

## Putting the rights of people at the heart of the new EU strategy on CSR

An overwhelming 87% of European citizens agree that the EU should try to ensure private companies comply with social and ethical standards when operating outside Europe<sup>1</sup>. Yet over the last few years civil society organizations have reported a large number of cases of corporate human rights abuses and environmental scandals involving European companies outside Europe<sup>2</sup>. Despite the recent renewed emphasis on Corporate Social Responsibility (CSR) by the EU and its Member States and a greater uptake of the CSR agenda by European business, the effectiveness of current voluntary CSR strategies in protecting human rights and the environment is questionable at best<sup>3</sup>. Much remains to be done to prevent European companies from having adverse impacts on society and to hold them accountable when they cause harm.

The EU has a responsibility to implement of international human rights law, principles and standards on business and human rights, both internally (regarding EU laws and institutions and within Member States) and externally (outside the EU).

ECCJ, Amnesty International and Friends of the Earth Europe are the civil society representatives in the Coordination Committee of the Multi Stakeholder Forum on CSR set up by the European Commission (EC). Our organizations welcome the initiative to elaborate a new CSR strategy for the years ahead. The multi-dimensional nature of the debate on CSR provides a space to develop a systematic and holistic approach on business and human rights issues across and beyond the EU and to enhance the responsibility of business to respect and promote human rights. However, a strategy based mainly on voluntary commitments will not lead to significant improvements for people and the planet. The EC must step up its ambition and initiate the necessary legislative reforms to ensure businesses respect human rights and the environment in their operations.

### I. Our assessment of the EU strategy 2011-2014

#### *Positive conceptual and normative developments*

The current CSR strategy represents an important step forward in a number of respects. It redefines the EU's understanding of CSR as *"the responsibility of enterprises for their impacts on society"* and explicitly refers to human rights as falling within CSR. It lays out a clear expectation that all European enterprises respect human rights and put in place due diligence mechanisms in order to identify and prevent possible adverse impacts, including on human rights. Strong emphasis is placed on the

<sup>1</sup>Flash Eurobarometer 363, April 2013

<sup>2</sup>Amnesty International ["The Toxic Truth: About a company called Trafigura, a ship called the Probo Koala, and the dumping of toxic waste in Côte d'Ivoire"](#) (September 2012); Amnesty International, ["Bulldozed: How a mining company buried the truth about forced evictions in the Democratic Republic of the Congo"](#) (November 2014); see also cases brought to UK and Dutch courts by communities affected by oil spills by Shell and other oil companies in Nigeria, which destroyed farm and fishing grounds and affected the health of the local population.

<sup>3</sup> Among the conclusions of the EU-sponsored IMPACT research project aimed at assessing the impacts of CSR at different levels across European companies, sectors, regions and EU27 is the view that: *"the aggregate CSR activities of European companies have not made a measurable positive contribution to achieving the economic, social and environmental goals of the EU, as framed in the Lisbon and Gothenburg Agendas"*. IMPACT Project, 2013. <http://www.csr-impact.eu>

international dimension of CSR. The strategy also acknowledges that regulation might be needed, in addition to voluntary measures, to ensure corporate accountability. In so doing, it moves away from the former purely voluntary approach. The current CSR strategy also marked an important step in the EU's commitment towards strengthening standards on business and human rights by committing to implement the UN Guiding Principles on Business and Human Rights (UNGPs). Also worth noting are the EC's efforts to encourage Member States to develop national action plans (NAPs) for the implementation of the UNGP.

A number of positive steps to implement the CSR strategy have been taken, most significantly the adoption of the new rules on "Disclosure of non-financial and diversity information by large companies and groups" which will require certain large companies to report annually on their human rights, environmental and social impacts. The new requirements for the extractive industry to report on the payments they make to governments included in the Accounting and Transparency Directives, despite not being part of the CSR strategy, also represent an important step towards greater corporate transparency and accountability.

#### *Shortfalls and concerns in the current strategy and in its implementation*

The current CSR strategy suffered from some major limitations from the outset. Despite making reference to the need for regulatory measures, both the strategy and agenda for action relied almost exclusively on voluntary measures. Business is given the leading role in the development of CSR initiatives while public authorities show a lack of willingness to hold companies accountable for human rights violations and remain primarily in a supportive role. The absence of enforcement remains the Achilles' heel of CSR policies, as market incentives are insufficient to guarantee minimum standards of corporate behaviour, and market sanctions are manifestly inadequate to guarantee all businesses respect human rights.<sup>4</sup>

Despite the EU's commitment to implement the UNGPs, the strategy is virtually silent on measures to implement the state duty to protect (pillar one) and access to remedy for corporate-related human rights abuses (pillar three). To date, the EC's efforts to implement the UNGP have disproportionately focused on the corporate responsibility to respect (pillar two) and have been confined to elaborating a number of sector specific voluntary guidelines for companies. Apart from the Directive on disclosure of non-financial information mentioned above, no steps have been taken or processes initiated to encourage Member States to elaborate legally binding measures that would ensure companies respect human rights or are held to account when they do not. Equally, no steps or initiatives have been taken to improve access to remedy for victims of corporate abuse despite the existence of well-known legal, procedural, institutional and other barriers to justice in this area.

Implementation efforts have also been hampered by an overall lack of leadership and coordination across relevant EU institutions. The CSR strategy has not translated into a coherent and systematic plan of action integrating key international standards on business and human rights and proposing concrete and coherent implementation measures across all relevant areas of EU law and institutions. For instance, the EU's CSR policy objectives have not been delivered in actions in key areas such as company law and corporate governance, which provide the structures, principles and incentives for

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<sup>4</sup> See also: Stiglitz, Joseph E. (2013): [Joseph E. Stiglitz's address to panel on Defending Human Rights](#) (revised). Geneva (December 3, 2013).

companies' decision making. EU policy in this area remains limited to a focus on the accountability of companies to their shareholders, rather than increasing their accountability to society. Such an approach, according to the EC's own analyses, fosters short-termism<sup>5</sup>.

All in all, the lack of leadership and coordination and an incoherent approach has resulted in haphazard progress in only a handful of areas.

## **II. Our recommendations for a future strategy**

As the EC embarks on a review and update of its CSR strategy for the years ahead, our organizations would like to offer the following recommendations.

### **1. A more systematic and holistic approach**

The EC should ensure a robust process to develop the new strategy driving and monitoring its implementation. As CSR is a cross-cutting issue, there should be a strong leadership and a coherent, coordinated approach across the different DGs. Stakeholders' involvement should be guaranteed, with particular attention given to those representing or working with communities adversely affected by the activities of European companies. Adequate human and financial resources should be made available for the implementation of the strategy.

The new CSR strategy and action plan should ensure the integration of international standards on business and human rights<sup>6</sup>, including the UNGP, across all relevant EU institutions and policy areas such as those related to commercial, corporate, administrative, environmental, criminal and civil law, trade and investment and project finance. The EC should encourage Member States to adopt the same approach at national level. For example, while promoting the elaboration of NAPs across Member States, the EC should also seek to redress fundamental imbalances in Investor-State dispute settlement regimes that disproportionately protect the interests of investors, while those affected by their operations struggle to gain access to justice. This and many other policy inconsistencies must be addressed.

As a first step, both the EU and its Member States should carry out a comprehensive review and baseline assessment of their respective normative frameworks to identify regulatory gaps and suggest reforms in all relevant areas of policy and law, where these are needed, to ensure effective protection of human rights in the context of business activity.

On the basis of these assessments, the EU and Member States should elaborate a road map or action plan for the implementation of business and human rights standards in their respective areas of competence. Priority should be given to the State duties to protect and ensure access to remedy

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<sup>5</sup>European Commission, Green Paper, Corporate governance in financial institutions and remuneration policies, COM(2010) 284 final, section 3.5. 'The role of shareholders'; European Commission, Green Paper, The EU corporate governance framework, COM(2011) 164 final, section 2. 'Shareholders'.

<sup>6</sup>Including international human rights law and standards which might not deal directly with business and human rights issues but have a direct bearing on what is required of states to protect human rights from abuses by third parties, including companies. This includes not only treaty provisions such as those of the core UN Human Rights Conventions and the European Convention on Human Rights; but also relevant UN Declarations such as the UN Declaration on the Rights of Indigenous Peoples and commentary by UN expert bodies such as General Comments by UN Treaty Bodies.

which have so far been neglected. For areas falling within national competence, the EC should offer guidance, coordination and monitoring to ensure effective implementation and a level playing-field across EU Member States. Current processes to elaborate NAPs provide an opportunity to undertake such comprehensive assessments and for the EC to provide support and monitoring.

In addition, any new laws, policies and programmes related to business operations as well as all trade and investment agreements should be subject to human rights impact assessments in order to identify and prevent any potential negative human rights impacts.

Improved coherence is required in other areas of EU policy that affect corporate governance. The EU should explore means through which corporate governance frameworks can prompt the adoption of long-term, sustainable thinking by publicly listed companies that are currently incentivized by capital markets to focus on short-term profits. This includes a fundamental rethinking of the purpose of the corporation and how this purpose can be reflected in corporate governance. This would include, for instance, the introduction of more comprehensive metrics for measuring corporate success, better alignment between management incentives, the long-term interest of companies and sustainability and a reformulation of fiduciary duties.

The EU should pay special attention to the role of investors in corporate governance, in particular of institutional investors in promoting responsible business strategies. This would require an overhaul of incentives for fund managers and investment consultants, and greater transparency by all actors in capital markets.

## **2. A renewed emphasis on an effective regulatory framework for CSR**

The recognition of the obligation and fundamental role that all public authorities have to protect against corporate abuses through “effective policies, legislation, regulations and adjudication”<sup>7</sup> is the foundation on which successful CSR policies can be built. Promoting responsibility cannot be dissociated from enforcing accountability in laws.

The “smart mix” approach (combining both voluntary and mandatory measures) to CSR should be given more teeth<sup>8</sup> and should not be undermined by the EC’s “Better Regulation” agenda. What is too often presented as a “regulatory burden” and as an obstacle to the EU’s development is in fact an indispensable safety net for individuals or society as a whole. For this reason it is particularly crucial in times of an economic crisis to ensure respect for international human rights standards.

At a minimum, the EU and its Member States must urgently address failures to enforce existing laws that make certain company behaviour illegal. Even where laws exist, corporate actors are not being held accountable for committing illegal acts that either are or lead to human rights abuses abroad. The comprehensive legal review suggested above should assess the extent to which criminal and other relevant domestic and EU laws are adequate to hold companies to account for activities that harm people and the environment abroad. Where these laws exist, the EU and Member States must ensure they are effectively enforced in practice. Where laws are lacking or inadequate, new laws must

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<sup>7</sup> UNGP, Principle 1.

<sup>8</sup> The above-mentioned IMPACT Project came to the following conclusion on the “smart mix”: “As a consequence, strong/dense (future) legislation & CSR can coexist and it even seems that only regulation can raise awareness of companies regarding some issues which are then being tackled with (additional) voluntary action”.

be enacted or existing laws amended. Ultimately, harmonisation of legal regimes might be needed to ensure consistent and effective human rights protection across all EU states. Harmonisation however, should not lead to the lowest common denominator but the highest possible protection according to international law. Furthermore, harmonisation should not close up existing accountability avenues but rather ensure greater access and build and expand on what is currently in place.

Action to strengthen EU and national legal frameworks should go hand in hand with engaging in debates at international level. The EU and its Member States should engage in good faith in all UN-led processes to develop and strengthen standards on business and human rights, including the UN Human Rights Council process to develop an international legally binding instrument to regulate the activities of transnational corporations and other business enterprises. A carefully developed international binding instrument would contribute to the reinforcement of national and regional legal systems, both in terms of prevention and remediation of corporate-related human rights abuses.

### **3. Mandatory Human Rights Due Diligence**

The new CSR Strategy should clearly set out the measures that the EU will both take itself and will encourage Member States to take, in order to ensure all EU businesses comply with their responsibility to respect human rights in all their activities, both within the national territory and extra-territorially, and both in their operations and with respect to the operations of their business partners.

A critical measure that the EU and its Member States should take to meet their duty to protect is to make human rights due diligence mandatory. Businesses should be legally required to undertake human rights due diligence throughout their global operations to identify and mitigate risks to human rights and to put in place policies and processes to prevent adverse human rights impacts and address them if they occur.

In this context, the EU now has a critical opportunity to strengthen its legislation on responsible conflict mineral supply chains<sup>9</sup>. However, the current EC draft proposal (which sets out a limited and purely voluntary scheme) will not be effective unless it is strengthened. The draft legislation must be revised to create a legal requirement for companies to carry out and report publicly on their supply chain due diligence efforts, in line with existing international standards.<sup>10</sup>

As stated above, another important but still limited step was taken through the adoption of the Directive on disclosure of non-financial information. Our organizations urge the EC and Member States to issue robust reporting guidance and pass implementing laws respectively, in line with the principle of maximum disclosure. Companies must report fully on their potential and actual impacts and measures to address them. Exceptions to disclosure should be limited and subject to a “harm test”, which takes into account whether non-disclosure would undermine the human rights of individuals or communities affected by the activity at stake.<sup>11</sup>

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<sup>9</sup> EC's proposal for a “regulation setting up a Union system for supply chain due diligence self-certification of responsible importer of tin, tantalum and tungsten, their ores, and gold originating in conflict affected and high-risk areas”.

<sup>10</sup> For a more detailed description of concerns and recommendations, see Joint Civil Society Briefing: “[Ensuring robust EU legislation on responsible mineral sourcing](#)”, August 2014.

<sup>11</sup> See AI statement of 29 April 2014 and ECCJ briefing of May 2014

#### 4. Removing barriers to remedy

Under international human rights law, people whose rights are violated are entitled to an effective remedy. The EU and its Member States must ensure that victims of corporate human rights abuse can exercise their right to effective remedy by improving and facilitating access to state-based judicial and non-judicial remedies. As part of this process, the EU should consider the ample research now available which identifies existing obstacles to remedy within the EU, including difficulties in accessing EU courts, and should work to remove or alleviate these obstacles. The EC should take the lead by either conducting its own assessment of the means through which obstacles within Member States' legal regimes can be addressed or by prompting Member States to undertake their own assessment with a view to removing obstacles. Common principles and standards may be needed to ensure consistent and effective human rights protection and a level playing field across all EU states. Again, harmonisation should not lead to a reduction of existing remedial avenues or the lowest common denominator.

Amnesty International<sup>12</sup> and ECCJ<sup>13</sup> have conducted extensive research and analysis of obstacles to remedy prevalent in cases of corporate-related human rights abuses. On the basis of this work, the organisations have concluded that attention must be focused in particular on a number of key areas, many of which are relevant in the EU Context. These include: addressing the issue of the “corporate veil<sup>14</sup>” and clarifying standards of care when implementing the concept of human rights due diligence in civil and tort law across the EU; tackling financial constraints; reviewing restrictive procedural and evidentiary rules; and improving EU rules of private international law on jurisdiction and choice of law. We urge the EC to make explicit reference to these problems in its forthcoming strategy, and to commit to exploring possible solutions.

The EC should also encourage Member States to focus strongly on the UNGP's third pillar when elaborating or revising their NAPs.

In the short-term the EU should build on its own Recommendation<sup>15</sup> and require Member States to introduce effective collective redress mechanisms. The EU should also consider the introduction of a directive for reversing the burden of proof in court cases involving allegations of human rights harm resulting from the activities of European companies, or establishing common standards that facilitate the disclosure of evidence regarding human rights due diligence practices. In its forthcoming review of the Rome II Regulation, the EC should also explore amendments that would better ensure the protection of human rights.

The EU and its Member States should also devote greater attention and resources to establishing or strengthening alternative State-based remedial mechanisms<sup>16</sup> capable of providing effective remedy for human rights abuses. In this regard, the EC should give guidance to Member States in setting up or strengthening such bodies.

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<sup>12</sup> Amnesty International, “[Injustice Incorporated: Corporate Abuses and the Human Right to Remedy](#)” (March 2014).

<sup>13</sup> Gwynne Skinner, Robert McCorquodale, Olivier de Schutter & Andie Lambe, ‘[The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business](#)’ (ICAR, CORE & ECCJ 2013)

<sup>14</sup> Corporate law doctrines of separate legal personality and limited liability

<sup>15</sup> 2013/396/EU.

<sup>16</sup> State-based non-judicial grievance systems such as national human rights bodies, ombudspersons and other administrative or quasi-judicial bodies.