

Statement to the Council of Europe High Level Seminar on Business and Human Rights (Strasbourg, 9 June 2017)

Human Rights implications of privatising or contracting out Public Services

1. Implementation of normative framework requires well-equipped monitoring mechanisms at domestic level

ENNHRI welcomes the Council of Europe High-level Seminar on Human rights and Business as an important opportunity to promote the effective implementation of global and regional human rights mechanisms across Europe.

ENNHRI is encouraged that the seminar aims to raise awareness about **Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business** ('The Recommendation'). The Recommendation was adopted by the Committee of Ministers on 2 March 2016 to provide guidance on the implementation of the United Nations Guiding Principles on Business and Human Rights ('UNGPs') at European level.

In addition to the UNGPs, the Recommendation builds on a number of initiatives in this field developed by numerous international organisations, including the International Labour Organisation (ILO) Tripartite Declaration of principles concerning multinational enterprises and social policy¹; the United Nations Committee on the Rights of the Child General Comment No. 16²; and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.³ ENNHRI has engaged with these institutions in line with the Edinburgh Declaration on the role of national human rights institutions in Business and Human Rights.⁴ For example, in 2015 ENNHRI filed a submission to the European Commission's consultation on the revision of its Strategy on Corporate Social Responsibility.⁵

ENNHRI welcomes in particular that, in line with the State duty to protect human rights outlined in Pillar 1 of the UNGPs⁶, the Recommendation highlights that

¹ http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf

² Committee on the Rights of the Child, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, CRC/C/GC/1.

³ <http://www.oecd.org/daf/inv/mne/48004323.pdf>

⁴ http://nhri.ohchr.org/EN/Themes/BusinessHR/DocumentsPage/Edinburgh_Declaration_ENG.pdf

⁵ <https://business-humanrights.org/sites/default/files/documents/EU%20CSR%20Communication%20ENNHRI%20Final%20Apr%202015%20%28%29.pdf>

⁶ The commentary to principle 5 of the UNGPs notes: 'States do not relinquish their international human rights obligations when they privatise the delivery of services that may impact upon the enjoyment of human rights'http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

“Member States should apply additional measures to require business enterprises to respect human rights, including, where appropriate, by carrying out human rights due diligence (...) when member States (...) conduct commercial transactions with business enterprises, including through the conclusion of public procurement contracts; privatise the delivery of services that may impact upon the enjoyment of human rights”⁷. The Recommendation further notes that “Member States should evaluate the measures taken and respond to any deficiencies, as necessary. They should provide for adequate consequences if such respect for human rights is not honoured.”

Further, **ENNHRI highlights that, according to the Recommendation, the National Contact Points established under the OECD Guidelines for Multinational Enterprises should be adequately resourced to ensure their visibility. NCPs recommendations should be taken into account by governmental authorities including in decisions on public procurement.**⁸

The integration of human rights into public procurement is also supported by the 2030 Agenda for Sustainable Development. Sustainable public procurement practices are specifically referred to in Goal 12. Indicator 12.7.1 refers to the number of countries implementing sustainable public procurement policies and action plans. Seen in the light of the explicit intention of the 2030 Agenda to ‘realize the human rights of all’⁹, there is a clear linkage between the implementation of the SDGs, human rights, and sustainable public procurement.

2. Human Rights Obligations call for impact assessment as NHRIs findings establish a range of Human Rights impacts of Privatisation of Public Services

ENNHRI reminds the Council of Europe Member States to assess possible adverse human rights impacts linked to privatisation and contracting out of public services in Europe. **ENNHRI, therefore, calls on Member States to step up efforts to establish a practice of human rights impact assessment in privatisation and public procurement processes.** Privatisation as well as sourcing out of public services does not allow the state to abdicate its responsibility to respect, protect, fulfil and promote human rights:

- **Obligation to respect**: When a state privatizes a particular service, the agreement with the private service providers must be consistent with relevant human rights norms.
- **Obligation to protect**: When a public service is privatized, it is crucial that private employers, private suppliers of goods and services, and other non-public entities are obliged to respect human rights norms, and in particular non-discrimination and equality norms in relation to vulnerable groups. For instance, in the case of water supply, the State has an obligation to prevent

⁷ Article 22 of CM/Rec (2016)3

⁸ Article 53 of CM/Rec (2016)3

⁹ Preamble, A/RES/70/1, 2015.

third parties from “compromising equal, affordable, and physical access to sufficient, safe and acceptable water”.

- **Obligation to fulfil and to promote:** States should adopt positive measures that enable and assist individuals and communities to enjoy their rights. Additionally, they should provide the right when individuals or groups are unable to realise the right by their own means. The state, thus, has the duty to ensure that accessibility, availability, quality and acceptability of basic services are not compromised in situations of privatisation.

Noting that public procurement accounts for approximately 12 per cent of gross domestic product across OECD countries, ENNHRI recognizes that there can be adverse impacts on the enjoyment of human rights **regardless** of whether the service providers are public or private. **National Human Rights Institutions across Europe have identified a range of human rights impacts in this area**, such as:

- A survey of twenty jurisdictions carried out the Danish Institute for Human Rights and others highlights impacts on human rights in the delivery of public services such as health and social care, housing, educational services, asylum and immigration-related service provision, prison or other detention facility management;¹⁰
- The Equality and Human Rights Commission (Great Britain) found that outsourcing has a direct impact on employment practices and working conditions in the cleaning sector;¹¹
- Following an investigation, the Northern Ireland Human Rights Commission found that the failure to place international human rights standards at the core of the legal and regulatory framework applicable to nursing homes can undermine residents’ human rights, such as the right to health;¹²
- The Irish Human Rights and Equality Commission highlighted the lack of human rights standards in inspect reports of accommodation centres for asylum seekers run by private companies;¹³
- The Finnish Parliamentary Ombudsman’s mandate covers public as well as private social and health care service providers, when the latter are performing public tasks. The Ombudsman deals with complaints raising human rights concerns from both type of service providers.¹⁴

¹⁰ <http://www.hrprocurementlab.org/wp-content/uploads/2016/06/Public-Procurement-and-Human-Rights-A-Survey-of-Twenty-Jurisdictions-Final.pdf>

¹¹ EHRC (2014) *The Invisible Workforce: employment practices in the cleaning sector*.

¹² <http://www.nihrc.org/documents/research-and-investigations/older-people/in-defence-of-dignity-investigation-report-March-2012.pdf>

¹³ IHREC (2017) *Ireland and the Convention on the Elimination of All Forms of Discrimination against Women*.

¹⁴ For information on the Office of the Parliamentary Ombudsman see: <http://www.oikeusasiamies.fi/Resource.phx/eoa/english/index.htm>

- The Greek National Commission for Human Rights has highlighted the impact of austerity measures and the privatisation of water and sanitation services on social and economic rights;¹⁵

The work carried out by ENNHRI members suggests that there are gaps in law, policy and practice across European states in relation to human rights and public procurement. For example, the Northern Ireland Human Rights Commission has highlighted that ‘current legislation and policy do not make sufficiently clear or explicit how the state’s positive duties to protect human rights are to be operationalised by public authorities in the course of purchasing activities’.¹⁶ ENNHRI has also previously raised concerns about the historically widespread and continuing perception of the existence of conflicts between the requirements of EU public procurement law and human rights.¹⁷

3. Strengthen Commitment to Human Rights Safeguards in Public Procurement

ENNHRI is of the view that the high level seminar presents a great opportunity to learn from the experience in other countries. For example, section 124 of the Finnish Constitution safeguards fundamental and human rights in the performance of public administrative tasks by private companies.

ENNHRI members have developed practical guidance in relation to public procurement and human rights which may be adapted and used across European states. For example, the Danish Institute for Human Rights has worked alongside others to develop the International Learning Lab on Public Procurement and Human Rights which serves as a network of central and local government procurement agencies and purchasing officers in the fields of electronics, apparel, international financial institutions, and private security.¹⁸ The Equality and Human Rights Commission (Great Britain) has also produced Responsible Procurement Principles for public and private sector organisations that buy in cleaning services.¹⁹

ENNHRI encourages States to use this timely seminar as an opportunity to strengthen their commitment to safeguard human rights in public procurement

4. Involving National Human Rights Institutions in National Action Plan processes

¹⁵http://www.nchr.gr/images/English_Site/CRISIS/GNCHR_Statement_%20impact_of_austerity_measures_on_HR_2015_.pdf

¹⁶ NIHRC (2013) *Public procurement and human rights in Northern Ireland*.

¹⁷ For example, Glasgow Commonwealth Games, Approach to Human Rights. Post-Games update, stating that the Organising Committee was “... advised that European case law prevented it making the Living Wage a competitively scored part of its procurement processes” (p.5), available at: http://www.megasportingevents.org/pdf/2014-10-16-Glasgow-2014-Approach-to-HumanRights_Post-Games-Update.pdf. In Denmark, answers to a recent parliamentary question indicated that terms referring to the UN Global Compact were inconsistent with Directive 2004/18 / EC: http://www.altinget.dk/udvikling/qa.aspx?id=14490&ref=newsletter&refid=17349&SNSubscribed=true&utm_source=Nyhedsbrev&utm_medium=e-mail&utm_campaign=udvikling

¹⁸ Further information available here: <http://www.hrprocurementlab.org/about/>

¹⁹ https://www.equalityhumanrights.com/sites/default/files/responsible_procurement.pdf

Finally, ENNHRI welcomes the recognition in the Recommendation of the role of NHRIs in relation to the development of National Action Plans implementing UN Guiding Principles on Business and Human Rights. This is particularly important given that a number of European states are currently in the process of developing their National Action Plans.²⁰ **ENNHRI encourages States to continue their efforts with respect to the development of their National Action Plans and to actively involve and consult with their independent National Human Rights Institution.**

²⁰ A summary of progress is available here: <https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>