that it allows for taking into account serious human rights violations.

One of areas where tension between different regulations was identified and which, potentially, could be addressed at the European level is the nexus between provisions of the General Data Protection Regulation 2016/679 (GDPR) and international standards requiring companies to undertake a meaningful human rights due diligence in the context of forced and slavery labour. The problem was identified in the course of work<sup>36</sup> on a toolkit for business enterprises on how to prevent forced labour and slavery within their own walls and across the supply chain.

Among the most effective tools aimed to assist in diagnosing situation on the ground is social audit (or variation thereof). Yet for it to be fully effective, apart from being able to talk to workers, access to documents concerning workers is needed, and those contain sensitive personal data. Of course, they could be anonymized, but this limits certainty that auditor is provided with various pieces of documentation concerning the same person (e.g. contract and payslip in an effort to check whether salaries are paid according to the contract and on time?).

Yet in line with the interpretation of the GDPR by the Polish Office for the Personal Data Protection, only in cases explicitly foreseen by legislative act specific personal data can be disclosed to the auditors, and only such situations can be covered by contractual clauses. This means in the Polish context that the only sensitive personal data that the contracting parties can agree - in contractual clauses - to disclose is whether social insurance contributions of migrant workers, employed on one out of few possible types of contract, are in fact paid. This interpretation seems to be too narrow, given that in the PP 4 of the GDPR it is clearly stated that "*The processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality*". But is it? While protecting privacy and personal data of individuals is important – yet even more so is the right to life and right to health, which are severely affected in situation of exploitation for the purpose of forced labour or slavery. Given the risk of different approach by individual Member States to GDPR implementation in this regard, and the fact that EU regulations are binding legislative acts applied

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<sup>36</sup> This was undertaken by a multi-stakeholder and inter-ministerial Working Group on workers, forming part of the Committee on Sustainable Development and CSR, an advisory body to the Minister of Innovation and Economic Development, which this author had privilege to co-chair.

in their entirety across the EU, it is recommended that efforts are taken to ensure similar treatment across the EU, ideally one that would support efforts aimed at rooting out the forced labour, which is on the increase in the EU.

If governments expect business enterprises to do their part and take their responsibility to respect human rights seriously, they need to start from taking seriously their own duty to protect human rights. Ensuring policy and regulatory coherence is a crucial part of it.

# DRIVING RESPONSIBLE BUSINESS CONDUCT IN GLOBAL SUPPLY CHAINS

## Responsible Business Alliance (RBA)



The Responsible Business Alliance (RBA) welcomes this opportunity to provide its views on salient business and human rights issues to the "Perspectives Paper" being developed for the December 2<sup>nd</sup> Conference organized by the Finnish Presidency of the Council of the European Union in Brussels. We are also pleased to note the Finnish government's prioritization of business and human rights and willingness to engage stakeholders and learn from experiences and best practices.

As the world's largest industry coalition dedicated to corporate social responsibility in global supply chains, the RBA has been helping member companies and their suppliers conduct risk assessments, perform due diligence, train staff, implement corrective actions and advance responsible business conduct globally. Founded in 2004 by a group of leading electronics companies, the RBA is a nonprofit comprised of companies committed to supporting the rights and well-being of workers and communities worldwide affected by global supply chains.

Today the RBA and its Initiatives include nearly 400 member companies with combined annual revenues of greater than \$7.7 trillion, directly employing over 21.5 million people, with products manufactured in more than 120 countries. Our membership reflects the complexity, breadth and power of integrated supply chains, including companies in industry sectors such as electronics, retail, auto and toys.

Our mission and vision are centered on the principle of shared value; what is good for workers and the environment is good for business. The intersection of public and private due-diligence is an example of implementation of this belief. RBA members not only want to do good because it is the right way to conduct business, but they also understand the greater and growing appetite for accountability from customers and other stakeholders such as civil society, investors, trade unions, consumers and governments.

RBA members commit to a common Code of Conduct and utilize a range of RBA training and assessment tools to support continual improvement in the social, environmental and ethical responsibility of their supply chains. The standards set out in the Code of Conduct reference international norms and standards including the Universal Declaration of Human Rights, ILO International Labor Standards, OECD Guidelines for Multinational Enterprises and many more.

These international frameworks provide high-level principles on what is expected of companies, and expectations of the due-diligence process, in terms of responsible business conduct. They crystallize expectations on companies' responsibility to identify risks, prevent, address, mitigate actual and potential adverse impacts in their supply chains, communicate progress and, where appropriate, provide remedy.

The RBA, through its tools, programs and initiatives, helps its members operationalize and implement human rights due diligence into their operations and supply chains. By using RBA tools, members can demonstrate that they are part of the growing movement of responsible businesses taking the necessary steps to prevent and address adverse impacts in their supply chains.

In addition to these international standards, a number of countries have enacted, or are in the process of enacting, legislation/regulation to further promote and drive business uptake of responsible business conduct. Regulatory frameworks can play an important role in establishing and sustaining progress. Efforts such as the United Kingdom and Australian Modern Slavery Acts and the French Duty of Care law are among many that have raised awareness on these issues, created and required senior-level company engagement for companies to develop and undertake due diligence for salient human rights issues.

However, global supply chains are highly complex webs of business and trading relationships spread across numerous countries, drawing upon human and other resources that come from diverse regions with varying cultures, standards and government regulations. While business has an obligation to make efforts, it is unrealistic to expect that companies by themselves can solve these complicated issues. Many companies have hundreds of customers and thousands of suppliers, and suppliers typically provide services to more than one industry sector. Many of the issues and conditions that lead to human rights abuses result from deep-rooted and underlying developmental challenges as well as lack of adequate human rights implementation from governments.

There is a risk that while policymakers have taken some steps to try to harmonize standards, the proliferation of frameworks and regulations related to supply chain due diligence results could create a daunting challenge for many companies and divert critical resources and attention from the urgent need to work collectively to address complicated problems.

Thus in our view it is not a simple question of more or less regulation, but rather of effective ways to work collaboratively to address fundamental issues in the supply chain that lead to human rights challenges while providing clarity on how companies can operationalize international recommendations and regulations and meet national and international expectations on responsible business conduct.

As an industry body the RBA has been advancing due-diligence by learning from different approaches. Building on our toolbox of resources including risk-assessments, validated third-party assessments, corrective action and remediation, verification and capacity-building, we have developed a wealth of expertise that has changed the very culture of workplaces across the globe. Via the RBA, industry-level collaboration and stakeholder engagement have driven progress on systemic issues, increased shared leverage among members, and achieved positive impact for workers and the environment.

An example of this is on the crucial issue of forced labor in global supply chains<sup>37</sup> where successes include:

- Millions of dollars in fees have been repaid to workers by our members or their suppliers;
- Passports and other forms of personal documents are being returned to workers and meaningful strides have been made in creating and enforcing industry-wide policies requiring the return of passports to workers in key countries like Malaysia;
- The membership has identified and reduced conditions that can lead to forced labor in global supply chains;
- The RBA has banned contract substitution.

As the Finnish and other governments consider measures to further responsible business conduct globally we strongly urge prioritization around several key principles:

1. *Strengthen public - private partnership to address root causes;*
2. *Build on existing programs, practices and tools and leverage them to scale solutions;*
3. *Work to increase efficiencies and level the playing field by encouraging the harmonization of efforts;*
4. *Set out general criteria encouraging companies to find their own ways to meet these obligations.*
5. *The importance of collective leverage in the remediation process to increase the probability of success for smaller actors in the supply chain*

The RBA stands ready to work closely with governments and civil society to address critical business and human rights issues in global supply chains. No organization, government or industry can do this alone. We are much more effective together than any one of us is individually. It is only by working collectively that we can truly address these complicated challenges, and it is important to implement multiple strategies and continually improve based on best practices and lessons learned by companies working toward common goals. We look forward to further engagement and cooperation.

# INCREASING LEVERAGE THROUGH PRE-COMPETITIVE MULTI-STAKEHOLDER COLLABORATION – THE NEED FOR POLICY COHERENCE, LEARNING AND EXCHANGE

Social and Economic Council of the Netherlands (SER) ,  
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*Global supply chains are complex and individual parties in EU countries mostly have limited leverage when it comes to improving human rights and environmental standards in these supply chains. Implementing the UNGPs and the OECD Guidelines requires government, business and civil society work together all along the supply chain. In order to increase leverage, joining forces and working towards more international collaboration is necessary. Providing platforms for multi-stakeholder collaboration; learning and exchange should be part of the smart policy mix of both individual member states and the EU. Moreover, providing policy coherence and incentives for pre-competitive collaboration on improving human rights, including within EU competition law can foster multi-stakeholder collaboration.*

## Sector agreements on international Responsible Business Conduct (RBC)

International RBC sector agreements are part of a wider array of Dutch policy measures to work towards improved conditions in global supply chains. The Social and Economic Council of the Netherlands (SER) has facilitated these agreements since 2014, following a unanimous advisory council report<sup>38</sup> at the request of the Dutch government. International RBC agreements offer companies the opportunity to work jointly at the sector level with the government, unions and CSOs to address specific complex problems in a structured and solution-oriented manner and thereby increase leverage.

Agreements have been concluded in the following sectors: garments and textile, banking, insurance, pension funds, gold, metals, natural stone, food products, floriculture and forestry<sup>39</sup>. Although the agreements differ per sector with respect to their specific goals, prioritised themes and implementation methods, they all require a firm commitment on the part of the parties. Moreover, measures are taken to increase transparency and to monitor the adherence of the parties to their commitment. The council report has served as a starting point for the agreement negotiations and outlined key elements for effective agreements, including an active role of the government. Parties to the agreement are expected to contribute to solving the problems prevalent in the sector supply chains. Companies adhering to the agreement are expected to perform risk based due diligence in accordance with UNGPs and the OECD Guidelines<sup>40</sup>. The parties work together on prioritised risks through collective projects.

<sup>38</sup> See: <https://www.ser.nl/-/media/ser/downloads/engels/2014/international-responsible-business-conduct.pdf>. The SER advises the Dutch government and parliament on social and economic policy and consists of representatives of employers, workers and independent experts. See <https://www.ser.nl/en/SER/About-the-SER> for more information.

<sup>39</sup> For an overview of the results of the sector agreements so far, see: <https://www.imvoconvenanten.nl/en/why/stand-van-zaken>

<sup>40</sup> The forestry agreement somewhat deviates from this and examines how certifications requirements relate to the OECD guidelines, and develops practical instruments for businesses to meet the OECD Guidelines, see <https://www.imvoconvenanten.nl/en/forestry>.

### **Some examples**

The Agreement for Sustainable Garments and Textiles (AGT) annually publishes an aggregated list of production locations. Currently, over 6000 production locations from over 60 companies, representing over 90 brands (which cover almost 50% of the Dutch market) have been published. Stakeholders reporting alleged violations at a location are brought into direct contact with the AGT affiliated brand<sup>41</sup>. Moreover, AGT brands sourcing from the same factories can increase their leverage by working together on addressing specific RBC risks. For example, two AGT brands decided to join forces to work towards securing the payment of living wages in a factory in Pakistan, from where they both source<sup>42</sup>. AGT parties also work on collective projects on paying living wages in the supply chain, on child labour in India and Bangladesh and on textile dyeing in China.

#### ***AGT illustration of multi-stakeholder collaboration: workers' rights in Cambodia***

Trade union CNV reported that Cambodian workers, who had started a mass strike, were laid off at two production locations of which two AGT companies source their clothes. Both brands were informed by CNV International which works with a local partner: the Coalition of Cambodian Apparel Workers Democratic Union (C.CAWDU). This trade union - although not organised at the factory concerned at the time - stepped in, upon request of the workers, to negotiate with both factory management as the ministry of Labour. One of the AGT companies, in particular, actively engaged its supplier about its concerns around the dismissal. After replacement of the factory management by its owner, the majority of the workers was rehired.

The parties to the Dutch Banking Sector Agreement have analysed value chains that are characterised by severe human rights risks and impacts, specifically those of cocoa, palm oil, gold and oil and gas. The aim of these analyses is to gather information and knowledge from multiple actors, and to find creative and constructive ways to exercise and increase collective leverage. Potentially affected stakeholders were involved in the palm oil value chain analysis: a delegation of trade unions from palm oil producing countries participated in an expert brainstorm meeting and the working group organised a field trip to Indonesia. During this field trip, the parties visited palm oil plantations and engaged with worker representatives about the labour conditions. The field trip has laid the basis for a proposal on the development of a database of existing collective bargaining agreements on palm oil plantations. Once this database is operational, the information can be used by banks when assessing loan requests from clients in the sector.

Within the Agreement for the Food Products Sector, the parties are committed to securing a living wage for farmers on banana plantations in international production chains. The commitment was signed by most major Dutch retailers, covering around 70% of the Dutch market for bananas<sup>43</sup>. The partnering retailers' aim is to reduce the gap between the current wage and the living wage by 75% in 2025.

### ***Collaboration with other EU member states***

Recognising that the influence of the Netherlands is limited, the agreements actively aim to collaborate with initiatives in other member states. For instance, an MoU was signed between the AGT and the Partnership for Sustainable Textiles (PST) in Germany. Companies that have signed the AGT can join the PST, and vice versa.

In the natural stone sector, the agreement process led to the founding of the TruStone Initiative by the

<sup>41</sup> For specific details of each case, see: <https://www.imvoconvenanten.nl/-/media/imvo/files/kleding/2018-cases-production-locations.pdf>

<sup>42</sup> See: <https://www.imvoconvenanten.nl/en/garments-textile/news/schijvens-zeeman>

<sup>43</sup> This estimate is based on the market share of retailers in the Food products sector, the exact market share of banana's can deviate slightly. See: <https://www.distrifood.nl/food-data/marktaandelen>

Netherlands and Flanders. This initiative includes a pilot project, which will result in recommendations on how Dutch and Belgian public contracting authorities can reduce RBC risks in supply chains, by leveraging their purchasing power. The metals agreements counts the European metals industry association Eurometaux amongst its parties, and is supported by the international tin and zinc associations. Trade union FNV contributes to this outreach through its international network.

## More EU collaboration needed

In order to further promote international RBC, more collaboration is needed at the level of member states and the EU. To foster multi-stakeholder collaboration there are two main areas of focus:

- 1. Providing platforms for multi-stakeholder collaboration; learning and exchange should be part of the smart policy mix of both individual member states and the EU.*

These platforms need to involve actors from all along the supply chains (including in production countries) in order to be effective. Individual member states can work together by bringing together their existing and future initiatives in this area. Where possible, sector-wide multi-stakeholder cooperation should be established directly at European level. Investing in capacity building on implementing human rights due diligence, dialogue skills and a mutual gains approach should be part of the support for such platforms. Moreover, smart tools for principled prioritisation and increasing leverage will further help implementation. An international research agenda on how human rights due diligence leads to better human rights outcomes and what makes multi-stakeholder collaboration effective is necessary to inform all actors working in this field.

- 2. Providing policy coherence and incentives for pre-competitive collaboration on improving human rights, including within EU competition law*

Policy coherence is about formulating a consistent message from all parts of government that responsible business conduct—as part of the corporate responsibility to respect human rights—is what is expected of companies at home and abroad.

Sector agreements increase transparency of supply chains within the boundaries set by current EU competition law. Competition law may prohibit companies from sharing and publishing specific information collectively because it is assumed to negatively affect the functioning of the market or consumers. More discussion is needed on avenues for pre-competitive cooperation within competition policy, leading towards a European policy framework that takes both social and environmental concerns into account.

Another important aspect of policy coherence is sustainable procurement. In its own operations, governments should apply international RBC criteria, thereby rewarding early adopters and ensuring a level playing field. There should be focus in international tenders on including international RBC criteria, and governments should encourage innovation and experimentation in tendering procedures.

Moreover, governments need to foster policy coherence with respect to international responsible business conduct, sustainable development, trade and development cooperation. In a recent advisory report<sup>44</sup> to the Dutch government the SER argues that implementing due diligence according to the UNGPs and the OECD Guidelines provides the basis for businesses to make an effective and coherent contribution to achieving the SDGs. Integrating the two frameworks can therefore drive both RBC and the fulfilment of the SDGs. The enabling rights of freedom of association and collective bargaining should be prioritised in this effort since they enable progress in other areas.

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<sup>44</sup> Seizing opportunities and managing risks – the relationship between the SDGs and IRBC, SER (2019), see: <https://www.ser.nl/en/Publications/sdg-and-imvo>

## SMART PROPOSES REFORM TO INTEGRATE HUMAN RIGHTS PROTECTION INTO BUSINESS

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In the SMART Project, ensuring that business respects human rights is an integral part of our work on reforms to support the transition to sustainability. In our work, we assume that human dignity, manifested in respect for and fulfilment of human rights, is a fundamental component of social sustainability, and as such a necessary foundation for any policies and practices that seek to ensure economic development within the boundaries of our biosphere. Yet, human rights are already under threat from economic activity that transgresses the planetary boundaries and social foundations that define our approach to sustainability. All indications point to a further rise in human rights risks, and a shrinking of human rights protections worldwide, unless sustainability is achieved.

Achieving sustainability is possible. There is an emerging recognition of the serious risks of continuing with unsustainability and that change is urgent. However, to achieve sustainability, we need to change the way business operates. Business needs to shift away from the unsustainable business models and be encouraged to create value and innovate sustainably. In recent months, the SMART project has been working on reform proposals for presentation to EU policy makers early in 2020. These proposals have as their overarching ambition the reshaping of key elements of the business environment, in particular to ensure business is operating in a regulatory framework that is consistent with the aims of sustainable value creation. We do this through proposals for dismantling regulatory barriers and reinforcing positive trends, to make it possible and easy for business to create value in a sustainable manner.

These reforms have clear echoes in the business and human rights field, including notions of smart regulatory designs that combine public regulation and support with private regulation and practice; changes to company policies; the integration of due diligence practices to company systems; and tracking/disclosure mechanisms that seek to ensure both best practice and accountability. In other words, the reform proposals from SMART not only integrate human rights to an understanding of sustainability, but also suggest legal reforms compatible with the approaches to regulation and responsibility adopted by the business and human rights field.

The SMART reforms proposals presently under consideration include, but are not limited to, the following:

We propose that the purpose of the company is defined as creating sustainable value within planetary boundaries. As noted above, the reference to sustainability here includes respect for human rights. This redefinition of the purpose of the company explicitly seeks to balance the interests of its members

and other investors and other involved and affected parties. In the articles of association or equivalent documents a more detailed purpose, specific to the business of the undertaking may be formulated, within the overarching purpose as formulated above.

We further propose to operationalise this through a redefinition of the duties of the board. This will include a duty to commit to the overarching purpose of sustainable value creation within planetary boundaries, again including human rights. Second, it entails adjusting the business model of the undertaking, where necessary. Third, it will require developing a strategy to implement the purpose throughout the business and its internal control and risk management systems, including, where relevant, its global value chains.

We propose two levels of risk management for sustainability. One involves an obligation for the board to ensure that a stringent sustainability assessment is undertaken at regular intervals (e.g. every five years). As part of this overall assessment, we propose a second form of sustainability risk management, in the form of due diligence. This sustainability due diligence, across the operations of its business, encompasses:

- a. environmental issues, including greenhouse gas emissions; impacts on biodiversity; water use; land use; biogeochemical flows (nitrogen and phosphorus); atmospheric aerosol emissions; introducing novel entities (including chemical pollution, plastics and nanomaterials) into nature; and contributions to ozone depletion and to ocean acidification.
- b. social issues, including human rights and labour rights, decent work and equality, and including affected communities and people, and seeking to ensure that also the needs and concerns of especially vulnerable groups and persons affected by the business are identified.
- c. governance issues, including anti-corruption and anti-bribery, anti-tax evasion, and inclusion of workers and other affected people and communities in open, participatory processes.

This assessment would form the basis of assessments of legal compliance and for a continuous improvement process towards the overarching purpose, on which the undertaking annually shall report as a part of the management report. The regular assessment should be subject to assurance requirements and the annual reporting to full audit.

In our research, we have sought to identify the ways in which human rights due diligence can be integrated to a sustainability perspective. We have successfully tested an integrated, risk-based approach to 'sustainability due diligence', with a focus on complex product lifecycles. This has shown that it is possible to conduct integrated human rights and environmental due diligence at the level of particular products and services. We also believe that, where relevant, human rights due diligence should be an important element in ensuring corporate sustainability, and that it should become an integrated aspect of a broader reform of the purpose of the company and the duties of the board. We see human rights due diligence as one form of 'sustainability due diligence', which companies and regulators apply to particular risks of company involvement in human rights abuses. We see the moves towards human rights due diligence regulation as constructive steps forward and will propose to the EU that these be the foundation for considering sustainability due diligence as the basis for EU regulation in the future.

These assessments would form the basis for the board to identify ongoing negative sustainability impacts and principal risks of future negative sustainability impacts. Where the negative impacts or risks thereof are caused by or commensurate with lack of legal compliance, the board must ensure that this is rectified as soon as possible. For other issues, a system for an ambitious continuous improvement process must be put into place.

We suggest that the European Commission shall issue Guidelines for how the sustainability assessment and due diligence requirements are to be carried out. The Guidelines should be revised every five years, through an open participatory process, integrating expertise and affected communities.

We also propose that both public and private enforcement mechanisms are put into place.

In addition, to these reform proposals, and in order to ensure coherence across the business environment for EU companies, the SMART project is developing reform proposals addressing other areas. This includes reforms to trade and investment agreements, the Sustainable Finance Initiative, banking, procurement, the Circular Economy, and consumer protection law. These comprehensive proposals all assume that human rights cannot be protected without also securing the very basis of all of humanity's existence; and that success in achieving sustainability is dependent upon protecting human dignity and progress towards social justice, including human rights. By formulating reforms that pursue these objectives as one, integrated definition of sustainability, we hope to contribute to securing a safe and just space for humanity now and in the future.



