

Contribution of the European Union to the consultations by the UN Working Group on Business and Human Rights on “policy coherence in government action to protect against business-related human rights abuse”

4 June 2019

The European Union was pleased to participate with all stakeholders in the consultation convened on 16 May 2019 by the Working Group on Business and Human Rights to inform its forthcoming report to the UN General Assembly on “policy coherence in government action to protect against business-related human rights abuse”. The European Union is thankful to the core group (Argentina, Ghana, Norway, Russian Federation) for its leadership in the Human Rights Council to advance the implementation of the UN Guiding Principles. The present contribution builds on the oral intervention during the consultation and comes as a complement to previous contributions¹.

The European Union is committed to ensuring policy coherence and is aware of the challenges ahead, particularly with respect to pillar 1 of the UN Guiding Principles on Business and Human Rights (“The State duty to protect”) and pillar 3 (“Access to remedy”). We find it important to look at work on Business and Human Rights as being intertwined with efforts to promote responsible business practices across the board and address many other global issues: environment, social and labour protection, tax evasion, corruption and the list is long.

We engage mindful of the legacy of former UN Secretary General Kofi Annan who already in 2001 at the World Economic Forum stressed the “need to make globalisation work for all the world’s people”: “if we cannot make globalisation work for all, in the end it will work for none”. Much has been done since then, but much still remains to be done to alleviate fears and concerns. We see the Business and Human Rights framework as a positive and forward-looking agenda, which can contribute to maximise the potential of globalisation while addressing its challenges.

The European Union also recalls the point made by former UN Special Representative of the Secretary General John Ruggie, the architect of the UN Guiding Principles, on the relationship between the Sustainable Development Goals and the UN Guiding Principles on Business and Human Rights. In his address to a past Forum on Business and Human Rights, he stated that “respect for human rights, respect for the dignity of every person, is at the very core of the people part of sustainable development [...] and is also the key to ensuring a socially sustainable globalisation, from which business stands to be a major beneficiary”. Since then, the UN Working Group issued key recommendations for embedding human rights in the private sector's contribution to the SDGs².

Public authorities, including the European Union institutions, have an important role in supporting and encouraging companies to conduct their business responsibly. Over the last years, the European Union introduced a smart mix of voluntary and mandatory actions to

¹ For instance, EU contribution in June 2018 on « corporate human rights due diligence » <https://www.ohchr.org/Documents/Issues/Business/WGSubmissions/2018/EU.pdf>; EU contribution to the 2018 Forum on Business and Human Rights <https://www.ohchr.org/Documents/Issues/Business/ForumSession7/EU.pdf>

² <https://www.ohchr.org/EN/Issues/Business/Pages/SustainableDevelopmentGoals.aspx>

implement the UN Guiding Principles on Business and Human Rights and the UN 2030 Agenda for sustainable development.

Under the framework of the multi-stakeholder platform on the implementation of the Sustainable Development Goals in the EU, which was created by the European Commission, a specific subgroup on Corporate Social Responsibility was set up in early 2018. It issued recommendations on how to ensure coherence as the implementation of the SDGs and Agenda 2030 is intertwined with the implementation of the UN Guiding Principles on Business and Human Rights.

The EU also organised a specific multi-stakeholders event on Business and Human Rights in June 2018 to identify the gaps and areas for improvement in the implementation of the UNGPs.

In this contribution, and against the background of key directions of work set out in the Foreign Affairs Council Conclusions on Business and Human Rights on 20 June 2016³, we would like to draw attention to recently published documents and highlight some specific examples to illustrate our efforts towards enhanced policy coherence.

1 / The Council Conclusions "Towards an ever more sustainable Union by 2030"⁴ call for an EU Action Plan on Responsible Business Conduct, a step that would have the potential to further enhance coherence and coordination. The Council highlighted "the important role of the private sector in achieving the SDGs and encourages its continued constructive involvement, through market-based partnerships, investments and business models in line with Responsible Business Conduct (RBC) and Corporate Social Responsibility (CSR) principles. These principles, which are based on other instruments such as the OECD Guidelines for Multinational Enterprises or the UN Guiding Principles on Business and Human Rights, should underpin a robust EU policy framework, including an EU action plan on RBC. The latter should promote responsible management of global supply chains in order to shape an international level playing field."

2/ the European Commission's Reflection Paper "Towards a Sustainable Europe by 2030"⁵, which was welcomed by the abovementioned Council Conclusions;

3/ the Commission Staff Working Document on "Corporate Social Responsibility, Responsible Business Conduct, and Business and Human Rights: Overview of Progress"⁶ which reports on progress made on Corporate Social Responsibility (CSR), Responsible Business Conduct (RBC) as well as in the area of Business and Human Rights since the 2011 strategy for CSR. The overview focuses on actions pursued by the European Commission including in collaboration with the European External Action Service.

³https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/council_conclusions_on_business_and_human_rights_foreign_affairs_council.pdf

⁴ <https://www.consilium.europa.eu/media/39019/st08286-en19.pdf>

⁵ https://ec.europa.eu/commission/sites/beta-political/files/rp_sustainable_europe_30-01_en_web.pdf

⁶ <https://ec.europa.eu/docsroom/documents/34482>

4/ the "EU Annual Report on Human Rights and Democracy" with a dedicated chapter on Business and Human Rights⁷.

While the abovementioned documents present a comprehensive overview of past or planned actions, we would also like to highlight some specific examples to illustrate progress within the EU and in partnership with Governments and international organisations worldwide.

Sustainable investment disclosure

Aware of the UN Working Group's news release of 25 April welcoming the "EU agreement on sustainable investment disclosure"⁸, we are pleased to provide some clarification and updates. The text available on the Council webpage⁹ will be edited and is expected to be published in the Official Journal around September/October 2019 and apply as of January/February 2021

The most relevant article is Article 3gamma "Transparency of adverse sustainability impacts at entity level": it lays down transparency of adverse impacts of investment decisions on external sustainability matters at financial entity and product levels.

The compliance with that requirement will have significant behavioural implications, in particular for business models of financial entities, their investment and marketing strategies, target market and product design as well as financial advice.

Under Article 3gamma manufacturers of financial products exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year shall publish and maintain on their websites a statement on due diligence policies with respect to principal adverse impacts of investment decisions on sustainability factors.

The remaining financial entities will have the option of

- either disclosing of how they consider *principal* adverse impacts or
- explaining why they do not consider adverse impacts.

Where the adverse impacts are considered at entity level, the product-related disclosures must also reflect adverse impacts.

'Sustainability factors' mean environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters.

[The disclosure should also include b) a description of the principal adverse sustainability impacts and of the actions taken and, where relevant, planned and d) reference to the adherence to responsible business conduct codes and internationally recognised standards for due diligence and reporting and, where relevant, the degree of alignment with the long-term global warming targets of the Paris Climate Agreement]

⁷ <https://www.consilium.europa.eu/media/39343/human-rights-2018-eu-annual-report-adopted.pdf>

⁸ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24518&LangID=E>

⁹ <https://data.consilium.europa.eu/doc/document/ST-7571-2019-ADD-1/en/pdf>

Trade and investment

The European Union is working to ensure that ongoing reform processes of investor-state dispute settlement (ISDS) at the bilateral and multilateral level (including in favour of a single Multilateral Investment Court) be consistent with the UN Guiding Principles on Business and Human Rights and other international human rights norms.

The European Union is pleased to share that its reformed approach to investment protection and investment dispute settlement aims to fully safeguard governments' right to regulate so that public policies are fully respected. The investment rules in EU bilateral treaties make clear that States preserve their right to regulate and to achieve legitimate policy objectives, such as the promotion and protection of human rights, labour rights, public health, safety, the environment, public morals and cultural diversity, and defines the precise content of key investment protection rules in order to prevent unwelcome discretion by adjudicators. More specifically, the European Union's reformed approach to investment dispute settlement gives individuals and civil society organisations the possibility to make their voices heard in the proceedings and foresees that tribunals apply in individual disputes not only the investment treaty but also other rules of international law applicable between the Parties, including any existing or future international treaties on human rights, environmental and labour protection. In addition, investment treaties are interpreted in accordance with international rules on treaty interpretation, which also take account of other international norms.

Under its reformed bilateral system for the resolution of investor-state disputes (Investment Court System), the EU further foresees that disputes be heard by individuals who, besides acting independently and impartially in accordance with a clear set of requirements, have a strong public international law background. Such expertise, which is necessary given the public international law foundation of investor-state disputes, ensures that adjudicators interpret the different international law rules that are relevant in a given case in a coherent and harmonious manner. The European Union considers that requirements to safeguard the public international law dimension of the resolution of investor-states disputes, including of human, environmental and labour obligations, should also be ensured in the operation of a single Multilateral Investment Court. In this regard, the European Union has noted with interest the letter sent by the UN Working Group calling for substantive reform to the ISDS system¹⁰ to UNCITRAL Working Group III.

Furthermore, the EU promotes corporate social responsibility (CSR) /responsible business conduct (RBC) through free trade agreements in conjunction with sustainable development issues. These provisions have been reinforced over time and include references to key international instruments such as the UN Guiding Principles on Business and Human Rights. Mechanisms ensuring dialogue and engagement with the parties and civil society are also provided for in this context.

Partnering with States and international/regional organisations in support of National Action Plans

While an EU Action Plan on Responsible Business Conduct has been called for in the abovementioned Council Conclusions, the EU Member States are encouraged to adopt National Action Plans and enhance policy coherence at national level. Already 16 EU Member

¹⁰ https://www.ohchr.org/Documents/Issues/Development/IEDebt/OL_ARM_07.03.19_1.2019.pdf

States have adopted NAPs and this experience can be shared with others. EU Member States clearly account for the larger part of existing Business and Human Rights Action Plans (16 out of 21) in a global perspective and we are encouraged to see that many States worldwide are in the process of developing/completing NAPs.

On 23 May 2019, a “peer learning” meeting on Business and Human Rights was organized in Brussels by Belgium with the support of the European External Action Service, the European Commission and Finland and the participation of the UN Working Group and OHCHR. It is a way to share experience among WEOG and EEG States in the development/implementation of NAPs and others measures to implement the UN Guiding Principles.

The EU is supporting peer learning initiatives and regional programmes also in other regions of the world to promote responsible business practices, including in relation to the adoption of National Action Plans. The EU has created pilot partnerships with international organisations such as the ILO, the OECD and the OHCHR. It is, for instance, providing technical support to implement due diligence and develop National Action Plans in nine Latin American and Caribbean countries (Argentina, Brazil, Costa Rica, Ecuador, Mexico, Panama, Peru, Chile and Colombia) through a project which started in 2019. Another Partnership Instrument project - developed by the EU together with the OECD and the ILO – aims to promote responsible supply chains in six of the EU's key trading partners in Asia (China, Japan, Myanmar, the Philippines, Thailand and Vietnam) and started in January 2018. In Africa, the EU is supporting the African Union (AU) Commission in developing an AU Policy Framework on the Implementation of the UNGPs.

Further progress on Access to remedy

The EU is thankful to OHCHR for its continued leadership in the field of Business and Human Rights, and particularly its Accountability and Remedy Project, as an important contribution to implement pillar 3 of the UN Guiding Principles. In a recent contribution, we welcomed the third phase focussing on "Enhancing effectiveness of non-State-based grievance mechanisms in cases of business-related human rights abuse" following on Human Rights Council resolution 38/13.

The EU has been actively involved in the two previous phases of this project, namely on "judicial mechanisms" and "State-based non-judicial mechanisms". As a follow up of the publication of European Agency of Fundamental Rights (FRA) opinion regarding access to remedy, the European Commission has requested the Agency to collect information on existing judicial and non-judicial mechanisms (State-based and non-State based) in the EU Member States related to access to remedy for victims of business related abuses¹¹.

FRA has contacted national authorities and selected companies and started collecting precise information regarding existing grievance mechanisms in the EU Member States. The results of the study are expected by the end of 2019. One option being discussed concerns the potential addition to the European e-Justice Portal of an information page on redress. We look forward to contributing further to the OHCHR Accountability and Remedy Project and to benefiting from its outcome.

¹¹ <https://fra.europa.eu/en/project/2018/business-and-human-rights-access-remedy-improvement>