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**ECCJ Submission to the call for inputs on “Policy coherence in government action to protect against business-related human rights abuses”**

**1. What do you consider to be the main challenges in achieving policy coherence at the national level in the implementation of the Guiding Principles? How have these challenges impacted on your work in the field of promoting business respect for human rights?**

ECCJ and other partner NGOs published an assessment of National Action Plans (NAPs) on business and human rights in 2017<sup>i</sup>. The report identified the inclusion of various government entities in the NAP’s drafting process as a positive trend towards greater policy coherence in this area. In all the assessed NAPs, the entity responsible for overseeing the drafting process was identified.

This positive development was nonetheless diminished by major shortcomings that most NAPs presented with respect to the content, as described in the following paragraphs.

Firstly, most NAPs focus on describing **past government’s actions and policies**. Even if a growing number of NAPs have recently laid out some forward-looking action points, these are in general overly vague. This makes it extremely difficult for stakeholders to adequately monitor the NAP’s implementation and hinders the capacity of the plan to ensure a systemic approach to business and human rights.

Moreover, most action plans fail to sufficiently **explore regulatory options** to prevent corporate-related human rights abuses and ensure access to remedy. The majority of assessed NAPs are primarily focused on a voluntary approach to the corporate responsibility to respect human rights. Most action points refer to actions involving awareness-raising, training, research, and other voluntary measures. This insufficient approach to the state regulatory capacity presents a major hurdle to address the persistent governance gaps in dealing with business human rights and environmental impacts.

The prevailing voluntary approach also stands in stark contrast to the “smart mix” principle established in the UNGPs, which requires states to act through “effective policies, legislation, regulations and adjudications” in order to meet their duty to protect against human rights abuse by third parties (Guiding Principle 1). Commentary to Guiding Principle 3 elaborates on this when saying that states “should consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights”<sup>ii</sup>.

Similarly, **Pillar III of the UNGPs on access to justice** remains the big absent in most NAPs. When it is mentioned, commitments in this area generally lack specificity. They moreover fail to seek to address domestic barriers to judicial remedy for victims of business-related human rights abuses which occur at home and abroad<sup>iii</sup>, while focusing on non-judicial mechanisms.

According to the OHCHR, policy coherence mandates all institutions that shape business conduct (including departments regulating labour conditions, corporate law, export and trade promotion...) to “observe the States’ human rights obligations with respect to protecting against negative impacts by business community”<sup>iv</sup>. The NAPs’ assessment described above reflects a

general situation of **asymmetry with respect to government regulation** of businesses' rights to conduct their operations, and of companies' duties to respect human and environmental rights in the course of such global operations. Companies enjoy a vast array of rights and benefits in the form of government promotion to business activities (including, for instance, public export and trade promotion, economic support through export credit agencies or diplomatic support to their global operations). These policies generally lack the adequate mechanisms to ensure that promoted business activities don't harm human rights. At the same time, most countries lack a coherent legal framework that clarifies companies' duties with respect to their human rights and environmental impacts throughout global business operations and supply chains. Victims of business-related harm face insurmountable obstacles to seek remedy in the country where the parent company is domiciled.

Finally, such a comprehensive and coherent approach is also missing at **the EU-level**. The European Commission has not developed the long-awaited EU Action Plan on Business and Human Rights that provides with a systematic a coherent approach to the UNGPs' implementation in the EU, despite numerous calls by the European Parliament, the Council and Member States<sup>v</sup>.

**2. Is there an effort on the part of the government to improve policy coherence in the area of business and human rights? If so, what is the nature of the process and has your organization been involved, for example, in the context of multi-stakeholder advisory bodies for developing and /or implementing National Action Plans or other policy frameworks? What were the challenges and opportunities encountered?**

Over the past years, some European and non-European countries<sup>vi</sup>, as well as the EU, have started to adopt or consider legislation imposing on companies requirements to prevent human rights and environmental impacts in the course of their global business operations<sup>vii</sup>. These laws give legal force to Human Rights Due Diligence (HRDD), recognized by the UNGPs as the procedure which enables companies to put their responsibility to respect human rights into practice.

Legislation in this field has evolved significantly, from a first generation of transparency laws that require companies to disclose their due diligence efforts<sup>viii</sup>, followed by a second generation which imposes a duty to implement full HRDD procedures<sup>ix</sup>, to the most recent generation of laws, in which this substantive HRDD obligation is coupled with corporate liability for harm caused in breach of a company's due diligence obligations<sup>x</sup>.

All these types of HRDD laws contribute to improve the protection of human rights against impacts by business actors, while they increase corporate transparency and pave the way to a more coherent and balanced legal framework. Nonetheless, only the so-called "third generation" of HRDD laws can meaningfully address the pressing governance gaps mentioned above, namely, the need to prevent human rights and environmental impacts linked to global business operations, and the need to address the multiples obstacles faced by victims of corporate malpractice to seek remedy.

The **French duty of vigilance law** (2017)<sup>xi</sup> is the most outstanding example to date. It requires large French companies to establish, implement and publish a vigilance plan with measures to adequately identify the risks and prevent serious harms to human rights, human health and

safety, and to the environment linked to their own activities and to the activities carried out by subsidiaries, subcontractors and suppliers. The law also establishes civil liability for harms resulting from a company's failure to observe its duty of vigilance.

In **Switzerland**, the First Chamber of the Parliament firstly approved in June 2018 a legislative proposal that requires large companies to undertake human rights and environmental due diligence according to the UNGPs and the OECD Guidelines<sup>xii</sup>. It also establishes civil liability for parent companies for harm caused by their subsidiaries. The bill was approved as a counter-proposal to the citizen Responsible Business Initiative<sup>xiii</sup>, which proposed changing the Constitution to introduce a duty of care for companies, including HRDD obligations and civil liability.

The French law and the Swiss bill strike a fair balance between the goals of preventing human rights abuses and improving access to remedy for victims. Both the UN Working Group on Business and Human Rights<sup>xiv</sup> and the UN Office of the High Commissioner on Human Rights have acknowledged the relevance of this legal model. In particular, the OHCHR has detailed that binding HRDD legislation can provide clarity with respect to companies' duties, create a level playing field, give human rights due diligence clear legal force and enhance access to remedy for victims of corporate misconduct<sup>xv</sup>.

Other countries are moving in the same direction. **The Netherlands** adopted a **Child Labour Due diligence Law** in May 2019. The Governments of Luxembourg, Germany and Finland have included in their government programmes a commitment to assess the adoption of HRDD legislation in the upcoming years. This growing trend towards regulation is a response to a clear public demand. Civil society organisations are conducting campaigns or advocacy actions in over 10 European countries<sup>xvi</sup>.

ECCJ members have been leading or are actively involved in these legislative developments. This includes, for instance, the French CSR Forum, the Swiss Corporate Justice Campaign, the Finnish mHRDD campaign (coordinated by ECCJ member Finnwatch), or the Luxembourg Platform for a duty of vigilance.

**3. Have improvements in policy coherence in the areas of business and human rights, including through development of National Action Plans or other policy frameworks, impacted on the human rights situation and, if so, in what ways? Please provide examples.**

The legislative developments mentioned above are very recent (the French duty of vigilance law only entered fully into force in 2019). Therefore, assessing their impact on the human rights situation of affected communities would be a premature exercise. There is nonetheless evidence that public debates on the topic and the adoption of laws such as the French one have already triggered a change in companies' perception of the relevance of taking the human and environmental impacts of their operations into account.

A growing number of companies are supporting this type of legislation<sup>xvii</sup>; for instance companies make up half of the over 140 members of the coalition calling for mandatory HRDD legislation in Finland, and the Swiss association of multinational enterprises (GEM) support the legislative proposal for mandatory HRDD and corporate liability in this country<sup>xviii</sup>.

**4. What do you consider to be the main challenges in the implementation of the Guiding Principles across the sub-national levels, for example in Federal States? NA**

**5. Are there any linkages made to encourage policy coherence in promoting responsible business conduct as part of the efforts to engage the corporate sector in the implementation of the Sustainable Development Goals?**

The 2030 Agenda for Sustainable Development calls on “all businesses to apply their creative and innovation to solving sustainable development challenges”. Private companies are indeed gaining a bigger role in the attainment of the Sustainable Development Goals (SDGs), as reflected in the European Consensus for Development (2017)<sup>xi</sup>.

This growing attention to the role of private companies in the sustainability agenda has not however been accompanied with the needed mechanisms to guarantee that companies *respect* human rights. The European Commission’s plan to implement the SDGs has overlooked the urgent need to address the negative impacts the private sector has on people and the planet<sup>xx</sup>.

**Legislation that holds companies accountable** for the impact of their global operations on human rights and the planet is a pre-requisite for the attainment of the SDGs, in particular for SDG 12 on ensuring sustainable consumption and production patterns<sup>xxi</sup>. The fact that the outgoing Commission acknowledged this in its recent reflection paper “Towards a sustainable Europe” is a positive sign. In this paper, the Commission nevertheless fell short of taking into account recent legal developments and political debates at national and EU level as mentioned above<sup>xxii</sup>. This approach stands in contradiction with the institution’s own efforts to explore options for EU mHRDD legislation as part of its 2018 Action Plan on Fostering Sustainable Growth<sup>xxiii</sup>.

**6. Are there examples of lessons learned from policy coherence in the implementation of other areas of social or environmental policy that could be beneficial in the area of business and human rights?**

A 2012 report commissioned by ECCJ and others showed that governments in diverse jurisdictions are already using a **great variety of regulatory tools** to ensure that business act with due diligence with regards to a range of policy goals, such as consumer or environmental protection, the fight against money -laundering or human trafficking<sup>xxiv</sup>. These regulatory tools have required business enterprises to integrate considerations that are not purely short-term or profit-oriented into their decision-making processes.

Existing regulatory models can be used to draw lessons on how to achieve a more balanced economy and policy coherence. Moreover, they offer opportunities to integrate greater human rights protection into their due diligence regimes. States should explore the full range of regulatory options that make use of due diligence when drafting regulations that require business respect human rights.

**7. Please provide any other relevant information relating to policy coherence to protect against business-related human rights abuse that you think that the Working Group should take into account in its preparation of its report to the General Assembly.**

**ENDNOTES:**

<sup>i</sup> Reference to NAPs' assessment in this section refers to the publication ICAR, ECCJ, De Justicia, "Assessment of existing national action plans (NAPs) on business and human rights", August 2017, Update. Available on [ECCJ website](#).

<sup>ii</sup> The state duty to protect is a proactive obligation, which means that governments should go beyond the enforcement of the existing framework. Thus, states should "periodically assess the adequacy of such laws and address any gaps" in light of changing circumstances. See in this respect, Shift, "Fulfilling the State Duty to Protect: A Statement on the Role of Mandatory Measures in a "Smart Mix", February 2019. Available on [Shift website](#).

<sup>iii</sup> A summary of main barriers to access remedy from business-related abuses and policy recommendations are included in 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 abuses", 2014. Available [here](#).

<sup>iv</sup> OHCHR, "Frequently asked questions about the Guiding Principles on Business and Human Rights", 2014. Available here: [https://www.ohchr.org/Documents/Publications/FAQ\\_PrinciplesBusinessHR.pdf](https://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf)

<sup>v</sup> See ECCJ, "Policy evidence for mandatory HRDD legislation, Update May 2019", available [here](#).

<sup>vi</sup> On non-European States, see California Transparency in Supply Chains Act 2010 (US); Dodd-Frank Act, sec 1502, 2010 (US).

<sup>vii</sup> The [BHRinlaw.org](#) website provides a global overview of legislative and case-law developments in the field of mandatory Human Rights Due Diligence and parent company liability.

<sup>viii</sup> Example of transparency or reporting frameworks in Europe are the [UK Modern Slavery Act](#) (2015), Provision 54, Transparency in Supply Chains, and the [EU Non-Financial Reporting Directive](#) (2014).

<sup>ix</sup> See for instance, the [Dutch Child Labour Due Diligence Law](#), adopted by the Senate in May 2017; the [Conflict Minerals Regulation](#) (2017) or the [EU Timber Regulation](#) (2010).

<sup>x</sup> The [French Duty of Vigilance Law](#) (2017) is the most notorious example, while Switzerland is also discussing a [legislative proposal](#) which establishes mandatory HRDD and corporate liability.

<sup>xi</sup> For an explanation of the law, analysis and other materials, see France country page in [bhrinlaw.org](#).

<sup>xii</sup> See "[Another step towards the adoption of a HRDD bill in Switzerland](#)", July 2018, corporatejustice.org. [more information at [BHRinLaw.org](#)]

<sup>xiii</sup> Responsible Business Initiative, Text and explanations [more information at [BHRinLaw.org](#)]

<sup>xiv</sup> Report of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises, "[Corporate human rights due diligence – emerging practices, challenges and ways forward](#)", July 2018.

<sup>xv</sup> Report of the UN High Commissioner on Human Rights, "[Improving accountability and access to remedy for victims of business-related human rights abuse: The Relevance of human rights due diligence to determinations of corporate liability](#)", June 2018.

<sup>xvi</sup> There are active campaigns in France (to follow the implementation of the duty of vigilance law), the UK, Luxembourg, Switzerland and Finland. An overview of civil society actions is also in [bhrinlaw.org](http://bhrinlaw.org).

<sup>xvii</sup> [List of large businesses and associations that support human rights due diligence regulation](#), BHRRRC, 2019.

<sup>xviii</sup> Association of Multinational Enterprises (GEM), "The Groupement des Entreprises Multinationales (GEM) welcomes the adoption by the National Council of the counter-project to the initiative for responsible companies. (...) This legislation would benefit the attractiveness of Switzerland as a business location. (...) It now calls on the Council of States to give its assent." Translation of [French press release 15.7.18](#).

<sup>xix</sup> The new European Consensus on Development – EU and Member States sign joint strategy to eradicate poverty, July 2017. Available [here](#).

<sup>xx</sup> See "EU Action Plan on SDGs overlooks human rights risks of corporate activity", ECCJ et al, 2016. Available [here](#).

<sup>xxi</sup> In this respect, see CONCORD, "[A 10-point roadmap for Europe on the role of the private sector in development](#)", 2017.

<sup>xxii</sup> See "[Commission reflection paper on Sustainable Europe lacks determination on Responsible Business Conduct](#)", ECCJ, 2019.

<sup>xxiii</sup> See EC's [Action Plan Financing Sustainable Growth](#) (2018) including a commitment to assess by 2019 the possibility of introducing supply chains due diligence requirements for corporate boards. To fulfil this commitment, the institution commissioned the British Institute of International and Comparative Law (BIICL) a research into legal developments on mHRDD and regulatory options for EU legislation. See [BIICL website](#).

<sup>xxiv</sup> De Schutter et al, "Human Rights Due Diligence: the Role of States", Commissioned by ECCJ. ICAR, CNCA, December 2012. Available [here](#).