

A Human Rights Review of the EU Non-Financial Reporting Directive

One year of reporting under the EU non-financial reporting directive (NFRD) reveals companies severely struggling with their human rights reporting obligations. Clarification is needed in order to help educate European business and increase the utility of disclosures, as well as promote policy coherence as moves toward the regulation of corporate human rights due diligence (HRDD) intensify across EU jurisdictions. By clarifying the form of HRDD reporting as the original United Nations Guiding Principle reporting framework, the NFRD can actually support companies on their current HRDD practice, whilst at the same time priming them for upcoming legal duties to undertake HRDD.

About ECCJ

The European Coalition for Corporate Justice (ECCJ) advocates for European laws that guarantee corporate accountability and transparency, and ensure justice for victims of corporate malpractice.

Quantitative studies continue to reveal the poor uptake of human rights due diligence reporting by companies. This report adds to that evidence by providing a qualitative study of four European companies' human rights due diligence reporting under the NFRD. These case studies give a glimpse into the reality behind the numbers; human rights impacts of individual European companies affecting hundreds or even thousands of people, which are not being afforded the adequate due diligence and disclosure they require. What is frustrating is that these failings continue despite the clear availability of a sophisticated, purpose-built human rights due diligence reporting framework: the *United Nations Guiding Principles on Business & Human Rights reporting framework*.

In order to live up to its promised potential, the NFRD must specify the UNGP reporting framework as *the means* by which European companies fulfil their existing legal duty under the NFRD to report on their human rights due diligence.¹

¹ Notwithstanding the 'comply or explain' requirement. See below section "clarifying the legislative duty to report on human rights due diligence".

The EUs commitments under the UNGPs

Unanimously endorsed by the UN Human Rights Council in 2011, Pillar II of the UNGPs affirms the corporate responsibility to respect human rights throughout their business operations. Pillar I affirms the state duty to protect rights' holders from business' adverse impacts, ergo to ensure companies operationalize their responsibility to respect human rights. Pillar III addresses the need for advancements in the area of redress for victims of corporate harm.

States have, under the UNGPs, committed to using a 'smart mix' of regulatory and non-regulatory measures to ensure companies fulfil their responsibility to respect human rights.² In its 2011 Communication on Corporate Social Responsibility³, the European Commission confirmed the importance implementing the UNGPs, since recognizing them as "the authoritative policy framework"; "the most practical, widely-endorsed and wide-ranging approach to preventing and redressing business-related human rights abuses."⁴

The 2013 passage of the EU Non-financial reporting directive represented a small but incremental step toward the progressive realisation of the EU's duty to ensure business operationalize their responsibility to respect human rights. Alongside results from recent studies, business and human rights scholars have questioned the current effectiveness of the NFRD as a (Pillar I) state mechanism to promote the (Pillar II) business responsibility to respect human rights.⁵

Human Rights Due Diligence

The 'blueprint' of the UNGPs is a corporate risk management approach – with the focus on risks to people, as opposed to risk to business. The UNGPs establish human rights due diligence (HRDD) as the principal means by which companies are expected to fulfil their responsibility to respect human rights.⁶ This responsibility extends throughout a business' value chain, and is **owed to rights' holders** – not to investors.⁷ Often described as operationalizing the principle of 'do no harm', HRDD includes four key steps: assessing actual and potential human rights impacts; integrating and acting on the findings; tracking responses; and communicating about how impacts are addressed.⁸ The UNGP reporting framework is a step-by-step reporting framework developed for the specific purpose of guiding and educating companies to undertake HRDD in order to prevent, mitigate and redress their adverse human rights impacts.⁹

² UN Human Rights Council, *Protect, respect and remedy: a framework for business and human rights: report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, 7 April 2008, A/HRC/8/5 [Hereafter "UNGP"]. Guiding Principle 3 plus commentary. Available at: <https://www.refworld.org/docid/484d2d5f2.html>

³ European Commission COM(2011)681 of 25/10/2011, *A renewed EU strategy 2011-14 for Corporate Social Responsibility*. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0681>

⁴ European Commission SWD(2015)144 of 14/7/2015, *Implementing the UN Guiding Principles on Business and Human Rights*. Pages 2 and 33. Available at: https://ec.europa.eu/anti-trafficking/eu-policy/commission-staff-working-document-implementing-un-guiding-principles-business-and-human_en

⁵ See, Karin Buhmann, "Neglecting the Proactive Aspects of Human Rights Due Diligence? A Critical Appraisal of the EU's Non-Financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action", *Cambridge Business and Human Rights Journal*, 3 (2018). Pp. 23-45.

⁶ UNGPs, Guiding Principle 17.

⁷ However, clearer and proper HRDD reporting would inevitably assist investors in the fulfillment of their own evolving legal duties vis-à-vis human rights, see below section: 'Companies are struggling and need their legal responsibility clarified'.

⁸ UNGPs, Guiding Principle 17 & commentary.

⁹ The UNGP reporting Framework is available at: <https://www.ungpreporting.org/about-us/>

A central concept of HRDD is salience of businesses' human rights impacts, which is separate from notions of materiality. Whereas materiality depends on the choice of a particular audience or goal, for who and which particular issues are judged to be more or less important, salient human rights issues are not defined in reference to any one audience or goal. Salience puts the focus on those human rights at risk of the most severe negative impact. This provides a consistent, predictable and principled means of identifying the appropriate focus of human rights reporting. At the same time, it gives business an effective tool for understanding how human rights issues connect with risk to the business.¹⁰

The corporate responsibility to undertake HRDD informed by the Pillar III access to remedy, is in the early stages of regulation across various European jurisdictions. It has so far been legislated in France with the passage of the *Duty of Vigilance Law*¹¹, whilst an advanced legislative process is underway in Switzerland. The German government has committed to legalisation should more than 50% of German companies still be failing to undertake HRDD by 2020; and its Development Ministry has recently drafted a law on mandatory human rights due diligence.¹² Other, national civil society campaigns (with the support of progressive business) are advancing in other states, alongside legal proposals.¹³ Harmonization of EU laws on HRDD will need a common reference, one best served by the UNGP framework, endorsed by the Member States and Commission as the 'authoritative policy framework'.

Reporting will never be enough

On its own, corporate reporting will never be enough to adequately compel responsible and sustainable businesses conduct. That the NFRD will actually induce changes in *business behaviour* (as opposed to investor decision-making), is not a hypothesis strongly supported by socio-legal, organisational and accounting literature on non-financial reporting. In fact, the literature suggests that in many cases mandatory non-financial disclosure has little to no effect on business decision-making to reduce adverse impacts on society.¹⁴ A recent study has shown that for 61% of German companies surveyed, compliance with the German NFRD transposition law was not the key driver for sustainability within

¹⁰ See, <https://www.ungpreporting.org/resources/salient-human-rights-issues/>

¹¹ See: European Coalition for Corporate Justice, *French Corporate Duty of Vigilance Law – Frequently Asked Questions*, Feb 2017. Available at: <http://corporatejustice.org/news/405-french-corporate-duty-of-vigilance-law-frequently-asked-questions>

¹² Business & Human Rights Resource Centre, *German Development Ministry drafts law on mandatory human rights due diligence for German companies*, Feb 2019. Available at: <https://www.business-humanrights.org/en/german-development-ministry-drafts-law-on-mandatory-human-rights-due-diligence-for-german-companies>

¹³ See <http://www.bhrinlaw.org/> for more examples.

¹⁴ Gerlinde Berger-Walliser and Paul Shrivastava, *Beyond compliance: Sustainable development, business, and Proactive Law*, (2015) 46 *Georgetown Journal of International Law* 418; Jean-Noël Chauvey et al, *The normativity and legitimacy of CSR disclosure: Evidence from France*, (2015) 133 *Journal of Business Ethics*; Jan Bebbington, Elizabeth A Kirk and Carlos Larrinaga, *The production of normativity*) 22 *Business Strategy and the Environment* 357; Danwatch, *The Impact of the Danish Law on CSR Reporting*, report for the European Coalition for Corporate Justice (Copenhagen: Danwatch and ICCCI, 2011).

the company.¹⁵ Non-financial disclosure has even been found to be used by firms to reduce exposure to critique and social or economic accountability, rather than provide meaningful transparency on their social and environmental impacts.¹⁶ A clear example being that at the height of the Dieselgate fraud in 2013, Volkswagen was awarded a sustainability award by the World Forum for Ethics in Business for “responsible action in the environmental and social fields”, based on its inclusion in Dow Jones Sustainability World index and Sustainalytics DAX 30 rating, relying on its non-financial reporting.¹⁷

In order to realise the UNGPs and properly operationalize the corporate responsibility to respect human rights, it is clear that what is actually needed is a legislative duty to undertake human rights due diligence. Such a legal duty should entail legal liability for harm in the event of non-fulfilment, enabling proper redress for victims, as foreseen by the UNGPs, and as already implemented in jurisdictions such as France.¹⁸

Clarifying the EU legislative duty to report on Human Rights Due Diligence

Clearly, the NFRD does not legally enshrine the responsibility of EU companies to undertake human rights due diligence; however it does legally require them to describe it – if they do it.¹⁹ Content-wise, the reporting requirements of the NFRD are already clearly-aligned with the HRDD process as elaborated in the UNGPs.

- Under the NFRD companies are required to disclose the “information necessary for an understanding” of their **impacts** on environmental; social and employee issues; **human rights**; as well as anti-corruption and bribery matters.²⁰ Companies must describe the policies pursued in relation to those matters, including **due diligence**,²¹ as well as the **outcomes** of those policies.²² Finally, companies must report on the principal **risks their operations pose to these areas (human rights), including where relevant and proportionate, their business relationships, products or services likely to cause adverse impacts, and how the company manages those risks.**²³

Whilst all the functional elements of HRDD are clearly contained within the NFRD disclosure requirements, the reporting framework is not specified. In

¹⁵ Econsense, *New Momentum for Reporting on Sustainability? Study on Implementation of the German CSR Directive Implementation*, 2018. Available at: <https://econsense.de/aktuelles/study-new-momentum-for-reporting-on-sustainability/>

¹⁶ Craig Deegan, *Organizational legitimacy as a motive for sustainability reporting* in Jeffrey Unerman, Jan Bebbington and Brendan O’Dwyer (eds), “Sustainability accounting and accountability” (Routledge, 2007) 127; Jan Bebbington and Craig Deegan, *The legitimizing effects of social and environmental disclosures: a theoretical foundation*, (2002) 15:3 Accounting, Auditing and Accountability Journal 282.

¹⁷ Corporate Social Responsibility Europe, *Volkswagen wins international sustainability award*, 2013. Available at: <https://www.csreurope.org/volkswagen-wins-international-sustainability-award#.XFxmsKBG2Uk>

¹⁸ See, European Coalition for Corporate Justice, *Key Features of Mandatory Human Rights Due Diligence Legislation*, 2018. Available at: <http://corporatejustice.org/news/6133-ecci-publishes-key-features-of-mandatory-human-rights-due-diligence-legislation>

¹⁹ If they don’t, then they are obliged to explain why they do not: Article 19a of the Directive 2013/34/EU

²⁰ Article 19a Directive 2013/34/EU

²¹ Article 19a(b) Directive 2013/34/EU

²² Article 19a(c) Directive 2013/34/EU

²³ Article 19a(d) Directive 2013/34/EU

other words, the material *content* of the disclosure requirements are aligned with HRDD as prescribed by the UNGPs, however the manner and form is not specified as the UNGP reporting framework. This is a problem.

Companies are struggling and need their legal responsibility clarified

Preliminary studies reveal companies are seriously struggling with their HRDD disclosure, likely indicating that they have not understood it and are therefore not doing it. A 2018 study by the Corporate Human Rights Benchmark reveals that internationally, HRDD reporting remains a key weak area of performance, with an alarming 40% of companies scoring zero points across five HRDD assessment indicators, with an average score of 6.8/25.²⁴ A 2019 European study by the Alliance for Corporate Transparency reveals that whilst 90% of companies in the pan-European sample expressed a commitment to respect human rights (typical of pre-NFRD reporting) only 36% described their human rights due diligence system (not necessarily in line with the UNGP reporting standard).²⁵ The same study found that 19% of companies had no description of the risks their operations pose to human rights; 48% had a “vague” description; whilst only 26% had a clear statement of salient issues.

It is clear that the UNGP reporting framework provides the best possible guidance framework for companies to report on their HRDD. Indeed it is built and promoted for this very purpose. Mandating use of the UNGP framework for the existing legal duty to report on HRDD is a clear, logical and obvious step toward solving the stubborn problem of companies not learning and undertaking HRDD. Formulating HRDD disclosure accordingly is helpful and practicable for both companies and rights’ holders, which would in turn provide far superior human rights information for ethical investors, themselves increasingly likely to be duty bound to undertake HRDD. The European Commission’s Sustainable Finance Action Plan assumes a reform of institutional investors duties that would require investors to carry out due diligence with respect to their investments.²⁶ Whether this will be focused only on financially material issues or more broadly on salient human right impacts is not yet clear, nonetheless investors will need, and are demanding, improved information from companies as regards their HRDD going forward. A company that does not properly undertake HRDD opens itself to clear reputational risk as well as financial liability (see company example 1 below); the relationship between salience of human rights risks and traditional materiality must therefore be recognised.²⁷

Mandating the UNGP reporting framework as the means by which companies must report on their HRDD would also go a long way to preparing them for upcoming legislative developments mandating HRDD, facilitating policy coherence and clarity. A study by Shift illustrates how the requirements of the French Duty of Vigilance law are so closely aligned with the UNGPs, that the UNGP reporting framework is “highly pertinent” and a “valuable resource for

²⁴ Corporate Human Rights Benchmark, *2018 Key Findings : Apparel, Agricultural Products and Extractive Companies*, 2018. Page 12. Available at: <https://www.corporatebenchmark.org/>

²⁵ The Alliance for Corporate Transparency, *2018 Research Report*, 2019. Page 45. Available at: <http://www.allianceforcorporatetransparency.org/>

²⁶ European Commission COM(2018) 97 final, *Action Plan: Financing Sustainable Growth*. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0097>

²⁷ On salience and materiality see: <https://www.ungpreporting.org/resources/salient-human-rights-issues/>

French companies subject to the law, offering greater specificity on how to meet the law's objective of respect for human rights.”²⁸

Case Studies

The following case studies give a qualitative analysis of the HRDD reporting of four EU companies whose operations pose serious, well-documented human rights risks and impacts. Desk research of media, civil society, human rights bodies and government reports has been undertaken in order to ascertain the companies' salient human rights risks. Reference is then made to the company's 2017 annual reporting and NFRD statement, in an attempt to understand the HRDD process that was (not) undertaken in relation to those salient human rights impacts. The methodology has broken down the NFRD reporting requirements into four key encapsulating questions, reflecting the UNGP framework, namely:

- Does the reporting explain the company's commitment to human rights?
- Does the company identify salient human rights risks and impacts?
- Does the reporting explain the company's policy to manage the particular salient issues or risks?
- Does the reporting provide evidence of effective management and outcomes (examples of indicators / KPIs)

The case studies shed light on the need for better structured HRDD disclosure and enforcement, by highlighting the current gap between corporate adverse human rights impacts and HRDD disclosure.

²⁸ Shift, *Human Rights Reporting in France : A Baseline for Assessing the Impact of the Duty of Vigilance Law*, September 2018. Page 11. Available at: <https://www.shiftproject.org/resources/publications/loi-vigilance/>

FERROVIAL

Ferrovial, S.A. is a Spanish multinational company with annual revenues of approximately 12.21 billion euros and 95,000 employees.²⁹ Its business includes the construction, operation and maintenance of transport infrastructure and urban services.

In 2016 Ferrovial fully acquired the Australian company **Broadspectrum**, the provider of “garrison and welfare services” for the running of highly-controversial “refugee processing centres” on the Pacific island nations of Nauru and Papua New Guinea (Manus Island) for the Australian government.³⁰ The provision of said services by Broadspectrum, fully-owned by Ferrovial, continued until Nov 2017 and entailed Broadspectrum servicing the day-to-day functioning of the centres; effectively controlling the daily lives of refugees and asylum seekers. Broadspectrum controlled access to food, clothing, property and recreational activities; and was responsible for dealing with incidents and “behavioural issues”, as well as for monitoring entry and exit to, and movement around, the facilities.³¹ In the fulfilment of these business operations, Broadspectrum also sub-contracted private security firms.

Human rights risks & impacts

From 2014 revelations concerning the serious, systemic abuse of refugees and asylum seekers detained in the offshore “refugee processing centres” began to emerge. These incidents are well-documented in numerous media articles and reports³² and include a February 2015 independent government report containing over 20 pages of allegations of harassment as well as sexual and physical abuse of asylum seekers by “service providers” and security guards.³³ A subsequent August 2015 Australian parliamentary report concluded that the processing centre on Nauru “was not a safe place for asylum seekers”³⁴, noting that “specific allegations and incidents reported to this committee about the conduct and the behaviour of contractor staff are too numerous to set out in detail ...”³⁵ In September 2016 a second parliamentary investigation was instigated after a large cache of documents from the centres was leaked, revealing new evidence of widespread and systemic physical and sexual abuse,

²⁹ Ferrovial, *Integrated Annual Report Ferrovial 2017*. Available at: <https://www.ferrovial.com/en/ir-shareholders/financial-information/annual-report/>

³⁰ Transfield Services Limited (now Broadspectrum), *Transfield Services to provide services to Department of Immigration and Citizenship*, 11 September 2012. Available at: www.broadspectrum.com/news-2012/transfield-services-to-provide-services-to-department-of-immigration-and-citizenship

³¹ Amnesty International, *Treasure Island: How Companies are Profiting from Australia’s Abuse of Refugees on Nauru*, 2017. Page 11. Available at: <https://www.amnesty.org/en/documents/asa12/5942/2017/en/>

³² For example, see: Moss Review, *Final Report*; Senate Select Committee, *Final Report*; Nick Evershed, Ri Liu, Paul Farrell, and Helen Davidson, *The Lives of Asylum Seekers in Detention Detailed in a Unique Database*, The Guardian, 10 August 2016, www.theguardian.com/australia-news/ng-interactive/2016/aug/10/the-nauru-files-the-lives-of-asylum-seekers-in-detention-detailed-in-a-unique-database-interactive

³³ Moss Review, *Final Report*; Senate Select Committee, Para 20.

³⁴ Australian Senate Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, *Taking responsibility: conditions and circumstances at Australia’s Regional Processing Centre in Nauru (Final Report)*, 31 August 2015, para. 5.71. Available at: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Final_Report (hereafter Senate Select Committee, Final Report)

³⁵ Senate Select Committee, *Final Report*, para. 2.55.

including against children; hunger strikes; unattended medical emergencies; rape and murder.³⁶



By May 2016 the UN Human Rights Committee had found 51 violations of the International Covenant on Civil and Political Rights in relation to the offshore incarceration of refugees and asylum seekers. Cases were found to amount to “arbitrary and indefinite detention”³⁷; “cruel, inhuman, or degrading treatment”; whilst men, women and children were found to be held in “violent and dangerous conditions”.³⁸ Several arms of the UN have repeatedly condemned Australia’s offshore regime, including the UN High Commissioner for Human Rights³⁹, the UN Committee Against Torture, UN Special Rapporteur on the Human Rights of Migrants⁴⁰ and the UN High Commissioner for Refugees.⁴¹

In February 2017, 17 international criminal law and refugee law academics submitted a case for investigation to the International Criminal Court outlining the potential legal liability of Australian officials and directors of Ferrovial for crimes against humanity on Nauru and Manus Island.⁴²

On 14th June 2017 a class-action on behalf of 1905 current and former detainees brought against the Australian government and Broadspectrum, alleging injuries and false imprisonment, was settled for \$70 million after the defendants opted to avoid a public hearing.⁴³

Company reporting vis-à-vis the NFRD requirements

Does the reporting explain the company’s commitment to human rights?

The Ferrovial *Code of Business Ethics*, applicable to all the Group’s companies, establishes the basic principles and commitments to which the behaviour of said companies and their administrators, managers and employees must adhere to:

³⁶ The Guardian, *The lives of asylum seekers in detention detailed in a unique database*. Available at: <https://www.theguardian.com/news/series/nauru-files>

³⁷ The Guardian, *Australia’s indefinite detention of refugee illegal, UN rules*, May 2016. Available at: <https://www.theguardian.com/law/2016/may/18/australias-indefinite-detention-of-refugees-illegal-un-rules>

³⁸ United Nation Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhumane or degrading treatment or punishment*, Juan E. Méndez, March 2015. Available at: www.static.guim.co.uk/nj/1425873116713/Mendez-report.pdf

³⁹ United Nations Office of the High Commissioner for Human Rights, *Human Rights Council Informal Briefing on Burundi, Tunisia, Migration Crisis in Europe and South-East Asia, and Sudan*. Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16012&LangID=E>; The Guardian, *United Nations reiterates demand for Australia to close ‘dire’ detention centres*, August 2016. Available at: <https://www.theguardian.com/australia-news/2016/aug/13/united-nations-reiterates-demand-for-australia-to-close-dire-detention-centres>

⁴⁰ United Nations Office of the High Commissioner for Human Rights, *Migrants / Human Rights: Official visit to Australia postponed due to protection concerns*, September 2015. Available at: <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16503&LangID=E>

⁴¹ The Guardian, *UN refugee agency condemns Australia’s offshore detention regime*, Nov 2013. Available at: <https://www.theguardian.com/world/2013/nov/26/un-refugee-agency-condemns-australias-offshore-detention-regime>

⁴² The Guardian, *Refugee camp company in Australia ‘liable for crimes against humanity’: directors and employers of Ferrovial told they risk prosecution over firm’s role at offshore detention sites*, July 2016. Available at: <https://www.theguardian.com/australia-news/2016/jul/25/ferrovial-staff-risk-prosecution-for-managing-australian-detention-camps>

⁴³ The Australian, *Manus Island class-action settlement*, June 2017. Available at: <https://www.theaustralian.com.au/national-affairs/immigration/manus-island-class-action-settled/news-story/efc8d2d274442459f3d90343f16d01c3>

Respect for Human Rights: all actions of Ferrovial and its employees shall scrupulously respect the Human Rights and Civil Liberties enshrined in the Universal Declaration of Human Rights.

All employees must adhere to the principles and requirements contained in the Code and ensure that other individuals or groups that carry out activities on behalf of Ferrovial, including contractors, agents, consultants and other business partners, do so.⁴⁴

Does the company identify salient human rights risks and impacts?

The reporting fails mention of any of the salient human rights risks associated with the running of the Nauru facilities and the large number of vulnerable people within its effective care. The reporting does not disclose information needed for an understanding of the human rights impacts of its business operations; including, as is here relevant and proportionate, the impacts of its business relationships with Broadspectrum. There is no mention of the salient risks of systemic harassment, intimidation, bodily & sexual assault, “cruel, inhumane and degrading treatment”; “arbitrary and indefinite detention” detailed in either the media, the independent government report, the two Parliamentary investigations, civil court proceedings, or UN treaty body rulings and reports.

Does the reporting explain the company’s policy on managing the particular salient issue or risk?

A 2017 Amnesty International report on the human rights impacts and potential legal liability of Broadspectrum and Ferrovial stemming from their business operations states that the latter’s 2016 annual report “does not outline any due diligence that the company took or is taking with respect to Broadspectrum’s operation of the RPC [Refuge Processing Centre] on Nauru. In fact, the [2016 annual] report states that Ferrovial did not undertake any human rights reviews or impacts assessments in 2016.”⁴⁵ Moreover, “Ferrovial has not provided any specific evidence of what human rights due diligence it conducted before buying Broadspectrum or conducts on an ongoing basis, or what specific steps it has taken to address the human rights impacts of Broadspectrum ... at the Nauru RPC or the conditions faced by refugees and asylum-seekers at the RPC”.⁴⁶

Despite the applicability of the NFRD requirements, a review of Ferrovial’s 2017 annual reporting reveals the same conclusion. There is no specific evidence or description of human rights due diligence conducted by the company in 2017 in response to the incredibly serious revelations of systemic human rights abuses occurring in the course of its business operations. The reporting fails to make any mention of the on-going potential civil liability of Broadspectrum; the \$70 million settlement with the 1905 Nauru detainees; conclusions from UN human rights bodies concerning the centres; nor the petition against the Ferrovial board of directors with the International Criminal Court. Such facts are moreover materially relevant to the present and future financial and managerial operations of the company.

⁴⁴ Ferrovial, *Integrated Annual Report Ferrovial 2017*, p 78.

⁴⁵ Ferrovial, *Annual Report 2016*, p. 70, 71 and 109; in Amnesty International, *Treasure Island: How Companies are Profiting from Australia’s Abuse of Refugees on Nauru*, 2017. Page 11. Available at: <https://www.amnesty.org/en/documents/asa12/5942/2017/en/>

⁴⁶ Amnesty International, *Treasure Island: How Companies are Profiting from Australia’s Abuse of Refugees on Nauru*, 2017. Page 29-30.

Ferrovial's 2017 reporting refers to the company's "Ethical Channel" incorporating human rights as a specific item⁴⁷ and the company's approach to "ethical risks" under its Compliance Model.⁴⁸ Whilst relevant, this information does not explain how this was applied; or what the company's response was during the course of 2017 to the revelations arising from its business relationships with Broadspectrum.

In its group-wide *human rights policy*, published in 2014, Ferrovial states that it does in fact conduct "an ongoing due diligence process in its activities" with the "aim of identifying, preventing, mitigating and responding to any potential negative consequences regarding human rights".⁴⁹ However general restatements of the concept of human rights due diligence do not qualify as an adequate description of how due diligence has been pursued, applied and undertaken in 2017 in relation to the particular (unidentified) salient risks. Likewise 2017 annual report statements such as, "Broadspectrum has prioritized the safety and welfare of these refugees and asylum seekers"⁵⁰ do not describe or detail the actual due diligence process taken toward that end.

Does the reporting provide evidence of effective management and outcomes (examples of indicators / KPIs)

The reporting fails the requirement to disclose the outcomes of the stated human rights due diligence policies that Ferrovial claims to undertake. Concerning its business operation on Nauru and Manus Island, there are no relevant KPIs to compare the situation in 2016 with that in 2017, however the company does give a breakdown of 78 complaints to the "Ethics Channel" in 2017.⁵¹

Comments

Despite the above controversies, Ferrovial is listed on both the Dow Jones Sustainability and FTSE 4 Good Indexes, which do not mandate the use of the UNGP reporting framework. Application of the UNGP reporting framework would have enabled Ferrovial not only to better communicate, but also better formulate its HRDD. Clearly, how Ferrovial manages the salient human rights impacts in its business separations is not only of critical importance to vulnerable affected rights' holders, the general public and ethical investors. As is clearly made out on the facts, potential and current investors have a traditional 'material' interest in how salient human rights risks are managed, as the mismanagement of those risks has led to a significant financial liability (settlement indicating likely civil liability, potentially on-going) as well as criminal complaints against the senior management of the company; information traditionally 'material' in terms of risk to the company.

⁴⁷ Ferrovial, *Integrated Annual Report Ferrovial 2017*, p 78.

⁴⁸ Ferrovial, *Integrated Annual Report Ferrovial 2017*, p 94.

⁴⁹ Ferrovial, *Human Rights Policy*, December 2014, page 3. Available at:

www.ferrovial.com/wpcontent/uploads/2016/01/Human-Rights-Policy-Ferrovial.pdf

⁵⁰ Ferrovial, *Integrated Annual Report Ferrovial 2017* page 94.

⁵¹ Ferrovial, *Integrated Annual Report Ferrovial 2017*, p 75.

ANDRITZ GROUP

ANDRITZ Group is a major Austrian-based engineering company with annual revenues of €5.88 billion, employing more than 30,000 employees and listed on the Vienna stock-exchange.⁵² Its major business areas include Pulp & Paper, Metals, Feed & Biofuel and Hydro-electric, for which Andritz Hydro GmbH is the responsible business arm.

Andritz Group has been a main partner in numerous, highly-controversial projects in the pulp and paper and hydropower sectors, including the *Ilisu* mega-dam in south-eastern Turkey⁵³, the *Belo Monte* mega-dam in Brazil⁵⁴ and the *Xayaburi* mega-dam in Laos. Andritz's involvement in each of these projects has carried significant, well-documented environmental, social and human rights risks and impacts for large numbers of locally affected communities. In the case of the *Ilisu* mega-dam project, environment and human rights risks were deemed so serious as to compel the divestment and withdrawal of already granted export guarantees. Six European private banks and Export Credit Agencies pulled out of the project in 2009⁵⁵ as did two European turbine providers, leaving Andritz Hydro as the sole European participant.⁵⁶

Human rights risks and impacts

In 2012 Andritz began work with the Lao government on the *Xayaburi* mega dam project on the region's Mekong Delta river. Environmental experts and CSOs warned that such significant changes to the flow and ecosystem of the Lower Mekong from the mega-dam's construction would impact hundreds of thousands of inhabitants, degrade traditional livelihoods, exacerbate economic inequalities and widely decrease food security by vastly reducing the amount of fish; as well as threaten the existence of numerous species of endangered fish.⁵⁷ Citing these adverse impacts, the governments of downstream Vietnam and Cambodia have opposed the project⁵⁸ as has an inter-governmental body mandated to advise countries along the Mekong Delta on its sustainable management, the Mekong River Commission, which warned construction would "fundamentally undermine the abundance, productivity and diversity of the



⁵² Bloomberg, *Andritz AG*. Available at: <https://www.bloomberg.com/quote/ANDR:AV>

⁵³ For details see: <https://www.business-humanrights.org/en/turkey-begins-construction-of-ilisu-dam-amid-concerns-over-displacement-cultural-environmental-impacts>

⁵⁴ The Inter-American Court of Human Rights has found violations of human rights in relation to the *Belo Monte* project: <https://news.mongabay.com/2018/12/belo-monte-dam-xingu-river-management-plan-violates-human-rights-finding/>

⁵⁵ Financial Times, *Creditors Pull Plug on Turkish Dam*, 2009. Available at: <https://www.ft.com/content/000c676c-6afd-11de-861d-00144feabdc0>; Banktrack, *Ilisu Dam: Pullout officially initiated*, 2008. Available at:

https://www.banktrack.org/news/ilisu_dam_pullout_officially_initiated

⁵⁶ Banktrack, *Construction of Ilisu Dam restarted – Austrian Andritz the only European company to remain in the project*, 2010. Available at:

https://www.banktrack.org/news/construction_of_ilisu_dam_restarted_austrian_andritz_the_only_european_company_to_remain_in_the_project

⁵⁷ Ecawatch Austria et al, *Specific Instance Complaint under the OECD Guidelines for Multinational Enterprises regarding the contributions of Andritz AG to human rights abuse and environmental damage in connection with the Xayaburi hydropower project in Lao PDR*, 2014. Available at:

<https://earthrights.org/wp-content/uploads/andritz-oecd-complaint-re-xayaburi-4.9.2014-1.pdf>

⁵⁸ The Diplomat, *Laos finally called out over Xayaburi Dam: are regional tensions over the Xayaburi dam finally coming to a head?*, June 2013. Available at: <https://thediplomat.com/2013/01/laos-finally-called-out-over-xayaburi-dam/>

Mekong fish resources" and "result in irreversible environmental impacts".⁵⁹ On this basis the World Bank and Asian Development Bank declined to fund the project.⁶⁰

In April 2014, a transnational coalition of eight NGOs from Laos, Thailand, Cambodia, Vietnam, USA and Austria filed a complaint against Andritz with the Austrian OECD National Contact Point arguing non-compliance with the *OECD Guidelines for Multinational Enterprises*.⁶¹ The complaint comprehensively details the various salient environmental and human rights risks of Andritz's business operations in the Mekong Delta, including concerns over the fair resettlement of Lao communities affected by the project. The complaint highlights Andritz's responsibility under the OECD Guidelines to undertake and publically communicate its due diligence processes as to risk identification, prevention, mitigation and remediation.⁶² The complainants note they had "not been able to uncover any information suggesting that Andritz has made efforts to improve the design of the dam to avoid or reduce impacts as construction has proceeded" and that Andritz "lacks any publicly available policies or procedures to assess the impacts of the projects to which it contributes".⁶³ Moreover they state,

*Andritz has failed to take mitigating measures that are under its control, by declining to use its leverage with the project developer to improve the design of the dam and by neglecting to adopt even the most rudimentary human rights and environmental policies that would allow for identification, mitigation, and remediation of adverse impacts.*⁶⁴

In June 2017 the OECD complaint process was concluded, with the Austrian NCP making, *inter-alia*, the following recommendations to Andritz Hydro GmbH:

- to continue to use its contacts to mitigate or prevent any negative impacts, related to the Xayaburi hydropower project
- to discuss and further develop its due diligence procedures in due consideration of internationally recognized human rights and environmental standards, including the OECD Guidelines for Multinational Enterprises.⁶⁵

Company disclosure vis-à-vis the NFRD requirements

Does the reporting explain the company's commitment to human rights?

⁵⁹ The Independent, *Mekong ecology in the balance as Laos quietly begins work on dam*, 2011. Available at: <https://www.independent.co.uk/environment/green-living/mekong-ecology-in-the-balance-as-laos-quietly-begins-work-on-dam-2270082.html>

⁶⁰ Earthrights International, *Xayaburi Dam*. Available at: <https://earthrights.org/what-we-do/mega-projects/xayaburi-dam/>

⁶¹ Ecawatch Austria et al, *Specific Instance Complaint under the OECD Guidelines for Multinational Enterprises regarding the contributions of Andritz AG to human rights abuse and environmental damage in connection with the Xayaburi hydropower project in Lao PDR*, 2014. Available at: <https://earthrights.org/wp-content/uploads/andritz-oecd-complaint-re-xayaburi-4.9.2014-1.pdf>

⁶² Ibid.

⁶³ Ibid. p 21.

⁶⁴ Ibid. p 24.

⁶⁵ Austrian National Contact Point, *Final Statement: Specific Instance regarding the involvement of ANDRITZ HYDRO GmbH in connection with the Xayaburi hydropower project in Lao PDR*, June 2017. Available at: <https://www.en.bmdw.gv.at/ExternalTrade/Documents/FollowUp%20Statement%2015102018.pdf>

The 2017 Andritz annual report provides the following statement in regards to human rights and its involvement in mega-projects.

Respect of human rights in execution of projects

ANDRITZ is often exposed to criticism from NGOs in connection with supplies for individual large-scale projects. Before taking part in projects, ANDRITZ surveys and analyzes all the relevant facts. Among the aspects examined are whether all the approvals are available for the respective project and whether the local legal provisions are observed in full in each case.

ANDRITZ takes any concerns relating to individual projects very seriously. Safeguarding of human rights has particularly high priority. In addition, detailed investigations are conducted beforehand on occupational safety, health and safety of the population, land purchases and resettlement, protection of cultural heritage, as well as opportunities available to the people affected by the project to be consulted and raise any objections.

Of course, ANDRITZ obeys the legal provisions applying in each case as well as any project-related requirements. Furthermore, ANDRITZ is committed to enhanced work protection and strict compliance with human rights regulations as determined in various internal policies. Over and above, ANDRITZ supports its customers in creating the best possible conditions in which to reduce social and ecological impacts to a minimum.⁶⁶

Does the company identify salient human rights risks and impacts?

Under the above section there is acknowledgment of the adverse “social and ecological impacts” to others as a result of company’s operations concerning ‘individual large-scale projects’. Nonetheless, the specific salient human rights risks related to any of the individual projects undertaken in 2017, or those typically arising from large-scale projects in general are not elaborated to a level necessary for an adequate understanding of the impact of the company’s activities on the environment and human rights. The level and detail of concern raised by a diverse range of stakeholders in relation to the *Xayaburi* mega-dam, summarised most comprehensively in the 2017-concluded OECD complaint alleging breach of due diligence obligations, stands in stark contrast to Andritz 2017 reporting on human rights risks posed by its operations (and which fails any mention of the *Xayaburi* OECD complaint process; its conclusions and recommendations).

The company utilises a GRI stakeholder materiality analysis⁶⁷ in order to decipher the main reporting topics, which includes *inter-alia* supply chain responsibility.⁶⁸ The corresponding sections outlining the company’s policies in regards to supply chain responsibility are well-developed.

Under the heading “Operational Risks” it is stated that “the ANDRITZ Group supplies many systems with products and/or processes that pose the risk of serious or fatal injury (also to a large number of people), or of substantial property damage.”⁶⁹ However under the heading the risk is framed in terms of

⁶⁶ Andritz, 2017 Annual Report, p 36. Available at: <https://www.andritz.com/group-en/investors/investors-downloads/financial-reports>

⁶⁷ It is not disclosed what stakeholders were included in Andritz’s stakeholder materiality analysis, and whether that included CSOs and affected communities, or the state governments opposing Andritz’s projects.

⁶⁸ Andritz, 2017 Annual Report, p 28.

⁶⁹ Andritz, 2017 Annual Report, p 21.

financial and legal liability to the company, not as human rights risks to external stakeholders.

Does the reporting explain the company's policy on managing the particular salient issue or risk?

“ANDRITZ supports its customers in creating the best possible conditions in which to reduce social and ecological impacts to a minimum” is a statement and not a description of a human rights due diligence policy. Moreover, the use of the term “reduce” diminishes the complete due diligence process outlined by the UNGP framework, as well as other due diligence guidance such as the OECD *Due Diligence Guidance for Responsible Business Conduct*, both of which require companies to: *identify, prevent, mitigate and remedy* their adverse human rights impacts, and to communicate respectively.⁷⁰ The reporting is therefore deficient in relation to those standards, as well as the Austrian OECD NCP recommendation that Andritz “discuss and further develop its due diligence procedures in due consideration of internationally recognized human rights and environmental standards.”⁷¹

Absent such a description of the company's HRDD process, the company appears to defer to legal compliance as its primary policy for respecting human rights. The UNGPs acknowledge that state laws often will not be enough to protect human rights, and therefore affirm the corporate responsibility to respect human rights as independent of state laws, the procedure for which is HRDD.⁷² Likewise, the company's *Code of Business Conduct and Ethics* contains general policy statements under the headings ‘Environment’, ‘Sustainability’ and ‘Community involvement’, such as:

*We are privileged to do business in over 125 communities around the world. As citizens of those communities, we must always act responsibly. This means conducting our operations safely and being prepared for any emergencies that may occur. When we make our communities a better place, we make our business a better place.*⁷³

Such statements do not contribute to a meaningful description of the company's HRDD as understood by the UNGPs nor the *OECD Due Diligence Guidelines for Responsible Business Conduct*, nor for that matter the NFRD which also envisages a description of the major risks to human rights; the policies pursued, and the outcomes of the described policies.⁷⁴

Does the reporting provide evidence of effective management and outcomes (examples of indicators / KPIs)

Key performance indicators of relevance to Andritz's HRDD process would derive from a human rights or risk impact assessment, and would include the number of inhabitants likely to be affected by the mega-dam project; impacts on fish populations; as well as estimates and figures regarding the mitigation measures: relocations of inhabitants etc. There is no such data provided in the reporting.

⁷⁰ OECD, *Due Diligence Guidance for Responsible Business Conduct*, 2018. Available at:

<http://www.oecd.org/investment/ue-diligence-guidance-for-responsible-business-conduct.htm>

⁷¹ Austrian National Contact Point, *Final Statement: Specific Instance regarding the involvement of ANDRITZ HYDRO GmbH in connection with the Xayaburi hydropower project in Lao PDR*, June 2017. Page 3.

⁷² Office of the UN High Commissioner for Human Rights, *Frequently Asked Questions About the Guiding Principles on Business & Human Rights*, 2014, page 7.

⁷³ Andritz, *Code of Business Conduct & Ethics*, 2010 p 14. Available at: <https://www.andritz.com/group-en/about-us/gr-compliance-startseite>

⁷⁴ See breakdown of the disclosure requirements on page 4 above.

Comments

The *OECD Guidelines for Multinational Enterprises* are certainly useful guidance for business in terms of operational conduct; however whilst there may be significant overlap, they are not a reporting framework and do not constitute effective step-by-step practical guidance for addressing and reporting human rights risks and due diligence.⁷⁵ Likewise, the recent 2018 *OECD Due Diligence Guidance for Responsible Business Conduct* is also not a reporting framework, despite the fact that it does provide that companies should communicate their due diligence⁷⁶ and provide information “sufficient to demonstrate the adequacy of an enterprise’s response to the particular human rights impact involved”, quoting the UNGPs principle 21 commentary.

ANGLO ASIAN MINING PLC

Anglo Asian Mining PLC is a UK public company with annual revenues of over \$70 million and 694 employees.⁷⁷ Together with its subsidiaries, the company’s operations primarily concern the exploration, development and operation of gold mines in the Republic of Azerbaijan.⁷⁸

Human rights & environmental risks

The extractives sector is recognised as being high risk in terms of impacts on both human rights and the environmental. Decades of adverse impacts have generated numerous (inter-)government, NGO and industry-own due diligence guidance detailing the specific risks and impacts; as well as policies to prevent, mitigate and remedy them.⁷⁹ Such guidance routinely highlights the risks, *inter alia*, of water pollution and environmental degradation; labour rights violations such as forced labour; problematic land acquisition deals; as well as corruption & bribery issues. Industrial gold mining in particular generates large volumes of toxic waste due to the use cyanide leaching: roughly 20 tons of toxic waste for every 0.333-ounce gold ring, laden with cyanide and toxic heavy metals.⁸⁰ There have been 30 major spills of cyanide waste in the past 25 years (including the Romanian *Baia Mare* spill that devastated the Danube⁸¹) and numerous jurisdictions worldwide have subsequently begun to outlaw the practice.⁸² Open pit gold mining also carries the persistent problem of *acid mine drainage*, when exposed iron sulphides (known as ‘fool’s gold’) interact with air and water to

⁷⁵ Reference is made to the *OECD Guidelines* as well as other guidance in the European Commission’s 2017 *Guidelines on Non-financial Reporting (methodology for reporting non-financial information)*. The latter is available at: https://ec.europa.eu/info/publications/170626-non-financial-reporting-guidelines_en

⁷⁶ OECD, *Due Diligence Guidance for Responsible Business Conduct*, 2018, pages 85-87.

⁷⁷ Bloomberg, *Company Overview of Anglo-Asian Mining PLC*, Jan 2019. Available at: <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=23107442>

⁷⁸ Anglo-Asian Mining PLC, *2017 Annual Report*, Jan 2019. Available at:

http://www.angloasianmining.com/investors/shareholder_info/reports_and_accounts/

⁷⁹ For a collection of such authoritative guidance, see: Business & Human Rights Resource Centre, *Guidance Portal: Extractives*, Jan 2019. Available at: <https://www.business-humanrights.org/en/tools-guidance-0/sector-specific-guidance/extractives>

⁸⁰ BrilliantEarth, *Gold Mining and the Environment*, Jan 2019. Available at:

<https://www.brilliantearth.com/gold-mining-environment/>

⁸¹ The Guardian, *Cyanide spill floods into Danube*, 2000. Available at:

<https://www.theguardian.com/world/2000/feb/14/1>

⁸² Mining-Technology, *Should cyanide still be used in modern day mining?* March 2016. Available at: <https://www.mining-technology.com/features/featureshould-cyanide-still-be-used-in-modern-day-mining-4809245/>

form sulphuric acid. Such acidic water draining from mine sites can be 20 to 300 times more concentrated than acid rain, is toxic to living organisms, and can lead to liver failure, skin cancer and tumours.⁸³ Once acid mine drainage starts, it is difficult to stop.

In recent years the government of Azerbaijan has come under heavy scrutiny for increasingly repressive and autocratic tactics, following revelations of large-scale corruption.⁸⁴ After a 2016 country-visit a UN special rapporteur concluded, “the already challenging environment for NGOs has turned into a total crisis”⁸⁵; whilst the UN Human Rights Committee has urged Azerbaijani authorities to end “the crackdown on public associations ... ensuring that they can operate freely and without fear of retribution for their legitimate activities”⁸⁶.

In March 2017 the Azerbaijani government withdrew itself from the *Extractive Industries Transparency Initiative* (EITI) after the EITI raised concerns regarding the worsening human rights situation in the country.⁸⁷ EITI is a global initiative to foster alliances between key stakeholders in a country’s extractive sector: government, civil-society and business, in a multi-stakeholder oversight group. According to the World Bank, EITI reports have helped uncover financial irregularities and have provided important insights for reform efforts in the oil, gas, and mining sectors.⁸⁸

NGO members of Azerbaijan’s EITI coalition have been subjected to criminal investigation by the Azerbaijani government.⁸⁹ These and other NGOs working on human rights have had to either suspend their work or continue in exile due to an inability to receive external funding.⁹⁰ In 2016 “Panama Papers” reports revealed corruption of the ruling regime in the country’s gold mining sector.⁹¹ In 2017, the government extended a moratorium on all labour inspections through to 2021.⁹²

⁸³ Mining-Technology, *Should cyanide still be used in modern day mining?* March 2016. Available at: <https://www.smithsonianmag.com/science-nature/environmental-disaster-gold-industry-180949762/>

⁸⁴ See, for example: Amnesty International, *Azerbaijan 2017/18 country update*. Available at: <https://www.amnesty.org/en/countries/europe-and-central-asia/azerbaijan/report-azerbaijan/>

⁸⁵ UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights defenders on his mission to Azerbaijan* (A/ HRC/34/52/Add.3), February 2017. Available at: <https://www.refworld.org/docid/58b956874.html>

⁸⁶ Human Rights Watch, *Azerbaijan Events of 2016*. Available at: <https://www.hrw.org/world-report/2017/country-chapters/azerbaijan#>

⁸⁷ EITI International Secretariat, *The cost of Azerbaijan’s leaving the Extractive Industries Transparency Initiative (EITI): Analysis of the impact on the economy and civil society*, March 2017. Available at: <https://eiti.org/document/cost-of-azerbaijans-leaving-extractive-industries-transparency-initiative-eiti>

⁸⁸ The World Bank, *Extractive Industries Transparency Initiative: Results Profile*, April 2013. Available at: <http://www.worldbank.org/en/results/2013/04/15/extractive-industries-transparency-initiative-results-profile>

⁸⁹ Human Rights Watch, *Azerbaijan Events of 2016*. Available at: <https://www.hrw.org/world-report/2017/country-chapters/azerbaijan#>

⁹⁰ Human Rights Watch, *Azerbaijan Events of 2016*. Available at: <https://www.hrw.org/world-report/2017/country-chapters/azerbaijan#>

⁹¹ International Consortium of Investigative Journalists, *The Panama Papers: how family that runs Azerbaijan built an empire of hidden wealth*, April 2016. Available at: <https://www.icij.org/investigations/panama-papers/20160404-azerbaijan-hidden-wealth/>

Organized Crime and Corruption Reporting Project, *People of Azerbaijan Bail Our Failed Aliyev Mining Empire*, May 2016. Available at: <https://www.occrp.org/en/panamapapers/people-of-azerbaijan-bail-out-failed-aliyev-mining-empire/>

⁹² United States Department of Labor, Bureau of International Affairs, *Child Labor and Forced Labour Reports: Azerbaijan*, 2017. Available at: <https://www.dol.gov/agencies/ilab/resources/reports/child-labor/azerbaijan>

Company disclosure vis-à-vis the NFRD requirements

Does the reporting explain the company's commitment to human rights?

No. The company's reporting does not make any reference to human rights whatsoever.

Does the company identify salient human rights risks and impacts?

The reporting does not identify the above well-known and significant environmental risks stemming from open-pit gold mining and cyanide leaching, despite confirming the use of these practices in its operations.⁹³ There is no mention of any human rights or other impact assessments having been undertaken, let alone their results. The reporting makes no reference to corruption and bribery risks.

Does the reporting explain the company's policy on managing the particular salient issues or risks?

The reporting identifies the "Health, Safety and Environment committee", responsible for the management of "risk related to health, safety, environmental and technological issues."⁹⁴ However there is no description of the due diligence procedures considered or undertaken by the committee, which comprises of two people, who meet "as required".⁹⁵ The reporting explains the procedure for storing the toxic waste ('tailings') in a dam. Given the significance of the risk, however, there is insufficient elaboration on prevention and mitigation measures concerning a potential spillage or seepage; the likelihood thereof etc. There is no reference to any of the government, industry or NGO due diligence guidance in regards to extractives and gold mining. The report dedicates two pages to the corporate social responsibility projects it undertakes in the region.

There is no reference to bribery and anti-corruption policies in place. The only reference to government relations states "Azerbaijan is outward looking and desirous of attracting direct foreign investment and the Company believes the country will be sensitive to the adverse effect of any proposed changes in the future. In addition, Azerbaijan has historically had a stable operating environment and the Company maintains very close links with all relevant authorities."⁹⁶

Does the reporting provide evidence of effective management and outcomes (examples of indicators / KPIs)

The reporting explains a reduction in reported safety incidents between 2017 and 2016, however other important indicators concerning the environmental impact are missing, for example the amount of toxic waste generated in the operations; how toxic it is etc.

Comments

Penalties for non-compliance are a central feature of any effective regulatory regime seeking to change business behaviour across the board. Whilst there will

⁹³ Anglo Asian Mining PLC, *Annual Report and Accounts 2017*, page 11. Available at: <http://www.angloasianmining.com/investors/>

⁹⁴ Anglo-Asian Mining PLC, *2017 Annual Report*, Jan 2019, Page 24.

⁹⁵ Anglo-Asian Mining PLC, *2017 Annual Report*, Jan 2019, Page 24.

⁹⁶ Anglo-Asian Mining PLC, *2017 Annual Report*, Jan 2019, Page 17.

be leaders in the move toward responsible business conduct, there will also be laggards. Penalties for non-compliance with the NFRD requirements need to be introduced. Whilst non-compliance with various financial disclosure requirements does attract sanction, it is not congruent that non-financial disclosure does not. This is especially the case when the relation between the management of salient environmental and human rights risks, as well as corruption and bribery, and traditional concepts of ‘materiality’ is understood.

H&M GROUP

H&M group is a Swedish multinational company and major fashion retailer globally. In 2017, the company had sales revenues of SEK 232 billion⁹⁷ from its eight brands – H&M, COS, Monki, Weekday, & Other Stories, Cheap Monday, H&M Home, and ARKET.⁹⁸ The same year, H&M and its associated companies had 4,739 stores across 69 markets and worked with 1,668 supplier factories, which employed over 1.6 million people (62% women).⁹⁹

Human rights risks & impacts

Labour abuses are rife within the garment industry, which provides employment to millions of people worldwide. These abuses vary in terms of their scope, scale and remedial character; from the Rana Plaza factory disaster in Bangladesh that killed 1,135 people, to gender based violence, denial of maternity leave, child or forced labour, excessive working hours, and repression of freedom of association.¹⁰⁰ As a fashion retailer, H&M faces human rights risks and impacts both in the countries it sources from as well as in its own supply chain. Some notable examples include:



On 25 February 2010, 21 workers died and 50 were injured when the Garib & Garib Sweater Factory in Gazipur, Bangladesh, caught fire for the second time in six months. The supplier produced clothing for H&M and other brands. The cause of the fire was deemed to be an electric short-circuit. Workers were unable to escape because exits were locked and materials blocked the stairways.¹⁰¹ H&M reported that it was satisfied with the factory’s safety measures during its audit in October 2009.¹⁰²

In 2016, cases of child labour were found in H&M supplier factories in Myanmar.¹⁰³ In one factory, there were indications that some workers were

⁹⁷ H&M Hennes & Mauritz AB, *Full-Year Report 2017*, published 2018. Available at: https://about.hm.com/content/dam/hmgroupp/groupsite/documents/en/cision/2018/01/2110334_en.pdf

⁹⁸ H&M group has since added an additional brand – Afound

⁹⁹ H&M Hennes & Mauritz AB, *H&M Sustainability Report 2017*, published 2018. Available at: https://about.hm.com/content/dam/hmgroupp/groupsite/documents/masterlanguage/CSR/reports/2017%20Sustainability%20report/HM_group_SustainabilityReport_2017_FullReport.pdf

¹⁰⁰ Business & Human Rights Resource Centre, *European textile industry and human rights due diligence: Key developments, human rights allegations & best practices*, April 2018. Available at: https://www.business-humanrights.org/sites/default/files/EU_Textile_Briefing_Final.pdf

¹⁰¹ Clean Clothes Campaign, *Garib Fire Survivors Call for Justice and a Safe Industry*, 11 March 2010. Available at: <https://cleanclothes.org/news/2010/03/11/garib-fire-survivors-call-for-justice-and-a-safe-industry>

¹⁰² The Independent, *21 Workers Die in Fire at H&M Factory*, 2 March 2010. Available at: <https://www.independent.co.uk/life-style/fashion/news/21-workers-die-in-fire-at-hm-factory-1914292.html>

¹⁰³ Centre for Research on Multinational Corporations, Action Labor Rights & Labour Rights Defenders and Promoters, *The Myanmar Dilemma: Can the Garment Industry Deliver Decent Jobs for*

younger than 15 years old when they started working, violating both Myanmar law and international labour standards.¹⁰⁴ People also reported working for more than 60 hours per week and for less than the legal minimum wage (EUR 2.48 per day).¹⁰⁵

In June 2014, workers who tried forming a union in the Pioneer Knitwears factory, an H&M ‘gold’ rated supplier, were beaten.¹⁰⁶ Similarly, more than a dozen union leaders in the East West Industrial Park, another H&M supplier, were physically attacked or threatened with violence and even death in May 2014. These leaders, fearing for their safety, left their homes and could not return to work.¹⁰⁷ More recently, during March to April 2018, managers at Shahi’s Unit 8 factory in Bangalore, an H&M ‘gold’ rated supplier, brutally repressed attempts by workers to unionise. Workers suffered physical beatings, death threats, and threats of mass termination.¹⁰⁸

On 11 December 2016, workers at the Windy Apparel factory, an H&M supplier, went on strike following the death of one of its employees after managers refused her repeated requests for time off. These events sparked a broader protest that was met with repression from both factory owners and the Government of Bangladesh.¹⁰⁹

From December 2018 to January 2019¹¹⁰, thousands of garment workers in Bangladesh staged wage protests and strikes. Protests were met with police violence, killing one person and injuring scores more. At least 5,000 people were dismissed from factories and dozens arrested.¹¹¹ This adds to the many criminal charges against worker representatives that are still pending since the 2016 –

Workers in Myanmar?, August 2017. Available at: <https://www.somo.nl/wp-content/uploads/2017/02/170731-The-Myanmar-Dilemma-update-web-1.pdf>

¹⁰⁴ The State Law and Order Restoration Council, “The Child Law (The State Law and Order Restoration Council Law No. 9/93),” 14 July 1993 (Myanmar) & ILO, “Worst Forms of Child Labour Convention”, 1999 (No. 182). Available at:

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312327:NO

¹⁰⁵ Centre for Research on Multinational Corporations, Action Labor Rights & Labour Rights Defenders and Promoters, *The Myanmar Dilemma: Can the Garment Industry Deliver Decent Jobs for Workers in Myanmar?*, August 2017

¹⁰⁶ Human Rights Watch, *Whoever Raises their Head Suffers the Most: Workers’ Rights in Bangladesh Factories*, 22 April 2015. Available at: <https://www.hrw.org/report/2015/04/22/whoever-raises-their-head-suffers-most/workers-rights-bangladeshs-garment#>

¹⁰⁷ International Trade Union Confederation, UNI Global Union & IndustriALL, *An Evaluation of the Bangladesh Sustainability Compact*, March 2015. Available at: https://www.ituc-csi.org/IMG/pdf/ituc-ia-uni_evaluation_of_the_bangladesh_sustainability_compact_march_final.pdf

¹⁰⁸ Workers Rights Consortium, *Workers Rights Consortium Assessment Shahi Exports Pvt. Ltd. (Bangalore, India): Findings And Recommendations*, June 2018. Available at:

https://www.workersrights.org/wp-content/uploads/2018/06/WRC-Assessment-re-Shahi-India-6_20_18.pdf

¹⁰⁹ Business Human Rights Resource Centre, *Bangladesh: Rights groups urge brands to take action to free detained workers*, 2016. Available at: <https://www.business-humanrights.org/en/bangladesh-workers-protesting-for-higher-wages-arrested-clean-clothes-campaign-says-detentions-apparently-arbitrary>

¹¹⁰ The latest protests, from December 2018 – January 2019, occurred after reporting period reviewed within this case study (H&M’s Sustainability Report 2017)

¹¹¹ Quartz, *5,000 workers protesting low wages in Bangladeshi garment factories have been fired*, 1 February 2019. Available at: <https://qz.com/1540275/5000-garment-workers-in-bangladesh-were-fired-after-protesting-low-wages/>

2017 protests for higher wages.¹¹² Three factories supplying to H&M were confirmed to have terminated workers as a result of the latest protests.¹¹³

Company disclosure vis-à-vis the NFRD requirements

Does the reporting explain the company's commitment to human rights?

H&M's 2017 'Sustainability Report' outlines a strong policy commitment to human rights due diligence within its supply chain.

At H&M group, we firmly believe that everyone connected to our business should be treated in a fair and equal way. [This] means making sure our values and respect for human rights are upheld and promoted within our own company and across our supply chain.¹¹⁴...All our policies and standards are based on international equivalents and well-recognised initiatives, such as ILO Conventions or the UN Guiding Principles on Business and Human Rights.¹¹⁵...Our human rights due diligence is conducted systematically as an integral part of all relevant assessment processes.¹¹⁶

Does the company identify salient human rights risks and impacts?

H&M identifies 10 salient human rights risks and impacts, including forced labour, freedom of association, working hours, health and safety, and living wages, as well as a number of policies to manage these.¹¹⁷

Does the reporting explain the company's policy for managing the particular salient issues or risks?

The brand has a 'Fair Living Wage' strategy that utilises good purchasing practices, engages with local governments, implements wage management systems, conducts workplace dialogue training, and promotes democratic elections of worker representatives.¹¹⁸ However while H&M's commitment to achieve a living wage is commendable, it is questionable whether the approach is commensurate to the identified salient risk as the brand is still far from attaining this goal, raising questions on effectiveness.¹¹⁹ H&M mainly sources its production from countries where the statutory minimum wage is often deemed insufficient to cover basic needs such as food, housing, health-care, education etc.¹²⁰ In addition, many of these countries have poor, if not hostile, industrial relations between workers and management, resulting in limited chance for wage increases through collective bargaining. Indeed, severe limitations on freedom of association are common, as demonstrated by the Shahi, Pioneer Knitwear, East-West, and Windy Apparels cases.

¹¹² Clean Clothes Campaign, *Bangladeshi garment workers face mass firings and criminal charges*, January 2017. Available at: <https://cleanclothes.org/news/2017/01/05/bangladeshi-garment-workers-face-mass-firings-and-criminal-charges>

¹¹³ H&M Group, *Unrest in Bangladesh*, 7 February 2019. Available at:

<https://about.hm.com/en/media/news/general-news-2019/unrest-in-bangladesh.html>

¹¹⁴ H&M Hennes & Mauritz AB, *H&M Sustainability Report 2017*, published 2018, p.56

¹¹⁵ H&M Hennes & Mauritz AB, *H&M Sustainability Report 2017*, published 2018, p.75

¹¹⁶ H&M Hennes & Mauritz AB, *H&M Sustainability Report 2017*, published 2018, p.77

¹¹⁷ H&M Hennes & Mauritz AB, *H&M Sustainability Report 2017*, published 2018, p.92

¹¹⁸ H&M Hennes & Mauritz AB, *H&M Sustainability Report 2017*, published in 2018, p.63

¹¹⁹ Clean Clothes Campaign, *Turn Around H&M: Wage Analysis*, September 2018. Available at:

<https://turnaroundhm.org/static/hm-wages-september2018-full-107815e8a7bc3bd4ffbfeca3426f1dcd.pdf>

¹²⁰ See WageIndicator Foundation for more information. Available at:

<https://wageindicator.org/salary/living-wage>

H&M seems to rely and report mainly on democratic elections of workers and workplace dialogue programmes. These are a poor proxy to the core labour right of workers to join and form an *independent and democratic union* of their own choice (as defined by ILO Convention 87), as “worker committees” are dependent on the factory owners’ willingness to participate and are often dominated and controlled by employers. For instance, H&M’s workplace dialogue programme in Bangladesh focuses on worker committees, which are not even authorised to negotiate on wages, as this is reserved for unions.¹²¹

In terms of protecting worker health and safety, H&M is signatory to the Bangladesh Accord, a legally binding agreement between brands and trade unions. Under the Accord, company signatories have a duty to require their supplier factories to undertake corrective safety measures within a designated time period.¹²² However, a review of 32 of H&M’s ‘gold’ and ‘platinum’ factories that should be top performers on safety found that as of 26 April 2016, 84% had yet to install all required fire-rated doors despite the deadlines passing.¹²³ Aside from reference to a Global Health and Safety policy,¹²⁴ there is limited information regarding worker safety beyond Bangladesh in H&M’s 2017 report.

Does the reporting provide evidence of effective management and outcomes (e.g. examples of indicators / KPIs)?

In contrast to H&M’s strong policy commitment, its 2017 reporting fails to provide material evidence of effective assessment and management of its salient issues. Firstly, H&M relies heavily on self-reporting mechanisms such as the Sustainable Impact Partnership Programme for measuring social and environmental performance.¹²⁵ Yet, suppliers are unlikely to report human rights violations perpetrated within their own factories. Indeed, interviews of 62 workers in ‘gold’ and ‘platinum’ H&M suppliers in Bulgaria, Turkey, India, and Cambodia during 2018, found that none of the workers earned a living wage, freedom of association violations occurred, and overtime hours exceeded the legal maximum.¹²⁶

Secondly, despite identifying 10 salient human rights issues, H&M only outlines five key performance indicators (KPIs) that fail to report on progress in a meaningful way. For example, wage levels rather than the KPI of number of factories using the ‘Fair Wage Method’ would indicate progress towards increasing real take home pay. Similarly, reporting the number of independent and freely formed trade unions or collective bargaining agreements reached would better indicate progress towards freedom of association compared to the KPI of democratic election of worker representatives to worker committees.¹²⁷

¹²¹ Ethical Trading Initiative, *Review of H&M Group’s Roadmap to Fair Living Wage*, December 2018. Available at: https://www.ethicaltrade.org/sites/default/files/shared_resources/ETI-HM%20FLWR%20Review_0.pdf

¹²² Article 12, *Bangladesh Accord*, 2016. Available at:

https://bangladeshaccord.org/wpcontent/uploads/2013/10/the_accord.pdf

¹²³ Clean Clothes Campaign, International Labor Rights Forum, Maquila Solidarity Network, and Worker Rights Consortium, *Three Years After Rana Plaza, H&M Factories Still Not Safe*, 2 May 2016. Available at: <https://cleanclothes.org/resources/publications/h-m-factories-still-not-safe>

¹²⁴ H&M Hennes & Mauritz AB, *H&M Sustainability Report 2017*, published in 2018, p.57

¹²⁵ H&M Hennes & Mauritz AB, *H&M Sustainability Report 2017*, published 2018, p.83

¹²⁶ Clean Clothes Campaign, *Turn Around H&M: Wage Analysis*, September 2018

¹²⁷ Across different reports, the language used is not consistent, and seemingly blurs the distinction between reporting on the number of independent democratic unions in its suppliers (in line with ILO convention 87, the H&M policy statement and the salient risk identified) and the number of worker-management committees, where workers were democratic elected, despite the two being fundamentally different concepts and bodies.

There is also only one KPI regarding safety, which is limited to Bangladesh.¹²⁸ KPIs have not been assigned to other salient risks. Overall, clearer evidence of the impact of H&M's policies is required; this means not only measuring outputs but also the outcomes of these actions.

Thirdly, H&M's progress on its salient issues is difficult to assess as the reporting fails to disclose the outcomes of its human rights impacts in a material manner. The brand only provides an aggregated figure of the number of investigated and closed incidents during 2017 without detailing the specific human rights issues concerned, if appropriate remedial action was taken, or whether the nature of the issue was incorporated in its human rights due diligence processes going forward.¹²⁹ It is also unclear whether these figures include unresolved cases from previous years.

Similarly, it is difficult to track H&M's progress against its living wage ambition, as the brand has deviated from its original target without explanation. In 2013, H&M aimed for 850,000 textile workers to earn a living wage by 2018, while the 2017 report refers only to the number of suppliers using the 'Fair Wage Method'.¹³⁰ This shifting target makes it impossible to track progress. However, H&M does publicly disclose its suppliers, covering 98.5% of its garment production and 60% of its fabric production, which helps to trace human rights abuses and impacts within the supply chain.¹³¹

Comments

Meaningful non-financial disclosure for companies with complex value chains entails supply chain disclosure. Such data includes the ownership of subsidiaries and supplier/sourcing lists. The disclosure of said information is already considered best practice by major brands in the garment sector. The disclosure of supplier lists enables civil society and trade unions to help companies to enforce their codes of conduct, address salient human rights issues in their supply chains, and ultimately stand accountable for the policy statements made in their reporting. The NFRD should require supply chain disclosure from, at least, companies in high-risk sectors where violations are rife, and where civil society has a legitimate and meaningful role to play in the protection of vulnerable rights' holders. In order to be most effective, such information should be machine readable in one or more of the following formats: csv, json, xlsx. The file should contain information for all authorized production units and processing facilities as well as the: full name; site address; parent company of the site business (if any); type of products made; number of workers at each site (which could be by category, for example: >1000).¹³²

¹²⁸ H&M Hennes & Mauritz AB, *H&M Sustainability Report 2017*, published 2018, p.55

¹²⁹ H&M Hennes & Mauritz AB, *H&M Sustainability Report 2017*, published in 2018, p.84

¹³⁰ Clean Clothes Campaign, *Lost and Found: H&M's Living Wage Roadmap*, September 2018.

Available at: <https://turnaroundhm.org/static/background-hm-roadmap-0f39b2ebc3330eead84a71f1b5b8a8d4.pdf>

¹³¹ H&M Hennes & Mauritz AB, *H&M Sustainability Report 2017*, published 2018, p.21

¹³² This demand is taken from the NGO statement "The European Commission must take action to improve the reporting obligations of companies on sustainability issue", 2018, Available at: <http://corporatejustice.org/news/11351-ngos-call-on-the-eu-commission-to-clarify-the-legal-framework-for-corporate-sustainability-reporting>

Conclusions & Recommendations

The above four case studies represent a statistically insignificant sample of European companies reporting under the NFRD. The actual and potential human rights and environmental impacts of their respective operations are, however, significant. Over half of the companies listed on the UK FTSE 100, France CAC 40 and the German DAX 30 have been identified in allegations regarding adverse human rights impacts.¹³³ Constituting only the biggest listed companies, the numbers are alarming, and testify to the reality that whilst globalisation has granted corporations much freedom of operation, rules for their accountability and the protection of the people they harm lag behind.

Only one year of reporting under the NFRD has passed, yet the general trend remains clear: companies are seriously struggling with human rights due diligence disclosure. Given the absence of penalties for non-compliance, it is not apparent how this general trend is set to improve. This, in turn, may evidence a Pillar I failure of the EU to effectively guarantee the Pillar II corporate responsibility to respect human rights. The UNGP reporting framework offers a clear format and guidance that can educate companies to improve, whilst increasing the quality and comparability of information for all relevant stakeholders and rights' holders. As a standard and format, it also promotes policy coherence, as emerging human rights due diligence legislation, such as the French *Duty of Vigilance Law*, is derived from the UNGPs and the human rights due diligence process. Setting the format and standard of the duty to report on HRDD as the UNGP reporting framework is the recommendation of a broad alliance of NGOs and civil society organisations in the 2018 collective statement, *The European Commission must take action to improve the reporting obligations of companies on sustainability issue*. The document and full set of recommendations for enhancing the effectiveness of the NFRD is available [here](#).

¹³³ International Peace Information Service, "The Adverse Human Rights Risks and Impacts of European Companies: Getting a Glimpse of the Picture" (2014). Available at: www.corporatejustice.org/documents/ahri_report_final-2.pdf

Attribution

This publication was prepared by
The European Coalition for Corporate Justice together with
The Clean Clothes Campaign

**Clean
Clothes
Campaign**



This document is licensed under a
Creative Commons Attribution-NonCommercial-NoDerivatives
4.0 International License
(<https://creativecommons.org/licenses/by-nc-nd/4.0/>)

Disclaimer

The material in this report is based on information publically
available that we consider correct and any statements, opinions, conclusions or recommendations
contained herein are honestly and reasonably held or made at the time of publication.

Photo Acknowledgments

MuslimsAustralia.net
InternationalRivers.org
Hrw.org

Contact

European Coalition for Corporate Justice asbl
Rue d'Edimbourg 26 1050 Brussels - Belgium
Phone number : +32 (0)2 893 10 26
Fax number : +32 (0)2 893-10-35
Christopher.patz@corporatejustice.org
www.corporatejustice.org