

## ***BDA position on elements to be included in guidance on National Action Plans***

### **BDA position on the open public consultation of the UN Working Group on Business and Human Rights on substantive elements to be included in guidance on National Action Plans to implement the UN Guiding Principles on Business and Human Rights**

August 2014

1. BDA appreciates the consultative process of the UN Working Group on Business and Human Rights with regard to the substantive elements to be included in guidance on National Action Plans (NAPs) to implement the UN Guiding Principles (UN GP). The UN GP are a matter of high priority for BDA and its 52 national sectorial organisations and 14 regional associations. BDA is very committed to work with the UN Working Group and the national government as well as with the stakeholders to advance the dissemination and proper implementation of the UN GP.

2. German companies actively embrace their responsibility in the field of business and human rights and commit well beyond what is required by law. In their international activities, German companies assume responsibility for the economic and political environment in which they operate. The numerous activities and initiatives of German companies at global, European and national level are one of the concrete expressions of this awareness of responsibility. In the framework of their direct investments, they create jobs abroad and enable higher social standards, more environmental protection, better education and hence a general improvement in the

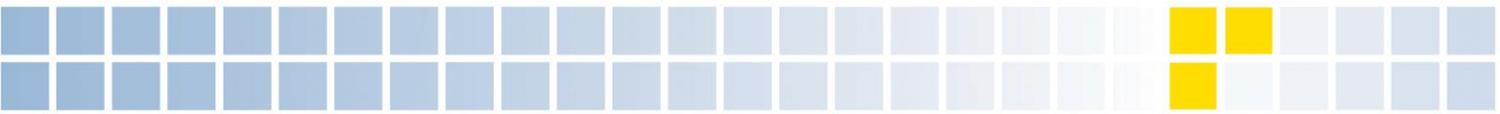
standard of living in the countries in question. This simultaneously increases the potential for more democracy and human rights. Companies are the source of employment, growth and poverty reduction and they are part of the solution to human rights challenges.

3. At the moment, mainly European countries have adopted NAPs or are in process of doing so. BDA therefore hopes that the guidance of the UN Working Group encourages more non-European countries to develop NAPs and to take the responsibility to implement the UN GP seriously.

4. BDA shares the opinion made in the consultation document that a “one-size-fits-all” approach should be avoided and that implementation can take many forms. The flexibility of governments to use the best suitable policy instruments to address the specific situation in their countries through the NAP should not be restricted through provisions made by the UN Working Group or other organisations. Some of the proposed substantive elements in the guidance document are too prescriptive. The UN Working Group should point out that the guidance document

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BDA is the leading organization dealing with social policy on behalf of the entire German private sector. It represents the interests of small, medium-sized and large companies in all sectors and all issues linked to social policy and collective negotiations, labour legislation, labour market policy and education. BDA works at national, European and international level for the interests of one million companies which employ 20 million workers, and which are networked with BDA through voluntary membership of employer federations. These employer federations are organized in 52 national sectorial organizations and 14 regional associations which are direct members of BDA.



should inspire governments and stakeholders, but that the document should not be seen as a check-list of “need-to-be implemented” actions. BDA is very concerned that the guidance document does not respect sufficiently the enormous differences and the diversity of the human rights situations in the various countries.

5. NAPs must focus on the implementation of the UN GP and should not move beyond that. The UN Working Group should not include additional elements in the guidance document.

6. Furthermore, the perspective of small and medium-sized enterprises (SMEs) must play an important role since SMEs are the essential backbone of all economies around the world. They have different challenges and resources, but also possibilities when it comes to the implementation of the UN GP. The NAPs must take these challenges, limitation and needs of SMEs into account since NAPs should be applicable to all companies, not only MNEs. Therefore, the draft guidance document needs to be reviewed from the perspective of SMEs taking a “think small first” approach.

7. Regarding the development of NAPs the involvement of business is key. While the feedback of individual companies is important, business should be consulted through its representative organisations. Only representative business organisations have the mandate to speak on behalf of the business community as a whole and are able to give a comprehensive feedback. This procedure ensures that SMEs are given a voice in the process.

### ***General comments on substantive elements to be included in guidance on NAPs***

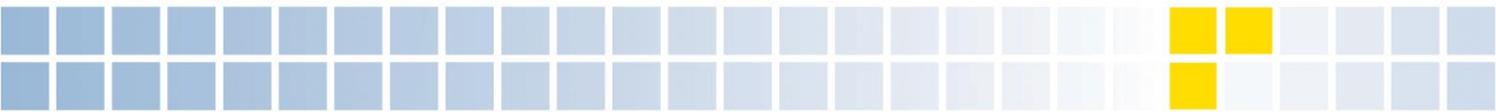
#### **First pillar**

1. The guidance document should provide a coherent framework on the state duty to pro-

tect and the responsibility of all actors in society to respect human rights. NAPs need to provide a clear and well-understood differentiation between the objectives and responsibilities of governments as the primary duty-bearers under international law, and those of non-state actors, including business. The different roles of governments and companies should be clarified. Many companies engage actively in the framework of solving serious social problems, especially in emerging and developing countries. However, the role that companies can play in solving these problems must be clearly demarcated from the tasks of governments. Through their engagement, companies can supplement policy-makers’ efforts in the area of societal development and social progress. However, it is governments which must enact and implement fundamental environmental and social standards. This task cannot be delegated to companies. The UN Guiding Principles on Business and Human Rights adopted in 2011 crystallise the right division of roles through the three-pillar “Protect – Respect – Remedy” approach. Under this approach, it is the task of the state to protect people on its territory against human rights infringements and it is the duty of companies to respect human rights.

2. It should also be remembered that the risk of infringements of human rights comes increasingly from failing or failed states in which all state authority is lacking. The application and implementation of human rights can ultimately only be ensured by extending the capacity of the national legal system. A key challenge in many countries with regard to the state’s “duty to protect” is often insufficient enforcement of the existing legislation. NAPs can play a role in this regard.

3. Governments should create clear responsibilities with regard to human rights in the national administration. It should be clear for business and other stakeholders which department has the authority within the government on these issues.



4. Governments should also consider how to support the promotion of the UN GP (e.g. through technical cooperation or development aid) at international level. Governments should also share their experience and practice concerning the implementation of the UN GP.

### Second pillar

5. The guidance document should avoid a “one-size-fits-all” approach and should not unduly restrict the existing diversity, since there is no single solution for strengthening the corporate responsibility to respect human rights. NAPs should not bind corporations to legally binding measures that restrict the spectrum of initiatives. On the contrary, NAPs have to enable corporations to implement individually tailored initiatives.

6. In general, NAPs should take a positive, constructive and practice-oriented approach and should focus on support for business. In the UN GP it is stated that states should “provide effective guidance to business enterprises on how to respect human rights throughout their operations”. Therefore, states should consider the following measures:

**Preparation of information on the human rights situation in host countries:** Companies are increasingly often economically active abroad. In this regard, they are conscious of their responsibility to comply with national laws and human rights obligations. However, it is often difficult for companies to acquire valid information on the concrete human rights situation. The states should ensure that companies can acquire such information, for instance via the diplomatic service. Governments should consider setting up a helpdesk which provides companies with information on country-specific risks. Furthermore, embassies should be instructed to work closely with companies – especially when companies are considering doing business in so-called weak governance zones. States should also exert their influence to encourage other states to pass

on the corresponding information to companies.

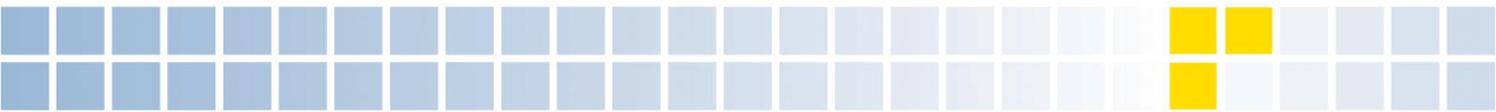
**Support for SMEs:** SMEs in particular need assistance as to how they meet the requirements of carrying out due diligence in accordance with the UN GP. Therefore, the states should take concrete measures to support SMEs in this regard.

**Guidance on how to implement the UN GP:** Especially in countries with a high informal or a grey sector in which enforcement of the law is weak states should consider providing companies with a step-by-step guide to national law and human rights obligations.

### Third pillar

7. Access to remedy and justice at local level needs to be a key issue for NAPs. Governments should use the NAP process to assess their civil and criminal judicial systems, identify gaps and improve their systems by addressing these gaps. They should do so by involving the stakeholders, setting clear timelines and reporting on the targets achieved, as well as persisting challenges in a transparent manner.

8. States should enhance non-judicial grievance mechanisms. The National Contact Points (NCPs) of the OECD Guidelines for multinational enterprises are an example. In the framework of the OECD Guidelines, NCPs help where there are inconsistencies or complaints linked to implementation by mediating and arbitrating. The procedure before the NCP was created for constructive solution of problems in connection with international investments and not to generate legal disputes. The states should endeavour to win further non-OECD countries for the OECD Guidelines. In particular, emerging countries should be persuaded to endorse the OECD Guidelines in order to establish responsible framework conditions. The OECD Guidelines with the NCP-procedure have the potential to strengthen the non-judicial grievance mechanisms. This poten-



tial should be better used. If a state is not an OECD member state, it should still consider adhering to the OECD Guidelines.

**Detailed comments on substantive elements to be included in guidance on NAPs**

**On chapter 1, General principles and point 1.1.:**

BDA supports the view that the UN GP should be implemented in a non-discriminatory manner. However, it is questionable whether NAP should prescribe to “consider gender perspectives in any examination of existing laws and rules and in the creation of new initiatives”, since such an obligation cannot be found in the UN GP.

**On chapter 1, point 1.2.:**

The consultation document demands “free, prior and informed consent” before the adoption of legislation or administrative policies that affect indigenous people. The right to be consulted and to participate in decision-making is part of ILO-Convention 169. However, Convention No. 169 does not imply a right to veto nor is the result of the consultations necessarily the reaching of an agreement or consent.

**On chapter 2:**

Many states face the problem of insufficient enforced legislation. This key challenge should also be addressed in this chapter. States could use NAPs to start processes to identify enforcement gaps and the reasons for these gaps and take adequate action to address and correct these situations.

**On chapter 3:**

We highly appreciate that states should identify options for support measures for enterprises with operations abroad, in particular for SMEs. For companies it is often difficult to acquire valid information on the human rights situation. Therefore, states should ensure that companies can acquire such information (e.g. via the diplomatic service or a

helpdesk). Furthermore, embassies should be instructed to work closely with companies – especially when companies are considering doing business in so-called weak governance zones.

Regarding the issue of extraterritoriality and the proposed measures the home state should take the guidance document should be in compliance with the wording of Guiding Principle 2.

**On chapter 4, point 4.1.:**

The task is not only to identify gaps in legislation, but even more importantly to identify the problem with insufficiently enforced legislation. This key challenge should be highlighted in this chapter.

**On chapter 4, point 4.2.:**

The guidance given in the consultation document focusses only on requirements for companies. However, Guiding Principle 3.b speaks of an enabling environment for business to respect human rights. Therefore, the focus must be on identifying laws which would constrain business in respecting human rights and on measures such as awareness raising campaigns.

**On chapter 4, point 4.3.:**

BDA supports the approach of identifying and evaluating if current laws provide sufficient guidance to allow business enterprises to respect human rights. In this regard it could be useful to outline already existing policies and guidance material.

**On chapter 4, point 4.4:**

The suggestion made in the guidance document to “create mechanisms to ensure adequate company reporting” is not covered by Guiding Principle 3.d. Guiding Principle 3.d. asks states to “encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.” Furthermore, it should be realised that reporting-obligations would increase burdens and costs for companies. The bureaucratic burden, in particular for



SMEs, would be considerable and is disproportionate to the benefit. According to European legislation only “public interest entities” with more than 500 employees must report on human rights, SMEs are explicitly excluded (European Parliament legislative resolution of 15 April 2014 on the proposal for a directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups (COM(2013)0207 – C7-0103/2013 – 2013/0110(COD))).

**On chapter 6:**

The private sector has a decades-long experience with responsible procurement. States should contact the private sector to learn and exchange experience. With regard to the demand “adequate, independent monitoring and accountability mechanisms for the activities of business enterprises employed to provide services for the state” it must be taken into account that many governments probably procure from hundreds of thousands of companies. Monitoring all these companies is unfeasible and inappropriate.

The focus of the chapter should not be only on legislation since this approach is too narrow. Other policy approaches, such as awareness raising campaigns, capacity building, etc. should be considered.

**On chapter 7:**

BDA supports the idea that states should ensure that companies can acquire information on human rights, for instance via the diplomatic service since it is often difficult for companies to acquire valid information on the concrete human rights situation. States should consider setting up a helpdesk which provides companies with information on country-specific risks and embassies should be instructed to work closely with companies.

**On chapter 8, point 8.2.:**

BDA supports the approach that states should facilitate multi-stakeholder initiatives

and that the state should cooperate with business and civil society. The guidance document should also mention that business should be consulted through its representative organisations. While the feedback of individual companies is important, only representative business organisations have the mandate to speak on behalf of the business community as a whole and are able to give a comprehensive feedback.

**On chapter 9, point 9.1., 9.2.:**

Access to remedy and justice at local level should be a key issue for NAPs. Governments should use the NAP process to assess their civil and criminal judicial systems, identify gaps and improve their systems by addressing these gaps.

**On chapter 9, point 9.3.:**

States should enhance non-judicial grievance mechanisms. The OECD Guidelines with the NCP-procedures have the potential to strengthen the non-judicial grievance mechanisms. This potential should be better used. Therefore, states should consider adhering to the OECD Guidelines.

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