

# Conference

## Global Supply Chains – Global Responsibility

### Human Rights and Decent Work in Global Supply Chains

Discussion Paper – Workshop #3

7 October 2020

## Quality Criteria for National Action Plans on Business and Human Rights within the EU

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### Relevance: Why do we have to act?

- » The Covid-19 crisis has once again revealed a lack of sustainable supply chain management. The implementation of the UN Guiding Principles on Business and Human Rights (UNGP) through National Action Plans (NAPs) has the potential to help companies to develop effective human rights risk management systems as well as states to increase their capacity to fulfill their duty to protect human rights.
- » Despite considerable progress since 2011, the content and focus of NAPs vary greatly. The perspective of rights holders is hardly taken into account. The central issue of access to remedy has been neglected. NAPs do not succeed in creating a smart mix of binding and voluntary measures. EU-wide standardisation of methods for a status-quo problem analysis, content development and implementation of NAPs would have great added value for improved UNGP implementation.

### Lessons Learned: Where do we stand today?

- » 15 EU countries have so far complied with the request of the European Commission to draw up and implement NAPs.
- » A great deal of knowledge about the design and implementation of NAPs has been gained through numerous national and international debates as well as research projects and conferences. For instance: all three phases of the implementation of the UNGP through NAPs are highly relevant for an effective outcome and should comply with quality criteria: 1) Development of an understanding of the status quo of the problem; 2) Preparation of the concrete contents and measures of a NAP; 3) Implementation of measures, monitoring and evaluation of effectiveness.
- » Relevant methodologies have been developed, such as for the monitoring of companies. Sector-dialogues were initiated.

### The way forward: What can we do to generate impact?

- » The European Commission plays a key role in ensuring ambitious and coordinated implementation of the UNGPs. For this, it should seek to base national policies on quality criteria for the preparation, content and effective implementation of NAPs and take on the organization and monitoring of the process.
- » Common objectives could be identified and formulated by the Commission together with the member states and with the involvement of relevant stakeholders, including the perspective of those whose rights are affected.
- » A handbook for member states on the preparation and implementation of NAPs could provide clarity in detail on what member states need to do to identify and close gaps in protection and should contain a methodology for monitoring businesses – compliance should be incentivized.

# Quality Criteria for National Action Plans on Business and Human Rights within the EU

## 1 Added value of EU-wide NAP quality criteria

Germany's Presidency of the Council of the European Union is taking place during the Covid-19 pandemic. It is still difficult to estimate the extent of the restrictions caused by the pandemic for people and companies and the consequences for the economy.

However, it is already clear that the pandemic is exacerbating existing risks to human rights in the business context. This is true for almost all human rights risks arising from the activities of corporations: precarious employment, lack of social security, sexual assault, conditions of accommodation for employees, and water-intensive economic activity in drought regions. According to a report by the Interfaith Center on Corporate Responsibility, an umbrella organisation that includes both business and civil society organisations, the livelihoods of 4.1 million workers in the textile industry are at risk as major brands are halting more than 3 billion dollars worth of business due to the Covid-19 crisis.<sup>1</sup>

The current crisis has revealed a general lack of sustainable supply chain management. It has clearly shown that human rights due diligence is also an indispensable prerequisite for resilience and thus for supply security in general: Supply chains are vulnerable because companies do not know them well enough, close relationships with suppliers are rare, especially deeper down the supply chain, and human rights risk management systems are lacking.

In the Corporate Human Rights Benchmark in 2019, only a single company out of 200 that were evaluated managed to meet 80 to 90 percent of its due diligence obligations.<sup>2</sup> The monitoring activities in the context of implementing the National Action Plan on Business and Human Rights (NAP) show that only a minority of companies based in Germany meet their due diligence obligations:<sup>3</sup> Only between 13 and 17 percent of the companies surveyed with more than 500 employees were able to demonstrate adequate risk management. These results correspond to the findings of a study commissioned by the European Commission (COM, Directorate-General for Justice and Consumers). According to those findings only 16 percent of companies in the EU carefully analyse their entire supply chain, i.e. more than just the

direct contractual partner, with regard to human rights and environmental impact.<sup>4</sup>

Against this background, the responsibility of companies to respect human rights and the duty of the state to protect those rights is even more important, especially in times of pandemic. The framework for action recognised by all stakeholders worldwide through which states and businesses can and should fulfil their obligations is the UN Guiding Principles. They were unanimously adopted by the UN Human Rights Council in 2011 and will celebrate their tenth anniversary in 2021. A great deal of knowledge about the design and implementation of National Action Plans (NAPs) has been gained through numerous national and international debates as well as research projects and conferences. This knowledge should now be put to good use at EU level. Several Council Conclusions (such as No. 6339/19 of 18.2.2019) contain a commitment to intensifying the EU's efforts to implement the UN Guiding Principles.<sup>5</sup>

Shortly after the adoption of the UN Guiding Principles, the European Commission called on the member states to draw up and implement NAPs in its CSR communication. Only 15 EU countries have so far complied with the request, and the NAPs that have been drawn up have significant shortcomings: Their content and focus vary greatly, and the perspective of the rights holders concerned is hardly taken into account; the national implementation activities are not coordinated and are therefore not sufficient to close gaps systematically; the NAPs lack ambition and coherence: The measures formulated are for the most part not specific, making it difficult to verify them; the central issue of access to remedy, the third pillar of the UN Guiding Principles, has been neglected and no NAP succeeds in creating a smart mix of binding and voluntary measures. In many cases, the NAPs refer to EU-level competences at crucial points, such as the regulation of corporate due diligence.

It is clear that an implementation process should take place not only at national but also at supranational level. An EU Action Plan would lead to more ambition, coherence and thus make national processes more comparable.

## 2 Quality criteria for NAPs

The implementation of the UN Guiding Principles through National Action Plans has three phases:

1. Development of an understanding of the status quo of the problem
2. Preparation of the concrete contents and measures of a National Action Plan
3. Implementation of measures, monitoring and evaluation of effectiveness<sup>6</sup>

EU-wide standardisation of all three phases would be of great added value for the quality of implementation of the UN Guiding Principles, because then all countries preparing NAPs could benefit from the lessons learned by the EU from implementation to date.

### 2.1 What needs to be standardised in the drafting process?

Four elements are decisive for the drafting phase - as a comparison of the NAPs published so far by the German Institute for Human Rights shows:

1. Coordination within the government
2. Participation of all stakeholders
3. Preparation of a National Baseline Assessment
4. Transparency<sup>7</sup>

#### 2.1.1 Coordination

Coordination within governments should take account of the principle of policy coherence. The aim is to bring together the perspectives of the various ministries in a negotiation process,<sup>8</sup> so that the human rights obligations of the state can be made clear and implemented in all areas of responsibility.<sup>9</sup> The mandate of the body (or bodies) heading up the project should also include cooperation with non-governmental interest groups and being in charge of the drafting process.

#### 2.1.2 Participation

The legitimacy and effectiveness of the process depends to a large extent on the participation of stakeholders. Legitimacy, because the implementation of the UN Guiding Principles aims to protect the human rights of those affected. Effectiveness, since it is above all groups of affected persons who have the knowledge of how the state should fulfil its duty

to protect.<sup>10</sup> For this reason, it is important to adequately involve not only companies, business associations and trade unions, but also non-governmental organisations and human rights institutions in the process, so that the perspective of affected persons, such as indigenous groups, women, children, ethnic minorities and people with disabilities, is incorporated into the processes. Stakeholders should be able to make their positions known and contribute their expertise in a transparent support process during the development and implementation of the action plan and should be consulted with sufficient advance notice.<sup>11</sup>

#### 2.1.3 National Baseline Assessment

As a starting point for the preparation of a NAP, a comprehensive, academic review in the form of a National Baseline Assessment (NBA) is recommended. It is necessary to compare existing conditions and national law with the requirements of the UN Guiding Principles and to identify gaps in protection and in the responsibility of states and companies. Indicators should be established to identify when a gap in protection has been filled. Ideally, the NBA should be formulated in such a way that, after implementation, a second assessment with identical indicators can be produced to determine the progress of implementation.<sup>12</sup> The UN Working Group on the issue of human rights and transnational corporations and other business enterprises (UNWG) recommends following the methodology of the Baseline Assessment Template of the International Corporate Accountability Roundtable (ICAR) and the Danish Institute for Human Rights (DIHR).<sup>13</sup>

The government departments responsible for preparing the NAP should ensure that the NBA is an academic study, the aim of which is to uncover all gaps in protection and responsibility. The ICAR and DIHR method provides indicators for this purpose. To ensure comparability between member states, the methodology should be applied uniformly in all countries.

#### 2.1.4 Transparency

Governments should present a work plan for the preparation and implementation of the NAPs to the public and ensure that relevant information, such as results of consultations, is shared with all stakeholders. Transparency also involves communicating clearly what opportunities for participation there are for the various interest groups.<sup>14</sup>

## 2.2 What needs to be standardised in terms of NAPs content?

### 2.2.1 General

The focus and weighting of the three pillars should follow the logic of the UN Guiding Principles. These are the product of an extensive consultation process that lasted several years. The then UN Special Representative Professor John Ruggie consulted states, companies, non-governmental organisations, trade unions, national human rights institutions and affected groups worldwide from 2006 to 2011. The 31 Guiding Principles were condensed from these consultations.<sup>15</sup> The three pillars cannot be understood or implemented in isolation from each other but are reciprocally related. A catalogue of measures focusing on one of the three pillars is therefore not suitable for implementing the UN Guiding Principles. Rather, it must be ensured that the individual actors do not shift their respective responsibilities onto each other: Neither should states evade their duty to protect by emphasizing the misconduct of other states or companies, nor should companies point to the failure of the state in the event of adverse human rights impacts. NAPs should make it clear that corporate responsibility, as defined in the UN Guiding Principles, requires companies to take responsibility for adverse effects arising from their own activities. This includes business relationships (do-no-harm principle). It must be distinguished from general CSR measures or sustainability strategies of companies.<sup>16</sup> For example, the provision of technical expertise on well construction in a drought region by an energy company can be a sensible CSR measure. It does not, however, meet the requirement of the UN Guiding Principles of taking into account its own adverse impacts, such as the lowering of groundwater levels when digging coal mines.<sup>17</sup>

Measures should be "specific", "measurable", "achievable" and "time-specific" and should always

- » contain a concrete goal;
- » designate the body responsible for implementation;
- » provide a clear timetable;
- » clarify the time and form of the measurement of effectiveness, preferably using indicators that have already been used in the NBA.<sup>18</sup>

### 2.2.2 State obligations

Smart Mix: The commentary on Guiding Principle 3 asserts that "States should not assume that businesses invariably prefer, or benefit from, State inaction".<sup>19</sup> This is also confirmed by the survey commissioned by the European Commission (DG Justice and Consumers), according to which, 75 per-

cent of the companies surveyed are in favour of uniform EU regulation on human rights due diligence obligations.<sup>20</sup> The key question is what mix of voluntary and binding measures leads to the best possible promotion of corporate respect for human rights while complementing each other seamlessly?<sup>21</sup>

On the one hand, companies need flexibility to implement their due diligence obligations in a manner suited to the specific case, and on the other hand, they need clear and concrete provisions in the case of binding regulation. Reconciling these contradictions remains one of the major challenges. The criterion for the relationship between binding legal regulations and soft law regulations should be "effectiveness and appropriateness".

National and transnational dimension: A National Action Plan should have a focus on supply chains as well as a focus on human rights risks at home. Guiding Principle 1 makes it clear that states should provide protection against human rights abuses committed by third parties, including business enterprises, within their territory and/or jurisdiction.<sup>22</sup> According to Guiding Principle 2, this also applies to all business activities of enterprises in supply and value chains under the jurisdiction of the implementing state.<sup>23</sup>

State-business nexus: Wherever the state has direct powers of intervention in companies because they are state-owned or because the state supports or safeguards them, for example through subsidies or foreign trade promotion, the state must do more to ensure compliance with due diligence obligations.<sup>24</sup> It should create clear incentives by refraining from the promotion of or granting of contracts to companies whose activities do not have adequate human rights due diligence along their supply chains. Where the state is itself an economic actor, in particular through public procurement, it should fulfil its duty to protect by applying human rights criteria in accordance with the UN Guiding Principles to its own economic decisions.<sup>25</sup>

Prioritisation: 1) Marginalised groups: Groups that are particularly at risk in terms of human rights must be prioritised when drawing up measures. These may include children, women, victims of racism or religious groups, as well as LGBTI persons<sup>26</sup>, people with disabilities, indigenous groups, elderly people, migrant workers and their families, people living in poverty or rural/geographically isolated communities, and those working in the informal sector.<sup>27</sup> Concrete measures should be formulated that take into account the different risks, disproportionate impact and difficult access to remedy for such groups.

2) Conflict regions: NAPs should prioritise measures that prevent companies from being involved in human rights violations in conflict regions or in the financing of illegal armed groups through their business relationships. So far, NAPs hardly provide for sufficient measures in this regard.<sup>28</sup> One reason for this is that the EU Conflict Minerals Regulation already exists. However, this regulation relates exclusively to the import of tin, tungsten, tantalum and gold. Economic activities in (post-)conflict regions, however, require increased human rights due diligence, regardless of the raw material or region concerned.

### 2.2.3 Corporate responsibility

Businesses need support and guidance to ensure that human rights are adequately respected in all their business activities. In line with UN Guiding Principle 3a, the NAPs should therefore formulate measures that generate such guidance, such as the initiation of sectoral dialogues. It is important that state obligations are implemented through the smart mix described in 2.2.2: both support services and enablement on the one hand, and legal requirements on the other belong together. Legislation does not render obsolete guidelines for action, which can, for example, be drawn up in industry dialogues, rather it increases their relevance. Legislation should also be formulated in such a way that it privileges those who meet certain industry standards developed with civil society.

### 2.2.4 Remedy

All NAPs should formulate specific measures to promote effective judicial and extra-judicial remedy mechanisms. It is a problem for most EU member states that those affected by adverse human rights impacts of businesses are often located in a jurisdiction outside their territory. This means that there is a great financial obstacle to persons concerned seeking remedy in the jurisdiction of the member states. NAPs of EU member states should address this problem with effective measures, for example by considering the possibility of collective legal action and by identifying and removing obstacles to effective remedies for those affected.

## 2.3 What needs to be standardised in the implementation structures?

### 2.3.1 Evaluation

NBA 2.0: It is necessary to ensure the measurability of the progress of implementation of the UN Guiding Principles

in national legal and policy frameworks through NAPs (cf. 2.1.3). A second NBA after implementation of the catalogue of measures can assess which gaps in protection and responsibility have been closed.

Status reports: Status reports make it possible to regularly track the progress of implementation before the effectiveness of the measures taken can be assessed.

Independent evaluation: Such reviews could, for example, be carried out by the National Human Rights Institution (NHRI), provided that it has been accredited with A status in accordance with the UN Paris Principles<sup>29</sup> and can guarantee sufficient evaluation expertise.<sup>30</sup> Currently, 16 of the 27 EU member states have A-status accredited NMRIs.<sup>31</sup> States with independent NHRIs should consider including them in the evaluation of the NAP.

### 2.3.2 Monitoring

Corporate monitoring: The state of implementation of the UN Guiding Principles and the NAP should be monitored by the government. Company surveys determine the extent to which companies have integrated the five core elements of due diligence into their management processes. The results can provide a good basis for targeted follow-up measures in terms of an appropriate smart mix.

The NAP should make clear what is meant by "monitoring", also to distinguish it from "evaluation". It should also make clear how the objectives of state-ordered monitoring procedures differ from evaluations and academic studies carried out by research institutions for the purposes of gaining knowledge.

Monitoring body: An independent monitoring body, as is sometimes set up to monitor state implementation of international human rights conventions, can also be useful for the implementation of the UN Guiding Principles. The model of such a monitoring body could correspond to the national review mechanism of the UN Convention on the Rights of Persons with Disabilities and be established in the National Human Rights Institution (with A status). The monitoring body could be charged with both the independent evaluation of NAP implementation and the review of companies' human rights due diligence.

### 3 Conclusions for the EU

In an EU Action Plan, the European Commission should commit itself to the ambitious and coordinated implementation of the UN Guiding Principles. This should also be done at the level of the member states. In addition to legal rules, the Commission should apply the open method of coordination (OMC) for the implementation of the UN Guiding Principles, following the recommendation of the European Union Agency for Fundamental Rights (FRA).<sup>32</sup> An EU Action Plan should not replace the member states' development and implementation of their own action plans.

The aim should be to base national policies on quality criteria for the preparation, content and effective implementation of NAPs. This discussion paper has developed proposals to this end. Member states are given the opportunity to compare their efforts and learn from each other's experiences.

The European Commission should take on the organisation and monitoring of the process. Common objectives could be identified and formulated by the Commission together with the member states and with the involvement of relevant stakeholders, human rights experts, including the European Network of National Human Rights Institutions (ENNHRI).

The perspective of those whose rights are affected should also be taken into account. A handbook on the preparation and implementation of NAPs could provide clarity in detail on what member states need to do to identify and close gaps in protection. The handbook should also include guidance on how member states can make the process participatory and how necessary measures can be made "specific", "measurable", "achievable" and "time-specific".

An incentive mechanism should also be established for member states to encourage and support NAPs in line with the handbooks. In order to determine the content, policy areas should be identified on the basis of which member states formulate measures. For the monitoring and effectiveness measurement phase, the EU Action Plan should provide a definition of "monitoring" and "evaluation" that is valid for all member states. It could also stipulate that the EU should develop a methodology for monitoring businesses.

Through campaigns to communicate information and raise awareness, the EU can report on good examples from member states, provide ongoing information on the need for ambitious and coordinated NAPs and promote their effective implementation.



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## Footnotes

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- 22 UN Guiding Principle 1
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**24** UN Guiding Principle 9

**25** UN Guiding Principles 4 to 6

**26** The abbreviation LGBTI stands for lesbian, gay, bisexual, transgender and intersexual.

**27** Niebank 2019, p. 23

**28** Countries whose NAPs include conflict financing only refer to existing OECD guidelines for the fulfillment of due diligence obligations and/or EU regulation on conflict minerals (cf. also the NAPs of Switzerland, Germany and Ireland).

**29** ICAR (2017) and Niebank 2019, p. 29

**30** ICAR (2017) and Niebank 2019, p. 29

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