

Wrocław, 26.05.2022

**Written input<sup>1</sup> in response to  
Multi-stakeholder Consultation on “Corporate Influence in the  
Political and Regulatory Sphere”<sup>2</sup>**

Under the UN Guiding Principles on Business and Human Rights (the UNGPs) business actors have an individual responsibility to respect human rights, irrespective of states’ abilities and/or willingness to fulfill their own human rights obligations. In addition, as specified in the Commentary to GP 11, business responsibility to respect human rights “exists over and above compliance with national laws and regulations protecting human rights.” This has been also endorsed by the UN Committee on Economic, Social and Cultural Rights in the General Comment No. 24 on State obligations under the ICESCR in the context of business activities<sup>2</sup>.

The above means that corporate actors must not exploit to the disadvantage of the rights-holders national systems where implementation and enforcement of human rights is weak, nor should they obstruct any state activity, including that of legislative-regulatory process, which seeks to fill regulatory gaps and safeguard better realisation of human rights. This responsibility corresponds with the extraterritorial obligation of States to fulfil human rights under the ICESCR and remains consistent with the Universal Declaration of Human Rights<sup>3</sup>.

Regarding the latter instance which is the focal point of our input, there is ample evidence for undue political influence by businesses in the process of deliberating and adopting mandatory human rights due diligence (HRDD) instruments at national, EU<sup>4</sup> and even UN level. This

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<sup>1</sup> The views expressed in this document are those of the authors alone and may not in any circumstances be regarded as the official position of the Adam Mickiewicz University.

<sup>2</sup> UN Committee on Economic, Social and Cultural Rights General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24, para. 5.

<sup>3</sup> Ibidem, para. 37.

<sup>4</sup> For the tactics described below applied in the context of preparing dear Directive on the EU-wide mandatory HRDD by the European Commission, see e.g. Off the hook? How business lobbies against liability for human rights and environmental abuses, publication by Corporate Europe Observatory, ECCJ and Friends of the Earth Europe, June 17th, 2021; <https://corporatejustice.org/wp-content/uploads/2021/06/OffThe-Hook.pdf>

undue political influence takes many forms, from direct opposing binding legislation<sup>5</sup>, through targeted activity to water down selected provisions or meaningful innovations of such legislation (e.g. on civil liability<sup>6</sup>, reversed burden of proof<sup>7</sup>, etc.) to the alleged commitment to the introduction of new binding instruments so as to retain influence and hollow their normative substance.<sup>8</sup> One of the most sophisticated forms of undue political influence by business actors is political agency of business and human rights (BHR) consultancy organisations that make ‘a business case for human rights to secure buy-in from corporations’, while presenting themselves as civil-society organizations to gain legitimacy.<sup>9</sup>

The above specified instances of undue political influence on public regulatory sphere are only exemplary and by no means exhaustive. We believe that all instances of this kind:

- cast a shadow over notably sincere efforts undertaken by many business actors to responsibly engage in policy making and regulatory process, including through elaborating alternative methods for achieving a given political objective;
- undermine the credibility of an open, constructive and participatory dialogue with business actors on the normative content of mandatory HRDD instruments;
- are above all inconsistent with the corporate responsibility to respect human rights set out by the UNGPs, whereby businesses have the responsibility to ‘avoid causing or contributing to adverse human rights impacts through their own activities’;

<sup>5</sup> Some business associations lobbied against even the less stringent first counterproposal to the Swiss Responsible Business Initiative which limited HRDD obligations to large companies and excluded civil liability for damage caused by a supplier. The finally adopted second counterproposal is widely criticized as mere transparency legislation with no public enforcement mechanism and limited practical utility. See N. Bueno and Ch. Kaufmann, ‘The Swiss Human Rights Due Diligence Legislation: Between Law and Politics’, *Business and Human Rights Journal*, 6 (2021), pp. 542–549, at 544, 547–48 respectively. See also D. Canapa, E. Schmid, E. Cima, ‘« Entreprises responsables » : limitations et perspectives’, (2021) 140(5) *Zeitschrift fuer Schweizerisches Recht/ Revue de droit suisse* 558–582

<sup>6</sup> See e.g. the statement by Johanna Kusch, coordinator of the civil society alliance “Initiative Lieferkettengesetz” to the German Supply Chain Act: <https://www.business-humanrights.org/en/latest-news/analysis-statement-by-german-initiative-lieferkettengesetz-not-there-yet-but-finally-at-the-start/>.

<sup>7</sup> The initial bill of the French Vigilance Law provided for a reversed burden of proof from victims to companies, but intense business lobbying eliminated this provision from the text finally adopted Cossart, Chaplier, and Beau de Lomenie, ‘The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All’, 2(2) *Business and Human Rights Journal (BHRJ)* (2017), at 317.

<sup>8</sup> E.g. the case of UK’s Modern Slavery Act for which a regulatory option of Bribery Act with extraterritorial corporate criminal liability for non-compliance were considered. Ultimately a less stringent model based on the California Transparency in Supply Chains Act was passed, whereby companies avoided mandatory liability for forced labour in their supply chain. This effect was achieved through the political agency of industry actors who supported public regulation so as to retain the status quo and have the existing private governance standards codified. See e.g. Le Baron and Rühmkorf, ‘The Domestic Politics of Corporate Accountability’ (2019) 17 *Socio-Economic Review* 719, at 736.

<sup>9</sup> See S. Deva, From ‘business or human rights’ to ‘business and human rights’: what next? in: S Deva & D Birchall (eds) *Research Handbook on Human Rights and Business.*, Edward Elgar Publishing, 2020, at 5-6.

- indirectly contribute to negative human rights, environmental or climate impacts i.a. by i) undermining public institutions' capacity to improve human rights environmental/climate protection and ii) obstructing the efforts and processes which could lead to their ceasing or phasing out
- undermine international cooperation and solidarity in the management of business and human rights challenges set out by the UNGPs and the corresponding obligations derived from Article 2(1) of the ICESCR<sup>10</sup>.

Therefore, we welcome the Working Group's initiative to draft a report addressing how businesses should account for their responsibility to respect human rights and exercise HRDD when engaging in activities in the political and regulatory sphere. Lobbying should be subject not only to a public register, but also to a code of conduct on fair lobbying in the respect of the public good. Criminal investigation and punishment of any form of bribery should be enhanced. Donations to political parties or organisations affiliated to them should be prohibited or at least subject to maximum ceilings and transparency obligations.

HRDD disposes of instruments which make it possible for business actors to identify, prevent, mitigate and bring to an end negative impacts on people and the planet resulting from or linked to their own activities. This applies also to the potential adverse impacts resulting from or linked to undue corporate political and regulatory influence.

In order to align business actors' political and lobbying activities with their responsibility to respect human rights, it is of vital importance that public authorities when dealing with business actors clearly communicate to them that **HRDD requires from them:**

- **firstly, to carry out the assessment of the structural impact of their activities, positive or negative, on the implementation of human rights by other state and non-state actors,**
- **secondly, to tailor their business plans and activities to the outcome of such an assessment,**
- **thirdly, to openly communicate to the public their involvement and position within the ongoing and future legislative and policy-making processes, in line with the transparency and corporate responsibility principles.**

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<sup>10</sup> UN Committee on Economic, Social and Cultural Rights General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24, para. 36.



We are convinced that by i) clear spelling out of the existence of this corporate responsibility under HRDD ii) requiring from businesses to deliver on the results of such impact assessment before they engage in the political and regulatory processes and iii) verifying compliance, and, if need be, declining or revoking the non-compliant business actor's mandate to engage in such processes could potentially prevent or at least mitigate undue corporate interference in political and regulatory sphere, and thus also possible negative impacts resulting from or linked to such interference.

*Dr Izabela Schiffauer,  
Dr Łukasz Szoszkiewicz  
Research Team Members of the Project:  
"Corporate HRDD - The Case of Implementation into National Law"  
Adam Mickiewicz University in Poznań, Poland*