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Report on the Compliance with the United Nations 2011 Guiding Principles on Business and Human Rights when Investing

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1 Executive summary

Following decisions from national contact points on the legal nature of the United Nations Guiding Principles, DANSIF has asked us to evaluate to what extent the Guiding Principles are legally binding on business enterprises, including investors. Even if we come to the conclusion that the Guiding Principles are in fact not legally binding on business enterprises, DANSIF has asked us to provide practical guidance on how to comply with the Guiding Principles when investing in other companies or debt obligation issued by the States.

It is our conclusion that business enterprises are not legally bound by the Guiding Principles and cannot be met with any kind of sanctions in case of non-compliance with these principles. When committing to the United Nation Framework of human rights responsibilities, the business enterprises shall follow certain procedures and self-assessment requirements but the sole consequence of non-compliance with these responsibilities is exclusion from the United Nations programme. National courts would therefore as a main rule not sanction a breach of the Guiding Principles.

Notwithstanding the non-binding nature of the Guiding Principles, it is relevant to consider how business enterprises best ensure compliance with these principles particularly when investing. The starting point for establishing whether an investment or any other activity would be contrary to the Guiding Principles is to establish whether under Danish law the investment in question would be illegal. Thus, if investing in a company would be contrary to international sanctions implemented in Danish law, or contrary to Danish law in general, such an investment would clearly also be contrary to the Guiding Principles. The question is, however, if an investment may be contrary to the Guiding Principles, even if it in terms of Danish law is legal.

Seeing that Danish law is silent on the questions of how to perform human rights due diligence and what constitutes grave human rights breaches, the answer to that question is not straightforward. However, since the States pursuant to principle 3 of the Guiding Principles are under an obligation to provide guidance to business enterprises on how to comply with human rights, the business enterprise is entitled to receive specific advice from its home State on whether or not an investment would be in compliance with the Guiding Principles. Further, the acts of the Danish State would also seem to serve as guidance for Danish business enterprises. Since the State is under an obligation to actively protect human rights, there must be a presumption that the actions of the State are in compliance with the Guiding Principles. If a State invests in another State or company, such investment would serve as a presumption for the business enterprises that investments in that particular State can be made without thereby contributing to human rights violations. Development assistance and other state investments with similar purpose will provide useful indication to business enterprise on whether or not a certain investment will be in compliance with human rights obligations.



2 Introduction

DANSIF has asked us to prepare a report, which sets out the legal obligations for Danish business enterprises under the United Nations 2011 Guiding Principles on Business and Human Rights (“Guiding Principles”) when investing.

More specifically, DANSIF has asked us to evaluate to what extent the Guiding Principles are legally binding on business enterprises, including investors.

Even if we come to the conclusion that the Guiding Principles are in fact not legally binding on business enterprises, DANSIF has asked us to provide practical guidance on how to comply with the Guiding Principles when investing in other companies or debt obligation issued by the States. The latter question particularly concerns whether Danish law provides guidance on how business enterprises can determine whether an investment infringes on the human rights of others and thereby is contrary to the Guiding Principles.

The report is structured around the two questions mentioned above and is consequently divided into two separate chapters:

- Chapter 1 of the report contains an introduction to the relevant legal framework and deals with the question whether under international law and Danish law respectively business enterprises are legally bound by international human rights rules, including the Guiding Principles.
- Chapter 2 of the report concerns the question of how business enterprises can determine whether an investment is contrary to the Guiding Principles, including in particular the due diligence process necessary to ensure compliance.

A Chapter One

3 Are the Guiding Principles Binding on Companies?

3.1 Introduction

In order to answer the first question; whether under international law Danish business enterprises are legally required to comply with international human rights obligations, it is relevant to first identify and describe the relevant rules.

3.2 Focus is on the Guiding Principles

The number of guidelines, reports and literature on corporate social responsibility is vast, and it is almost impossible to provide a comprehensive report covering all relevant human rights frameworks. The most well-known and well-established set of rules concerning responsibilities for business enterprises with regard to human rights are, however, the Guiding Principles, and the focus of this report will therefore be on these principles. This, of course, does not imply that other frameworks are not important, and whenever relevant this report will try to make reference also to other rules. Other than the UN Guiding Principles, three of the most important frameworks are respectively 1) the UN Principles for Responsible Investments, which is a UN supported network of investors aiming at incorporating six principles for responsible investments into practice, 2) the United Nations Global Compact’s 10 principles regarding human rights, including labour, environment and



anti-corruption and 3) the OECD Guidelines for Multinational Companies, which are a set of government-backed recommendations on responsible business conduct, including the United Nations Guiding Principles. The report will primarily concern the Guiding Principles but will also draw upon the Principles for Responsible Investments as well as other guidelines under the Guidelines for Multinational Companies.

3.2.1 The History of the Human Rights Framework for Business Enterprises

In the early 1970s the United Nations initiated a process of formulating the human rights responsibilities of business enterprises, if any. The starting signal for this process was the request of the United Nations Economic and Social Council to the Secretary General to constitute a study group with the aim of presenting an assessment of how transnational corporations affected development processes primarily in developing countries and international relations in general. Later, in 1999, the Secretary General of the United Nations, Kofi Annan, presented his idea of a Global Compact, which was launched comprising of 10 principles regarding human rights, including labour, environment and anti-corruption.

In 2005 the United Nations Commission on Human Rights requested that the Secretary General appointed a Special Representative on the issue of human rights with the purpose of developing the project. Professor John Ruggie was appointed as Special Representative with the overall task to investigate and thereby shed some light on the human rights responsibilities of *inter alia* business enterprises.

In 2008 the Framework "Protect, Respect and Remedy: A Framework for Business and Human Rights" was presented as a report made by the Special Representative of the Secretary General. The report offered a statement on human rights in relation to transnational corporations and other business enterprises.

The Framework is based on the concept of multinational corporations having "*differentiated but complementary responsibilities*", and it comprises of three principles: Firstly, the duty of the States to protect human rights; secondly, the responsibility of the corporations to respect human rights and thirdly, the access to remedies.

3.2.2 The Development of the Guiding Principles

On basis of this Framework, John Ruggie drafted the so-called "Guiding Principles". The Guiding Principles were drafted following the request of John Ruggie from the United Nations Human Rights Council to "operationalize" the Framework. Thus, the *raison d'être* behind the Guiding Principles was to provide specific recommendations for the implementation of the Framework.

The Principles were formulated on basis of comprehensive research and discussions with the relevant stakeholders in the Framework, including Governments, business enterprises, communities, and experts in the many fields of law and sciences related to the focus of the Framework. According to John Ruggie, the primary objective was to reduce and compensate for the governance gaps created as a consequence of the globalization.

In 2011 the Guiding Principles were publicised. The Guiding Principles are of a distinctly normative character but are not meant as a set of rules introducing new international legal obligations. Rather,



the Guiding Principles should be seen as elaborating on the existing obligations and as a practical and coherent guide on how to implement existing obligations.

3.2.3 The Guiding Principles concern States, Business Enterprises and Individuals

The Guiding Principles are founded on the notion that the States are obliged to *protect* human rights, whereas business enterprises are obliged to *respect* human rights, including complying with domestic laws on human rights. The overall purpose of the Guiding Principles is to ensure that every individual is treated as required under international human rights law, and the Guiding Principles recognise that the States are the primary actors in ensuring this objective.

Thus, under the Guiding Principles there is a clear distinction between States and Enterprises and their respective obligations.

3.2.3.1 Obligations of the States

The States are required not only to respect human rights, but also to protect and fulfil those rights within their territory and jurisdiction. This obligation comprises ensuring that business enterprises do not violate human rights. Consequently, the States can be held responsible under international law for failing to ensure that business enterprises, acting on their territory or under their jurisdiction, comply with domestic law on human rights.

In complying with the obligation under the Guiding Principles of respecting, protecting and fulfilling human rights, the States must, among other things, provide effective guidance to business enterprises on how to comply with human rights and moreover encourage business enterprises to work with and communicate their actions with regard to human rights. This duty of providing guidance to business enterprises includes sharing best practices, communicating expected outcomes, advise on appropriate measures of human rights' due diligence and advise on specific challenges.

Additionally, the States must ensure that adequate human rights' due diligence is exercised when the State contracts with business enterprises. Thus, the States need to be able to effectively oversee the activities of business enterprises that they potentially contract with. This obligation requires the State to use suitable and independent monitoring and accountability mechanisms to ensure compliance.

Finally, an essential part of the obligations of the States is that the States support business enterprises in avoiding participating in human rights violations when contracting in conflict-affected areas. In conflict-affected areas, the risk of grave human rights abuses is higher, and the States must support business enterprises in identifying, preventing and mitigating human rights abuses in connection to their activities and operations in such areas. When business enterprises are acting cross-borders, it is the home state of the business enterprise which is obliged to ensure that the business enterprise refrains from committing human rights abuses through its activities.

As a consequence of the obligation of the State to provide guidance to business enterprises in order to assist them in avoiding breaching human right obligations, the European Union has called upon the Member States to generate national action plans for the adequate implementation of the Guiding Principles. The Danish Government has established the Danish Council for Corporate Social Responsibility (Rådet for Samfundsansvar). It is the task of the Danish Council for Corporate Social



Responsibility to provide guidance to the Government, Danish business enterprises, NGO's, local municipalities as well as trade unions on how to comply with the Guiding Principles.

The Danish Council for Corporate Social Responsibility serves the purpose of providing the State guidance as required under the Guiding Principles. The Council has publicised seven guidelines on how to comply with the Guiding Principles as well as produced reports on this question. However, the Council has to our knowledge not provided specific guidance on how to perform the due diligence required under the Guiding Principles.

It is noteworthy that we have not been able to detect a single example of the Danish State performing such a due diligence procedure neither in connection with decisions on providing development assistance nor when selling public companies to private investors. In its report on responsible investments, the Danish Council For Corporate Social Responsibility mentions that any investment by the Danish State in another State, or any decision to provide development assistance to States in which human rights are violated, may not in itself be construed as acceptance that investments by business enterprises in such States are in compliance with the Guiding Principles¹. However, the Council does not elaborate on the due diligence performed by the Danish Government, or on the obligation of the State to *protect* the human rights and the interplay between this obligation and the decision of the State to invest in such States.

3.2.3.2 Obligations of Business Enterprises

Under the Guiding Principles, business enterprises should respect human rights. This means that business enterprises should take adequate measures to ensure that their activities do not infringe on the human rights of others. The responsibility to respect human rights further entails that business enterprises should address adverse human rights impacts by taking adequate measures in order to mitigate and remedy human rights violations.

The responsibility of business enterprises does not, however, in any way diminish the obligations of the States. The State remains the primary subject under the Guiding Principles, and the actions, measures and initiatives of the States will inevitably serve as guidance for business enterprises. Thus, the hierarchy under the Guiding Principles is that i) the States must take active measures to protect human rights, and ii) business enterprises must respect the rules enacted by the State.

This distinction is central in understanding the different roles of the States and business enterprises within the framework of the Guiding Principles. To a great extent, business actors can therefore use actions and initiatives from the States as guidance on how to ensure compliance with the Guiding Principles and thereby fulfilling their obligations to respect human rights.

3.2.4 The Content of the Guiding Principles with respect to Business Enterprises

The Guiding Principles are divided into three parts; the first part concerns the obligations of the States, the second part concerns the obligations of business enterprises, and the third part concerns the access to remedies.

¹ http://raadeforsamfundsansvar.dk/file/431139/vejledning_statsobligationer.pdf



In this context, part two concerning the responsibility of business enterprises to avoid infringing on human rights represents the most essential principles since this part offers guidance for business enterprises on how to fulfil their human rights obligations.

The Guiding Principles advise business enterprises to respect human rights by urging them to avoid causing or contributing to human right infringements and to make them seek to prevent and mitigate adverse human rights impacts which are directly linked to their activities and commitments.

To accomplish these goals, business enterprises should commit to three mechanisms securing the effective implementation of the Guiding Principles.

- Firstly, a formal policy commitment to respect human rights should be drafted;
- secondly, a human rights due diligence process to ensuring the ability to identify, prevent, mitigate and account for how the business enterprise's impacts on human rights impact should be produces; and
- thirdly, business enterprises should develop a remediation process to ensure that any adverse present or potential human rights impacts caused by itself, or contributed to by itself, is addressed and properly dealt with.

The initial principle in part two of the Guiding Principles regarding the responsibility of business enterprises is principle 11 which states that business enterprises should respect human rights by avoiding infringements of human rights and by addressing adverse human rights impacts connected to their activities and operations. Principle 12 refers to the international law instruments on which the Guiding Principles are based and states that as a minimum, the human rights set out in the International Bill of Human Rights and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work must be respected by the business enterprises.

By way of principle 13, the obligations of business enterprises are elaborated, while principle 14 states that the responsibilities set out in the Guiding Principles apply to business enterprises regardless of size, sector, operational context, ownership and structure.

Principle 15 requires the business enterprises to develop respectively policies for their human rights strategy, human rights due diligence processes as well as processes enabling the business enterprises to remedy adverse human rights impacts. Principle 16 elaborates on the policy commitment and provides certain guidelines on how to develop a statement of policy.

The principle of human rights due diligence as set out in principle 17 is undoubtedly one of the most essential parts of the Guiding Principles since the due diligence procedure should ensure the execution of the corporate responsibility to respect human rights. Principle 17 of the Guiding Principle sums up the requirement of the business enterprises and has the following wording:

"In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, inte-



grating and acting upon the findings, tracking response, and communicating how impacts are addressed.”

In addition to the above-mentioned, the due diligence obligation should cover not only the business enterprises’ own activities, but also third party activities linked to the activities of the business enterprise, including all links in the market chains. The due diligence is an obligation of varying intensity and extent; the scope of the due diligence is to vary in accordance with the size and risks encompassed with the business in question.

Finally, it is clear by means of principle 17 that the Guiding Principles are meant to form a flexible Framework dealing with adverse human rights impacts. The flexibility is an essential characteristic of the Framework thereby acknowledging that human rights obligations may change over time, evolving into new contexts and revealing new risks connected to the enterprise activities. An important part of ensuring efficiency of the Framework is the reliance of both internal and external expertise when committing and fulfilling the responsibilities by way of the three mechanisms. In other words, businesses should seek to involve all crucial stakeholders in compliance with human rights responsibilities.

While principle 17 defines the parameters for the due diligence procedure, the following principles 18 to 21 elaborate on the key components of the due diligence. Principle 18 establishes that business enterprises should identify and assess actual or potential human rights violations committed in relation to the activities of the business enterprise. The identification and assessment of actual or potential violations should draw on human rights expertise, preferably independent, and moreover the business enterprises should always consult potentially affected groups and stakeholders when performing the due diligence.

Principle 19 requires business enterprises to integrate the findings from the impact assessments in their operations and procedures and furthermore take appropriate action in this regard. What is defined as appropriate actions will vary according to severity and extent of the adverse human rights impacts. In principle 20 it is stated that business enterprises should track and record the effectiveness of their actions, procedures and due diligence. This data should preferably be based on appropriate qualitative and quantitative indicators and should encompass feedback from both internal and external sources.

Finally, principle 21 points out that the business enterprises should commit to publicly account for their adverse human rights impacts, if any. As an important element in this commitment, business enterprises should report on how they address actual or potential human rights violations. Such reports should contain sufficient and easily accessible information to allow affected groups or stakeholders to understand the information provided, and such reports should, moreover, be issued in a form and frequency that reflects the actual or potential violations.

3.2.5 The Nature of the Guiding Principles

Those of the Guiding Principles concerning business enterprises were introduced with the purpose of increasing the focus on human rights in connection with commercial transactions.

The Guiding Principles relating to business enterprises are not binding in nature, but built on a system of voluntary compliance. The idea behind the Guiding Principles is to encourage business en-



terprises to develop a policy of corporate commitment which ultimately should lead them to strive to fulfil of these moral responsibilities by means of self-regulation.

The Guiding Principles are thus behavioural guidelines based on the idea that creating awareness ultimately will result in a greater respect for human rights when conducting business. If one wishes to qualify the normative nature of the Guiding Principles, they most fittingly seem to belong to the “corporate governance” or “soft law” group, which are generally principles that may not be legally binding – but nonetheless serve as important guidelines on how a business enterprise complies with certain norms and preferences when conducting business.

Thus, business enterprises are not legally bound by the Guiding Principles and cannot be met with any kind of sanctions in case of non-compliance the principles. When committing to the United Nation Framework of human rights responsibilities, it is true that business enterprises commit themselves to certain procedures and self-assessment requirements but the sole consequence of non-compliance with these responsibilities is exclusion from the programme.² National courts would therefore as a main rule not sanction a breach of the Guiding Principles.

3.3 Could the Guiding Principles or other Human Rights Obligation become Binding on Business Enterprises in the Future?

Notwithstanding the fact that the Guiding Principles are non-binding, there is an increasing global awareness that business enterprises have an important role to play in the protection of human rights.

The growing tendency of considering business enterprises as actors equivalent to the States in the context of international human rights has led some scholars to argue that business enterprises can also be subjects of international human rights obligations, and that a breach of any such obligations by a business enterprise may be sanctioned.

Even if the Guiding Principles pursuant to their wording and the intention behind them are non-binding, it may therefore be relevant to consider to what extent these principles could become binding on Danish business enterprises in the future. In order to answer the question whether the Guiding Principles or other human rights obligation could become binding on business enterprises, it is relevant to set out the fundamental rules of Danish law on incorporation of international obligations.

3.3.1 The Relationship between Danish and International Law

The starting point for answering the question whether the Guiding Principles could become binding is the fundamental principle that it is the States and international organizations (if the appropriate conditions exist) that are the subjects of international law.

The basic reason for this position is that *“the world is today organized on the basis of the co-existence of States, and that fundamental changes will take place only through State action,*

² Business enterprises complying with the Guiding Principles are listed on a public list of actors committed to the UN Framework, and in case of non-compliance the business actors can suffer the loss of being delisted.



*whether affirmative or negative*³. The States are in other words the repositories of legitimated authority over peoples and territories. It is only in terms of State powers, prerogatives, jurisdictional limits and law-making capabilities that territorial limits and jurisdiction and a host of other questions of co-existence between the States can be determined.

The State territory and its appurtenances, together with the government and population within its frontiers, comprise the physical and social manifestations of the State⁴. The fact that the State's sovereignty extends to its population is reflected in the attitude of national legal systems toward international law. Even if the constitutional law of the States varies greatly, it is a common feature that most States do not give primacy to international law over national law. This main principle, however with many modifications, also holds true for Denmark. Thus, Denmark applies the so-called "dualistic doctrine" according to which international law and national law are two separate legal systems which exist independently of each other.

The State is sovereign and constitutes a supreme authority over its own territory, whereas international law needs support of the States to reach its goals. Danish constitutional law has therefore been clear that international law can only create legal obligations for private individuals to the extent that the obligations under international law are incorporated into Danish law⁵. Under Danish constitutional law, ratification by the Danish State of international agreements does therefore not *per se* entail that the obligations flowing from these agreements become binding on Danish nationals. On the contrary, the international agreement in question needs to be incorporated into national law before it may be applied by Danish courts.

Recent Danish legal literature on the subject has introduced gateways allowing international law to become part of national law without incorporation, but the starting point remains the dualistic doctrine. The reason for still adhering to the dualistic principle is i) recognition that the sovereign State should be in control of national law as well as ii) considerations of legal certainty for the individual in that under the dualistic doctrine the individual will have certainty that only rules emanating from the State will be binding upon it.

The consequence of the dualistic doctrine is that international obligations must be incorporated into Danish law before it can be binding on Danish individuals and business enterprises. Any allegation of violation of human rights must therefore in principle be based on Danish law and dealt with by Danish courts.

The question is therefore whether the Guiding Principles or other relevant human rights obligations have been incorporated into Danish law.

3.3.2 Are the Guiding Principles Incorporated into Danish Law?

As a consequence of the voluntary and aspirational nature of the Guiding Principles, it may easily be concluded that the Guiding Principles are not legally binding on Danish companies.

³ Jessup, *A Modern Law of Nations* (1948), page 17

⁴ Brownlie, *Principles of Public International Law* (4th ed.), page 107-108

⁵ Ross, *Dansk Statsforfatningsret* (1983), § 99



The question is, however, whether the Guiding Principles have been incorporated into Danish law and by means of any such Danish legislation have become binding on Danish business enterprises.

The only Danish act, which deals with corporate social responsibility and explicitly mentions the Guiding Principles, is the Danish Financial Statements Act ("FSA"). Pursuant to Section 99(a) of the FSA, large Danish companies are under an obligation to account for their corporate social responsibility ("CSR") policy.

The preparatory works of the FSA does not state that the Act incorporates the Guiding Principles, nor are the Guiding Principles repeated in the Act. The conclusion therefore seems to be that the Act is only inspired by the Guiding Principles, but does not incorporate these principles.

Nonetheless, it may be worthwhile to briefly set out the content of the provision on CSR. Under Section 99(a) of the FSA, larger Danish companies must account for how they work with and aim to comply with the principles of CSR, and the collective account must be an incorporated part of the annual financial statements report. The requirements are only obligatory for companies above a certain size as stated in the Act, and the account must as a minimum contain the following three parts:

1. Firstly, the accounts must state the aims of the company with regard to CSR. By way of this requirement, the companies are obliged to formulate a CSR policy, including which standards and/or principles the company is using as guidelines. If a company decides not to account for its commitment to CSR, it must specifically mention this choice.
2. Secondly, the accounts must mention the company's present action with regard to CSR. In this part the company must describe what it is actually doing to realise the formulated CSR aims.
3. Thirdly, the account must mention the results of working with CSR policies. This part must consist of partly the actually achieved results achieved by having a CSR policy and partly an assessment of future results and expectations concerning the CSR policy.

Under the above scheme, Danish business enterprises enjoy complete freedom when it comes to the commitment to CSR accountancy. Business enterprises can choose whether or not to report on CSR policy, and the provision in the FSA is thus based on the "comply or explain" principle. Either a business enterprise chooses to account for its CSR policy or the business enterprise must explain in the Directors' Report that a decision has been made not to create CSR policies and strategies.

It is, however, important to note that the abovementioned section 99 (a) does not constitute an incorporation of the Guiding Principles into Danish law but solely places upon business enterprises an obligation to disclose whether or not they have an official CSR policy and, if that is in the affirmative, what the policy comprises, including aims and actions to be taken.



3.3.2.1 Danish Business Enterprises Reporting on Corporate Social Responsibility

If Danish business enterprises choose to report on CSR under the FSA, they must draft an “Account of Social Responsibility”⁶ which must take into account both parent company and all subsidiaries notwithstanding where these are based. If the parent company is domiciled in Denmark, the entire group will be covered by the CSR requirements in the FSA.

Danish business enterprises have four different options of accounting for CSR. They can choose between placing the accountancy in the Directors’ Report, as a supplementary report to the Financial Statements report, publish the policy on their website or finally, companies can announce that they commit themselves to the United Nations Global Compact regime. By choosing the latter option, the companies are obliged to report on compliance with the requirements set out by the United Nations with regard to human rights. There are no formal requirements for the CSR accountancy. Consequently, it is for the business enterprises to decide on their CSR policies including which subjects are chosen as primary focus areas.

4 How Should Danish Companies Nonetheless Behave to Comply with the Guiding Principles?

Having concluded that The Guiding Principles are non-binding and only aspirational, this part of the report will nevertheless address how Danish Companies can ensure compliance with the Guiding Principles.

The first section concerns the implementation of the due diligence procedure described in the Guiding Principles to ensure human rights compliance, and the second section will concern how business enterprises can seek guidance from the States as well as determining the extent to which they can rely on actions taken by the States.

Accordingly, this first section revolves around the determination of which steps are necessary for a business enterprise to take in order to ensure human rights compliance, not only with regard to its own activities but also with regard to activities of suppliers, service partners and other kinds of parties connected to the business enterprise. This section will also touch upon the fact that the States are the primary duty-bearers under the Guiding Principles and the consequences that follows from this division of obligations.

When business enterprises decide to participate in the UN Human Rights Framework, the relevant principles are the so-called “operational principles” contained in principles 16 to 24. These principles provide guidance for business enterprises on how to ensure compliance with human rights and set out certain minimum requirements with which the business enterprise has to comply.

The pertinent question, however, remains how in practical terms the business enterprise in question ensures that the human rights due diligence performed is adequate?

4.1 Human Rights Due Diligence

The initial step for business enterprises with regard to human rights is the formulation of an official policy.

⁶ In Danish: Redegørelse om samfundsansvar



In this statement of policy, the business enterprises must set out their responsibilities, commitments and expectations, and the business enterprises are often advised to draw on and be informed by relevant external expertise as well as approved by the highest level of the business enterprise's management. The statement must be publicly available and must be sent to all stakeholders of the business enterprises. Moreover, it is vital that the policy commitment is embedded not solely at the highest management levels, but throughout all layers of the business enterprises.

Having formulated the human rights policy, the next step is to produce and complete a human rights due diligence procedure. As mentioned in section 3.4.2, principles 17 to 21 concern the due diligence procedure that business enterprises should carry out in order to properly address any actual or potential adverse human rights impacts.

Principle 17 lays out the essential parameters for the due diligence. In essence the principle states that the due diligence should concern any actual or potential adverse effect on human rights that the business may cause or contribute to. It is recognised under principle 17 that the due diligence may vary according to the size and activities of the business enterprise. Finally, the due diligence should not only be ongoing but also be initiated as early as possible. Principle 17 raises a specific question in connection with investments where the business enterprise will only be minority shareholder and as such have limited possibilities to influence the decisions of the target of the investment as well as remediation. The Guiding Principles are not clear on whether or not minority shareholders have obligations equalling investors with decisive influence. However, since the main objective of the principles is to ensure that the business enterprises *respect* human rights, it would seem fair to conclude that the Guiding Principles do apply also to minority shareholders. That is also the conclusion of the Dutch and Norwegian contact points in the so-called Posco-case⁷. However, if the position is very small it would also seem reasonable to conclude that the due diligence ought not to be as comprehensive as would be the case if the investor had decisive influence.

Principle 18 is concerned with the identification of any actual or potential adverse human rights impacts, while principle 19 concerns the issue of how business enterprises should best prevent and mitigate such impacts. Principle 20 states that business enterprises should keep record of their findings and responses with respect to adverse human rights impacts, and finally principle 21 states that business enterprises should be prepared for publicly accounting for their actions and initiatives concerning human rights compliance.

4.1.1 How to Construct the Due Diligence Procedure

Even if the principles contain wording on the human rights due diligence, there is no practical guidance in the principles on how to perform the due diligence. Thus, the principles are silent as to when a business enterprise has performed adequate due diligence and what constitutes grave human rights breaches.

The decisive factor with regard to human rights due diligence seems to be that procedures for due diligence are established and effectively integrated in the administration of the business enterprise

⁷ <http://www.oesorichtlijnen.nl/en/news/publication-final-statement-posco-ao-lok-shakti-abhiyan-ao>,
<http://www.responsiblebusiness.no/en/2013/05/27/norwegian-bank-investment-management-violates-oecd-guidelines/>,
http://oecdwatch.org/cases/Case_262



in question, and that any findings of actual or potential adverse human rights impacts are met with appropriate action.

4.1.2 Identifying Adverse Human Rights Impacts

When a business enterprise decides to commit to the UN human rights Framework, step one is to review to which extent the enterprise already focusses on human rights. What is the existing policy, if any, and to which extent do these existing measures cover the obligations of the UN Guiding Principles?

The next step is to identify whether the actions, or potential actions, of the business enterprise violates or will violate human rights.

In order to answer this question, it is relevant to determine what in fact constitutes a human rights breach. Danish law does not provide any guidance on this question, nor do the Guiding Principles define breaches of human rights. It is difficult to perform human rights due diligence if the business enterprise in question has no yardstick defining whether or not an investment or any other activity would infringe on human rights.

In its report on investments in government bonds, the Council on Corporate Social Responsibility has defined due diligence as the obligation for business enterprises to show the necessary care to ensure that for example human rights are respected in connection with the investment. Investors should further take the necessary steps to ensure that their investments will not contribute to breaches of human rights even if human rights breaches occur in the country in question⁸. The definition does not address the pertinent question on how to establish whether or not an activity will breach human rights and in reality the definition therefore adds little to the wording already contained in the Guiding Principles.

The starting point for establishing whether an investment or any other activity would be contrary to the Guiding Principles is to establish whether under Danish law the investment in question would be illegal. Thus, if investing in a company would be contrary to international sanctions implemented in Danish law, or contrary to Danish law in general (for example if the investment would constitute a criminal offence under the Danish Penal Act), such an investment would clearly also be contrary to the Guiding Principles. The question is, however, if an investment may be contrary to the Guiding Principles, even if it in terms of Danish law is legal.

Seeing that Danish law is silent on the questions of how to perform human rights due diligence and what constitutes grave human rights breaches, the answer to that question is not straightforward. The dualistic principle, cf. above, however entails that a Danish business enterprise as a starting point will not be bound by international obligations, if they are not incorporated into Danish law, and therefore there is a presumption that a Danish business enterprise will be on the safe side if it complies with Danish law. This conclusion is further underpinned by the very fact that the States are obliged to comply with the Guiding Principles, which in turn must entail an obligation for the State to ensure compliance also in its national legal system.

⁸"Due diligence" betyder i denne forbindelse, at investorerne skal udvise nødvendig omhu for at respektere f.eks. menneskerettigheder i forbindelse med deres investeringer. Investorerne skal tage de fornødne forholdsregler for, at deres investeringer ikke bidrager til krænkelse af menneskerettigheder, selvom sådanne krænkelse kan finde sted i det pågældende land"



4.2 Actions of the Danish State

Even if it is presumed that the actions of business enterprises comply with the Guiding Principles if they are lawful under Danish law, the fact that Danish law is silent on the performance of due diligence and the definition of grave human rights breaches creates some uncertainty. None of the decisions of the Danish OECD contact point (Konflikt- og Mæglingsinstitutionen) comment on the requirements with regard to due diligence. Should the contact point decide to do so, any such decision would in our opinion serve as valuable guidance in terms of establishing the threshold Danish business enterprises must meet to comply with the Guiding Principles.

As mentioned above, the Guiding Principles operate with a distinction between protect and respect; the States must protect human rights and the business enterprises respect the human rights, (which typically should be incorporated into national law as a consequence of the States obligation to protect).

The distinction between protect and respect entails that in case of human rights violations, the States are always the primary object of responsibility and the primary object to prevent and mitigate the violations. If a business enterprise is in doubt whether a contemplated act – for example an investment in a business enterprise in another country, or in a country for that matter, would be contrary to the Guiding Principles, the division of obligations under the Guiding Principles entails that the business enterprise should be able to rely on the guidance and acts of its own State.

4.3 Actions of the State will Serve as Guidance

As mentioned, it follows from principle 3 of the Guiding principle that the States are under an obligation to provide guidance to business enterprises on how to comply with human rights. Hence, when business enterprises wish to make investments in addition to ensuring an effective human rights due diligence, the business enterprise is under the Guiding Principles entitled to receive specific advice from its home State. By bringing forth specific questions regarding potential investments in certain states, the home State is obliged to provide the business enterprise with specific answers to whether or not the investments are advisable in terms of human rights compliance. This conclusion would also seem to follow from Danish administrative law, which places upon the State an obligation to guide Danish citizens and business enterprises.

In addition to providing specific guidance to business enterprises, the acts of the Danish State would also seem to serve as guidance for Danish business enterprises. Since the State is under an obligation to protect human rights (as opposed to the more passive obligation of business enterprises to respect), there must be a presumption that the actions of the State are in compliance with the Guiding Principles. If a State invests in another State or company, such investment would serve as a presumption for the business enterprises that investments in that particular State can be made without thereby contributing to human rights violations. Development assistance and other state investments with similar purpose will provide useful indication to business enterprise on whether or not a certain investment will be in compliance with human rights obligations.

Hence, when a State invests in another state, this serves as a kind of endorsement from the investing state that, as far as it is aware, the State, in which investments are made, does not violate human rights.



When business enterprises gain information for the purpose of being able to decide whether a potential investment would be contrary to the Guiding Principles, data concerning State investments thus serve as important and valuable information aiding the business enterprise in the evaluation of whether or not an investment should be made.

4.3.1 Preventing, Mitigating and Accounting for adverse Human Rights Impacts

Finally, if any actual or potential adverse human rights impacts of the activities of the business enterprise in question are detected, the business enterprise must assess which actions must be taken in order to prevent, mitigate and account for these impacts.

Firstly, the business enterprise must assess which adaptations and supplements are needed in order to fill out any gaps concerning the compliance. This assessment must continuously be done and to ensure the best possible way of doing such assessments, the business enterprises must develop internal procedures and tools which can be used to gather the necessary information and data.

Any actual adverse human rights impacts must be properly addressed, and actions required to both stop and mitigate any violations of human rights must be taken in the most efficient and quick manner possible.

Finally, the business enterprise must, in addition to carrying out human rights due diligence and doing so consistently and frequently, comprehensively account for any actual and potential human impacts to ensure that the actions required are taken. Moreover, the accountancy will serve as the public window with regard to the overall compliance of the business enterprise with human rights. This is essential since publicity is one of the general requirements that business enterprises will have to meet when committing themselves to the Guiding Principles.

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