

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

REFERENCE: SPB/SHD/NF/GF/ff

22 October 2020

Dear Commissioner Reynders,

The [United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises](#) (“Working Group”) welcomes your commitment to a proposed European Union (EU) Directive on human rights and environmental due diligence in 2021 as part of the EU’s COVID-19 recovery package and the European Green Deal.¹ The Working Group is pleased to share our recommendations with you regarding key elements to be included in the proposed Directive, as well as the process by which it will be developed.

The Working Group is a group of five independent experts appointed and mandated by the United Nations Human Rights Council (resolutions 17/4, 26/22, 35/7, and 44/15) to promote dissemination and implementation of the [UN Guiding Principles on Business and Human Rights](#), which provide the globally recognized and authoritative framework for the respective duties and responsibilities of governments and business enterprises to identify, prevent, mitigate, and address business-related human rights impacts. The expectations set out in the Guiding Principles have been integrated in other leading standards for responsible business conduct, including the [OECD Guidelines for Multinational Enterprises](#).

Background

Since the unanimous endorsement of the Guiding Principles by the UN Human Rights Council in 2011, a new era of socially responsible and sustainable business has taken shape and continues to build momentum. Under the Guiding Principles, all business enterprises have a responsibility to respect human rights,² and the process of continuously

¹ We also note the draft report from the European Parliament’s Committee on Legal Affairs with recommendations to the European Commission on corporate due diligence and corporate accountability, available at https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf.

² Guiding Principles 11-24, available at https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf; Office of the High

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conducting human rights due diligence (HRDD)³ is a core requirement for businesses in fulfilling that responsibility.

HRDD is a key tool in the global efforts to build forward better in the wake of the COVID-19 pandemic.⁴ HRDD enables companies to focus their attention on the most severe human rights risks and identify actual or potential risks to people as part of any response to the pandemic.

The Guiding Principles also clarify that States' international human rights law obligations include the duty to protect against human rights abuse by business.⁵ The Guiding Principles set out the legal and policy implications for how to operationalize this duty through a "smart mix" of measures that include legally binding measures,⁶ particularly where voluntary measures continue to leave significant gaps in human rights protections.⁷

A wave of responsible business legal requirements is impacting markets across the world, with mandatory human rights due diligence (mHRDD) regimes already in place or in development⁸ across a growing number of jurisdictions, particularly in the EU context. Increasingly, businesses and investors,⁹ alongside civil society organizations,¹⁰ are calling for effective mHRDD legislation.

Recommendations

In light of the Working Group's prior work related to mHRDD, we recognize that legislative initiatives like the one proposed at the EU level are critical for speeding and scaling up business respect for human rights. In particular, we have highlighted key features of HRDD and how stakeholders can and should contribute to effective HRDD in our [report to the 2018 UN General Assembly](#). We also point to our other relevant work throughout the recommendations below.

Commissioner for Human Rights (OHCHR), "The Corporate Responsibility to Respect: An Interpretative Guide," available at www.ohchr.org/Documents/publications/hr.puB.12.2_en.pdf.

³ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 73th session of the UN General Assembly, A/73/163, "Corporate human rights due diligence – emerging practices, challenges, and ways forward," July 2018, available at https://ap.ohchr.org/documents/dpage_e.aspx?si=A/73/163. For more on the Working Group's reports and efforts in this area, see

<https://www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDDueDiligence.aspx>.

⁴ See the Working Group's statement, "Ensuring that business respects human rights during the Covid-19 crisis and beyond: The relevance of the UN Guiding Principles on Business and Human Rights," available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25837&LangID=E>. See also the Working Group's recommendations, "The business and human rights dimension of sustainable development:

Embedding 'Protect, Respect and Remedy' in SDGs implementation," available at https://www.ohchr.org/Documents/Issues/Business/Session18/InfoNoteWGBHR_SDGRecommendations.pdf.

⁵ Guiding Principles 1-10.

⁶ Commentary to Guiding Principle 3.

⁷ As recognized by the recent European Commission study on due diligence requirements through the supply chain, available at <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>.

⁸ For a mapping of these developments, see the Business & Human Rights Resource Centre (BHRCC)'s mHRDD portal, available at <https://www.business-humanrights.org/en/mandatory-due-diligence>.

⁹ See BHRCC's mapping of companies and investors in support of mHRDD, available at <https://www.business-humanrights.org/en/big-issues/mandatory-due-diligence/companies-investors-in-support-of-mhrdd/>.

¹⁰ See, e.g., "An EU mandatory due diligence legislation to promote businesses' respect for human rights and the environment," <https://corporatejustice.org/principal-elements-of-an-eu-mhrdd-legislation.pdf>.

In addition, we take note of the Office of the High Commissioner for Human Rights (OHCHR)'s June 2020 [issues paper](#) outlining [key considerations](#) for policymakers in the EU and elsewhere to consider in developing mHRDD regimes, as well as the recommendations submitted to the European Parliament's Subcommittee on Human Rights in [two briefing papers](#).

We have set forth below ten key recommendations for the EU as it develops the proposed Directive. These preliminary recommendations build on our past and ongoing work.

1. The Directive should be based on the key expectations set out in the Guiding Principles.

Under Guiding Principles 17-21, HRDD is a way for enterprises to proactively manage potential and actual adverse human rights impacts with which they are involved. The four core components of HRDD under the Guiding Principles are:

- a. Identifying and assessing actual or potential adverse human rights impacts that the business 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;
- b. Integrating findings from impact assessments across relevant business processes and taking appropriate action according to its involvement in the impact;
- c. Tracking the effectiveness of measures and processes to address adverse human rights impacts in order to know if they are working; and
- d. Communicating on how impacts are being addressed and showing stakeholders – in particular affected stakeholders – that there are adequate policies and processes in place.

The prevention of adverse impacts on people, including in relation to impacts on the planet, is the main purpose of HRDD. It concerns risks to people, not risks to business, although there may be convergence between the two. HRDD should be ongoing, as risks to people may change over time, and be informed by meaningful stakeholder engagement, in particular with affected stakeholders, human rights defenders, trade unions, and grassroots organizations.

The Guiding Principles are built around the concept of proportionality: the higher the risk, the more complex the processes. The Directive should therefore also clarify the expectation that business enterprises exercise heightened due diligence in conflict-affected contexts because of the increased risk of being involved in serious human rights abuses. This is set forth in Guiding Principle 7, which notes that, because of this increased risk, “States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by...[e]nsuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.” The Working Group has elaborated on this in its most recent report to the UN General Assembly, which focuses on heightened action by States and heightened due diligence by business in conflict and post-conflict contexts.¹¹

¹¹ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 75th session of the UN General Assembly, A/75/212, “Business, human rights and conflict-affected regions: towards heightened action,” Oct. 2020, *available at* <https://undocs.org/en/A/75/212>.

2. The Directive should be based on meaningful and inclusive stakeholder consultations.

The development and implementation of the Directive at the EU level should involve proactive and ongoing consultation with affected and potentially affected rights-holders (including but not limited to communities, workers, trade unions, civil society groups, women’s organizations, human rights defenders, and Indigenous Peoples) and other stakeholders across the full value chain, meaning both within the EU and also in connection to business activities, trade, and investment linked to the EU but based in other regions.

Consultation should also include government and business actors from across contexts, including national human rights institutions, business associations, and multi-stakeholder initiatives, to take into account potential unintended consequences while seeking to design effective measures that contribute to better prevention of adverse human rights impacts on the ground.

We point you to the process recommendations for effective stakeholder engagement and consultation found in the Working Group’s [Guidance on National Action Plans on Business and Human Rights](#) for further support in this area.¹²

3. The Directive should cover all internationally recognized human rights and all types of adverse human rights impacts.

In line with Guiding Principle 12, the Directive should cover, at a minimum, the human rights outlined 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. It should also consider covering other international human rights instruments and EU-level human rights instruments and standards.

The Directive should in particular address issues of vulnerable groups, including human rights risks in relation to gender,¹³ Indigenous Peoples, human rights defenders,¹⁴ religious and ethnic minorities, racial discrimination, and LGBTI+ issues. The Working Group has elaborated on the critical need to address these issues and focus on these vulnerable groups in our [country visit reports](#) and in reports to the UN Human Rights Council such as our recent report focused on the Guiding Principles and gender.¹⁵

The Directive should also aim to address all potential or actual adverse impacts, not just severe impacts, and it should incorporate Guiding Principle 24, which states: “Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.”

¹² For more on the Working Group’s report and efforts in this area, see <https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>.

¹³ For more on the Working Group’s reports and efforts in this area, see <https://www.ohchr.org/EN/Issues/Business/Pages/GenderLens.aspx>.

¹⁴ For more on the Working Group’s report and efforts in this area, see <https://www.ohchr.org/EN/Issues/Business/Pages/HRDefendersCivicSpace.aspx>.

¹⁵ See, e.g., Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 41st session of the UN Human Rights Council, A/HRC/41/42, “Gender dimensions of the Guiding Principles on Business and Human Rights,” May 2019, available at https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/41/43.

4. The Directive should apply across value chains, not just within supply chains.

The Guiding Principles state that “the responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.” The commentary to Guiding Principle 13 states that “a business enterprise’s ‘activities’ are understood to include both actions and omissions; and its ‘business relationships’ are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.”

The responsibility of a business enterprise to identify, prevent, mitigate, and account for how it addresses potential and actual impacts on human rights therefore extends not only to its relationships with first-tier suppliers, but to business relationships along the whole of its value chain, including business connections in the extended supply chain, business relations using products and services, joint venture partners, corporate lenders, project financiers, investors, and governments. Thus, the Directive should align with the approach of the Guiding Principles and not impose a definition of responsibility for respecting human rights and carrying out HRDD that is strictly limited to an enterprise’s own activities and first-tier suppliers. The scope of HRDD expected under the Guiding Principles may be broader than the scope of a company’s legal liability for negative human rights impacts, and the nature of legal obligations and liability will therefore need to be carefully calibrated to achieve desired outcomes.¹⁶

5. The Directive should cover all EU undertakings (i.e. companies and other forms of business enterprises incorporated or domiciled in an EU Member State) and non-EU (i.e. foreign) business enterprises which sell goods or services in the EU, and it should apply to both groups’ extraterritorial operations and business relationships.

As stated in Guiding Principle 14, “the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure.” While recognizing the implementation challenges for small and medium enterprises (SMEs), any legislation should ideally reflect the full scope of this expectation.

If the Directive’s scope starts with a specific number of large businesses only, there should be a clear and transparent timeline for extension to all EU undertakings and non-EU (i.e. foreign) business enterprises which sell goods or services in the EU, including their extraterritorial operations and business relationships. Examples of other legislative developments that have included extraterritorial reach include the French duty of vigilance law and the Modern Slavery Acts in the United Kingdom and Australia.

Regarding the unique implementation challenges associated with SMEs and/or specific sectors such as the financial industry, the Directive could incorporate a phased approach allowing certain businesses to start implementing the full set of responsibilities at a later but clearly defined stage, with targets and monitoring measures linked to key

¹⁶ The Working Group has elaborated in these points in our July 2018 report to the UN General Assembly, available at https://ap.ohchr.org/documents/dpage_e.aspx?si=A/73/163.

performance indicators. The Working Group has previously authored a report looking at the challenges faced by SMEs,¹⁷ as well as examples of good practice and tools that can be used to help SMEs concretely address these challenges.¹⁸ As Guiding Principle 3 notes, States can play a facilitative role in helping SMEs develop human rights due diligence practices.

6. The Directive should apply to government as an economic actor.

The Guiding Principles clarify that all States are expected to ensure protection of and respect human rights in their role as economic actors.¹⁹ This aspect of the State duty to protect human rights – the “State-business nexus” – covers policy areas such as management of State-owned enterprises,²⁰ export credit, official investment insurance, and public procurement. The Guiding Principles emphasize that States should both integrate HRDD in the activity of entities in charge of these areas, as well as incentivize due diligence by business with which the State conducts commercial transactions.²¹

As such, the Directive should cover business enterprises that: (a) Are owned or controlled by EU Member States; (b) Receive substantial support and services from EU Member State agencies such as export credit agencies, official investment insurance or guarantee agencies, development agencies, and/or development finance institutions; and/or (c) Are involved in commercial transactions with EU Member States, such as in the context of public procurement. The Directive should also require these government functions and processes to operate as incentives for businesses complying with the Directive.

7. The Directive should facilitate both vertical and horizontal policy coherence.

As highlighted in the Working Group report on policy coherence in October 2019,²² a key priority in developing a mHRDD regime should be harmonizing standards and setting clear, consistent expectations for businesses in ways that facilitate business compliance, avoid duplication of efforts, and allows optimal use of businesses’ resources to achieve positive impacts for people.

As highlighted by OHCHR in its June 2020 [issues paper](#), the development of the Directive should involve a thorough review of relevant legislation and policy initiatives to ensure:

¹⁷ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on opportunities for small and medium-sized enterprises in the implementation of the Guiding Principles, 35th session of the UN Human Rights Council, A/HRC/35/32, April 2017, *available at* https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/32.

¹⁸ Companion note II to the Working Group’s 2018 report to the General Assembly (A/73/163), “Corporate human rights due diligence – Getting started, emerging practices, tools and resources,” *available at* <https://www.ohchr.org/Documents/Issues/Business/Session18/CompanionNote2DiligenceReport.pdf>.

¹⁹ For more on the Working Group’s reports and efforts in this area, see <https://www.ohchr.org/EN/Issues/Business/Pages/StateEconomicActor.aspx>.

²⁰ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 32nd session of the UN Human Rights Council, A/HRC/32/45, “Leading by example - The State, State-owned enterprises, and Human Rights,” May 2016, *available at* https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/45.

²¹ Guiding Principles 4-6.

²² Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 74th session of the General Assembly, A/74/198, “Policy coherence in government action to protect against business-related human rights abuses,” July 2019, *available at* <https://undocs.org/en/A/74/198>.

- a. A smooth, mutually reinforcing interface between the Directive and other legal regimes;
- b. That the new regime is capable of meeting its regulatory objectives, that the risks of any negative unintended consequences are identified and addressed, and that businesses are not subjected to any compliance dilemmas (e.g., in the form of conflicting requirements); and
- c. That the regime is able to take full advantage of any opportunities that may be presented by regulation in other areas (e.g., in the form of leverage or incentives to enhance the commercial or reputational drivers for carrying out HRDD activities to a high standard).

Within the EU, this review process should include existing mHRDD-related regimes such as the Conflict Minerals Regulation and the Timber Regulation, as well as existing EU legislation on non-financial corporate reporting, development assistance, sustainable finance disclosure, export credit regulation, and trade. Within certain EU Member States, this may also include broad human rights due diligence legislation or legislation focused on specific human rights issues such as modern slavery and child labor.

HRDD obligations may potentially touch upon many other areas of EU law and policy, covering areas such as non-financial reporting, climate change, competition law, conflict of laws, consumer law, corporate governance, corporate liability, corruption,²³ development cooperation and finance, the environment, labor rights, privacy, taxation, and trade and investment promotion.²⁴ The Directive could promote an EU-wide action plan on business and human rights to support this critical need for coherency and ensure that what is asked of business is consistent across these different substantive areas of EU competence.

8. The Directive should go beyond reporting regimes and require meaningful processes and outcomes.

The proposed Directive will need to do more than mandate disclosure from companies. Moreover, a “comply or explain” approach is not a sufficient mHRDD regime under the Guiding Principles. Instead, the Directive should require that covered businesses meet the regime’s requirements regarding meaningful HRDD processes and outcomes, including creative uses of leverage to address root causes and systemic challenges.

While HRDD includes some form of reporting or disclosure to facilitate transparency about processes and outcomes, the Directive must be such that it focuses on

²³ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 44th session of the UN Human Rights Council, A/HRC/44/43, “Connecting the business and human rights and anti-corruption agendas,” Feb. 2020, *available at* https://www.ohchr.org/Documents/Issues/Business/A_HRC_44_43_AdvanceEditedVersion.pdf. For more on the Working Group’s reports and efforts in this area, see <https://www.ohchr.org/EN/Issues/Business/Pages/Connecting-business-and-human-rights-and-anti-corruption-agendas.aspx>.

²⁴ The Working Group’s 2021 report to the UN General Assembly will focus on providing practical guidance to States on negotiating human rights-compatible international investment agreements in line with the Guiding Principles. For more on the Working Group’s reports and efforts in this area, see <https://www.ohchr.org/EN/Issues/Business/Pages/IIAs.aspx>.

and incentivizes *meaningful* HRDD processes and outcomes.²⁵ At the same time, the Directive should pragmatically give covered businesses time for continual improvement and explore incentive structures that reward compliance, such as those in relation to State business functions and processes (see recommendation 6 above).

As specified under recommendation 7 above, the Directive should be aligned with the revised Non-Financial Reporting Directive and other EU reporting standards while at the same time improving current reporting standards in such a way that stakeholders can measure the impact and efficacy of covered companies' HRDD.

9. The Directive should require businesses to take measures that facilitate access to effective justice and remedy.

In order to be aligned with key aspects of Pillar III of the Guiding Principles, which focuses on access to remedy, the Directive should require covered companies, at a minimum, to:

- a. Establish or participate in grievance mechanisms in line with the effectiveness criteria set forth in Guiding Principle 31 and open to all forms of workers, affected communities, users and consumers, and other third parties;
- b. Undertake periodic monitoring of complaints received and effectiveness of any remediation provided and/or supported, in specific alignment with Guiding Principle 31(g) on grievance mechanisms as a source of continuous learning; and
- c. Actively involve stakeholders, including workers and affected communities, in the strengthening of the relevant grievance mechanisms.

In line with Guiding Principle 22, the Directive should also require covered companies to cooperate with judicial and non-judicial procedures involving any allegations of harm with which the business is involved, including refraining from any retaliatory actions against actors (including human rights defenders and trade unions) bringing allegations.

10. The Directive should set out clear compliance monitoring and enforcement structures and procedures that facilitate access to effective justice and remedy.

Under the Directive, implementation of HRDD measures by covered companies should be closely monitored and consistently enforced to ensure compliance and promote accountability. In particular, the Working Group notes the role of States in providing effective remedy for harmed rights-holders and has elaborated on access to effective remedies under the Guiding Principles in its July 2017 report to the General Assembly.²⁶

²⁵ For example, the Norwegian Government's proposal for an Act regulating enterprises' transparency about supply chains, duty to know, and due diligence emphasizes the role of transparency, noting that the aim is to "provide consumers, trade unions, civil society organisations and others the right to information on enterprises impact on fundamental human rights and working conditions" and "through duties to know and to disclose information, it aims to advance respect for fundamental human rights and decent work in enterprises and supply chains." See Report of the Ethics Information Committee, appointed by the Norwegian government on 1 June 2018, to assess the adoption of an ethics information law, Nov. 2019, available at <https://www.regjeringen.no/en/dokumenter/supply-chain-transparency/id2680057/>.

²⁶ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 72nd session of the General Assembly, A/72/162, "Access to effective remedies under the Guiding Principles on Business and Human Rights: Implementing the United Nations Protect,

The Directive should set out clear expectations for EU Member States regarding the monitoring of covered companies' compliance with the Directive and promote harmonization of approaches. The Directive should require explicit designation within each EU Member State of competent administrative and judicial authorities that will manage oversight of implementation, such as via a central registry of covered companies' annual reporting, a system for processing information and complaints by third parties such as civil society organizations and trade unions, and the investigation of potential infringements.

Enforcement of the Directive should draw on multiple measures, including administrative, civil, and criminal law instruments, to penalize or sanction infringements. Covered companies should be liable for harms that they, or a company they control or have the ability to control, have caused or contributed to through acts or omissions. The Directive should also establish grounds for liability when a covered company fails to engage in meaningful HRDD and when and how this might give rise to a cause of action and/or access to remedy by rights-holders.

Conclusion

We hope to see continued leadership at the European level in building out regulatory responses to business' actual and potential impacts on human rights. As [we are developing a roadmap to advance implementation of the Guiding Principles in the next decade](#), we remain at your disposal to discuss these topics further and to provide continued technical input on the application of the Guiding Principles to the new legislation. Please accept, Excellency, the assurances of my highest consideration.

Yours sincerely,



Anita Ramasastry
Chairperson

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