H
Council of the European Union

General Secretariat

Brussels, 29 September 2017

WK 10606/2017 INIT

LIMITE

COHOM

WORKING PAPER

NOTE

From:	EEAS and Commission
To:	Delegations
Subject:	Non-Paper EEAS / Commission services on the preparation of the "open ended intergovernmental group on transnational corporations and other business enterprises with respect to human rights" (OEIWG)

Ahead of the COHOM meeting on 4 October, delegations will find attached a non-paper prepared by the EEAS and Commission services on the preparation of the "open ended intergovernmental group on transnational corporations and other business enterprises with respect to human rights" (OEIWG).

Non-Paper EEAS / Commission services on the preparation of the "open ended intergovernmental group on transnational corporations and other business enterprises with respect to human rights" (OEIWG)

Objective

1. Following up on the Non-Paper on business and human rights presented to COHOM in March 2016 (024/16), this non-paper aims to help prepare the discussions in the "open ended intergovernmental group on transnational corporations and other business enterprises with respect to human rights" ("OEIWG" or "Group") scheduled for 23-27 October 2017. The group's mandate is to elaborate an international legally binding instrument on business and human rights.

[redacted]

3. [redacted]

Background/State-of-Play

4. The EU is committed to making progress on the issue of business and human rights and is a strong supporter of the UNGPs endorsed by Consensus by the Human Rights Council in 2011. The EU has supported and engaged with the UN Working Group on Business and Human Rights, a mandate established by a cross regional core group (Argentina, Ghana, Norway, Russian Federation), which is tasked with promoting the effective implementation of the UNGPs. The EU is engaged in the annual Forum on Business and Human Rights, with the next edition due on 27-29 November 2017 with a focus on "Realizing access to effective remedy". The EU also contributes to the OHCHR-led Accountability and Remedy Project.

[redacted]

[redacted]

[redacted]

8. **EU views - General Principles**

[redacted]

[redacted]

[redacted]

[illegible]

[illegible]

[illegible]

[illegible]

- [illegible]

- [illegible]

EU-related activities on business and human rights

15. The EU and Member States have been increasingly active in the area of business and human rights. They are also strongly committed to the implementation of the UNGPs, as well as other instruments such as the 2016 Council of Europe Recommendation on human rights and business.

16. As a sign of this commitment, in June 2016, EU MS adopted Council Conclusions on human rights and business outlining clear steps towards the implementation of the UNGPs. At present, 13 EU Member States have adopted national action plans on human rights and business.[2] Likewise, several EU MS have taken the initiative to engage the private sector in responsible business conduct agreements across different sectors

17. In 2015, the European Commission published A Commission Staff Working Document on implementing the UN Guiding Principles on Business and Human Rights. This comprehensive document outlines the different internal

[2] Belgium, Denmark, Finland, France, Germany, Ireland (about to be published), Italy, Lithuania, Netherlands, Poland, Spain, Sweden, UK

and external initiatives and legislative framework on this issue[3]. Some examples include:

- Guiding material to companies adopted in 2013 outlining the responsibility of business to respect human rights in three key business sectors (employment and recruitment agencies, ICT companies, and oil and gas companies)4. The Sector Guides are consistent with the UNGPs and take account of the experience of EU companies, but aim to be as globally applicable as possible. A separate guide was elaborated to help SMEs translate human rights in their operations[5].

- Directive on non-financial information disclosure: the Council adopted a proposal in September 2014 according to which companies with more than 500 employees will be required to disclose certain non-financial information in their management reports. The Directive leaves significant flexibility for companies to disclose relevant information in the way that they consider most useful, or in a separate report. Companies will need to disclose information on policies, risks and outcomes as regards environmental matters, social and employee-related aspects, respect for human rights, anti-corruption and bribery issues, and diversity in their board of directors. The scope includes approximately 6,000 large companies and groups across the EU. Member States were required to transpose the Directive into national legislation by 6 December. The European Commission issued guidelines to facilitate the implementation of the Directive on 26 June 2017[6]. Companies will start reporting in 2018 about the 2017 financial year.

- Public Procurement: The EU Directives on public procurement and concessions (Directives 2014/24/EU, 2014/25/EU and Directive 2014/23/EU) adopted on 26 February 2014, had to be transposed into national law by Member States by 18 April 2016. They allow public authorities to take social, labour and environmental concerns into account in the award decisions, exclusion grounds, rejection of a tender and conditions for the performance of contracts. These Directives cover all HR aspects relevant for public procurement including child labour and human trafficking.

- The EU and Responsible Global Value Chains - EU Council conclusions (12 May 2016) recognise that global value chains (GVCs) have become an important feature of global production patterns. With the complexity of GVCs comes the need for increased and proactive engagement in the EU

3 SWD(2015) 144 final

4 https://ec.europa.eu/anti-trafficking/publications/european-commission-sector-guides-implementing-un-guiding- principles-business-and-hum-0_en

5 https://business-humanrights.org/sites/default/files/documents/SME-BHR-guide-EU.pdf

6 https://ec.europa.eu/info/publications/170626-non-financial-reporting-guidelines_en

and abroad to ensure their adequate management for inclusive and sustainable growth. One of the objectives of the EU is to ensure that inclusive economic growth and development go hand in hand with social justice, human rights, including core labour standards, and sustainable environmental practices and policy frameworks. This issue is of particular relevance in a development context, as developing countries often face significant challenges in terms of sustainable development and growth for the most vulnerable.

- The EU Council Conclusions on Child Labour from June 2016 reaffirmed strong commitment to the elimination of child labour, recalling the Charter of Fundamental Rights of the EU, the EU Action Plan on Human Rights and Democracy 2015 - 2019, the Council Conclusions on Child Labour (2010), the EU Guidelines on the Promotion and Protection of the Rights of the Child and the EU Guidelines on Children and Armed Conflict. In particular, the Council reaffirms the urgency to eliminate the worst forms of child labour and underlines the importance to apply a child-rights based approach to inform and guide all EU actions to eliminate child labour.

- Country-by-country reporting (Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings): to enhance transparency in the sensitive oil, gas, mining and forestry sectors, the European Union adopted in June 2013 a Directive according to which companies in these sectors are obliged to report payments of more than €100,000 made to the government in the country in which they operate, including taxes levied on their income, production or profits, royalties, and license fees.

- Access to EU courts if human rights violations occur outside the EU: The Brussels I Regulation[7] establishes rules regulating the allocation of jurisdiction in civil or commercial disputes of a cross border nature, including civil liability disputes concerning the violation of HR. The Regulation ensures the recognition and enforcement of judgements among MS, and means that a person domiciled in a Member State can generally be sued in the courts of that Member State. The Regulation provides for the possibility of an EU-based transnational corporation being sued before the courts of the EU Member State where the company has its domicile (either seat, central administration or principal place of business) even for violations of human rights committed abroad.

- When a court in a MS has jurisdiction in a case with a cross-border element, it has to determine which country's law is applicable to the dispute. Related rules have been harmonised at EU level by the Rome I

7 Regulation No. 1215/2012 of 12.12.2012 on jurisdiction and the recognition of judgements in civil and commercial matters

Regulation[8] for contractual obligations and by Rome II[9] Regulation for non-contractual obligations. The case of four Nigerian farmers against Royal Dutch Shell, which is currently heard in the Netherlands, is an example of the application of these EU provisions. These two legal instruments are limited to determining which law applies without regulating the content of the applicable law. Therefore, the legal liability of parent companies for actions of their subsidiaries which is an issue of substantive liability law, is governed by national law in the Member State.

- Responding to the Council's request in the 2016 Conclusions on Business and Human Rights, the European Union Agency for Fundamental Rights (FRA) published on 10 April 2017 an opinion on "improving access to remedy in the area of business and human rights at the EU level. As a follow up to the Agency's opinion, the Commission proposed on 24 August 2017[10] that FRA "could collect information on judicial and non-judicial mechanisms in the Member States concerning access to remedy for victims of business related violations".

- Externally, business and Human Rights is also one of the objectives of the 2015/2019 EU Action Plan on Human Rights and Democracy. The main priorities in this area: 1) increased role (and training) of EU delegations to promote actively B&HR around the world; 2) Increased seminar and awareness-raising activities with Third countries on top of regular human rights dialogues; 3) co-ordination with COM work (including domestic EU strategy) on corporate and social responsibility (CSR) and Business rights; 4) continued work on NAPs, both at EU level in our external policy and on the integration of the UN Guiding Principles in national CSR Strategies; 5) Increased engagement with business, civil society, National Human Rights Institutions, on issues related to business and human rights.

- As for EU external action, in addition to commitments to respect core labour standards and Conventions, all EU's recent Trade and Sustainable Development Chapters (TSD) in EU trade agreements contain provisions on internationally agreed principles and guidelines on CSR, including the OECD Guidelines for Multinational Enterprises, the UN Global Compact and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and social policy. The most recent textual proposals of the EU also include a reference to the UNGPs.

- At bilateral levels, the EU is increasingly discussing and exchanging experience on Business and Human Rights in EU human rights dialogues and dedicated seminars and workshops with a number of partner countries. This has been the case with China, South Africa, or Brazil to list a few.

8 Regulation No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations
9 Regulation No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations
10 C(2017) 5764 Final

The EU has also established a strong partnership with the African Union (AU), and is financing a project to support the AU to develop a framework to implement the UNGPs. Support is also being given to the development of national Action Plans in CELAC countries.

- Technical support is also provided by the European Instrument for Democracy and Human Rights (EIDHR). Moreover, the EU supports an increasing number of human rights defenders and activists working to prevent and denounce abuses committed by businesses and through the EIDHR and the Rights, Equality and Citizenship Programme (ie ENNHRIs and Equinet.). The EU is also engaging in capacity building and awareness raising activities in the area of Business and Human Rights and CSR/RBC through the Partnership Instrument.

18. The EU has thus developed a rich acquis regarding human rights and business which if highly relevant and could serve as a template for some of the issues that an international legal instrument proposal may seek to address. The Brussels and Rome regimes[11] (explained above) could inform the international legal instrument on the issues of determination of jurisdictional questions of forum and choice of law. These examples could be invaluable as guidance to any attempt to create an international jurisdictional framework, particularly with regard to key features of the European regime, such as the right of victims to choose home state law in environmental cases (being the law either of the event causing the damage or the place of the damage) and the potential for the application of over-riding mandatory provisions of home state law by the home state forum even when applying host state law.

19. [redacted]