



SUGGESTED ELEMENTS FOR AN EU ACTION PLAN ON BUSINESS AND HUMAN RIGHTS

(June 2018)

I. INTRODUCTION

When in October 2011 the European Commission (EC) invited Member States to develop national plans on the implementation of the *United Nations Guiding Principles on Business and Human Rights* (UNGPs), it committed to also presenting a plan listing its priorities for the implementation of the UNGPs by the end of 2012.¹ Since then, fourteen Member States have developed national action plans, triggering national processes on the establishment of safeguards for human rights against business-related adverse impacts.

At European Union (EU) level, in contrast, this plan has yet to be developed.

The EU carries a particular responsibility to show leadership in the promotion and protection of human rights against adverse business-related human rights harm. Not only is the EU directly bound by its treaties to promote and protect human rights globally, it also has a duty to protect against harm by third parties. As already highlighted by representatives of governments from five Member States,² the role of the EU as the world's largest economy also provides it with significant economic and political power to influence and shape the fair regulation of the global market.

The undersigned organisations call on the EU to live up to this responsibility and to embrace its unique leadership role. This requires, *inter alia*, that:

¹ European Commission, A renewed EU strategy 2011-14 for Corporate Social Responsibility, 2011, p 14.

² Joint letter from the Netherlands, Sweden, Finland, France and Denmark to Frans Timmermans about the missing EU Action Plan on Responsible Business Conduct; <https://www.business-humanrights.org/en/joint-letter-to-european-commission-calls-for-an-eu-action-plan-on-responsible-business-conduct>.

- Such a commitment **is reflected in its organisational structure and in a coordinated, ambitious approach towards business and human rights across all relevant sectors**. Business and human rights issues need their own home in the EC and the European External Action Service (EEAS) - they need a strong voice. The organisational structure should also ensure that the UNGPs are meaningfully and effectively implemented across all relevant sectors and departments, including but not limited to Directorate-Generals of Trade, Justice, Internal Market, and International Development Cooperation.
- The EU ensure **constructive engagement with the process toward the establishment of a legally binding instrument** on business and human rights at the United Nations;
- The EC and EEAS begin speedily and effectively the process of **developing an EU Action Plan** (EU AP) with the aim of achieving the full implementation of the UNGPs throughout the EU;
- The EC **incentivises and encourages EU Member States** to establish more ambitious and forward-looking National Action Plans and to effectively implement them. Equally, existing National Action Plans that fail to effectively protect human rights, provide access to remedy or compel companies to respect human rights, should be revised.

With this document, the undersigned organisations wish to highlight the urgency for a coordinated and ambitious EU approach towards business and human rights. The process for the development of an EU AP should be started post-haste. This paper respectfully presents our expectations for such an EU AP.

II. GENERAL ELEMENTS

A EU AP should build on the EU's endorsement of the UNGPs and entail strong, ambitious and concrete commitments to promote and implement these human rights standards and principles within and outside of the EU.

The EU AP should be developed in consultation with all stakeholders, including civil society, trade unions and right-holders at risk, both internal and external to the EU. It should outline current gaps in the implementation of human rights and labour rights standards; define short, mid- and long-term objectives to address these gaps; and identify and commit to actions to achieve these objectives. The EU AP should ensure accountability, which requires allocation of clear responsibilities, measurable objectives and outcomes as well as a timeframe for their delivery.

The EU AP should be taken as an opportunity to develop a systematic approach to the protection and respect of human rights in the context of business operations addressing all three pillars of the UNGPs. It should draw from and include concrete commitments in relation to the Opinion and Recommendations of the Fundamental Rights Agency (FRA) issued in 2017. The EU AP should also reflect the variety of policy areas which are of relevance for the implementation of business and human rights standards, such as corporate governance, trade, finance, including as well those policy areas which are usually often overlooked in the business and human rights discussion such as development cooperation and economic diplomacy.

The EU AP should also pursue better policy alignment between EU institutions which foster economic activities. For instance, improved cooperation with the EEAS will assist the European Investment Bank (EIB) in identifying human rights risks and possible risk mitigation measures when considering financing a project.

III. PILLAR 1: THE STATE DUTY TO PROTECT HUMAN RIGHTS

The UNGPs clarify that within their jurisdiction, states must protect against human rights abuse by third parties through effective policies, legislation, regulations and adjudication.³ They should ensure that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations. Despite having exclusive and shared competences in a number of relevant areas (e.g. common commercial policy, freedom of establishment), the EU has so far made little use⁴ of its regulatory instruments.

A) A legislative approach to corporate accountability

The obligation to protect requires state parties to prevent and redress infringements of human rights that occur outside their territories due to the activities of business entities over which they can exercise control.⁵ The need for a regulatory approach towards corporate accountability at EU level has been repeatedly voiced by the European Parliament⁶, national Parliaments⁷ and civil society. The EU AP should therefore entail a commitment **to develop legislation introducing a corporate “duty of care” or “vigilance”** towards individuals and communities affected by their global operations, including **mandatory Human Rights Due Diligence** regarding a company’s operations, investments, business relations and global supply chains.

In this context, we welcome as an important initial step that the European Commission’s Action Plan on Financing Sustainable Growth⁸ commits to looking into,

³ Principle 1 of the UNGPs,

http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

⁴ The only legislation imposing a human rights due diligence obligation on business is the Regulation laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (2017).

⁵ General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, para 30-31.

⁶ European Parliament report on EU Flagship initiative for the garment sector (2017); European Parliament report on Global Value Chains (2017); European Parliament report on corporate liability for serious human rights abuses in third countries (2016).

⁷ See for example Green Card Initiative in 2016 <http://corporatejustice.org/news/132-members-of-8-european-parliaments-support-duty-of-care-legislation-for-eu-corporations>.

⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0097>. Action Point 10: “To promote corporate governance that is more conducive to sustainable investments, by Q2 2019, the

among other initiatives, the possible need to require corporate boards to develop appropriate due diligence throughout the supply chain. Yet, we believe that the Action Plan on Financing Sustainable Growth falls short of adequately incorporating human rights into its sustainability approach.

B) Trade and investment policies encouraging responsible business conduct

With regards to trade and investment relations with non-EU countries, the EU must ensure that its policies and the trade agreements it implements are not harmful to the enjoyment of human rights abroad, but are rather designed and implemented in order to consolidate human rights (Art. 21 TEU). The EU AP should therefore entail an explicit commitment to the improvement of human rights impact assessments ahead of trade negotiations, to ensure that trade and investment agreements entail adequate safeguards to address human rights risks related to business conduct or any negative impact the agreement may have on human rights; and to ensure that access to remedy is available to people, workers and communities affected by alleged human rights abuses by and linked to companies benefitting from the agreement. The EU AP should foresee the establishment of efficient monitoring and complaint mechanisms regarding those human rights risks and harms. Also, the EU AP should commit that the EU seeks to obtain from its partners the ratification of core human rights conventions and fundamental labour standards before the conclusion of trade and investment agreements to help creating a local environment conducive to responsible trade and investments.

The EU AP should ensure that investment agreements and policies respect and promote the UNGPs and fundamental labour standards. It should reflect an approach to investments that recalls the parties' obligation to protect against human rights abuses by third parties, including business enterprises (principle 1), and that obliges business enterprises to respect, not only domestic law, but the internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work (principle 12).

Commission will carry out analytical and consultative work with relevant stakeholders to assess: (i) the possible need to require corporate boards to develop and disclose a sustainability strategy, including appropriate due diligence throughout the supply chain, and measurable sustainability targets; and (ii) the possible need to clarify the rules according to which directors are expected to act in the company's long-term interest."

In addition, the EU AP should commit to a better implementation of principle 9 of the UNGPs, by explicitly ensuring adequate policy and regulatory space to protect human rights under the terms of such agreements.

A new investment framework should include a binding investors' due diligence obligation on human and labour rights, and environmental protection. Last but not least, the EU AP should commit the EU to ensure the multilateral discussions about the Multilateral Investment Court encompass the necessity to protect human rights and the environment.

C) Ensuring an enabling environment for human rights defenders and other civil society actors

All over the world, human rights defenders and other civil society actors are crucial to exposing human rights abuses, providing support to victims of abuse and identifying and mitigating adverse business-related human rights impacts. At the same time, there are increasing records of threats against, and attacks on, human rights defenders as well as worsening restrictions from both governments and private actors in retaliation against this work.⁹ Equally, the space for civil society to express concerns about adverse human rights impacts and to engage in the mitigation of harm is shrinking globally, for instance as activists face criminalization for engaging in public protest or so-called SLAPP lawsuits (**S**trategic **L**itigation **A**gainst **P**ublic **P**articipation) with the intention to intimidate and silence critics.

The EU AP should commit to concrete steps to ensure that human rights defenders and civil society actors working on issues of business and human rights are able to undertake their work in a safe and enabling environment free from hindrance and insecurity. It should outline how the EU Guidelines on Human Rights Defenders will be implemented as regards the specific situation of human rights defenders who work on business-related human rights issues, also with regard to the role of business in potentially contributing to human rights harm or in helping to protect defenders and the civic space. This should also address the particular challenges that women and children human rights defenders face.

The EU AP should further recognize the crucial role human rights defenders can play in human rights due diligence and in enabling business to engage with affected right-

⁹ See the 2017 Annual Report on 'Human Rights Defenders at Risk' by Frontline Defenders. <https://www.frontlinedefenders.org/en/resource-publication/annual-report-human-rights-defenders-risk-2017>.

holders and to understand human rights concerns. It should express the EU's expectation towards business to engage with, respect and support human rights defenders in line with the UNGPs. Furthermore, it should commit to engage with business on the basis of the forthcoming Guidelines for Business on engaging and respecting human rights defenders by the UN Working Group on Business and Human Rights.¹⁰

Finally, the EU should encourage Member States and partner governments to investigate any alleged threats, attacks and acts of intimidation against human rights defenders or civil society actors in connection with their work.

D) Basing endorsement of economic activity on human rights

Any direct or indirect endorsement of economic activities (financially or politically), within and outside of the EU must respect, integrate and promote international human rights law; business and human rights standards and core labour standards. This will, for instance, regularly require human rights impact assessments for economic or development policies (taking into account the rights and needs of vulnerable groups), agreements and projects, human rights due diligence requirements for business which benefit from these policies and projects, and awareness raising among policy makers and implementers.

The EU AP should in particular take into account the following:

- **Direct or indirect financing of economic activity** e.g. through the EIB or the European Fund for Sustainable Development, should be preceded by a human rights and environmental impact assessment of the prospective activity, as well as require ongoing human rights due diligence by companies and effective accountability mechanisms towards the investor and the public. Effective grievance mechanisms should be available. Responsible tax behaviour by European companies should be encouraged.
- The implementation of the UNGPs should be an objective of **economically driven diplomacy**, such as raw materials and energy diplomacy. The process of designing diplomatic strategies and policies should include a gender-sensitive human rights impact assessment and ensure the respect for, and the promotion of, human rights law and labour rights standards. The implementation of the

¹⁰ See UN Working Group on Business and Human Rights' website, <http://www.ohchr.org/EN/Issues/Business/Pages/HRDefendersCivicSpace.aspx>.

UNGPs should further become a standing agenda point of the EU's political dialogues (e.g. raw materials dialogue). These dialogues should include structured dialogue with civil society, including affected communities, workers' organisations and other rights-holders.

- **Practical support** to small and medium enterprises and business investments abroad, e.g. assistance to achieve compliance with national standards and legislation by EU delegations and Member State embassies, should encompass compliance with international human rights standards and take into particular account the rights and needs of vulnerable or discriminated groups.
- Inclusion of human rights due diligence standards in **procurement contracts** of all EU institutions and develop recommendations and implementing guidance to Member States on the uptake of human rights due diligence standards in procurement contracts (the Commission has already committed to do so as regards conflict minerals); furthermore inclusion of exclusion criteria for businesses that fail to comply with transparency and due diligence legislation in countries where they operate and for businesses convicted of criminal activities related to human trafficking and other human rights abuses.
- Establishment of mandatory human rights due diligence requirements for European investors as part of their obligations to analyse and mitigate environmental, social and governance impacts of the projects they invest in. This should be linked to the European Commission's Action Plan on Financing Sustainable Growth.¹¹
- **Training on international business and human rights and labour standards** for EU officials developing and implementing policies fostering economic activity.

¹¹ European Commission, Action Plan on Financing Sustainable Growth, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0097>.

III. PILLAR 3: ACCESS TO REMEDY

The EU AP should pay particular attention to the implementation of the third pillar of the UNGPs. Victims of corporate human rights abuses face considerable legal, procedural, and practical barriers to accessing justice and remedy.¹² In 2017, the FRA outlined these barriers and made recommendations concerning how to address them.¹³

The EU AP should lay out how these recommendations will be implemented.

In particular, measures of the EU AP should include, but not be limited to, measures:

- Tackling the overwhelming financial burdens faced by plaintiffs who seek reparations in European courts against companies allegedly involved in human rights abuses, in particular by making **collective redress mechanisms** available to victims of all harm resulting from alleged business practices. The EU should equally strengthen the standing of third parties and 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.
- As regards the **applicability of domestic law**, amending Rome II Regulation to allow exceptions to the rule that the applicable law is the law of the place where the harm occurred, such as on “public policy” grounds, through overriding mandatory laws or, in certain circumstance, by giving the claimant the ability to choose the law to apply to their claim. This should ensure that victims of alleged human rights harm have a fair possibility to access remedy, for instance as regards statute of limitation or the scope of damage compensation. In addition, the Commission should provide guidance how to apply these exceptions to make full use of the flexibility available to ensure adequate access to remedy for the victims of the alleged abuse.
- Encouraging Member States to adopt **procedural rules on discovery** allowing plaintiffs to access information in the possession of the defendant corporation or a third party that is relevant to the subject matter of the lawsuit, and sanction

¹² Amnesty International, Creating a Paradigm Shift, <https://www.amnesty.org/en/documents/pol30/7037/2017/en/>; International Corporate Accountability Roundtable, European Coalition for Corporate Justice, CORE (2013, ‘The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business’. Available at: <https://www.icar.ngo/publications/2017/1/4/the-third-pillar-access-to-judicial-remedies-for-human-rights-violations-by-transnational-business>.

¹³ Fundamental Rights Agency; Improving access to remedy in the area of business and human rights at the EU level, <http://fra.europa.eu/en/opinion/2017/business-human-rights>.

failures to produce the requested information. Such rules are typical of Common Law jurisdictions and give practical effect to the right to effective remedy.

- Further encouraging Member States to improve **access to evidence** for plaintiffs in court proceedings through changes to procedures on disclosure of evidence, for instance by establishing a rebuttable presumption that the relevant parent or controlling company is legally responsible for harm caused by the affiliated or controlled company.
- With the aim to ensure that victims of alleged human rights violations in context of business operations enjoy a fair trial or the right to access justice, reviewing the **Brussels I Regulation** to establish a *forum necessitatis*. EU courts should be able to exercise jurisdiction where there is no other reasonably available forum which could fairly exercise jurisdiction over a dispute.
- Explicitly allowing extra-territorial tort claims against European business entities for harm to life, limb or property to be eligible for support from any future created **EU public fund for litigation** in support of Fundamental Rights, as is currently under consideration.

IV. ENSURING TRANSPARENCY OF BUSINESS OPERATIONS

Human rights due diligence practices will become robust only if relevant data is publicly accessible. Lack of access to information is also one of the main obstacles to achieving remedy for human rights abuses in the global supply chain. The EU AP should therefore commit to put measures in place with the aim to create transparent supply chains of goods and services, ensuring access to information within the supply chain as well as for the public. In this context, the EU AP should commit to:

- The review of customs-related regulations to ensure that all companies that import goods into the EU are required to disclose the name and address of its direct supplier to the relevant customs authorities;
- Amending the Union Customs Code to determine that customs data is not confidential and can be disclosed publicly, for instance by the authorities, as is typical of other jurisdictions such as the United States;
- Taking steps to ensure that EU wide customs data will be available to the European Commission and publicly accessible;
- Taking steps to ensure that EU businesses and businesses operating in the EU publicly disclose supplier lists and report on steps to identify, prevent and mitigate risks of human rights abuses;
- Introducing an obligation for all EU businesses to publicly report their tax payments country-by-country with no exceptions – i.e. covering also European companies' activities in third countries.