

Recommendations Regarding the Revision of the UK's National Action Plan on the UN Guiding Principles

31 July 2015

Shift is pleased to submit these recommendations to the UK Government as part of the Government's revision of its 2013 National Action Plan ("NAP") entitled *Good Business: Implementing the UN Guiding Principles on Business and Human Rights*.

As the first state to develop a NAP on the UN Guiding Principles, and now the first to review and update an existing NAP, the UK has the opportunity to continue to show critical leadership on business and human rights.

We have contributed to several of the consultations held by the Government and this submission is in addition to the views we have expressed in those sessions. In it, we address three key recommendations relating to: particular opportunities when the state "does business with business", human rights reporting, and access to effective state-based remedy.

1. Particular Opportunities when Doing Business with Business

A number of UK departments and agencies have critical roles to play in creating markets for good corporate practices that respect human rights when they engage with businesses as clients or suppliers to the government. Guiding Principles 4 through 6 address some of the ways in which the state can incentivize, support or require business clients and suppliers to pay greater attention to human rights, in particular, through export credit and investment guarantee agencies, development finance institutions and government procurement requirements. While the 2013 NAP touched on some of these opportunities, there is clearly scope for the revision process to consider these in more depth.

It is essential that the state convey the clear expectation that its business clients and suppliers should carry out human rights due diligence to manage human rights risks in relation to their operations or business relationships. It is just as important that a failure to meet those expectations has consequences in relation to further business with or support from the state.

The last few years have seen a growing awareness among OECD **export credit agencies** (ECAs) and **development finance institutions** (DFIs) of the expectations of the UN Guiding Principles, particularly in

relation to the need for heightened human rights due diligence in high-risk circumstances. Through our work with the IFC, as well as various countries' ECAs (such as those of Norway and Canada) and DFIs (such as those in the Netherlands, Germany and France), we have seen a growing number of financial institutions strengthen their existing environmental and social due diligence approaches to incorporate human rights due diligence more directly, in order to better prevent risk to people as well as risk to the investments at issue.

- *We encourage the Government to commit to reviewing the existing approaches of UK Export Finance and CDC through the lens of human rights due diligence and identifying whether and how they could be strengthened. We also urge the Government to support discussion at the OECD level in relation to updating the 2012 Common Approaches to better align with the UN Guiding Principles.*

With regard to the issue of **public procurement**, we welcome the transposition of the 2014 EU Procurement Directives through the UK Public Contracts Regulations 2015 that allows contracting authorities to take into account social considerations. At the same time, we believe that more is needed to “ensur[e] that in UK Government procurement human rights related matters are reflected appropriately when purchasing goods, works and services” (as stated in the 2013 NAP in 2(ii)).

- *We recommend that the Government take advantage of the revision process to commit to develop clear guidance for relevant authorities on how to integrate consideration of human rights into the bidding process for public sector contracts, as well as what the appropriate consequences should be where human rights are not respected in practice by business suppliers.*

2. Human Rights Reporting

As Guiding Principle 3(d) makes clear, in meeting the duty to protect, states should: “Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.” The UK has taken a number of very welcome actions in this space since its initial NAP was launched. However, we see the potential for confusion among companies with regard to two specific initiatives.

First, with regard to the domestic **transposition of the EU Directive on Non-financial Reporting** (the EU NFR directive), there is a risk of significant confusion among companies that will be subject to its requirements about what it means to report on “policies” and their “outcomes”, “principal risks related to [a company’s] operations...which are likely to cause adverse impacts”, and “due diligence” regarding respect for human rights. As the UK Companies Act is revised as part of the transposition process, companies will need clear guidance that the information they need to provide with respect to human rights is no different from that expected under the UN Guiding Principles.

Second, in relation to the **disclosure required under the Modern Slavery Act 2015**, we know that companies are uncertain about whether the law is asking for additional steps beyond what is set out in the UN Guiding

Principles. As our short, publicly available memo analyzing the Act against the UN Guiding Principles seeks to illustrate, the Act is asking for evidence of specific policies and processes to prevent and address slavery, human trafficking and related severe abuses that are aligned with the policies and processes expected under the UN Guiding Principles.¹ (The memo is also annexed to this submission for ease of reference.)

In both cases, we believe that the **UN Guiding Principles Reporting Framework** (www.UNGPRreporting.org) can help UK companies make the connection between the requirements of these laws and their responsibility to respect human rights under the UN Guiding Principles, which many of them are actively working to meet in practice.²

The UK supported the development of the UNGP Reporting Framework and continues to actively support its implementation. We have already seen significant uptake of the Framework since its launch in February 2015. It has been downloaded 20,000 times; dozens of companies report that they are using it as an internal management tool or to improve their external reporting; Unilever has piloted the Framework, releasing a stand-alone Human Rights Report in June this year and other companies from diverse sectors, including ABN AMRO, Ericsson, H&M, Nestlé and Newmont, are early adopters. The UNGP Reporting Framework has the support of over 90 investors representing over USD \$4.5 trillion assets under management worldwide, and a number of governments are considering it in the context of their current NAP processes.

- *We urge the UK to consider the particular relevance of the UNGP Reporting Framework in providing guidance to companies with regard to the human rights requirements of the EU NFR directive (once it is transposed) and the provisions of the Modern Slavery Act. We also ask the Government to consider recommending the use of the Reporting Framework to UK companies more broadly as a tool to help them meet their responsibility to respect human rights under the UN Guiding Principles.*

3. Access to Effective State-based Remedy

Guiding Principle 25 affirms the need for effective state-based remedy, both judicial and non-judicial, as the foundation of a wider system of remedy for business-related human rights harms. Guiding Principle 26 identifies common legal and practical barriers to accessing judicial remedy for such harms.

Guiding Principle 26 could only address **barriers to judicial remedy** in very broad terms because their precise nature, and the most appropriate solutions to them, must necessarily be determined at the national level. Doing so requires detailed analysis and review of the existing situation, taking into account broader access to justice considerations that go well beyond the business and human rights sphere, and will necessarily involve difficult

¹ See <http://shiftproject.org/publication/mapping-modern-slavery-act-against-un-guiding-principles>.

² Shift, together with our project partner the international accountancy firm Mazars, led the development over the last two years of the UNGP Reporting Framework. The Reporting Framework is the first comprehensive guidance for companies to report on human rights issues in line with the UN Guiding Principles.

judgments. Yet it is essential to meeting the duty to protect in practice. It is therefore very concerning that no existing NAP fully engages with this principle.

In terms of **non-judicial state-based remedy**, it is again important that negative findings by such mechanisms are linked to meaningful consequences for the businesses involved. A recent example can be found in the revised Canadian Extractive Sector CSR Policy, which formally links poor corporate performance and refusal to cooperate in various dialogue processes, including those of the Canadian National Contact Point (NCP), to limitations on export credit and other official trade promotion support.³

- *The Government committed in its 2013 NAP to “keep the UK provision of remedy under review” (4(v)). We urge the Government to use the revision process to update stakeholders on the progress of this review and to specify the steps it will take as a result in the revised NAP. We also encourage the Government to consider appropriate consequences for companies that refuse to engage with or are subject to negative findings by the UK National Contact Point.*

In closing, we appreciate the opportunity to make this submission and would be pleased to provide any further information that may be of use.

Shift is the leading center of expertise on the UN Guiding Principles. The Shift team was centrally involved in shaping and writing the UN Guiding Principles, and is chaired by their author, Harvard Professor John Ruggie, the former Special Representative of the UN Secretary-General for Business and Human Rights. Shift works globally with businesses, governments, civil society and international organizations to put the UN Guiding Principles into practice. We share our learning through public materials that help accelerate change globally. For examples of our work please see www.shiftproject.org. Shift is a non-profit organization headquartered in New York with 501(c)(3) status.

³ See <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng> under “Encouraging alignment with CSR guidance and participation in dialogue”.

Annex to Submission: Mapping the Provisions of the Modern Slavery Act Against the Expectations of the UN Guiding Principles on Business and Human Rights

July 2015

The UK's Modern Slavery Act 2015⁴ received Royal Assent on 26 March and is now law of the land. The Act is a critical step forwards in strengthening company disclosure on efforts to prevent some of the most serious abuses that exist in today's global supply chains as a result of slavery, servitude, forced or compulsory labor and human trafficking.

However, the Act has raised questions for many UK companies about the relationship between its provisions, particularly Part 6 which deals with transparency in supply chains, and their broader responsibility to respect human rights. What exactly are they being asked to report on relating to modern slavery? And how does this new reporting requirement relate to what they are already doing to implement the UN Guiding Principles?

This short analysis by Shift aims to help companies and other stakeholders understand the relationship between the provisions of the Act and the expectations of the UN Guiding Principles. It is not intended as legal advice.

A. Context

The Act asks companies of a certain size to publish an annual "slavery and human trafficking statement" to disclose the steps the company has taken during that year to ensure that slavery and human trafficking is not taking place in any of its supply chains or in any part of its own business.⁵ Alternatively, a company can state that it has not taken these types of steps. Where a company has a website, it must publish the statement on its website.⁶ The statement must be approved by the board or its equivalent.⁷

Unlike a similar law in the state of California in the US, there is no requirement that companies conduct a certain amount of business in the UK for the law to apply. The Act applies if a company is carrying on business, or part of a business, in any part of the UK.

⁴ See http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpga_20150030_en.pdf

⁵ Section 54(4).

⁶ Section 54(7).

⁷ Section 54(6).

The law applies to a significant number of companies. In line with the general view expressed by both business and civil society stakeholders during the public consultation on this point, the Government announced on July 29 that the law applies to any company with an annual turnover of £36 million – the lowest of the proposed turnover thresholds. As a result, the Act applies to an estimated 12,000 UK active companies; that is more than the number that will be subject to the new EU non-financial reporting directive that is being transposed into UK law this year.

B. Analyzing the Modern Slavery Act through the Lens of the UN Guiding Principles

So what are UK companies that are subject to the Act being asked to do? Section 54(5) provides that a company's statement "may include" the following:

- (a) the organisation's structure, its business and its supply chains;
- (b) its policies in relation to slavery and human trafficking;
- (c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
- (d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;
- (e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate;
- (f) the training about slavery and human trafficking available to its staff.

The text is, admittedly, potentially confusing for those trying to assess its requirements against the expectations of the UN Guiding Principles. But in essence, paragraph (a) asks for critical context to enable a reader to understand the business; the remainder of the provisions reflect expectations set out under the UN Guiding Principles and apply them to the risks of slavery and human trafficking in a company's own operations and in its supply chain. This is consistent with the UN Guiding Principles, which expect companies to seek to prevent or mitigate negative human rights impacts that are directly linked to their operations, products or services through their business relationships, even if they have not caused or contributed to those impacts.

In short, companies are being asked to disclose:

- Evidence of a **policy commitment** in relation to slavery and human trafficking, as well as evidence of the effectiveness of the **embedding** of this policy specifically through training provided to staff;
- The company's **human rights due diligence processes** in relation to slavery and human trafficking in its operations and supply chains. This includes:

- **Identifying** the parts of a company’s operations and supply chains where the risks of such impacts are the most salient, that is, where they would be the most severe in terms of the impact on people, were they to occur, and where they are the most likely to occur.
- Explaining the steps a company has taken to **assess and manage those risks and the effectiveness of its efforts**, which are all parts of human rights due diligence as set out in the UN Guiding Principles.

The law does not specifically refer to information about companies’ remediation processes where negative impacts have taken place and the company has caused or contributed to them. (Remediation is the third element, together with a policy commitment and human rights due diligence processes, that the UN Guiding Principles expect companies to have place to meet their responsibility to respect human rights in practice.) However, the list of relevant information in Section 54(5) is non-exhaustive.

So companies can rest assured: the law does not introduce anything new. It is not asking for additional information beyond that which is already covered by the UN Guiding Principles. Rather, the Act is asking for evidence of specific policies and processes to prevent and address slavery, human trafficking and related severe impacts.

C. The Relationship between the Modern Slavery Act and Broader Human Rights Reporting

Companies and their stakeholders can now benefit from the UN Guiding Principles Reporting Framework – the first comprehensive guidance for companies to report on human rights in alignment with the UN Guiding Principles – in their efforts to meet the requirements of the Modern Slavery Act. See www.UNGPRreporting.org.

The table below illustrates the connections between the information asked for under the Act and the guidance provided in the UNGP Reporting Framework.

Modern Slavery Act, s 57	UNGP Reporting Framework
5(a) Information about an organization’s structure, business and supply chains	→ Reporting Principle A.
5(b) Information about an organization’s policies on modern slavery	→ Relevant information is contained under Question C1.
5(c) Information about an organization’s due diligence processes in relation to modern slavery in its business and supply chains	→ Relevant information is contained under Questions C2 through C5. The four components of due diligence are: (i) assessing impacts, (ii) integrating findings and taking action, (iii) tracking performance and (iv) being prepared to communicate about a

	<p>company's efforts.</p> <p><i>Note:</i> "Communicating" encompasses both formal reporting about the company's efforts to manage its human rights risks, where appropriate, and communication with stakeholders through other means. Since the UNGP Reporting Framework itself provides guidance on formal reporting, its questions focus on the other main aspect of communication under C2 on stakeholder engagement.</p>
5(d) Information about the parts of an organization's business and its supply chains where there is a risk of modern slavery taking place, and the steps it has taken to assess and manage that risk	→ Relevant information is contained under Questions C2 through C5.
5(e) Information about an organization's effectiveness in ensuring that modern slavery is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate	→ Relevant information is contained under Questions C2 through C5.
5(f) Information about the training on modern slavery available to its staff	<p>→ Relevant information is contained under Question C1.1.</p> <p><i>Note:</i> The Implementation Guidance provides other examples of how a company can demonstrate that a policy commitment has been embedded into company practice beyond training.</p>

The UNGP Reporting Framework provides additional resources on how companies can enhance the credibility of their disclosure in relation to their efforts to prevent and address risks related to slavery, human trafficking and related impacts, particularly in terms of stakeholder engagement (see C2) and remediation (see C6).

Companies that use the UNGP Reporting Framework for their human rights reporting more generally, and for which slavery, human trafficking or related impacts are a salient human rights issue, will already have addressed the Act's disclosure requirements by addressing the provisions of the Reporting Framework indicated above. In this way, companies' disclosure on their efforts to prevent and address these severe impacts can become part of a broader, more coherent approach to human rights reporting.