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POSITION PAPER ON AN EU-WIDE MANDATORY HUMAN RIGHTS AND ENVIRONMENT DUE DILIGENCE LEGISLATION

Today, many companies are integrated in the global market and operating in a number of countries, including countries where human rights violations and environmental degradation are widespread. Corporations have complex value chains with many tiers of production and business relationships, investors and other commercial actors. By acting responsibly, corporations can play an important role in steering the development towards a desired direction. However, there are many negative human rights and environmental effects related to corporate activities: child labour, poor working conditions, violations of trade union rights, forced evictions, threats to indigenous people, water pollution and deforestation.

The Covid-19 pandemic has aggravated the situation for many workers worldwide through strict lockdowns, massive job losses and millions of people pushed into unemployment and increasing poverty. Particularly vulnerable are the millions of workers in the production and manufacturing part of global value chains, often women and migrant workers. As for businesses, while some have made extraordinary efforts to support their communities through the pandemic, others are criticised for exploitative practices.

Leaders across the world, including the Swedish government, have pledged to build back better for future generations, including a fairer, greener and more resilient global economy. There is now the opportunity to take an important step towards a new economic system that works for everyone.

Voluntary guidelines are not enough

The UN guiding principles on business and human rights (UNGPs) as well as the OECD guidelines for multinational enterprises are the main international guidelines regarding business and human rights. However, none of these guidelines are mandatory for businesses, nor are they legally binding. While there are companies making serious efforts, still too many are failing to meet their responsibility to respect human rights and the environment. It is evident that voluntary guidelines are not enough to prevent human rights abuses and environmental damages associated with business activities.

An analysis in 2020 of the sustainability reports of 1 000 European companies shows that only 20 per cent of the companies report on how they act to assess value chain risks for adverse human rights impacts and ensure that human rights are respected. Still, more than 80 per cent of the companies state that they have a policy for human rights.

This not only undermines the full realisation of human rights, but it also penalises responsible businesses that are investing in upholding their responsibilities. Finally, while voluntary action might indicate the commitment of a business to respect human rights, it does not ensure accountability or recourse to remedy for victims, so providing limited additional protections.

The current rate of change is far too slow. There is an urgent need for effective and mandatory regulations in order to prevent human rights abuses and environmental harm related to business operations. Mandatory regulations are necessary in order to hold companies accountable in case they cause or contribute to negative impact.

EU will propose new rules for business

The European commission has announced that it will present a legislative proposal on human rights and environmental due diligence for companies during 2021. In March 2021, the European Parliament adopted a resolution on corporate due diligence and corporate accountability. Due diligence is a process for identifying, preventing and mitigating adverse impacts on human rights and the environment.

Our recommendations regarding the forthcoming due diligence legislation

1. Purpose and aim with the legislation

An EU-wide legislation shall aim at preventing and mitigating adverse human rights and environmental impacts throughout the companies' value chains, as well as ensuring that companies can be held accountable for the adverse human rights impacts they cause or contribute to and that anyone affected by negative impact can exercise the right to obtain remedy.

A legislation with mandatory due diligence requirements at the EU-level will provide businesses with legal certainty and harmonisation as well as secure a level playing field. Today, the companies that make efforts to respect human rights and the environment have to compete on uneven terms with companies that do not make the same considerations. Many businesses and investors have expressed support for the introduction of mandatory due diligence legislation at the EU level.

The law shall build on the UN Guiding principles for business and human rights as well as the OECD Guidelines for multinational enterprises.

2. Content of the law

The following are important elements that need to be included in a forthcoming law, in order to ensure that the law is effective.

The law should:

Scope:

- Cover all human rights as well as environmental impacts.
- Have a comprehensive approach to human rights and environmental due diligence, based on internationally recognised human rights, including those that consider specifically the rights of different groups at risk of being impacted by business, such as indigenous people, migrant workers, women and children. The legal framework must include a gender equality perspective.
- Apply to all companies not based on their size or industry, but their actual risk and impact on human rights. Both small and large companies can be part of the same value chain and the focus must be on identifying and mitigating the risks in the entire value chain. Small and medium-sized enterprises (SMEs) represent 99 per cent of all businesses in the EU and account for more than half of Europe's GDP. Thresholds that exempt SMEs from the scope of the EU legislation would exclude many companies whose operations may have significant negative human rights impacts. SMEs should receive capacity building support to introduce due diligence processes. Furthermore, the means through which SMEs will be expected to meet their obligations to respect human rights will be proportional to their size and impact.
- Apply across all sectors, to both public and private companies, including financial institutions, and to all products as well as services.
- Apply to companies domiciled or based in the EU as well as third country companies operating or offering products and services within the EU internal market. Inclusion of third country companies operating or offering products and services within the EU internal market is essential in order to ensure a level playing field amongst companies and not put European companies at a disadvantage.
- Cover the entire value chain. It is not sufficient to cover for example only the first tier. Often, the most severe violations are happening further up in the value chain. Where it is necessary to prioritise actions to address actual and potential adverse human rights impacts, businesses should first seek to prevent and mitigate those that are most severe or where delayed response would make irreparable damages.

Due diligence duty:

- Include mandatory obligation for companies to conduct due diligence in order to prevent and address human rights and environmental risks and adverse impacts. This obligation must relate to the companies' own operations, their entire value chains and within their business relationships. This means activities of the parent company itself, companies it controls directly or indirectly (subsidiaries etc), subcontractors and suppliers, customers and other business relationships throughout the value chain.
- Due diligence consists of an on-going process that companies undertake in order to identify, cease, prevent, mitigate, monitor, disclose, account for, address and remedy risks and adverse impacts on human rights and the environment.
- Include meaningful engagement and consultations with different stakeholders. Trade unions and other rights holders, such as indigenous people, migrant and informal workers, children and other vulnerable groups, should be included. Targeted engagement to access workers and communities who may face barriers to participate in other processes should be included.
- Integrate a gender perspective and require companies to conduct due diligence that is gender-responsive, paying attention to multiple or aggravated forms of discrimination and identifying overlapping vulnerabilities.
- In line with commitments in international humanitarian law and the EU guidelines on the promotion of compliance with international humanitarian law, which encompasses non-state actors such as business enterprises, the legislation must address corporate involvement in human rights violations and grave breaches of international law as well as their role in sustaining conflicts.

Liability:

- Include criminal and civil liabilities, with criminal, civil and administrative sanctions. Business enterprises must be liable for the harm that they have, by acts or omissions, caused or contributed to in their direct operations or by operations in their global value chains. The companies should also be liable if they have not carried out adequate due diligence.
- Civil liability for harm in a company's value chain will only apply if there is a link between the harm and the company's actions or omissions, and if the company cannot prove that it acted with due care, i.e if it had not taken all reasonable measures that could have prevented the harm. Liability would be determined in accordance with the level of control or influence of the company over the relevant link in the value chain, and the means the company had to conduct its due diligence, as a link between the company's omission and the damage would be needed.

Remedy:

- Ensure remedy for victims inside and outside of the EU when business enterprises have caused or contributed to harm by their actions or omissions.
- Allow victims to bring complaints and seek remedies against all companies, including parent companies, when abuses occur for failure to prevent adverse human rights and environmental impacts for lack of adequate due diligence.
- Ensure the system takes into account the challenges for business-related human rights litigation and that integrates enabling measures to overcome additional barriers that groups of victims face. The law must enable class action. There must be no barriers to justice preventing victims from obtaining remedy. Victims must have access to courts in their own country and in the country where the parent or lead company is based or operates.
- Remedy may for example consist of financial or non-financial compensation. Business enterprises should ensure that remedy is effective and ensure that there is mutual agreement with the rights-holders on the parameters of the remedy and how it will be provided.
- Ensure a fair distribution of the burden of proof, which businesses must bear when claimants have provided relevant evidence to support their claim.
- Ensure sufficient time for victims' transnational claims, especially given that the effects of environmental impacts may be discovered long after they occurred.

Enforcement and supervision:

- EU member states must set up robust enforcement mechanisms, with effective administrative sanctions, in order to ensure compliance with the obligations for companies as well as ensure access to remedy, including judicial remedy, for victims. Administrative and judicial authorities must have the competence and mandate to investigate potential infringements of the law and impose appropriate sanctions.
- Contain requirements for transparency disclosures and reporting obligations.

ForumCiv

Fair Action

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