

United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises

Via email: wg-business@ohchr.org

Re: CALL FOR INPUT – Connecting the business and human rights and anti-corruption agendas

February 21, 2020

Dear Working Group Members,

1. In response to the call for inputs by the UN Working Group on the issue of human rights and transnational corporations and other business enterprises (the “Working Group”) regarding the Working Group’s ongoing activities and multi-stakeholder consultation on “Connecting the business and human rights and anti-corruption agendas”, I respectfully submit my comments relating to question four of the Working Group’s Concept Note:

“4. How can anti-corruption compliance and human rights due diligence be better coordinated within companies as part of an overall approach to responsible business conduct? What are examples of good practice?”

Background

2. As recognized by the Human Rights Council and the Office of the High Commissioner for Human Rights (OHCHR) and the Working Group, corruption involving the private sector both directly and indirectly impacts and harms the enjoyment of human rights. I am very grateful for the Working Group’s decision to highlight the connection between corruption and human rights violations as this nexus is of practical relevance for corporations, and connecting them can be a step towards more values-driven corporate compliance that embeds an ethical culture of integrity and respect for human rights throughout businesses.
3. My comments are primarily informed by the experience and knowledge I acquired in 2014-2016 while preparing and authoring a Good Practice Note on behalf of the UN Global Compact on “*Linking Human Rights and Anti-Corruption Compliance*”, supervised by Anthony Ewing, lecturer in Law at Columbia Law School and member of the UN Global Compact’s Human Rights and Labour Working Group. The Good Practice Note (the “GPN”) was a part of a series of good practice notes endorsed by the UN Global Compact’s Human Rights and Labour Working Group which sought to identify general approaches that have been recognized by a number of companies and stakeholders as being good for business and good for human rights. During our work with the GPN, we interviewed experts in the areas of business and human rights, anti-corruption and compliance as well as several representatives of multinational companies, and gained insight into both good practices and further challenges in the field.
4. My submission aims to draw attention to certain key findings from our work with the GPN and subsequently as they relate to question four of the Concept Note, with the hope that

they can assist the Working Group in its ongoing activities. Along with this submission, I am also sending our GPN which provides more information on most of the points raised here.

The case for coordinating anti-corruption compliance and human rights due diligence

Increasingly, corporate compliance needs to consider human rights

5. The UN Guiding Principles on Business and Human Rights (the “Guiding Principles”) are currently being implemented through a growing body of legislation, regulations and initiatives that call for human rights due diligence and / or reporting.¹ As the legal requirements on companies to respect societal values are catching up with the publicly perceived expectations on them to do so, corporate human rights obligations are shifting from “soft” to “hard” law and companies are no longer only expected to contribute to sustainable development and ethical business through voluntary initiatives.
6. To be vigilant about business relationships and operations has become a *necessity* for companies, as failing to respect human rights can now involve not only reputational but also financial and legal risks. Through the growing body of laws and policy, companies are increasingly expected to “know and show” that they respect human rights throughout their operations by implementing measures similar to those prescribed for anti-corruption compliance, such as due diligence, risk-assessment and self-regulation.² In fact, according to the Guiding Principles, companies should – given the “expanding web of potential corporate legal liability” – treat the risk of being complicit in gross human rights abuses as a *legal compliance issue* wherever they operate.³
7. The “compliance”-system prescribed by the Guiding Principles is not intended to be limited only to legal departments of companies. Rather, human rights policy commitments and procedures have to be embedded across all relevant departments and functions of a company.⁴ As an ultimate goal human rights should be built into the very core of a company by emphasizing rules and values in a way that influences positive behavioral change and promotes an ethical corporate culture.

Best practice anti-corruption compliance also focuses on corporate culture

8. As a result of the consistent implementation of robust national and international anti-corruption regulations requiring companies to prevent, detect and respond to corruption throughout their global operations (bolstered by vigorous regulatory enforcement), most larger companies have today developed and implemented anti-corruption compliance programs. While these programs vary between companies, a consensus on best practices has emerged, largely as a result of the elaborate guidance published by national enforcement agencies and international organizations providing companies with guidelines on developing programs that can demonstrate a genuine dedication to prevent bribery throughout their operations.

¹ See e.g. California Transparency in Supply Chains Act of 2010; the EU Non-Financial Reporting Directive (2014/95/EU); Section 54 of the UK Modern Slavery Act 2015; French Law No. 2016-1691 (“Sapin II Law”).

² The Guiding Principles, Commentary to Principle 15 and *ibid*.

³ The Guiding Principles, Principle 23 and Commentary to Principle 23.

⁴ See e.g. the Guiding Principles, Principle 16(e) and Commentaries to Principles 16 and 19.

9. The ultimate aim of these best practice compliance programs is to go beyond risk mitigation and help companies internalize ethical values in corporate culture by promoting positive behavioral change.⁵ The best practices that have emerged around anti-corruption compliance are hence noteworthy for not only promoting compliance as a risk mitigation tool, but also as a means to *embed ethical values in corporate culture*. This makes best practice anti-corruption compliance an interesting model for how compliance can play a role in creating a values-driven approach to corporate governance, and can make such systems a valuable resource for companies in developing human rights due diligence systems.

Coordinating anti-corruption compliance and human rights due diligence can result in benefits to both and enhance overall responsible business conduct

10. In light of the hardening of human rights obligations and the shared need for an overall ethical corporate culture for effective compliance in both areas, there are practical advantages to be gained by coordinating human rights due diligence with anti-corruption compliance systems in some circumstances.
11. To meet the corporate responsibility to respect human rights, the Guiding Principles envision a system of measures that together make up three pillars of policies and procedures appropriate to the company's size and circumstances – a system that bears striking resemblance to best practice anti-corruption compliance systems.⁶ In implementing such a system, companies do not necessarily need to reinvent the wheel; according to the Guiding Principles, human rights due diligence can be integrated within existing corporate risk-management systems provided they go beyond identifying risks to the company itself and also consider rights-holders.⁷ Therefore, companies with successful anti-corruption compliance systems can seek support and learnings from these structures when translating the values that underpin the Guiding Principles into specific operational measures.
12. Anti-corruption compliance systems within companies can also benefit from being more connected to its human rights procedures. Building a meaningful case for integrity beyond mere compliance is a key focus of today's anti-corruption compliance teams.⁸ Extraterritorial anti-bribery laws such as the US Foreign Corrupt Practices Act of 1977 and the UK Bribery Act 2010 have created a de facto global standard that requires companies to avoid corruption wherever they operate. As a result, companies need to uphold a standard of integrity across their operations that is broader than one that merely complies with the minimum requirements under local laws.
13. Today, both human rights and anti-corruption efforts are to a large extent modeled on similar principles – do no harm standards that require businesses to refrain from violating

⁵ On the importance of promoting a corporate culture that effectively prevents and resists corruption, see e.g. Article 10 of the ICC Rules on Combating Corruption (2011) and Principle 2 of the UK Ministry of Justice's "The Bribery Act 2010 Guidance"; §8B2.1. of the U.S. Sentencing Commission Guidelines Manual; Transparency International UK, "UK Bribery Act Adequate Procedures: Guidance on good practice procedures for corporate anti-bribery programmes" (2010) p. 13; Paul H. Cohen et. al. "International Corruption" (Sweet & Maxwell 2010) pg. 358-360.

⁶ For further on the similarities between these systems, see the GPN pg. 7-8.

⁷ The Guiding Principles, Commentary to Principle 17.

⁸ Alison Taylor, "Compliance Alert: Anti-corruption and human rights efforts will converge in 2020", The FCPA Blog, January 3, 2020.

a certain standard of care. Corporate anti-corruption efforts can therefore benefit from being linked to human rights due diligence efforts, which focus on the broader impacts on stakeholders and can hence serve to detect risks beyond those identified from mere tick-the-box exercises. Furthermore, support for anti-corruption among employees and other stakeholders, that goes beyond merely regarding it as an imposed bureaucratic exercise, can be encouraged by providing an understanding of how corruption causes real-life human rights impacts in addition to legal risks to the company itself.⁹

Examples of good practices connecting human rights and anti-corruption

14. Some companies have started taking into consideration the intrinsic linkage between corruption and human rights risks and coordinating their human rights due diligence and anti-corruption compliance measures where appropriate. Examples of how this is being done are listed in the GPN and some are highlighted below.

Leveraging top-level support

15. As with all compliance, a key component is to have the senior management's full support as "*tone from the top*" is what will resonate throughout the company's operations. In companies where top level support for anti-corruption efforts is strong (many times being the result of an incident or scandal that has involved reputational, business or legal consequences), such support could be drawn upon in seeking to advance overall corporate respect for societal values, including the respect for human rights. Momentum for ethical business practices can be leveraged to raise the necessary resources to advance human rights due diligence and sustainability within an organization by linking human rights to anti-corruption and pointing out that they go hand in hand.

Integrate human rights and anti-corruption documents and procedures

16. Some companies are integrating human rights with anti-corruption in their compliance systems to generate certain *efficiency gains*. Examples of where companies are doing this include codes of vendor conduct, contract clauses (such as supplier agreements), internal reporting (where the different departments jointly report to the board and executive committee) or externally through websites and reports, as well as training modules that include real-life scenarios, visual examples and role playing where employees are confronted with issues involving both human rights and corruption risks (which has e.g. been done in the extractive industry where many companies have experienced how these issues thrive in the same climate). Companies who are employing such practices also report that such joint efforts help reduce compliance fatigue (where employees and vendors feel overwhelmed by different trainings and codes from different departments).

Coordinate assessment of external operating risks

17. Human rights and anti-corruption can be integrated in areas relating to external operating risks such as geographical and regional risk assessments, business partner screening, procurement questionnaires and non-financial auditing or human rights impact assessments and grievance mechanisms. Apart from serving as a good starting point to initiate dialogue with business partners on human rights issues, increased *information-*

⁹ *Ibid.*

sharing between departments involved in such integrated practices can help pick up on issues that would have fallen through the cracks if the connection between corruption and negative human rights impacts (and their causal relationship) had not been made. Integrating anti-corruption into the more robust stakeholder dialogues involved in human rights impact assessments (which usually involve direct engagement with staff and external stakeholders such as local community members) can reveal conditions that should trigger red flags for anti-corruption risk assessment. This can serve to mitigate overlapping harmful effects or risks. For example, a factory that has been found to have poor working conditions involving risks to worker safety can be indicative of labor inspectors having been paid bribes to pass factory inspections.

18. Another way in which coordinated systems are being used to detect external operating risks is through extending whistleblower hotlines to pick up human rights related issues and training personnel on how to properly respond to such reports and refer them to the appropriate channels.

Cautionary notes

19. When considering how anti-corruption compliance and human rights due diligence can be better coordinated within companies as part of an overall approach to responsible business conduct, a few key precautions should be kept in mind.

Always be mindful of the differences

20. There are significant distinctions between human rights due diligence and how anti-corruption compliance is traditionally carried out that make certain areas of compliance unsuitable for coordination with human rights due diligence, or at least means coordination efforts should be undertaken with caution.
21. Human rights due diligence is an *ongoing process* and tracking and monitoring has to be carried out continuously. This is different from, at least, transactional anti-corruption compliance where due diligence, auditing and monitoring are usually carried out upon the occurrence of a specific event. Furthermore, anti-corruption efforts are usually more focused on certain *conduct* while human rights due diligence is more focused on the *harm* to rights holders.
22. Another important difference is remediation procedures, where companies have a zero-tolerance policy when it comes to bribery. Remedies for breaches of anti-corruption standards are often focused on regulatory aspects and whether to terminate a particular employee or business relationship. Such an approach may not be possible or advisable for human rights impacts where the encouraged approach is rather to “lean in” and work to overcome such harmful practices. Corporate procedures for human rights remediation may include the termination of a relationship as one method, but only after having considered whether the company can build the capacity of the partner to better respect human rights. Human rights remediation will also need to include a dialogue with stakeholders whose rights are affected or potentially affected by the company’s operations and the consideration of compensation to affected groups.

Avoid a compliance-driven approach

23. It is important to be mindful that human rights due diligence does not become a compliance-driven (rather than values-driven) exercise in a company. As a general rule, given how most anti-corruption compliance systems today are organized, to advise a company to treat its responsibility to respect human rights like it does its anti-corruption responsibilities would be a mistake. However, drawing on lessons from *best practice* anti-corruption compliance systems, with an emphasis on creating a corporate culture of responsible business practice to be implemented from the senior management level and across the organization, can help a company in implementing the responsibility to respect human rights into its operational measures.

No “one size fits all”

24. It is also always important to keep in mind that anti-corruption compliance, human rights due diligence and the strategies for coordinating them, like with all corporate systems and procedures, must be tailored to the individual company and will depend on the company’s size, industry, location and circumstance. There is no “one size fits all” or “easy fix” and using the emerging learnings on coordinating these areas as such would be a mistake.

Human rights expertise is necessary, but avoid a siloed approach

25. A point that came up during our interviews with sustainability departments was the need for human rights expertise and a comprehensive understanding of an individual company’s human rights impacts and responsibilities in order to help companies align their policies and procedures with the responsibility to respect human rights.

26. However, certain companies trying to coordinate anti-corruption compliance and human rights due diligence within their organizations reported experiencing some backlash from representatives of different departments of a company displaying somewhat “territorial” attitudes and reluctance to “sharing” their respective areas. These companies primarily described challenges in expanding the focus of their staff to view human rights not only as a matter of sustainability or ethics, but also one of compliance and risk management.

27. According to the Guiding Principles, a company’s human rights policy commitment needs to be embedded across all functions of a company, which otherwise may act without awareness or regard for human rights.¹⁰ To achieve this, effective communication and sharing the responsibility for human rights is essential. It is important to avoid a siloed approach where the human rights due diligence process becomes insulated from other operational areas of a corporation, particularly in areas where with which there is much overlap such as anti-corruption and environmental issues. To encourage increased interaction and communication and break down such siloes, it is important to enhance trust, mutual respect and continued knowledge building. Companies need to be flexible and open to recognizing the synergies between human rights and other areas of compliance such as anti-corruption.

¹⁰ The Guiding Principles, Commentary to Principles 16 and 19.

Concluding remark

28. As a final point, it is important to note that during our work with the GPN, we did not see anything that pointed to a trend towards developing one single integrated compliance system for both human rights and anti-corruption. Rather, what emerged were potential ways to improve and optimize existing systems by increasing collaboration, communication and information sharing between departments and, in some circumstances, integrate certain procedures to create overall responsible business practices – while always being mindful of the differences and without seeing such coordination as a quick-fix.

I welcome the opportunity to assist the Working Group further in its efforts in any way I can. Please feel free to contact me with any questions for additional information.

Sincerely,

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