

## **Public hearing of the Legal Affairs Committee on Corporate Social Responsibility.**

### **Intervention of Jérôme Chaplier, Coordinator of the European Coalition for Corporate Justice**

Protecting human rights is one of the EU's overarching objectives and has acquired a growing importance over the years. The EU treaties make very clear that the EU has a duty to promote respect for human rights, within its powers and competences, when it adopts and implements EU legislation as well as in its relations to the wider world.

The UN Guiding Principles for Business and Human Rights (UNGPs) clarify the emerging international consensus and reaffirm the state duty to protect HR and to ensure access to effective remedy. States have a responsibility to implement these principles, through a smart mix of voluntary approach and regulation.

Building on the UNGPs, the EC announced in its 2011 Communication on CSR, that it would publish by 2012 an EU Action Plan on Business and HR, and encouraged MS to do likewise. 5 years later, we are still waiting for an EU AP. 13 Member states have published a National Action Plan (NAP) – out of 19 worldwide. We have assessed these NAPs and have seen three major shortcomings.

First, although there has been some improvement in the recent NAPs, the majority of cases are mostly just describing a state of play, they are overly vague and don't provide information about concrete future steps the State will take.

Second, existing NAPs focus heavily on a voluntary approach to corporate responsibility - such as awareness-raising, training, research, promotion of best practice. There are only timid acknowledgements that a regulatory approach should be considered - as in the Italian or German NAPs recently. They don't reflect the growing consensus that binding obligations can contribute to level up the playing field and create accountability mechanisms.

Third, they neglect the issue of access to remedies. In all jurisdictions there are still insuperable obstacles for victims of human rights abuses to access courts. These barriers are practical, procedural, financial, and legal. Several NAPs don't acknowledge the severity of the problem – and none is putting forward robust solutions to improve access to judicial remedies domestically.

At EU level, the absence of any process within the EC to articulate a set of measures into an EU Action Plan shows an absence of internal leadership, and is in blatant contradiction to the EU's discourse in international fora. Recently the governments of the Netherlands, Denmark, Sweden, France and Finland have written to VP Timmermans urging the EC to develop an AP on Responsible Business Conduct as soon as possible.

Speaking on behalf of ECCJ's 21 members from 15 European countries, I would like to make two concrete recommendations for improving the EU legal framework towards greater respect for human rights by business. In these areas – for which the Legal Affairs Committee is competent – the EU has an opportunity to demonstrate coherence, leadership, and show its citizens that it places the rights of people at the center of its political and economic project. Such reforms can also ensure fair competition for responsible companies and proper functioning of the Single Market.

- (1) EU and MS should ensure that corporate respect for human rights is guaranteed through mandatory Human Rights Due Diligence (HRDD) legislation
- (2) EU should facilitate access to justice through harmonizing rules on collective redress across Member States and make collective redress available to all those who have been harmed as a result of business malpractice

### Mandatory Human Rights Due Diligence (HRDD)

Protecting human rights in the context of global business operations and supply chains is one of today's most complex challenges. Complicated corporate structures and relationships make it difficult to attribute responsibility to parent and sub-contracting companies for human rights violations, and ensure effective accountability.

HRDD legislation is a well-acknowledged tool providing a blueprint and incentives for business to respect human rights across their operations and supply chains. It provides a basis for translating the corporate responsibility to respect human rights into a legal obligation, under civil/tort law, and mandates adherence to a standard of reasonable care when performing any acts that could foreseeably harm others. Such legislation would extend the scope of this duty of care to a company's subsidiaries and business partners. It would represent a powerful prevention mechanism, and also improve access to justice. Affected people could bring a civil/tort action against the company, whereas the company could as well effectively discharge its liability by demonstrating it carried out its due diligence.

The regulation of companies' duty of care in the sense described above touches on matters of company law, hence it falls within EU shared competences. The conjunction of Articles 50 and 114 of the Treaty on the Functioning of the European Union allows for the EU to harmonise legislation in order to ensure the proper functioning of the internal market. Over the years, the EU and the Member States have interpreted the Treaties so as to give the EU broad competence to harmonize legal and economic conditions for doing business across the EU and alleviate obstacles to a level playing field, whilst contributing to the achievement of other key EU objectives. This is now about ensuring the same standard of responsibility to respect human rights for all companies across all EU Member States.

France was the first country to adopt legislation that transposed into civil law the duty of parent companies to identify and address human rights and environmental violations throughout their activities and business relationships. What is particularly innovative in this law is that it establishes civil liability for harms resulting from a company's failure to observe its duty of care.

Reforms have been initiated in other states, like the Dutch bill on child labour due diligence, and the Swiss Responsible Business initiative. The German government has committed in its NAP to consider legislative measures if fewer than half of major German companies adopt HRDD processes by 2020. Similar debates are taking place in other national parliaments.

The EU has a duty to build on these developments, and minimise risks of tragic events involving European companies.

The EU *can* adopt mandatory Human Rights Due Diligence legislation – and it *should* do so in order to substantially reduce corporate human rights violations, improve access to justice, and level the playing field for responsible companies

We encourage the European Parliament to reiterate calls for legislative action, to pressure the Commission and to be a space for a lively debate on the role of the EU to enhance HR protection

#### Another area for immediate action is Collective Redress

Collective redress - or class action - is a procedural tool allowing a group of persons harmed by the same illegal practices to request cessation of that practice and obtain remedy. It helps to mitigate the power imbalance between the parties by addressing the problem of high legal costs and financial risks that often prohibit individuals from going to court. The UN Human Rights Council, the Council of Europe, the EU Council, the European Parliament and the EU Fundamental Rights Agency have all identified collective redress as a key tool for the protection of human rights in scenarios involving violations by business entities.

In 2013, the Commission issued a Recommendation that encouraged Member States to provide for collective redress in all areas where a „violation of rights granted under Union“ law had occurred. In October 2017, Commissioner Jourová announced that a European collective redress possibility for EU consumers will be discussed as part of the “New Deal for Consumers plan” to be released in March 2018.

Contrary to the original horizontal approach of the 2013 Recommendation, the present consumer collective redress proposal – prompted by the Dieselgate scandal - aims only at enhancing consumer protection. The problem with this narrow approach is that there are other areas where gross business malpractice can have severe impacts on people and be detrimental to the level playing field – these areas include competition law, environmental law or fundamental rights.

Violations in these other areas may be even more egregious than consumer rights violations and have equally disruptive effects on fair competition, if left without sanction and remedy. Examples include unlawful pollution, systemic discrimination and abuse of labour rights, or corporate surveillance and digital privacy violations. Similarly, the costs and challenges associated with such litigation can be far more significant for those seeking justice: for example, proving the causal link of harm in environmental cases. For those affected by gross business

malpractice, accessing an effective remedy may literally only be viable when done collectively; when the sharing of risk and the pooling of resources is allowed.

Effective protection of fundamental rights against corporate abuse is also necessary for a proper functioning of the EU Single Market. As outlined in the Impact Assessment published 3 weeks ago by the Commission, fair competition in the Single Market requires comparable exposure to deterrent and corrective actions in all Member States, based on further harmonised EU rules. We believe the EU legislation on collective redress shouldn't result in further fragmentation of procedural rules for different areas of law across the EU.

The 2013 Recommendations to MS on collective redress already stated that the principles contained within „should ensure that fundamental procedural rights of the parties are preserved“. Future legislation on collective redress should therefore be aligned with this approach that has so far remained purely declaratory.

We encourage the European Parliament to call on DG JUSTICE to ensure that the future EU action on collective redress works towards the realisation of a *fundamental* “right to effective remedy“ and be available indiscriminately in case of violations of any rights guaranteed or protected by the EU law.

## **Conclusion**

The EU has made repeated commitments over the past years and declared itself forthcoming on business and HR, urging the rest of the world to speed up the implementation of the UNGPs. Civil society believes that actions in the field of mandatory HRDD and collective redress are concrete opportunities to walk the talk.

They would be important steps to minimize risks of events like the Rana Plaza factory collapse in Bangladesh that killed over 1,100 people, mostly women. Or mass chemical and oil spills by European companies in India, Romania and Nigeria which destroyed entire communities livelihoods ecosystems; or the ongoing use of forced labour in agricultural supply chains within Europe itself.