

**The ECCJ's recommendations on EU priorities for the implementation of the
UN Guiding Principles on Business and Human Rights
May 2012**

General remarks

Recalling that the UNGP rest on the UN “Protect, Respect and Remedy” framework adopted by the Human Rights Council in 2008, the ECCJ would like to stress the need to frame discussions on the implementation of the UNGP within the broader context of States' international human rights obligations, which lies at the heart of the UNGP.

The ECCJ's statement focuses on the obligations of States. Nevertheless, it is clear that all three pillars of the “Protect, Respect, Remedy” framework are interdependent. The effective implementation of the Framework and the UNGP will depend on both the EU institutions and individual Member States adopting a holistic, cross-departmental approach.

The following recommendations are informed by the challenges and obstacles faced daily by those affected by the adverse impacts of European companies operating in Europe and abroad. They aim to ensure that the EU and Member States comply with their legal obligations and address, as a priority, the concerns of rights-holders. The individuals and communities directly affected by the activities of European companies are not able to raise their concerns in person at the conference. This is unfortunate as their concerns should be at the heart of the debate. The challenges they face and the harm they suffer should be the underlying thread in identifying the EU's priorities for the implementation of the UNGP.

The ECCJ recognises that there are numerous challenges to ensure that businesses respect human rights throughout their operations. However, it should be noted that the UNGP represent neither an insuperable burden nor an ideal target. On the contrary, the UNGP do not create new international obligations and rather represent an international consensus regarding the minimum standards States should put in place to ensure effective human rights protection and respect for human rights by businesses.

European citizens expect the EU and Member States to take a leading role in ensuring that businesses respect human rights and the environment. Furthermore, it is worth highlighting the often neglected perspective that effective management by companies of human rights and other related risks, in particular those related to the environment and corruption, is not only essential for social and environmental sustainability, but is also the foundation for rebuilding stable markets and the sustainable recovery of the European economy.

In light of existing governance gaps, the ECCJ urges the EU and Member States to:

- **Effectively assist companies in meeting their responsibility to respect human rights, by identifying appropriate ways of enforcing due diligence via regulatory measures;**
- **Ensure policy coherence at both the EU and Member State level, by adopting a holistic approach to the implementation of the UNGP. This would include providing a mandate to an independent institution in charge of analysing existing gaps in current frameworks and all policy and regulatory options, as well as developing, monitoring and evaluating the implementation of a comprehensive policy plan;**
- **Take effective measures to lift existing obstacles to justice and to ensure effective remedies for victims of corporate-related violations (within and outside the EU), in particular by addressing the issue of separate legal personality and the excessive costs related to accessing courts.**

The following recommendations represent immediate and concrete steps that the ECCJ urges the EU and Member States to take.

General recommendations on the process of implementing the UN Framework and the UNGP

While corporate social responsibility (CSR) initiatives may constitute tools which can contribute to the business respect for human rights, the European Commission should address the issue of the implementation of the UNGP¹ independently. The European Commission's work on CSR initiatives is important, yet it should not lead to the neglect of other appropriate ways of fostering business respect for human rights, as identified in the UNGP.

Procedural recommendations

Recommendation 1: The Danish Presidency is encouraged to take the lead on proposing a template model for States to use when drafting their national plans on UNGP implementation. By highlighting major issues and questions to be analysed, including policy and regulatory framework for human rights due diligence, obstacles to justice and policy coherence, this template would contribute to a systemic and comparable approach to the implementation of the UNGP in Europe.

Recommendation 2: The European Commission is committed to identifying priorities for the implementation of the UNGP. This work should be done in a transparent manner, based on consultation with all relevant stakeholders. The work should result in a plan which analyses and addresses all issues, all Guiding Principles, their mutual interdependencies and all policy and regulatory options.

Recommendation 3: Member States should ensure that national plans on UNGP implementation are drafted through meaningful participation of all relevant stakeholders, not excluding communities adversely affected by business activities and civil society. Member States should report annually on the implementation of their national plans on the UNGP. There should be a clear process for evaluating impacts in order to share learning and address any gaps.

Policy coherence

As part of their duty to protect human rights, the EU and Member States “should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations [...]”, as stipulated in Guiding Principle 8.

Recommendation 4: The European Commission and EU Member States should analyse existing policies and regulations with regard to their influence and impacts on the objectives outlined in the UNGP in order to ensure both vertical and horizontal domestic policy coherence.

Recommendation 5: The EU and Member States should ensure that the positions they take in national, regional and international forums do not go against the objective, purpose and standards reflected in the UNGP. This includes positions with regard to trade & investment matters (including the lift or the enforcement of bans and sanctions), positions as amicus curiae before courts, and positions vis-à-vis legislative reforms such as the current reforms on access to information.

Recommendation 6: The EU and Member States should conduct meaningful and adequate impact assessments of any legislative proposals with respect to the objectives and recommendations of the UNGP.

Recommendation 7: The EU and Member States should conduct meaningful and adequate human rights impact assessments prior to, during, and after the conclusion of multilateral and bilateral trade and investment agreements and the attribution of development aid.

Recommendation 8: At both the EU and Member State level, there should be a designated independent institution (such as the EU Agency on Fundamental Rights or the EU Special Representative on Human Rights) with a mandate in the field of human rights in charge of ensuring the adequate implementation of EU and national plans for the implementation of the UNGP, as well as monitoring EU and States' policy coherence. This body should work in close coordination with all relevant EU and State departments, as well as national relevant institutions (such as the National Human Rights Institutions, national ombudsmen).

State Duty to protect: ensuring that EU corporations meet their responsibility to protect

¹ The term 'UNGP' as used in this document refers both to UN Guiding Principles and UN Framework for Business and Human Rights that Guiding Principles rest on.

In order to ensure effective implementation of the State duty to protect human rights, there is a need to specifically address the governance gaps in the field of business and human rights created by economic globalisation.

Current European and national legal frameworks do not address the consequences of the absence of a legal status for transnational enterprises (TNEs). This is a concept otherwise known as 'the corporate veil'; i.e. the concepts of separate legal personality, limited liability for shareholders and the ability for the company itself to become a shareholder in other companies, which together insulate each legal unit of the TNE, including the parent company, from obligations of and to other members of the economic group. This, along with the absence of an international legal framework directly governing corporate human rights responsibilities as a whole, represents a barrier to holding TNEs legally responsible for their actions, in particular where the TNE benefits from the harmful operations of its subsidiaries in countries with low governance standards and/or inefficient judicial systems.

Human Rights Due Diligence

One key aspect of the UNGP rests on the corporate responsibility to act with due diligence as part of their overall responsibility to respect human rights. The former Special Representative on business and human rights has identified this concept as an essential process for corporations to identify, prevent, mitigate, and account for their human rights impacts. As part of their duty to protect and to ensure corporate respect for human rights, the EU and its Member States should thus ensure that companies do not cause or contribute to harm and carry out human rights due diligence where needed.

For States this means identifying and bridging the gaps in the legal framework related to the responsibility of European companies and their management to respect human rights, in particular with respect to the impacts connected to their subsidiaries, subcontractors, suppliers, and other business partners.

Recommendation 9: The EU and Member States should clarify the concept of human rights due diligence and embed this in their legislation and policies. In addition to providing guidance to companies, this process should consist of both requesting and defining ways of enforcing human rights due diligence, and exploring legal means to ensure companies carry out human rights due diligence as appropriate.

In doing so, immediate policy action is appropriate in the following areas:

- **Recommendation 10:** With a view to implementing Guiding Principles 4, 5 & 6, and in order to ensure that tax-payers' money does not cause or contribute to human rights violations, the EU and Member States should address companies with a State nexus. Human rights due diligence should be immediately required in cases where business enterprises are owned or controlled by the State, receive substantial support and services from State agencies such as export credit agencies and official investment insurance, guarantee agencies, or aid and development agencies, in case of public procurement, or when enterprises enjoy other commercial benefits and advantages (i.e. trade missions, diplomatic services) or receive funding from European public financial institutions.
- **Recommendation 11:** The EU and Member States should adopt clear and mandatory requirements for the disclosure of companies' due diligence policies and their implementation, which should include disclosure of impacts and risks linked to a company's operations, products or services and how these are addressed (see below). Effective enforcement of these reporting requirements is also essential.
- **Recommendation 12:** The EU and Member States should develop specific due diligence requirements for business which source from high risk areas, building on the OECD Recommendations for conflict minerals, or for enterprises engaging in other high-risk activities, including but not limited to agribusiness, oil and gas, chemicals and mining.

Disclosure and access to information

The issues of the disclosure of environmental, social and governance (ESG) information and access to information for stakeholders are closely linked with due diligence and are a prerequisite for the effective management by companies of human rights, environmental and governance-related violations linked to their business. ESG information is vital for investors, other stakeholders and the general public to be able to assess the efficiency of companies' risk management mechanisms. For these

reasons, the EU and Member States should enforce a robust regime for the disclosure of information on business impacts on human rights and the management of these risks.

Recommendation 13: As a first step, the European Commission, the European Parliament and Member States should make use of current EU discussions on the legislative proposals related to information disclosure and non-financial reporting to require transparency on companies' impacts and human rights due diligence processes.

Recommendation 14: The EU and Member States should adopt pending legislation on revenue transparency for the extractive and forestry industries and require both country-by-country and meaningful project-by-project reporting.

Recommendation 15: The EU and Member States should explore ways to ensure the effective enforcement of the aforementioned requirements and access to information, at least for those whose rights have been impaired by the impacts of European businesses.

State Duty to protect: ensuring access to effective remedies

The third pillar resting on the need for States and companies to ensure victims' access to effective remedies is an equally important part of the Framework. The ECCJ strongly condemns the lack of attention given to this pillar by the EU and Member States to date and urges them to take immediate and concrete measures to ensure compliance with this fundamental pillar.

To date, there are no existing judicial or non-judicial mechanisms that adequately guarantee access to remedy for victims of abuses committed by European companies operating abroad, with the exception of a few cases. As a result, there is a major gap in the existing framework, undermining the EU's efforts to solve the business and human rights predicament.

While various options may be considered for strengthening both judicial and non-judicial remedies, the latter can never replace the former, as highlighted in the UNGP. Non-judicial mechanisms, due to their inherent limitations, cannot satisfy the requirements of the right to an effective remedy, including the right to reparation, as per international law.

Judicial mechanisms

Recommendation 16: The European Commission should assess the practical and judicial barriers faced by victims of corporate abuse, in particular cost-related issues, and identify and propose measures to make access to judicial remedy possible for them. This could be implemented through EU or Member State actions. In doing so, attention should be paid to the situation of victims both within and outside the EU. As a starting point, the EU should take guidance from the study it commissioned (study by Edinburgh University on the legal framework for human rights and the environment applicable to EU companies operating outside the European Union) which highlighted measures to be taken to increase access to justice, as well as effective remedies, and identified further obstacles to be analysed, in particular those related to the excessive costs of litigation.

Recommendation 17: The EU and Member States should enable victims to join their cases and provide them with option of collective redress. The European Commission should build on the results of 2011 public consultations on collective redress and develop a proposal for common legislative framework in the EU.

Non-judicial mechanisms

Recommendation 18: With a view to implementing Guiding Principle 27, the EU and Member States should review the effectiveness of existing non-judicial grievance mechanisms such as the National Contact Points (NCP) for the OECD Guidelines and National Human Rights Institutions and expand their mandates where necessary to ensure effective functioning. In particular, OECD member states and adhering governments of the EU should review their NCP to ensure that their structures and procedures comply with the 2011 update on the procedural guidance of the OECD Guidelines for MNEs and ensure the impartial and effective handling of grievances.