

## RECOMMENDATIONS FOR THE NEXT EU STRATEGY ON CSR

April 2015

The European Network of National Human Rights Institutions (ENNHRI) here presents its second submission to the revision of European Commission's policy on Corporate Social Responsibility (CSR).<sup>1</sup>

National human rights institutions (NHRIs) are independent public bodies established at national level under the UN Paris Principles with responsibility for promoting and protecting human rights.

ENNHRI is Europe's regional association of NHRIs, comprising forty-one national human rights commissions, institutes and ombudsmen.<sup>2</sup>

ENNHRI recognises the European Commission's CSR policy as an important instrument with potential to influence not just the practices of governments and enterprises within the European Union (EU) but also CSR and business and human rights norms and standards more widely across the globe.

In this submission ENNHRI highlights our priorities and recommendations for the next CSR Communication.

### PILLAR I

#### 1. National action plans on business and human rights

ENNHRI commends the measures included in the 2011 Communication on CSR<sup>3</sup> and 2012 EU Strategic Framework and Action Plan for Human Rights and Democracy<sup>4</sup> to promote implementation of the UN Guiding Principles on Business and Human Rights (UNGPs) by EU Member States. In particular, ENNHRI reiterates its support for the requests contained in these documents that Member States develop National Action Plans (NAPs) on the UNGPs. Already in 2012, ENNHRI published recommendations regarding the scope, content and process of NAPs on business and human rights.<sup>5</sup> We also emphasised the importance of NAPs in our recent submission to the Council of Europe's Human Rights Committee, and are pleased to see that the current Draft Recommendation recommends that member states

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<sup>1</sup> ENNHRI's first submission was contained in Letter from Chair of ENNHRI, Prof. Alan Miller, to Sophie Muller, DG Internal Market, dated 9 September 2015.

<sup>2</sup> <http://nhri.ohchr.org/EN/Contact/NHRIs/Pages/Europe.aspx>.

<sup>3</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>.

<sup>4</sup> [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/131181.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf).

<sup>5</sup> <http://business-humanrights.org/en/pdf-implementing-the-un-guiding-principles-on-business-and-human-rights-discussion-paper-on-national-implementation-plans-for-eu-member-states>.

“...share plans on the national implementation of the UN Guiding Principles on Business and Human Rights (“National action plans”), including revised national action plans as well as their best practices concerning the development and review of national action plans in a shared information system, established and maintained by the Council of Europe, which is accessible to the public, including through reference to existing information systems”.<sup>6</sup>

ENNHRI applauds progress to date towards the development of NAPs amongst some EU Member States. However, we are concerned that:

- The vast majority of EU member states have not yet published NAPs, more than a year after the target of December 2013 set by the European Council for this;
- Ongoing NAPs processes in some Member States are neither participatory or transparent, with stakeholders involved weakly or not at all, and civil society organisations in particular frequently lacking even basic information or opportunities to engage in dialogue with government representatives;
- Member States’ published NAPs to date mostly describe historical actions, and lack specific commitments capable of demonstrably improving UNGPs implementation at national level.<sup>7</sup>

Such weaknesses undermine NAPs’ contribution to respect for human rights, good governance and accountability, both in the EU and abroad.

Furthermore, they undermine the credibility of the EU’s professed commitment to the UNGPs, at home and international fora.

It is therefore imperative that the next Communication on CSR contain strong measures to ensure continuing attention to national implementation of the UNGPs throughout the EU.

### **Recommendation**

ENNHRI urges that the new Strategy on CSR should include an emphasis on NAPs, and should renew its call for EU Member States develop, update and report on UNGPs NAPs.

ENNHRI recommends that the European Commission produce guidance for Member States, or direct them to existing guidance, on how to develop effective NAPs, through a human rights-based process, and coherently with EU policy commitments in other areas. Any such guidance should emphasise, in line with the practice of EU member states that have published NAPs, that NAPs extend in scope, like the UNGPs, to matters both inside and outside the state’s territorial jurisdiction.

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<sup>6</sup> [http://www.coe.int/t/dghl/standardsetting/hrpolicy/other\\_committees/hr\\_and\\_business/Documents/CDDH-CORP\(2014\)007add\\_en%20\(2\).pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/hr_and_business/Documents/CDDH-CORP(2014)007add_en%20(2).pdf) .

<sup>7</sup> ECCJ and ICAR, *Assessments of Existing National Action Plans on Business and Human Rights*, available at: <http://accountabilityroundtable.org/analysis/napsassessments/> .

In this connection, ENNHRI commends to the Commission the *Toolkit for the Development, Implementation and Review of State Commitments to Business and Human Rights Frameworks* published in June 2014 by the Danish Institute for Human Rights, an ENNHRI member, and the International Corporate Accountability Roundtable.<sup>8</sup>

ENNHRI further urges that the new Communication should commit to analysing options and modalities for the establishment of a human rights-based, participatory, transparent multi-stakeholder NAPs review process at EU level. Such a process could support the implementation of the UNGPs by permitting:

- Member states to present their experiences on business and human rights and NAPs, and to learn from each other by considering lessons learned and identifying good practices
- Scrutiny of coherence of law, policy and actions at EU and member state levels across relevant areas
- Structured dialogue involving all stakeholder groups on opportunities and common challenges.

## 2. Public procurement and human rights

ENNHRI welcomes the new EU public procurement Directives and their intention to permit public purchasers to integrate respect for human rights into procurement, in line with the UNGPs. However, ENNHRI remains concerned that the historically widespread and continuing perception of the existence of conflicts between the requirements of EU public procurement law and human rights will undermine the achievement of this goal.<sup>9</sup>

In addition, ENNHRI is concerned at the lack of guidance at European level regarding measures that Member States may need to consider adopting, in order to secure respect for human rights in connection with the transposition of the new Directives into national law. Indeed, draft transposing legislation in at least some EU Member States already demonstrates that human rights protections are weak or absent.<sup>10</sup>

### **Recommendation**

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<sup>8</sup> C Methven O'Brien *et al*, National Action Plans on Business and Human Rights, A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks (June 2014, Copenhagen/Washington DC: DIHR and ICAR), available at <http://humanrights.dk/files/media/dokumenter/udgivelser/DIHR%20-%20ICAR%20National%20Action%20Plans%20%28NAPs%29%20Report.pdf>.

<sup>9</sup> See e.g. 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-Human-Rights-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](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).

<sup>10</sup> DIHR, response to hearing of Danish bill to implement EU Directive 2014/24 / EU of the 26<sup>th</sup> February 2014 on public procurement and repealing Directive 2004/18 / EC (Public Procurement Directive): [http://menneskeret.dk/files/media/hoeringssvar/1\\_b\\_udbudsloven.pdf](http://menneskeret.dk/files/media/hoeringssvar/1_b_udbudsloven.pdf).

The next Communication on CSR must take steps to promote knowledge and use of the scope for public purchasers to integrate measures to ensure respect for human rights into their procurement processes, consistently with the new EU procurement Directives and EU commitments to human and fundamental rights under legislation in other areas.

The Communication could do this, for example, by providing support for analytical studies, pilot exercises, and development of guidance and training tools for public procurers in the EU with regard to the UNGPs and the interface between public procurement and human rights.

In addition, the EU should evaluate the human rights impacts of its own procurement, as well as procurement in the context of EU development assistance, and take appropriate measures to mitigate risks of any complicity in business-related human rights abuses identified.<sup>11</sup>

### **3. Implementing the UNGPs at EU level**

The 2011 CSR Communication contained a commitment that the Commission would publish a report on EU priorities for the implementation of the UNGPs and “...thereafter to issue periodic progress report”.<sup>12</sup> This commitment has not been honoured.

The EU now has exclusive competence over trade and investment agreements. While the EU committed in its 2012 Strategic Framework and Action Plan on Human Rights and of Democracy to promote human rights within trade and investment, concerns remain on the potential human rights impacts of currently negotiated agreements both inside the EU and in third countries, mechanisms for resolution of disputes arising under such agreements, and the consistency of these with EU legal obligations to respect human and fundamental rights.

#### ***Recommendation***

ENNHRI urges that the next Communication on CSR renew and deliver on the commitment made in the 2011 CSR policy to publish a report on EU priorities for implementing the UNGPs.

In line with the approach we advocate for the development of UNGPs NAPs, the Commission should produce both a baseline study and action plan that address all aspects of the UNGPs and internal and external dimensions, through a transparent and accessible multi-stakeholder process. In this context, the EU should pay specific attention to issues of trade and investment.

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<sup>11</sup> See e.g. DANIDA, e-learning course on Procurement and Aid Effectiveness: <http://um.dk/en/about-us/e-learning/procurement-and-aid-effectiveness/>.

<sup>12</sup> P.14.

## PILLAR II

### 4. Human rights due diligence and non-financial reporting

By the Commission's own report, by 2013 only 33% of large European companies had adopted a CSR policy that referred to the UN Global Compact, OECD Guidelines or ISO 26000, only 3% to the UNGPs themselves, and 2% to the ILO MNE Declaration.<sup>13</sup> This suggests that, in spite of being urged by the 2011 Communication to do so, the extent to which large European companies have adopted human rights due diligence remains minimal. Likewise, experiences within Member States is that, while "soft" requirements encouraging large companies to undertake non-financial reporting do trigger a positive response, their effects can take many years to reach a level of significance.

The non-financial reporting directive has put specific emphasis on the need for companies to report on salient human rights issues, while in addition introducing a comply-or explain element to non-financial reporting. Though the reach of the Directive is limited to larger companies, there are already examples of its scope being extended at national level to a broader group of companies.<sup>14</sup> In addition ENNHRI is looking forward to the development of specific guidance on non-financial reporting by the EU Commission.

#### **Recommendation**

ENNHRI recommends that the next Communication on CSR should commit to further analysis of the impact and effectiveness of "soft" regulatory approaches at EU and Member State level in incentivising large companies to implement human rights due diligence, including non-financial reporting on human rights impacts, as compared to alternative models with a stronger mandatory element.

In addition, the Communication should strongly encourage member states to undertake activities to support the adoption and performance of human rights due diligence within European companies, including through the upcoming guidance on non-financial reporting. It should also support member state activities to implement the country-by-country reporting directive on revenue transparency,<sup>15</sup> for instance with reference to the planned process to review legislation and assess whether to extend similar provisions to other sectors.

ENNHRI emphasises the importance of coherence in EU messaging on this issue. In this regard, we note with concern that a statement made on behalf of the EU at the second Financing for Development drafting session that "...the EU could not support mandatory integrated reporting on environment, social and governance (ESG) frameworks for large

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<sup>13</sup> C Schimanski, *An Analysis of Policy References made by large EU Companies to Internationally Recognised CSR Guidelines and Principles*, [http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/csr-guide-princ-2013\\_en.pdf](http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/csr-guide-princ-2013_en.pdf). This study undertaken on behalf of the European Commission assessed 200 randomly-selected large European companies.

<sup>14</sup> In the draft Act amending the Danish Financial Statement Act 2014 it is proposed that the reporting requirement should apply to all companies currently subjected to the CSR reporting requirement of the act, approximately 1100 companies.

<sup>15</sup> Directive 2013/34/EU

companies,”<sup>16</sup> in apparent contravention of the wording of the EU non-financial reporting directive.

## PILLAR III

### 5. Collective redress and pre-trial disclosure

The EU has competence in areas which can affect the availability of an effective remedy to victims of business-related human rights abuses. Recent revisions of regulations governing jurisdiction and applicable law have seen limited progress toward increasing access to justice.<sup>17</sup> However, provisions on collective redress and pre-trial disclosure of evidence remain underdeveloped at EU level.

EU law mandates collective action mechanisms in Member States, for instance, for environmental and consumer claims, but not for human rights abuses. At national level, collective redress mechanisms are lacking in many Member States. Similarly, there are no provisions for pre-trial disclosure of evidence at EU level, even for cases involving more than one European jurisdiction.

#### **Recommendation**

ENNHRI recommends that the next Communication on CSR commit to steps to examine the scope to strengthen pre-trial disclosure of evidence for the benefit of claimants in business-related human rights cases, especially when more than one European jurisdiction is engaged.

We further urge the exploration of options to develop the EU law to expand possibilities for collective redress by victims of large-scale human rights violations or abuses.

### 6. Participation in international processes

Discussions at the international level on the need for further legal developments have intensified with the adoption in June 2014 at the UN Human Rights Council of a resolution establishing an inter-governmental working group tasked with the elaboration of a legally

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<http://static1.1.sqspcdn.com/static/f/1080111/26159119/1429623077117/enb2308e.pdf?token=DhdwQyFyGEOoXGY0VHGvZYhwI%2FI%3D>

<sup>17</sup> The revision of the Brussels I Regulation stops short of including, e.g., a Europe-wide *forum necessitatis* provision as recommended by the Commission: Commission Green Paper on the Review of the Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters COM(2009) 175 final. But it retains the provision, now Art. 6, that allows Member States to exercise jurisdiction over defendants not domiciled within the EU according to their own rules, and e.g. the Netherlands has recognized such jurisdiction over non-domiciled subsidiaries of Dutch companies. (DC The Hague, 30.01.2013, C/09/337050).

binding instrument.<sup>18</sup> The EU has expressed concern that this process might jeopardize the consensus around the UNGPs and undermine current implementation efforts.

***Recommendation***

ENNHRI recommends that the EU and its Member States take every opportunity to engage constructively in the inter-governmental working group, while maintaining strong support for the UNGPs and their implementation at national, EU and international levels, including via NAPs.

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<sup>18</sup> UNHRC Res. 26/... of 24 June 2014, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, UN Doc. A/HRC/26/L.22/Rev.1. This resolution was supported by 20 countries.