

Brussels, 20 April 2016

To:

Member States Representatives on the Council of the EU Working Party on Human Rights (COHOM)

Re: Business and Human Rights: Addressing gaps

Dear Members of the Council of the EU Working Party on Human Rights,

The Dutch EU Presidency has invited the Foreign Affairs Council to come forward with Conclusions on business and human rights, in particular on access to justice for human rights abuses related to business operations. There are still significant gaps – at EU and Member State level - in the protection of human rights from business-related abuses and we call on the Council of the EU to strongly commit in its Conclusions to tackling these gaps effectively. In particular, we call on the Council to consider the recommendations in the attached appendix.

Following the adoption of the UN Guiding Principles on Business and Human Rights (UNGPs) in 2011, the EU and its Member States have repeatedly expressed their commitment to implementing these principles, which include the state duties to protect human rights from corporate abuse and to ensure accountability and effective remedy when abuses occur. However, with the exception of a few states,¹ Member States have so far failed to take legislative or other meaningful action to ensure effective prevention of, and accountability and remedy for, corporate human rights abuses.

The EU and many Member States are yet to develop their strategy and action plans for UNGPs immediate implementation and to undertake the necessary legal and policy reforms to this end. More worryingly, while a small number of countries have produced National Action Plans for UNGPs implementation, these plans do not sufficiently contemplate and commit to taking the necessary legislative steps to adequately address the most significant human rights protection gaps.

As a result, a legislative framework to ensure corporate respect for human rights is still lacking and important obstacles to effective accountability and remedy for corporate human rights abuses still remain at both European and national level.

Over the last few years a number of legal initiatives at European and national levels have paved the way towards greater regulation of the corporate responsibility to respect human rights in their business operations and global value chains. They are promising steps but much more is needed. Legislation should be adopted at both EU and Member State levels to require and monitor that business enterprises respect human rights throughout their global operations and carry out robust human rights due diligence processes to discharge this obligation. At the same time, a thorough review of existing obstacles to remedy leading to the adoption of concrete measures to remove or alleviate these obstacles must be pursued, in consultation with civil

¹ For example, the UK's Modern Slavery Act 2015 and the legislative proposal to impose a "duty of vigilance" on certain French companies in France.

society. EU governments also need to engage positively and constructively in normative efforts at global level, such as the process towards a UN binding instrument on business and human rights.

The Annex provides detailed recommendations on the most pressing challenges to effectively protect human rights in the context of business activity. They include legal measures to ensure corporate respect for human rights, including embedding human rights due diligence into law, to identify and remove obstacles to remedy and to develop effective national and European action plans to ensure policy coherence and clear roadmaps for effective UNGPs implementation. They also refer to the need for the EU and its Member States to bring a strong, constructive voice to the current discussions within the UN on the scope and nature of a binding instrument on business and human rights.

We welcome and support the efforts to ensure discussions on these important topics are taking place within the Council of the European Union and at a high level EU conference on business and human rights organised jointly with civil society on 11th May in Amsterdam.

We hope and trust that you will take our recommendations into consideration and we look forward to continuing our discussions.

Yours sincerely,

Jerome Chaplier, Director, ECCJ

Iverna McGowan, Director, Amnesty International EU Institutions Office

Bernd Nilles, Secretary General, CIDSE

Magda Stoczkiewicz, Director, Friends of the Earth Europe

Antoine Bernard, Chief Executive Officer, FIDH

With 21 member groups, representing over 250 organisations from 15 countries, the **European Coalition for Corporate Justice (ECCJ)** is the only European coalition bringing together European campaigns and national platforms of NGOs, trade unions, consumer organisations and academics to promote corporate accountability.

CIDSE is an international family of Catholic social justice organisations, working together to promote justice, harness the power of global solidarity and create transformational change to end poverty, inequalities and threats to the environment both global and local.

Amnesty International's European Institutions Office (EIO) seeks to ensure that the EU integrates human rights into its internal and external policies and that its Member States take tangible action to promote and protect human rights nationally and regionally.

Friends of the Earth Europe is the largest grassroots environmental network in Europe, uniting more than 30 national organisations with thousands of local groups. FoEE is the European branch of Friends of the Earth International, which unites 74 national member organisations, some 5,000 local activist groups, and over two million supporters around the world.

FIDH is an international human rights NGO federating 178 organizations from 120 countries. Since 1922, FIDH has been defending all civil, political, economic, social and cultural rights as set out in the Universal Declaration of Human Rights.

Appendix: Civil Society Recommendations

Addressing the lack of access to remedy for victims of corporate human rights abuses

Today victims of human rights abuses involving European companies face multiple obstacles to access judicial remedies. These include several obstacles on admissibility; the often prohibitive costs associated with pursuing remedies through the courts; restrictive procedural rules related to the disclosure of evidence in civil litigation, the absence of clear liability standards for corporate involvement in human rights abuses and the lack of clarity regarding the application of EU rules of private international law in transnational civil litigation. While some barriers are specific to certain Member States (i.e. they relate to the specific features of a given Member State judicial or legal system), some are common to many or all Member States (e.g. when they arise from EU legislation such as “Rome II”). Often combined, these obstacles make it virtually impossible for victims to access justice.

The EU has committed to implementing the UNGPs in their entirety. However, despite access to remedy being a fundamental pillar and core principle of the UNGPs, the EU has so far given very little attention to this issue. The **Council of Europe Recommendation on Human Rights and Business** adopted on 2nd March 2016² to facilitate the implementation of the UNGPs places particular emphasis on the need to remove barriers to remedy, including in particular barriers to accessing Member States’ courts. This instrument provides a number of concrete recommendations which should be placed at the heart of the Council conclusions.

As a matter of priority, the Council conclusions should **address obstacles to access remedy** and:

- *Invite the European Commission to undertake a thorough examination, in consultation with civil society, of existing barriers to justice in cases brought before Member State courts for alleged abuses to human rights committed by EU enterprises abroad. This assessment should be geared towards identifying and promoting the adoption of effective measures that remove or alleviate these barriers.*
- *Invite the EU and Member States to:*
 - o *Tackle financial and procedural burdens in civil litigation for alleged corporate human rights abuses, including setting minimum common standards to allow associations to bring claims on behalf of alleged victims and ensure collective redress including for non-EU claimants for abuses committed outside of the EU.*
 - o *Improve access to evidence through better evidence disclosure procedures and by reversing the burden of proof in certain cases, so that it is down to the most well-resourced party in the best position to do so to prove that it took all necessary due diligence steps to prevent abuses throughout its global operations.*

² “Council of Europe, Recommendation CM/Rec (2016)3 of the Committee of Ministers to Member States on human rights and business”, 2 March 2016.

- *Establish clear corporate liability standards in line with the scope of the corporate responsibility to respect human rights of the UNGPs.*
- *Address legal, procedural and practical obstacles that prevent prosecution authorities from investigating and prosecuting EU companies involved in crimes linked to human rights abuses.*

Embedding human rights due diligence in law

Over the last few years a number of legislative initiatives at European and national levels have paved the way towards embedding the corporate responsibility to respect human rights into law. in their business operations and global value chains³. It is essential that the EU builds on these legal developments towards more responsible global value chains. Human rights due diligence (HRDD) should be mandatory for all companies.

The **Council of Europe Recommendation on Human Rights and Business** includes a number of strong recommendations in relation to legislative measures to ensure companies respect human rights and to require HRDD. These should be implemented as matter of urgency throughout the EU and be expressly referenced in the Council Conclusions.

The Council Conclusions should emphasise the need to ensure EU companies **respect human rights throughout their global operations**, and:

- *Urge the EU and the Member States to take legal measures to make sure that companies respect human rights throughout their operations and in relation to their business relationships including outside the EU. Mandatory HRDD should follow the steps required in the UNGPs (identify, prevent/mitigate, remedy and account for). It should furthermore be guided by certain overarching principles related to the proactive identification of risks to human rights, the elaboration of rigorous and demonstrable action plans to prevent or mitigate these risks, adequate response to known abuses, and transparency. Consultation with relevant actors should be ensured at all stages as well as disclosure of all relevant project or investment-specific information to affected stakeholders.*
- *Call on the EU and Member States to prioritise for immediate action the establishment of mandatory HRDD for:*
 - *business enterprises which are owned or controlled by the State, receive substantial support and services from State agencies or European institutions (such as export credit agencies, official investment insurance and guarantee agencies aid and development agencies and European financial institutions) businesses that provide goods or services to Member States or EU institutions (through public procurement*

³ French legislative proposal on Duty of Vigilance, UK Modern Slavery Act, and the Swiss popular initiative for mandatory human rights due diligence; EU Non-Financial Reporting Directive, EU legislative proposal on Conflict Minerals.

- contracts), and enterprises which enjoy other commercial benefits and advantages (i.e. trade missions, diplomatic services).
- o business enterprises whose activities pose particularly high risks to human rights including in third countries and / or sourcing from high risk or conflict-affected areas.
 - o business enterprises responsible for the delivery of privatised services that may impact upon the enjoyment of human rights.
- *Support, within in the current legislative process on conflict mineral, mandatory human rights due diligence for upstream and downstream operators consistent with the OECD Due Diligence Guidance.*

Enhancing the global legal framework and ensuring policy coherence between the trade and the business and human rights agendas

Efforts to implement the UNGPs should be accompanied by positive engagement in further normative developments in the context of the ILO, the OECD and the UN, including in particular the process initiated by the Human Rights Council to elaborate a binding instrument on business and human rights. Regarding the latter, UNGPs implementation and participation in negotiations on a binding instrument on business and human rights should be regarded as complementary as both are essential pathways to achieving greater protection against business-related human rights abuses across the globe.

The Council conclusions should recognize the need to **enhance the international normative framework** and encourage Member States' positive and constructive participation in multilateral processes alongside domestic action, by:

- *Including a commitment to engage in good faith in all normative development processes related to business and human rights.* In particular, governments should participate in the UN Inter-Governmental Working Group developing a legally binding instrument on business and human rights, and support its efforts to bridge gaps in the global protection of human rights.

The Council conclusions should also address EU **trade and investment policies** as far as they are relevant for the business and human rights agenda. EU on-going negotiations of trade and investment agreements include a call to parties to encourage the implementation of the UNGPs. However, these agreements fail to fully address their potential human rights implications, thus adding further challenges to the gaps in protection identified so far. The Council Conclusions should:

- *recall the necessity to consider the potential human rights impacts of such agreements and to take the appropriate preventive measures, including through the incorporation of human rights clauses, as required in the **Council of Europe Recommendation on Human Rights and Business.***
- *invite EU and Member States to continue to develop a robust and methodologically sound approach to the analysis of human rights impacts of trade and investment agreements, in line with the 2012 EU strategic framework on human rights and democracy and its 2015 action plan.*

- *recall the need to ensure that those agreements are consistent with international human rights obligations and responsibilities of all stakeholders (the EU, Member States and business enterprises), and enhance in those trade agreements the human rights monitoring, enforcement and grievance mechanisms in line with the aforementioned documents and the UNGPs.*

Developing robust EU and Member States Action Plans on Business and Human Rights

Action plans for the implementation of the UNGPs that are evidence-based and developed through a transparent and participatory process have the potential to catalyse much needed political discussion across different government bodies and deliver a coherent, integrated and accountable program of action to improve human rights protection in the context of business activity.

The Council conclusions should emphasise the need for a **European action plan** as well as coherent and robust **National Action Plans** and:

- *Include a renewed commitment from Member States and a call on the European Commission and the External Action Service to implement the UNGPs in all areas falling under their respective competence;*
- *Invite Member States to develop or review National Action Plans in line with the guidance provided by the UN Working Group on Business and Human Rights. In particular, Action Plans should build on baseline assessments that identify gaps in laws, policies and practice. The plans should be developed through meaningful stakeholder participation and feedback. They should identify priorities, define specific actions and timelines, allocate responsibilities between government bodies or EU institutions and ensure policy coherence. They should establish a mechanism to monitor the implementation of these plans and assess their effectiveness, with the participation of stakeholders.*

Committing to regularly assessing and addressing remaining gaps

The Council conclusions should

- *include a commitment to report regularly, at least every two years, on the steps taken to ensure effective protection of human rights in the context of business activity and results achieved, the remaining gaps in protection and the recommended future actions to address these gaps.*
- *invite the Commission and Member States to report annually on their efforts, actions, achievements and obstacles in pursuing the implementation of all three pillars of the UNGPs at national, regional and global level.*