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Conseil consultatif sur la cohérence
des politiques en faveur du développement

Opinion of the Advisory Council on Policy Coherence for Development

Strengthening human rights due diligence

1. Introduction

01. This opinion was adopted on 14 March 2019 by the Advisory Council on Policy Coherence for Development. Language of the original text: English.

02. On 12 December 2017, Belgium officially presented its National Action Plan (NAP) on Business and Human Rights. The NAP was developed on the basis of a range of consultations involving the private sector, academics and civil society organisations, before being jointly agreed on 23 June 2017 by the Federal Government and by the governments of the Region of Brussels-Capital, of the Walloon Region, and of the Flemish Region. The NAP aims to implement the Guiding Principles on Business and Human Rights, endorsed on 16 June 2011 by the Human Rights Council in Resolution 17/4. It also seeks to implement the commitment reiterated by the second EU Action Plan on Human Rights and Democracy, adopted on 20 July 2015 by the Council of the EU (Foreign Affairs) for the period 2015-2019, which provides that the EU Member States shall "Develop and implement National Action Plans (NAPs) on the implementation of the UN Guiding principles or integrate the UN Guiding Principles in national CSR Strategies", as part of the objective of "advancing the business and human rights agenda".

03. In this opinion, the Advisory Council on Policy Coherence for Development identifies strengthening human rights due diligence of businesses as one area where the NAP could be improved, and where Belgium could further demonstrate its commitment towards the global business and human rights agenda.

04. The Council is convinced that private businesses under Belgian jurisdiction may make a significant contribution to development in developing countries. Investments in infrastructure and technology are vital to the fulfillment of the Sustainable Development Goals, particularly with respect to Goal 8 concerning the promotion of "sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all". For such a contribution to have positive impacts however, such businesses should comply with their duty to respect human rights (HR) by establishing due diligence (DD) processes.

05. The Guiding Principles on Business and Human Rights provide that corporations should 'act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved'.¹ Principle 15 provides:

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

...

(b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.²

06. This is further explained under Principle 17 of the Guiding Principles on Business and Human Rights, according to which:

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

07. The OECD Guidelines on Multinational Enterprises, following their revision in 2011 to insert a human rights chapter (chapter IV), also include due diligence in the definition of the responsibility of business enterprises to respect human rights. These Guidelines define as follows the responsibility to respect human rights:

Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.

3. *Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.*

4. Have a policy commitment to respect human rights.

5. *Carry out human rights due diligence as appropriate to their size, the nature and context of*

¹ A/HRC/17/31, para. 6.

² Ibid. Principles 17-21 elaborate further on the content of the due diligence requirement.

operations and the severity of the risks of adverse human rights impacts.

6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.

08. Thus, both the Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises impose on corporations human rights due diligence duties. Such duties include a duty to identify impacts ; to prevent and mitigate impacts thus identified ; and to account for impacts and establish grievance mechanisms.

09. The Committee on Economic, Social and Cultural Rights takes the view that the obligation of States to protect the rights guaranteed under the International Covenant on Economic, Social and Cultural Rights 'entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights. States should adopt measures such as imposing due diligence requirements to prevent abuses of Covenant rights in a business entity's supply chain and by subcontractors, suppliers, franchisees, or other business partners'.³

10. Such a duty to protect extends to situations where corporations have activities outside the national territory. According to the Committee on Economic, Social and Cultural Rights: 'In discharging their duty to protect, States parties should also require corporations to deploy their best efforts to ensure that entities whose conduct those corporations may influence, such as subsidiaries (including all business entities in which they have invested, whether registered under the State party's laws or under the laws of another State) or business partners (including suppliers, franchisees and subcontractors), respect Covenant rights. Corporations domiciled in the territory and/or jurisdiction of States parties should be required to act with due diligence to identify, prevent and address abuses to Covenant rights by such subsidiaries and business partners, wherever they may be located. The Committee underlines that, although the imposition of such due diligence obligations does have impacts on situations located outside these States' national territories since potential violations of Covenant rights in global supply chains or in multinational groups of companies should be prevented or addressed, this does not imply the exercise of extraterritorial jurisdiction by the States concerned. Appropriate monitoring and accountability procedures must be put in place to ensure effective prevention and enforcement. Such procedures may include imposing a duty on companies to report on their policies and procedures to ensure respect for human rights, and providing effective means of accountability and redress for abuses of Covenant rights'.⁴

11. The adoption by Belgium of a National Action Plan (NAP) on Business and Human Rights is a commendable step towards promoting and protecting human rights in a business context. However, even more could and should be done to impose due diligence obligations on corporations under Belgian jurisdiction.

12. The NAP provides for a total of 33 actions, among which incorporating the principle of human rights due diligence in the management of the corporation ("Intégrer le principe de « diligence raisonnable » au sein des organismes de gestion de l'entreprise, également en matière de droits de l'Homme"). However, the NAP describes this objective as simply equivalent to the implementation of

³ Committee on Economic, Social and Cultural Rights, General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24), para. 16.

⁴ Id., para. 33.

Directive 2014/95/EU of 22 October 2014 concerning the disclosure of non-financial information by certain large undertakings and groups.⁵

13. **The Advisory Council does not underestimate the importance of this directive, in particular as a tool to improve the attractiveness of socially responsible investment and to ensure both investors and consumers are better informed about the the non-financial impacts of a company's operations. Directive 2014/95/EU, indeed, imposes** certain reporting requirements (including "a description of the policies pursued by the undertaking in relation to [environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters], including due diligence processes implemented" and " the outcome of those policies") on "large undertakings which are public-interest entities exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year" (article 1). This is significant. It is not equivalent, however, to the imposition of human rights due diligence obligations. It does not comply with the expectations set forth in this regard either by the Guiding Principles on Business and Human Rights, or by the OECD Guidelines on Multinational Enterprises.

2. Presentation of the issue

14. In the NAP, the Belgian state expresses its intention to support a whole series of already existing initiatives - mostly through enhanced information, sensitization and stimulation of enterprises under its jurisdiction, including those operating abroad⁶. It also commits support to the development of a UN binding instrument on business and human rights,⁷ and to the signing of global framework agreements (GFA) or enforceable brand agreements (EBA) (like the Bangladesh Accord)⁸; and it pledges ratification of ILO conventions regarding labor rights of women (C175, C156 and C189) as well as a number of other ILO conventions ensuring health and safety at work.⁹ Consistent with one of the actions listed in the NAP (action 13), Belgium implemented the EU directive on public procurement (2014/24/EU)¹⁰ with effect on 30 June 2017,¹¹ a change which may be expected to encourage public procurement supporting better compliance with the ILO's Declaration on fundamental principles and rights at work.

15. Consistent with the joint duty of states and enterprises to provide access to remedy for victims of human rights abuses (the so-called "third pillar" of the Guiding Principles on Business and Human Rights, in particular principles 22 and 25), it is further encouraging to note that the Belgian state has already launched an assessment of existing state and non-state judicial and non-judicial remedial mechanisms in order to identify and address gaps¹². Noteworthy too is the intention to strengthen the

⁵ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, *OJ L 330*, 15.11.2014, p. 1.

⁶ Belgian NAP Actions 1, 2, 4, 5, 7, 8, 9, 15, 19, 20, 21, 22, 24, 27, 28, 31, 32.

⁷ Belgian NAP Action 12 - Continuing Belgium's commitments and pioneering role in the field of human rights at international level.

⁸ Belgian NAP Action 8 – Encouraging international framework agreements.

⁹ Belgian NAP Actions 25 and 26 – Ratification of conventions regarding women's rights as well as health and security at work.

¹⁰ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, *OJ L 94* of 28.3.2014, p. 65. See Belgian NAP Action 13 - Strengthening and monitoring of respect for human rights in public procurement.

¹¹ Loi du 17 juin 2016 relative aux marchés publics, *Mon. b.*, 14.7.2016; and arrêté royal du 18 avril 2017 relatif à la passation des marchés publics dans les secteurs classique, *Mon. b.*, 9 mai 2017.

¹² Belgian NAP Action 3 – formulation of recommendations towards improvement of remedial mechanisms.

human and financial capacities of the Belgian National Contact Point (NCP)¹³ which is providing non-judicial referral and mediation services.

16. However, despite the stipulations in the Guidance on National Action Plans on Business and Human Rights developed by the Working Group on Business and Human Rights¹⁴ and the precedent set by national action plans on business and human rights developed by other jurisdictions,¹⁵ the Belgian NAP fails to provide for a duty imposed on corporations under Belgian jurisdiction to practice human rights due diligence. The existing Belgian initiatives and the NAP should be complemented with legislative and regulatory measures imposing human rights due diligence on corporations under Belgian jurisdiction. This is particularly important for corporations operating within global supply chains, where part of the production process takes place in countries with a weak record in human rights or labour rights areas. The imposition on corporations under Belgian jurisdiction of strong human rights due diligence obligations should not be seen as a means to protect Belgian economic actors from unfair forms of competition (so-called "social dumping"). It is, rather, a means for Belgium to support workers' unions and civil society groups in developing countries, which seek to pressure their own governments to abstain from seeking to achieve a competitive advantage in the global marketplace by sacrificing human rights or the rights of workers, and to move instead towards forms of production that are consistent with the objective of sustainable development.

3. Recommendations:

17. The Advisory Council for Policy Coherence for Development is particularly concerned with the impacts, in the countries from where Belgian corporations source their supplies, of the failure of Belgium to implement robust human rights due diligence requirements in Belgian legislation. It therefore recommends the Belgian state to:

- (1) **Legally anchor territorial as well as extraterritorial human rights due diligence requirements across all business sectors for all (small, medium and large) companies under Belgian jurisdiction, especially with relation to issues such as forced labor and child labor.** This means providing in legislation that the company may be held liable for any human rights violation occurring within the supply chain which the company was aware of or should have been aware of, allowing victims of such violations to file a claim for compensation before Belgian courts in accordance with the mandatory jurisdiction provided for in accordance with Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I' Regulation).¹⁶
- (2) **Impose on the largest companies, in addition, duties to seek information proactively about the human rights risks in their supply chains, and to take action on the basis of the information received.** The Advisory Council notes in this regard that a number of countries have adopted

¹³ Belgian NAP Action 23 – Strengthening the OECD National Contact Point (NCP).

¹⁴ Guidance on National Action Plans on Business and Human Rights, Working Group on Business and Human Rights, Version 1.0, December 2014 – Guidance on NAP Substance, p. iii, as well as Annex 1, 1. Statement of commitment, p 14.

¹⁵ *Belgium and the sustainable supply chain agenda : leader or laggard ? : Review of human right due diligence initiatives in the Netherlands, Germany, France and EU, and implications for policy work by Belgian civil society*, Dr. Huib Huyse and Dr. Boris Verbrugge, HIVA - KU Leuven, April 2018; *Assessments of existing national action plans (NAPs) on Business and Human Rights*, International Corporation Accountability Roundtable (ICAR) and European Coalition for Corporate Justice (ECCJ), August 2017.

¹⁶ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L 351, 20.12.2012, p. 1.*

similar requirements for corporations of a certain size. For instance, the UK Modern Slavery Act of 2015 requires corporate entities carrying on any part of their business in the UK that supply goods or services and have a minimum turnover of £36 million to produce a ‘slavery and human trafficking statement’ each year, thus imposing on such businesses to ensure transparency in their supply chains with respect to slavery and human trafficking (see section 54 of the MSA). The California Transparency in Supply Chains Act 2010 requires companies to disclose their efforts to keep supply chains free from slavery and human trafficking by reporting about risks and about how suppliers are expected to comply to ensure compliance, as well as about the auditing of suppliers and the training of personnel, applies to corporations doing business in California with annual receipts over 100 million US dollars. The French Law of 27 March 2017 on due diligence (**Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre**) imposes the adoption of a due diligence plan on companies incorporated in France with at least 5,000 employees (including the employees of its subsidiaries), or companies with at least 10,000 employees whether or not they are incorporated in France ("Toute société qui emploie, à la clôture de deux exercices consécutifs, au moins cinq mille salariés en son sein et dans ses filiales directes ou indirectes dont le siège social est fixé sur le territoire français, ou au moins dix mille salariés en son sein et dans ses filiales directes ou indirectes dont le siège social est fixé sur le territoire français ou à l'étranger").

- (3) **Ensure that Belgian enterprises operating in high-risk sectors with relation to adverse extraterritorial impacts on human rights join sectoral initiatives developed in other EU Member States.** This is the best way for Belgian corporations to be prepared as these sectors are gradually subject to regulations imposing due diligence obligations: the Dutch multi-stakeholder initiative in the gold sector, for instance, prepares companies for the recently adopted EU conflict minerals Regulation.¹⁷
- (4) **Engage in a meaningful stakeholder dialogue with Belgian businesses already engaged in human rights due diligence, relevant civil society organizations and other appropriate stakeholders towards development (and monitoring) of measures being put into place.**

4. Justification of the recommendations:

18. Worldwide, violations of human rights – including civil, political, economic, social, cultural and workers’ rights - are known to occur within the context of transnational business activities. Workers and communities in developing countries, are affected by either direct or indirect corporate human rights violations – with the latter mostly occurring within complex supply chain structures. High risk sectors include the extractive, manufacturing, infrastructure and retail sectors¹⁸ - in which Belgian enterprises too are active, with some of them being actually involved, in alleged cases of corporate

¹⁷ Regulation (EU) 2017/821 of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ L 130 of 19.5.2017, p. 1.

¹⁸ The UNGP were based on a number of surveys, such as ‘Corporations and Human Rights : A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse, John Ruggie, 23 May 2008’ ; more recent reports, articles, videos, country visit reports, surveys, maps, etc. with regards to corporate human rights abuses are collected by e.g. the Business and Human Rights Resource centre (<https://www.business-humanrights.org/en/issues/abuses>), Human Rights Watch (<https://www.hrw.org/topic/business>), Amnesty International (<https://www.amnesty.org/en/what-we-do/corporate-accountability>), the working group of the UNHR Office of the High Commissioner (<http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx>), the ILO (<http://www.ilo.org/global/standards/lang--en/index.htm>), the ITUC (<https://www.ituc-csi.org/annual-survey-of-violations-of-271>), Harvard Law (<http://hrp.law.harvard.edu/areas-of-focus/business-human-rights>), the Portal for Sustainability Reporting (<http://www.sustainability-reports.com>), the CHRD Project (<http://chrdproject.com/mapping-trends.html>), and many more.

abuse¹⁹. Hence the main reason for urgency in legally obliging all Belgian enterprises to comply with extraterritorial HRDD requirements - not only in order to prevent adverse impacts on human rights from occurring, but equally to provide legal certainty both to victims of abuses and to the companies themselves as to which duties of care can be imposed and, if not complied with, can give rise to legal liability.

19. The failure to make all Belgian enterprises comply with human rights due diligence requirements, also fails to ensure a level playing field for the good number of Belgian enterprises already engaging in human rights due diligence on an individual and voluntary basis. And taking into consideration the increasing risk of reputational damage when not in compliance, it is in all businesses' best interests to implement human rights due diligence. Strengthening human rights due diligence obligations would be widely supported by public opinion, according to the Eurobarometer surveys: in 2012, 87% of European citizens supported the idea of Europe obliging enterprises to respect social and ethical norms within as well as outside of the European territory²⁰.

20. Other EU Member States seem to have moved faster to comply with their duty to make enterprises comply. They not only have adopted legislative reforms (France), or have taken initiatives with a view to adopting such reforms (the Netherlands), they also are supporting enterprises through meaningful sector processes towards preventing human rights abuses and making positive contributions to development. The Netherlands are running multi-stakeholder initiatives for clothing and textile, banking, gold, forestry, meat and natural stone sectors, while initiatives for the insurance, food, metallurgy, floriculture and pension sectors are being developed²¹; Germany is running a similar process for the textile sector²². The wide range of state and non-state human rights due diligence-initiatives at Belgian, European and international levels has led to fragmentation threatening effectiveness and efficiency. As illustrated by the growth of litigation in countries such as the Netherlands and the United Kingdom, this is a source of legal uncertainty for business actors. The Belgian state could ensure Belgian enterprises align with existing sector initiatives of neighboring countries, while actively supporting their pending harmonization and scaling up to European levels.

21. From legal and sector processes in neighboring countries, it further emerges that a meaningful and transparent stakeholder dialogue will be of vital importance towards development (and monitoring) of the proposed legislative and regulatory measures. Such dialogue should involve the Belgian state, business enterprises (preferably those already engaging in human rights due diligence processes), as well as relevant civil society actors (including trade unions) and academic experts.

22. Compliance of all Belgian enterprises with extraterritorial human rights due diligence requirements will greatly contribute to development in line with the SDGs. Companies under the jurisdiction of other countries may however (and will) continue to go unpunished in violating human rights in developing countries. Therefore Belgium should actively support the ongoing process towards a UN legally binding instrument on the issue of transnational corporations and other business enterprises and human rights. In view of the universality of human rights and of the right to development in particular, supporting the binding treaty process must be done with a view to making it as ambitious as can be – as forcefully as possible imposing not only territorial, but also extraterritorial obligations on states and enterprises to fully protect and respect human rights, including through making all companies comply with HRDD, transparency and access to remedy requirements.

¹⁹ Such as reports on work conditions and child labor in cobalt mining in the DRC (<https://www.amnesty.org/en/documents/afr62/3183/2016/en>); and on the exploitation of migrant workers on 2022 FIFA World Cup sites in Qatar (<https://www.amnesty.org/en/documents/mde22/3548/2016/en>).

²⁰ Eurobarometer 2012 (last publication in which this issue was taken up).

²¹ Sector Covenants – https://www.imvoconvenanten.nl/?sc_lang=en

²² Partnership for Sustainable Textiles – www.textilbuendnis.com/en/

The Advisory Council on Policy Coherence for Development (ABCO-CCPD) was established by Royal Decree of 2 April 2014 in application of the Act of 19 March 2013 on Belgian Development Cooperation (articles 2.16°, 8, 31 and 35.2°). This Council's primary mission is to provide opinions to the Belgian federal authorities in order to promote Policy Coherence for Development in accordance with Article 208 of the Lisbon Treaty and Article 8 of the legislation initiated on March 19, 2013, related to Belgian Development Cooperation.

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