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Towards an open method of coordination for business
and human rights

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Abstract

The paper examines the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs) in the European Union via National Action Plans (NAPs). We argue that some of the procedural and substantive shortcomings currently observed in the implementation process could effectively be addressed through the Open Method of Coordination – a governance instrument that the EU has already successfully used in other policy domains such as employment, social protection and education. Section two sketches out the polycentric global governance approach envisaged by the UNGPs and discusses the institutional and policy background of their implementation in the European Union. Section three provides an assessment of EU Member State National Action Plans on business and human rights, as benchmarked against international NAP guidance. Section four relates experiences with the existing NAP process to the policy background and rationale of the Open Method of Coordination and discusses the conditions for employing the OMC in the business and human rights domain. Against this background, section five make some more concrete proposals for developing an Open Method of Coordination on Business and Human Rights.

Keywords

Human Rights, Business, United Nations Guiding Principles, Open Method of Coordination, National Action Plan

Introduction

In June 2016 the Council of the European Union published its Conclusions on Business and Human Rights,¹ marking the 5th anniversary of the endorsement of the UN Guiding Principles on Business and Human Rights (UNGPs) by the UN Human Rights Council.² The UNGPs are the first universally accepted global framework on business and human rights, developed by Professor John Ruggie in his capacity as Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business entities (SRSG).³ Following the end of the SRSG's mandate in 2011, a UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Entities was established to promote the 'effective and comprehensive dissemination and implementation' of the UNGPs.⁴ The UN Working Group has *inter alia* encouraged States to develop National Action Plans (NAPs) on business and human rights.⁵ NAPs are policy documents in which States outline strategies and instruments to comply with their duty to prevent and redress corporate-related human rights abuse, as laid down in international human rights law and restated in the first and the third pillar of the UNGPs. Reiterating the European Union's support of the UN Guiding Principles, the 2016 Council Conclusions on Business and Human Rights welcome the European Commission's intention to develop an EU Action Plan on Responsible Business Conduct that should outline an overall European policy framework to enhance the further implementation of the UNGPs.⁶ The European Council further notes that 'EU Member States have taken the lead internationally on developing and adopting National Action Plans to implement the Guiding Principles or integrating [them] into national CSR Strategies'. In this regard, it encourages the European Commission and the European External Action Service 'to promote peer learning on business and human rights, including cross-regional peer learning'.⁷

The paper examines the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs) in the European Union via National Action Plans (NAPs). We argue that some of the procedural and substantive shortcomings currently observed in the implementation process could effectively be addressed through the Open Method of Coordination – a governance instrument that the EU has already successfully used in other policy domains such as employment, social protection and education. Section two sketches out the polycentric global governance approach envisaged by the UNGPs and discusses the institutional and policy background of their implementation in the European Union. Section three provides an assessment of EU Member State National Action Plans on business and human rights, as benchmarked against international NAP guidance. Section four relates experiences with the existing NAP process to the policy background and rationale of the Open Method of Coordination and discusses the conditions for employing the OMC in the business and human rights domain. Against this background, section five make some more concrete proposals for developing an Open Method of Coordination on Business and Human Rights.

¹ Council of the European Union, 'Council Conclusions on Business and Human Rights', 3477th meeting of the Foreign Affairs Council, 10254/16 (20 June 2016).

² H. R. C., 'Guiding Principles on Business and Human Rights: Implementing the United Nations' "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011).

³ For a more detailed account of the evolution of the UNGPs see P. Thielbörger & T. Ackermann, 'A Treaty on Enforcing Human Rights against Business: Closing the Loophole or Getting Stuck in a Loop', *Indiana Journal of Legal Studies* (2017), forthcoming.

⁴ H. R. C., 'Human Rights and Transnational Corporations and Other Business Entities', A/HRC/RES/17/4 (06 July 2011).

⁵ U. N. Secretary-General, 'Report of the Working Group on the issue of Human Rights and Transnational Corporations and other Business Enterprises', A/69/263 (6 August 2014).

⁶ See Council Conclusions (n 1) para 6.

⁷ *Id.* para 5.

Implementing the UNGPs in the European Union

The UNGPs Polycentric Global Governance Approach

The UNGPs build on three pillars: (i) the state duty to protect human rights against violations by third parties, including corporations; (ii) the corporate responsibility to respect human rights, meaning to act with due diligence to avoid infringing the rights of others; and (iii) greater access to effective remedies, both judicial and non-judicial, for victims of corporate human rights abuse. The overall goal of this ‘protect, respect and remedy’ framework is to address today’s business and human rights challenges by closing ‘governance gaps created by globalisation’:

The root cause of the business and human rights predicament today lies in the governance gaps created by globalisation – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.⁸

While this is not the place for a detailed discussion of the global governance system envisaged by the UNGPs, a number of its core elements relevant to the further analysis should be highlighted. The UNGPs adopt a polycentric approach to preventing and redressing corporate-related human rights abuse based on the insight that corporate conduct at the global level is shaped by three different governance systems: a political governance system comprising the rules of domestic and international public law; a civil governance system in which stakeholders affected by business operations employ social and legal compliance mechanisms such as advocacy campaigns and strategic litigation; and a corporate governance system which internalises pressures and expectations of the other two systems.⁹ The UNGPs aim at intertwining these governance systems through creating mutual leverage and interdependencies. This is to spur a ‘new regulatory dynamic’ towards a ‘more comprehensive and effective global regime’ in which the different governance systems ‘each come to add distinct value, compensate for one another’s weaknesses, and play mutually reinforcing roles’.¹⁰ The three pillars of the UNGPs should thus not be treated in isolation but rather form a complementary whole. Together, they posit a system in which States are duty-bound to ‘translate’ international human rights norms into domestic laws and policies regulating corporate activities, while corporations respect human rights as globally recognised standards of expected conduct (their ‘social licence to operate’), with both providing remediation for breaches of these overlapping governance systems within their respective jurisdictions.¹¹

One important consequence of the UNGPs’ polycentric governance approach is that States, as part of their duty to protect, have to assume a proactive role in ensuring corporate respect for human rights. This pertains not only to the interplay between pillar one and pillar two but also to the relationship between state-based and corporate-based remediation that together form pillar three. To this end, States have to mainstream human rights into all business-related laws and policies. While the UNGPs should not be seen as a ‘toolbox’ premised on a one-size-fits-all approach, they stress the importance of ensuring vertical and horizontal policy coherence in the domestic realm as well as in States’ cooperation

⁸ H. R. C., ‘Protect, Respect and Remedy: A Framework for Business and Human Rights’, A/HRC/8/5 (7 April 2008) para 3 (‘2008 Report’).

⁹ J. Ruggie, ‘Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization’, *Regulatory Policy Program Working Paper RPP-2015-04* (Mossavar-Rahmani Center for Business and Government, Harvard Kennedy School: 2015) 2.

¹⁰ J. Ruggie, *Just Business: Multinational Corporations and Human Rights* (Norton: 2013).

¹¹ See further L. C. Backer, ‘On the Evolution of the United Nations’ “Protect-Respect-Remedy” Project: The State, the Corporation and Human Rights in a Global Governance Context’, 9 *Santa Clara Journal of International Law* (2011) 37-80.

with each other through multilateral agreements and international institutions.¹² Effective leverage between the different governance systems furthermore requires States to adopt a ‘smart mix’ of mandatory and voluntary instruments in preventing and redressing corporate-related human rights abuse. This is of particular relevance in the ‘state-business nexus’:

States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies or official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.¹³

Finally, closing governance gaps at the global level requires States to make use of extraterritorial instruments that can range from so-called home-state or parent-based regulation to softer measures incentivising or supporting corporations to respect human rights when doing business abroad.¹⁴

The EU’s Contribution to the Development and Implementation of the UNGPs

The European Union has played a proactive role in the development and implementation of the UNGPs.¹⁵ Already in its 2009 Conclusions on Human Rights and Democratisation in Third Countries, the Council of the European Union expressed its full support of the UNGPs and reaffirmed its commitment to promote human rights globally and across all relevant policy domains.¹⁶ The UNGPs should become a ‘key element for the global development of CSR practices’ and provide ‘a significant input to the CSR work of the European Union’ that now had to be taken further by ‘developing common frameworks, raising awareness and improving dialogue between all stakeholders, and measuring and evaluating tangible results’.¹⁷ In response, the European Commission adopted in 2011 a new strategy for corporate social responsibility and more recently committed to developing an EU Action Plan on Responsible Business Conduct expected for early 2017.¹⁸ The 2011 strategy steered away from the Commission’s ‘voluntary’ approach to CSR by emphasising the ‘responsibility of enterprises for their impacts on society’ and expressing the expectation that ‘all European enterprises meet the corporate responsibility to respect human rights’ (2nd pillar of the UNGPs). To comply with their duty to protect (1st pillar of the UNGPs), EU Member States should ‘develop by the end of 2012 national plans for the implementation of the UN Guiding Principles’. This request was reiterated in the Council of the European Union’s 2012 and 2015 Action Plans on Human Rights and Democracy, with the deadline for Member State NAPs being extended to 2017.¹⁹

¹² See UNGPs (n 2) paras 8-10.

¹³ *Id.* para 4.

¹⁴ In this regard, the SRSR distinguished between ‘direct extraterritorial jurisdiction’ and ‘domestic measures with extraterritorial implications’. While the former refers to ‘jurisdiction exercised directly in relation to actors or activities overseas’, the latter ‘relies on territory as a jurisdictional basis even though it may have extraterritorial implications’; see H. R. C., ‘Business and Human Rights: Further Steps towards the Operationalization of the “Protect, Respect and Remedy” Framework’, A/HRC/14/27 (9 April 2010) para 55 (‘2010 Report’); see further D. Augenstein & D. Kinley, ‘When Human Rights “Responsibilities” become “Duties”: The Extra-Territorial Obligations of States that Bind Corporations’, in S. Deva & D. Bilchitz (eds.), *Beyond the Corporate Responsibility to Respect?* (Cambridge University Press: 2013) 271-294.

¹⁵ For a more detailed account see D. Augenstein et al., ‘Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating outside the European Union’ (European Commission: 2010).

¹⁶ Council of the European Union, ‘Council Conclusions on Human Rights and Democratisation in Third Countries’, 2985th Foreign Affairs Council Meeting, 17218/09 (8 December 2009).

¹⁷ Swedish Ministry for Foreign Affairs, ‘Conference Report: Protect, Respect, Remedy – A Conference on Corporate Social Responsibility (CSR)’, Stockholm 10-11 November 2009.

¹⁸ European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility’, COM (2011) 681 final.

¹⁹ Council of the European Union, ‘EU Strategic Framework and Action Plan on Human Rights and Democracy’, 11855/12 (25 June 2012); ‘EU Action Plan on Human Rights and Democracy’ (20 July 2015).

Following the Commission's timely initiative, a number of Member States developed National Action Plans prior to the UN Working Group (UNWG) publishing its official NAP guidance in December 2014.²⁰ At present, seven EU Member States have released NAPs on business and human rights (the United Kingdom, the Netherlands, Denmark, Finland, Lithuania, Sweden and Germany) and 9 further Member States have produced drafts or have initiated a NAP process (Czech Republic, France, Greece, Italy, Ireland, Latvia, Portugal, Slovenia, and Spain).²¹ The majority of Member States have furthermore published NAPs on CSR that also make reference to human rights.²² In terms of quantity if not quality, this makes the European Union a global leader in developing NAPs on business and human rights.

The European Union Approach to Implementing the UNGPs

Recalling the duty of States, 'acting within their jurisdiction ... to protect human rights, including against abuses committed by companies even if they operate in third countries', a recent European Parliament Resolution requests the European Commission and the Member States 'to guarantee policy coherence on business and human rights at all levels: within different EU institutions, between the institutions, and between the EU and its Member States, and in particular in relation to the Union's trade policy'.²³ The proper functioning of the European Union with its highly integrated internal market and its extensive free movement guarantees (of goods, services, capital and workers) depends greatly on a coherent and reasonably harmonized body of rules,²⁴ including in the field of business and human rights. At the same time, what complicates the implementation of the UNGPs in the European Union context is the so-called principle of conferral that only permits the EU institutions to act within the confines of competences conferred upon them by the Member States and in pursuance of objectives set out in the European Treaties.²⁵ This poses difficulties not only with regard to identifying the competent actor(s) but also with regard to aligning EU and Member State measures to protect human rights against corporate-related abuse. The UNGPs take a holistic approach to business and human rights that requires action across a wide range of legal and policy domains many of which lie outside the EU's (exclusive) competence. Internally, the EU needs to ensure policy coherence not only between its own institutions and agencies but also in relation to the Member States. Externally, the EU is tasked by the European Treaties to 'define and pursue common policies and actions, [and] to work for a high degree of co-operation in all fields of international relations' in order to consolidate and support human rights.²⁶

The 2015 EU Action Plan on Human Rights and Democracy and a 2015 European Commission Staff Working Document carve out the European Union's three-layered approach to advancing business and human rights.²⁷ At the global level, the EU aims at developing the capacity and knowledge necessary for an effective implementation of the UNGPs. Initiatives range from the inclusion of human rights and

²⁰ U.N. Working Group on Business and Human Rights, 'Guidance on National Action Plans on Business and Human Rights' (December 2014); a revised version of the Guidance was published in November 2015, with a third and final version forthcoming.

²¹ Within the EU, Scotland will develop its own National Action Plan. Of the European countries without EU membership, Norway published its NAP in 2015 and Switzerland in December 2016; for a global overview see Business & Human Rights Resource Centre: National Action Plans, available at <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>.

²² European Commission, 'Corporate Social Responsibility: National Public Policies in the European Union' (June 2014).

²³ European Parliament, 'Resolution on corporate liability for serious human rights abuses in third countries', 2015/2315(INI) (25 October 2016) paras 13-14.

²⁴ See, for example European Commission, 'Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth', COM(2010) 2020 final (3 March 2010).

²⁵ Article 5 of the Treaty on European Union, OJ C 326, 26/10/2012 P. 0001/0390.

²⁶ See Article 21 Treaty on European Union.

²⁷ See 'EU Action Plan 2015' (n 19) 29; European Commission, 'Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights – State of Play', SWD(2015) 144 final (14 July 2015).

CSR clauses in international trade and cooperation agreements to a rights-based approach to development and the promotion of NAPs in policy dialogues with non-EU countries. Within the EU legal framework, the Union has developed legislation and published various guidelines to encourage and support business enterprises in complying with their corporate responsibility to respect human rights. Among these measures are a revision of existing accounting directives to require large companies and groups to disclose information on policies, risks and results concerning human rights, the environment and social- and employee related matters; an overhaul of EU public procurement rules to facilitate the use of social and environmental criteria in the selection process; and a strong focus on business and human rights in its overall CSR strategy. In relation to the Member States, the EU has focused on encouraging and supporting the development of National Action Plans on business and human rights and the incorporation of the UNGPs into national CSR strategies, including through facilitating coordination and sharing of best practices. To promote the development of National Action Plans on CSR, a peer review process was established that also considered the UNGPs and that led to the publication of a CSR Compendium in 2014.²⁸ Some Member States have requested the European Commission to put into place a parallel peer review process dedicated to the development of NAPs on business and human rights.²⁹

NAP Guidance and EU Member State National Action Plans

International NAP Guidance

The two most important international guidelines assisting States in the development, implementation and review of NAPs are the Guidance on National Action Plans on Business and Human Rights developed by the UNGP-WG (UNWG Guidance);³⁰ and a Toolkit on National Action Plans on Business and Human Rights published by the Danish Institute for Human Rights in collaboration with the International Corporate Accountability Roundtable (DIHR/ICAR Guidance).³¹ Drawing on extensive multi-stakeholder consultations and previous experiences with developing NAPs, both guidelines flesh out the UNGP's procedural and substantive requirements concerning the state duty to protect human rights.

National Action Plans on business and human rights should pursue three overarching objectives: taking stock of existing state measures that contribute to the implementation of the UNGPs; identifying gaps in States' legal and policy framework that require further action; and outlining strategies to close protection gaps and to otherwise prevent and redress corporate-related human rights abuse. In this regard, the UNWG Guidance emphasises four criteria essential for a NAP to be effective. First, NAPs must be based on the UNGPs, incorporate all three pillars and be informed by basic human rights principles such as non-discrimination and equality. Second, NAPs must respond to challenges in the national context and reflect country-specific priorities or particularly important sectors within the national economy. Third, they must be developed and implemented through an inclusive and transparent process, taking the views and needs of affected parties and relevant (governmental and non-governmental) actors into account. Fourth, NAPs must be regularly reviewed to ensure continuous progress in enhancing human rights protection and effective responses to changing conditions in the

²⁸ See 'Corporate Social Responsibility' (n 22). The European Commission has furthermore organised pilot peer reviews on business and human rights in the capitals of seven EU Member States, see <http://ec.europa.eu/social/keyDocuments.jsp?advSearchKey=CSRprreport&mode=advancedSubmit&langId=en&policyArea=&type=0&country=0&year=0>.

²⁹ See 'Commission Staff Working Document' (n 27) 34.

³⁰ See UNWG Guidance (n 20).

³¹ DIHR & ICAR, 'National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks' (June 2014).

regulatory environment.³² The DIHR/ICAR Guidance identifies the following benefits of using NAPs in the business and human rights domain: coordinating government efforts in developing policies by identifying and involving all relevant actors, therewith avoiding duplication and inconsistencies between government departments; offering a common platform for robust collaboration, dialogue and trust-building among stakeholders; and mobilising stakeholder resources beyond government to achieve policy aims.³³

The UNWG Guidance and the DIHR/ICAR Guidance contain more detailed process- and content-based criteria for developing and implementing a NAP. Both documents recommend that States make a formal commitment to engage in a NAP process, including publication of the terms of reference and a timeline. States should furthermore establish a format for inter-ministerial and cross-departmental collaboration, develop and publish a work plan and make adequate resources available.³⁴ Stakeholder participation in line with a rights-based approach is critical for a successful development of a NAP. States should conduct and publish a stakeholder mapping to ensure the equal inclusion of all affected parties. Meaningful and effective participation should be ensured through capacity building and providing all stakeholders with adequate and timely information. Stakeholders should participate in the identification of national priority areas and implementation gaps, as well as in the development of instruments to enhance human rights protection against corporate abuse.³⁵ In preparation of drafting a NAP, a national baseline assessment should be conducted by a competent independent body (external research institutes, NHRIs, etc.) that maps out the current state of implementation of the UNGPs. The draft NAP should be widely disseminated and discussed with all relevant stakeholders prior to being finalized and officially launched.³⁶ A NAP should address the full scope of the UNGPs, while also taking into account cognate business and human rights frameworks (such as the OECD Guidelines for Multinational Enterprises) and local/regional and sector-specific human rights issues. It should contain a ‘smart mix’ of mandatory and voluntary, and national and international measures,³⁷ and ‘extend to all matters in the state’s jurisdiction, including matters outside the state’s territorial jurisdiction’.³⁸ NAPs should outline actions to implement the UNGPs that are specific, measurable, achievable, relevant and time-specific (SMART).³⁹ They should also lay down a framework for monitoring and reporting, based on a clear allocation of responsibility and accountability for implementation. All relevant ministries and government departments should collaborate in the implementation process, supported by a multi-stakeholder group and other institutions including NHRIs.⁴⁰ Finally, NAPs should be regularly reviewed, evaluated and updated in order to identify successes and failures, remedy shortcomings, and share information and best practices within and between governments.⁴¹

Overall Assessment of EU Member State NAPs

While as noted above, the EU Member States have played a pioneering role in the early development of National Action Plans on business and human rights, their NAPs have also been criticized for shortcomings in process and content. A 2014 assessment of the UK, Dutch, Danish and Finnish NAP

³² See UNWG Guidance (n 20) 3-4.

³³ See DIHR/ICAR Guidance (n 31) 14.

³⁴ See UNWG Guidance (n 20) 5-6; DIHR/ICAR Guidance (n 31) 41-42.

³⁵ See UNWG Guidance (n 20) 6-8; DIHR/ICAR Guidance (n 31) 43-44.

³⁶ See UNWG Guidance (n 20) 7-8; DIHR/ICAR Guidance (n 31) 44-45.

³⁷ See UNWG Guidance (n 20) 12.

³⁸ See DIHR/ICAR Guidance (n 31) 45.

³⁹ See UNWG Guidance (n 20) 12; DIHR/ICAR Guidance (n 31) 46.

⁴⁰ See UNWG Guidance (n 20) 9; DIHR/ICAR Guidance (n 31) 47.

⁴¹ See UNWG Guidance (n 20) 10; DIHR/ICHR Guidance (n 31) 49.

conducted by ICAR and the European Coalition for Corporate Justice (ECCJ) suggests that while States have involved various entities within the government and external parties in the drafting process, the mapping of relevant stakeholders and existing protection gaps as well as the inclusiveness and quality of consultations left something to be desired. In terms of content, while all four NAPS scrutinized by ICAR and ECCJ made an explicit commitment to the UNGPs, they focus heavily on past actions and soft/voluntary measures (such as awareness raising or training) at the expense of exploring forward-looking and regulatory options. Commitments to future action tend to remain vague and lack sufficient information about concrete steps to be taken and the agencies responsible for implementation.⁴²

In a similar vein, the European Network of National Human Rights Institutions (ENNHRI) has deplored procedural and substantive shortcomings in the development of EU Member State NAPs:

Ongoing NAP processes in some Member States are neither participatory nor transparent, with stakeholders involved weakly or not at all, and civil society organizations in particular frequently lacking even basic information or opportunities to engage in dialogue with government representatives. Member States' published NAPs to date mostly describe historical actions, and lack specific commitments capable of demonstrably improving UNGPs implementation at national level.⁴³

Noting that 'such weaknesses undermine NAP's contribution to respect for human rights, good governance and accountability both in the EU and abroad', ENNHRI has called upon the European Commission to better guide Member States through the NAP process and to establish a 'human rights-based, participatory, transparent multi-stakeholder NAP review process at EU level'.⁴⁴ Such a NAP review process should support the implementation of the UNGPs by

- Permitting Member States to present their experiences on business and human rights and NAPs, and to learn from each other by considering lessons learnt and identifying best practices
- Facilitating the scrutiny of law, policy and actions at EU and Member State levels across relevant sectors
- And enabling a structured dialogue involving all stakeholder groups on opportunities and common challenges.⁴⁵

More specifically, the following procedural and substantive shortcomings in the development and implementation of EU Member State NAPs risk undermining the polycentric governance approach envisaged by the UNGPs: a failure to use indicators and benchmarks to measure success and insufficient attention to review and follow-up action; and a misalignment of the three pillars, coupled with a failure to adopt a smart regulatory mix including extraterritorial measures.

No Use of Indicators and Benchmarks and Insufficient Provision for Review and Follow-up

For States to design SMART actions implementing the UNGPs, the effects of the employed means have to be 'measurable'.⁴⁶ Classical tools of measuring effectiveness of public policies are indicators and

⁴² International Corporate Accountability Roundtable & European Coalition for Corporate Justice, 'Assessments of Existing National Action Plans on Business and Human Rights' (November 2014) 3-5.

⁴³ European Network of National Human Rights Institutions, 'Recommendations for the next EU Strategy on CSR' (April 2015) 2.

⁴⁴ *Id.* 2, 3. In a similar vein, the Committee of Ministers of the Council of Europe has called upon States to 'share plans on the national implementation of the UN Guiding Principles on Business and Human Rights, including revised National Action Plans and best practice concerning the development and review of National Action Plans ...'; see Council of Europe, 'Recommendation CM/Rec(2016)3 of the Committee of Ministers to the Member States on human rights and business', 1249th meeting of the Ministers' Deputies (02 March 2016) p. 1.

⁴⁵ See ENNHRI (n 43) 3.

⁴⁶ According to the ICAR-ECCJ Guidance, SMART actions are those that are 'specific, measurable, achievable, relevant and time-specific'; see ICAR-ECCJ Guidance (n 31) 46.

benchmarks. Indicators are parameters that assess whether and to what extent (the laws and policies envisaged in) the NAPs have proven suitable to contribute to an effective implementation of the UNGPs; benchmarks are quantifiable targets that States set themselves to achieve in that regard. None of the current NAPs lists quantitative or qualitative indicators, nor do they generally set concrete benchmarks to be achieved. To some extent, this lack of indicators and benchmarks may not be surprising, given that these parameters also receive little attention in the guidance provided by UNWG and DIHR/ICAR.⁴⁷ Possible indicators and benchmarks that could be used are various, ranging from the number of corporations of a certain size having adopted a human rights due diligence mechanism (as defined in the second pillar of the UNGPs) to the amount of (public and private) funding being dedicated to the implementation process.

The recent German NAP sets a benchmark of 50% of large German companies having incorporated human rights due diligence by 2020.⁴⁸ Some other EU Member State NAPs offer suitable entry points for using indicators and benchmarks. The Swedish NAP, for instance, encourages companies to create grievance and redress mechanisms (e.g. ombudsmen mechanisms), but falls short of setting a concrete benchmark to be achieved.⁴⁹ The Lithuanian NAP promises to offer awards for responsible businesses and best anti-corruption practices, without however quantifying or measuring these efforts.⁵⁰ The Finnish NAP considers that new funding lines to support the UNGPs could ‘possibly’ be made available but fails to indicate any concrete time commitment or target as to the intended amount.⁵¹ A commitment to hold roundtable meetings with all relevant stakeholders on a sector-by-sector basis remains similarly vague.⁵² Recent studies on the suitability of indicators and benchmarks in assessing business-related human rights impacts provide a solid basis for including such indicators and benchmarks into the NAPs.⁵³ This would render the envisaged actions more measurable and the implementing institutions more accountable. Moreover, while some EU Member States have already conducted comparative studies in areas of law and policy relevant to business and human rights,⁵⁴ a set of agreed indicators and benchmarks would facilitate cross-country comparison and contribute to achieving policy coherence at the European level.

The provisions concerning review and update in the EU Member State NAPs are overall weak and incomplete. Commonly, the lack of specific commitments concerning review goes hand in hand with a failure to specify the institution responsible and accountable for the NAP update. The Netherlands Institute for Human Rights has urged the Dutch Government to provide ‘more specific information about

⁴⁷ See UNWG Guidance (n 20) and DIHR/ICAR Guidance (n 31). In addition, States seem to treat the respective guidance documents as laying down exhaustive rather than minimum standards, with the consequence that requirements not listed in the Guidance are unlikely to be considered in the NAPs.

⁴⁸ German Government, ‘Nationaler Aktionsplan: Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte 2016-2020’ (21 December 2016) 41.

⁴⁹ Government Offices of Sweden, ‘Action Plan for Business and Human Rights’ (August 2015) 17.

⁵⁰ Government of the Republic of Lithuania, ‘Lithuania’s Action Plan on the Implementation of the United Nations Guiding Principles on Business and Human Rights’ (March 2015) 7.

⁵¹ Finnish Ministry of Employment and the Economy, ‘National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights’ (October 2014) 29.

⁵² *Id.* 26.

⁵³ D. Tromp, ‘Assessing Business Related Impacts on Human Rights, Indicators and Benchmark in Standards and Practice’, *INEF Report 110/2016* (December 2016).

⁵⁴ For example, the Dutch Government has recently published a comparative study on duties of care of Dutch business enterprises with respect to international corporate social responsibility; see L. Enneking et al., ‘Zorgplichten van Nederlands ondernemingen insake internationaal maatschappelijk verantwoord ondernemen’ (2015), <https://www.rijksoverheid.nl/documenten/rapporten/2016/04/21/zorgplichten-van-nederlandse-ondernemingen-inzake-internationaal-maatschappelijk-verantwoord-ondernemen>.

the follow-up of the National Action Plan on Business and Human Rights'.⁵⁵ The Swedish NAP indicates that there could be a review in 2017 without using mandatory language or circumscribing the scope of such a review.⁵⁶ While the Finnish NAP provides for yearly monitoring by the Finnish Committee on Corporate Social Responsibility, there is no timeframe set for an official adaptation and update process.⁵⁷ The same is true of the Danish NAP that merely promises to 'continuously update Danish priorities with regard to the implementation of the UNGPs' in alignment with its National Action Plan on CSR.⁵⁸ The United Kingdom is currently the only country to have published an updated version of its NAP. The update serves mainly to record government achievements since the publication of the initial NAP in 2013 and to reflect more recent international developments, including guidance on implementation and the experience of other countries.⁵⁹ While the UK update itself does not add much to the original NAP in terms of forward-looking actions, the UK Joint Committee on Human Rights has launched an (ongoing) inquiry into human rights and business that scrutinises the steps the Government takes to monitor compliance with the UNGPs; to clarify how far the Government is able to enforce the UNGPs; to review progress British business has made in carrying out its responsibility to respect human rights; and to verify whether victims of human rights abuse involving business enterprises within UK jurisdiction have access to effective remedy.⁶⁰ The UK example points to the importance of regularly reviewing and updating NAPs, under the scrutiny of parliamentary bodies sufficiently independent from government. The UNWG Guidance suggests that the review and update process should include the following steps: evaluation of the impact of the previous NAP; identification of governance gaps and priority areas in consultation with stakeholders; identification of measures to address gaps and priority areas in consultation with stakeholders; drafting of an updated NAP and further consultation prior to the finalisation and official launch.⁶¹ A regular review and update process is indispensable to adopt NAPs to a changing international regulatory and economic environment. Identifying responsible institutions and setting binding timeframes for review and update contributes to holding States to account for failures to deliver on their commitments. For an open and inclusive review and update process, it would be desirable to entrust this task to an institution different from the one responsible for drafting the initial NAP, and to ensure a robust participation of all relevant stakeholders including national parliaments.

Insufficient alignment of the pillars, coupled with a failure to adopt a smart regulatory mix including extraterritorial measures

As seen, the UNGPs' polycentric governance approach requires that the 'respect, protect and remedy' pillars of the framework are treated as a complementary whole, with each pillar supporting the others in achieving sustainable progress.⁶² Yet existing EU Member NAPs cover the three pillars unevenly, with little attention given in particular to remediation (pillar three).⁶³ Moreover, many NAPs focus on pillar two at the expense of exploring the full scope of the state duty to protect in relation to the corporate responsibility to respect human rights. One consequence is that, as in the case of the Danish NAP,

⁵⁵ Netherlands Institute for Human Rights, 'Advice: Response to the National Action Plan on Business and Human Rights "Knowing and Showing" (February 2014) 2.

⁵⁶ See Swedish NAP (n 49) 19.

⁵⁷ See Finnish NAP (n 51) 32.

⁵⁸ Danish Government, 'Danish National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights' (March 2014) 22.

⁵⁹ UK Government, 'Good Business: Implementing the UN Guiding Principles on Business and Human Rights – updated May 2016' (May 2016) 2.

⁶⁰ See 'Human Rights and Business Inquiry', <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/inquiry/>.

⁶¹ See UNWG Guidance (n 20) 9-10.

⁶² See above, section two.

⁶³ See ICAR & ECCJ Assessment (n 42) 4.

measures relating to pillar two appear reminiscent of the old ‘voluntary’ approach to CSR in that they heavily rely on corporate self-regulation and access to non-judicial remedies.⁶⁴ Relatedly, the NAPs fail to make sufficient use of mandatory instruments, with state actions listed under pillar one mainly confined to ‘soft’ measures such as state guidance, awareness raising, and training initiatives.⁶⁵ While important, such measures are not suitable to address well-documented protection gaps in the legal framework governing business and human rights, particularly in the area of access to justice and effective remedies.⁶⁶ This failure to close legal protection gaps is aggravated by the fact that all NAPs including the 2016 UK update give priority to describing past measures over outlining concrete future actions.

The insufficient alignment of the three pillars translates into a failure of the NAPs to adopt a ‘smart mix’ of voluntary and mandatory instruments that would allow States to use their political and financial leverage in incentivising or compelling corporations to respect human rights. The NAPs’ approach to human rights due diligence – the heart of pillar two – is a good example. Human rights due diligence is not only relevant in relation to the corporate responsibility to respect in that it enables businesses to manage stakeholder-related risk. Incentivising or requiring human rights due diligence is equally a means for States to comply with their duty to protect human rights.⁶⁷ The EU Member State NAPs fail to sufficiently operationalize this mutually reinforcing relationship between pillars one and two. The Dutch government, for example, commits to taking a more proactive role in implementing the UNGPs and to analysing its current regulatory mix as applied to human rights due diligence.⁶⁸ However, the Dutch NAP largely confines itself to listing supportive government actions (such as awareness raising and capacity building) and does not provide for legislative and enforcement measures. As concerns the latter, the NAP concludes that consultations have ‘failed to produce consensus on whether the obligations of Dutch companies in relation to CSR are adequately regulated by law’ and merely commits to further examining the existing legal framework in the light of ‘the situation in neighbouring countries (level playing field), and the effects of legislation on companies and the business climate’.⁶⁹

The preparation of the German NAP offers an example of how achieving a smart regulatory mix through a proper alignment of the three pillars can be jeopardized during the drafting process, with the consequence of undermining the polycentric governance approach envisaged by the UNGPs. A 2013 scoping study for the German Ministry of Labour and Social Affairs had highlighted the importance of the state duty to protect in ensuring and monitoring corporate human rights due diligence.⁷⁰ The later drafting process including multi-stakeholder consultations was conducted under the auspices of the Ministry of Foreign Affairs. In July 2016, the Ministry of Finance – not previously involved in the process – requested significant revisions of the draft NAP, allegedly under the pressure of corporate

⁶⁴ See Danish NAP (n 58) 17-18.

⁶⁵ See ICAR & ECCJ Assessment (n 42) 4.

⁶⁶ A recent report of the UN High Commissioner for Human Rights asserts that ‘while many domestic legal regimes focus primarily on within-territory business activities and impacts, the realities of global supply chains, cross-border trade, investment, communications and movement of people are placing new demands on domestic legal regimes and those responsible for implementing them’; see H. R. C., ‘Improving accountability and access to remedy for victims of business-related human rights abuse’, A/HRC/32/19 (10 May 2016) para 5; see further G. Skinner, A. McCorquodale & O. de Schutter, ‘The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business (ICAR, CORE & ECCJ: 2013).

⁶⁷ See Ruggie (n 9) 4.

⁶⁸ Dutch Ministry of Foreign Affairs, ‘National Action Plan on Business and Human Rights’ (April 2014).

⁶⁹ *Id.* 28, 41. Considering access to justice, the Netherlands Institute for Human Rights has urged the Dutch government ‘to remove the procedural inequality between victims of human rights violations and companies who violate human rights’, see ‘Advice’ (n 55) 2.

⁷⁰ J. Knopf, C. Rees, D. Augenstein et al., ‘Unternehmensverantwortung für Menschenrechte: Ableitung von Handlungsempfehlungen auf der Basis von Experteninterviews und internationalen Fallstudien’ (Februar 2013), <https://www.adelphi.de/de/publikation/unternehmensverantwortung-f%C3%BCr-menschenrechte>.

lobbying.⁷¹ The July 2016 draft (which is not in the public domain) would have omitted any reference to legislative instruments requiring human rights due diligence. Proposals to elaborate corporate due diligence obligations through best-practice examples and guidelines were branded as ‘sweeping’ and ‘arbitrary’. The entire chapter on monitoring would have been removed. The final NAP published in December 2016 is an awkward compromise that, while in some regards paving new ground (such as a 2020 benchmark on implementing corporate human rights due diligence), appears overall noncommittal and dominated by concerns of creating a ‘global level playing field’ for German corporations.⁷²

To achieve the leverage required for operationalising the UNGPs’ polycentric global governance framework, States’ ‘smart mix’ of mandatory and voluntary measures must furthermore include instruments with extraterritorial effect that reach out to corporate practice abroad. In this regard the UNWG Guidance recommends, in line with the approach taken by the UNGPs,⁷³ that governments ensure ‘that measures outlined in the NAP take full advantage of the leverage home states have in order to effectively prevent, address, and redress extraterritorial impacts of corporations domiciled within their territory and/or jurisdiction’.⁷⁴ In a similar vein, ENNHRI has urged the European Commission to develop NAP guidance emphasizing ‘that NAPs extend in scope, like the UNGPs, to matters both inside and outside the state’s territorial jurisdiction.’⁷⁵ There is some best practice in the EU Member States concerning the use of extraterritorial instruments in the business and human rights domain, both legislative and court-driven.⁷⁶ Nevertheless, the provisions in the existing NAPs concerning extraterritorial measures are very weak to non-existent. Some NAPs, including the Dutch and the Danish one, doubt the usefulness of extraterritorial instruments and envisage setting up working groups to further discuss their need and feasibility.⁷⁷ Other NAPs confine themselves to expressing an expectation that corporations respect human rights when operating abroad or remain entirely silent on the issue.

This reluctance to use extraterritorial instruments is inconsistent with a basic premise that appears to inform all EU Member State NAPs, namely that corporate human rights abuse is most likely to happen abroad. It is also difficult to justify given that there is nothing unusual *per se* about states employing measures with extraterritorial effect, particularly in areas of law with a strong market-nexus such as antitrust or securities regulation.⁷⁸ As the SRSR notes in one of his reports to the UN Human Rights Council, while States have in certain policy domains agreed to the use of extraterritorial jurisdiction, this is ‘typically not the case in business and human rights’.⁷⁹ The NAPs’ reluctance to use

⁷¹ See ‘Lobbyismus auf Regierungsebene: Profit statt Menschenrechte’, Monitor (9 September 2016), <http://www1.wdr.de/daserste/monitor/sendungen/lobbyismus-104.html>.

⁷² See German NAP (n 48). The German Institute for Human Rights that was heavily invested in the process described the final NAP as evincing ‘a lack of political will to advance the UNGPs’; see Deutsches Institut für Menschenrechte, ‘Stellungnahme: “Zögerliche Umsetzung”. Der politische Wille reicht nicht weiter: Deutschland setzt die VN-Leitprinzipien um – mit kleinen Schritten’ (21 December 2016), available at <https://business-humanrights.org/de/deutschland-ausw%C3%A4rtiges-amt-schliesst-konsultationsphase-zum-nationalen-aktionsplan-zu-wirtschaft-und-menschenrechten-ab#c148465>.

⁷³ See ‘2010 Report’ (n 14) para 55.

⁷⁴ See UNWG Guidance (n 20) 18.

⁷⁵ See ENNHRI (n 43) 2.

⁷⁶ For example, the UK Bribery Act 2010 that provides for liability of UK companies in the UK for acts of bribery committed anywhere in the world; a French Bill relating to the duty of care of parent companies and contracting undertakings that, if adopted, would establish legal obligations of French companies in relation to the human rights impacts of their subsidiaries and sub-contractors overseas; and a series of court cases in the Netherlands against Royal Dutch Shell Plc and its Nigerian subsidiary for environmental pollution and human rights violations in Nigeria.

⁷⁷ See Dutch NAP (n 68) 39; Danish NAP (n 58) 16.

⁷⁸ See further J. Zerk, ‘Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas’, 59, *Corporate Social Responsibility Initiative Working Paper* (Kennedy School of Governance, Harvard University: 2010).

⁷⁹ See ‘2010 Report’ (n 14) para 46.

extraterritorial instruments is concerning not only because it threatens to undermine the global regulatory regime envisaged by the UNGPs but also because it suggests an insufficient reception of more recent developments in international human rights law.⁸⁰ In the latter regard, the UN Treaty Bodies have already called upon EU Member States to take appropriate legislative, judicial and administrative steps to prevent and redress human rights violations committed by corporations domiciled within their jurisdiction when operating abroad.⁸¹

Improving the Implementation of the UNGPs via NAPs: Lessons from the OMC

The Concept of the Open Method of Coordination

One can build a more complete picture of the strengths and limitations of the existing NAP process by engaging with the history of other forms of trans-national policy coordination. A prime example in this regard is the Open Method of Coordination (OMC) – a process for multi-lateral surveillance introduced to coordinate EU social policies in the late 90's.⁸² Since that period, the method has spread to a number of further policy areas, from education to culture, health, fiscal policy and beyond. While one of the characteristic features of the OMC is the lack of any one single procedural model applicable to all fields, the core of the method was elaborated by the Lisbon European Council in 2000. Most OMC processes thus contain some elements of the following four features:

- 'Fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long terms;
- Establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice;
- Translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences;
- Periodic monitoring, evaluation and peer review organised as mutual learning processes.'⁸³

Understanding the usefulness of the OMC for the implementation of the UNGPs *via* National Action Plans requires understanding the rationale for the OMC's creation. At its core is a tension between diversity and interdependence. For the EU of the late 1990s and early 2000s, interdependence meant the increasing realization that in a common currency Union, fiscal and social policies were likely to have severe spill-over effects between States (potentially capable of de-stabilising the Union itself). The diversity concern was that extensive EU intervention in areas such as budgetary and social policy was legally, politically and functionally infeasible.⁸⁴ Legally, the EU carried unclear competences in these

⁸⁰ On the extraterritorial application of international human rights treaties with focus on economic, social and cultural rights see 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights' (Maastricht: 2011), published with extensive commentary in 34 *Human Rights Quarterly* (2012) 1084-1169; and more recently C. E. S. C. R., 'General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities', E/C.12/60/R.1 (17 October 2016).

⁸¹ CERD, 'Concluding Observations: United Kingdom of Great Britain and Northern Ireland', CERD/C/GBR/CO/18-20 (14 September 2011); Human Rights Committee, 'Concluding Observations on the sixth periodic report of Germany, adopted by the Committee at its 106th session (November 2012).

⁸² On the history of the OMC see M. Dawson, *New Governance and the Transformation of European Law* (Cambridge University Press: 2011) 24-68. On its more recent evolution see E. Barcevicus, J.T. Weishaupt & J. Zeitlin, 'Tracing the Social OMC from its Origins to Europe 2020', in *Assessing the Open Method of Coordination: Institutional Design and National Influence of EU Social Policy* (Palgrave MacMillan: 2014).

⁸³ Presidency Conclusions, Lisbon European Council (23-24.03.2000) para 37.

⁸⁴ See F. Scharpf, 'The European Social Model: Coping with the Challenges of Diversity', 40 *Journal of Common Market Studies* (2002) 4.

domains under the European Treaties.⁸⁵ Politically, Member States were unwilling to transfer more control to an unloved Brussels machinery. Meanwhile, functionally, any attempt at EU harmonization would likely flounder given the obvious diversity between the social and fiscal regimes of the Member States. Open Coordination was the perfect solution to this dilemma.⁸⁶ It promised coordinated EU action, guided by common principles and goals, but EU action that respected ‘legitimate diversity’ between different national legal and social orders.⁸⁷ It also promised a more responsive form of EU regulation, where Member States could shift and change their policy priorities according to new developments, and experiment with and learn from the practices of their neighbours.⁸⁸ The outcome – a process of national plans based on EU goals, with peer-level review, exchange and benchmarking at the EU level – was thus seen as the best of both worlds: EU action without steering and control from the top down.

Lessons from the OMC for the UNGP NAP Process

The rationale behind the OMC – responding to increased interdependency while also respecting legitimate diversity – is not far removed from that of the UNGP NAP process. The UNGPs’ attempt to ‘close governance gaps created by globalisation’ responds to the necessity of enhanced state cooperation in preventing and redressing corporate human rights abuse under conditions of global interdependency.⁸⁹ The ability of States to enforce human rights in relation to businesses incorporated within their jurisdiction increasingly depends on the human rights practice of other States where those businesses may be producing, packaging and trading their goods. Responding to this challenge requires consistent and effective international standards that ensure corporate compliance with human rights wherever they operate. At the same time, the legal and political orders into which the UNGPs must fit, and the state capacity to enforce them, varies considerably between national contexts. As a result, agreement on binding international norms – such as an overarching Treaty regime – has thus far proven difficult to achieve.⁹⁰ As the UNWG Guidance puts it, ‘while all NAPs share common ground in their alignment with the UNGPs and with international human rights instruments, ... NAPs and the processes through which they are developed and updated must also adjust to each State’s capacity and cultural and historic contexts’.⁹¹

The OMC’s experience provides a number of lessons as to how the NAP process could manage this tension between interdependence and diversity successfully. Rather unsurprisingly, given the high hopes that greeted its arrival, the OMC in practice rarely lived up to its full promise. A key concern within

⁸⁵ See the limits on social policy measures contained in Article 153 of the Treaty on the Functioning of the European Union (TFEU).

⁸⁶ J. Zeitlin, ‘Social Europe and Experimentalist Governance: Towards a New Constitutional Compromise?’ in G. de Burca (ed.) *EU Law and the Welfare State: in Search of Solidarity* (Oxford University Press: 2005); G. de Burca, ‘The Constitutional Challenge of New Governance in the European Union’, 28 *European Law Review* (2003) 6.

⁸⁷ F. Scharpf, ‘Legitimate Diversity: The New Challenge of European Integration’ in T. Borzel and R. Cichowski (eds.), *The State of the European Union: Law, Politics and Society* (Oxford University Press: 2003).

⁸⁸ C. Sabel and J. Zeitlin, ‘Learning from Difference: The New Architecture of Experimentalist Governance in the European Union’, in *Experimentalist Governance in the European Union* (Oxford University Press: 2010); S. Deakin and O. de Schutter, ‘Reflexive Governance and the Dilemmas of Social Regulation’ in *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (Brulyant: 2005).

⁸⁹ See ‘2008 Report’ (n 8) para 3.

⁹⁰ An early failed attempt in this regard were the 2003 UN Draft Norms that proposed to directly impose international human rights obligations on corporations; see UN Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, ‘Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’, E/CN.4/Sub.2/2003/12 (26 August 2003). In 2014, the UN Human Rights Council adopted a resolution establishing a working group tasked with drafting an international human rights and business treaty; see H. R. C., ‘Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights’, A/HRC/RES/26/9 (14 July 2014).

⁹¹ See UNWG Guidance (n 20) 4.

social science research has been the OMC's effectiveness.⁹² The EU's original Lisbon Strategy – replete with goals designed to boost the EU's economic and social performance – failed to reach most of its headline targets, with much of the blame falling at the OMC's door.⁹³ The problem was seen as one of the OMC's voluntary nature: if Member States were to deliver social and economic goals through purely national plans, what was their incentive to be responsive to common EU objectives? It was feared that national reports would merely list programs governments wished to implement anyway. States would follow EU principles they agreed with and disregard those that involved budgetary and political costs. Such a risk also presents itself in relation to National Action Plans implementing the UNGPs – and has already shown signs of realisation in those EU Member State NAPs that mainly confine themselves to listing past national achievements.⁹⁴ UNGP NAPs, too, are designed as a largely nationally guided process with few explicit incentives (either positive or negative) for governments to respond directly to international norms.

However, the OMC's evolution from these early experiences also illustrates how both positive and negative incentives can be established. While empirical accounts of the first ten years of the OMC's life are relatively sceptical about its ability to induce direct policy change, these accounts are more supportive of 'second order' effects.⁹⁵ Second-order effects concern the ability of the OMC to alter the process through which national and EU policy-making is conducted, encouraging policy-making to be more responsive to over-arching substantive goals. Examples include the ability of the OMC to mainstream social goals across government departments, to place new issues on the national political agenda or to improve policy-makers' understanding of the relationship between policies and effects (on inequality, poverty and other indicators). This speaks to some elements of the UNWG and ICAR-ECCJ NAP Guidance already taken up by a number EU Member States, such as the emphasis placed on inter-ministerial and cross-departmental cooperation and on including civil society actors into the development and implementation of NAPs.⁹⁶

Structural Features of the OMC Process

The ability to induce second-order effects depends on a number of structural features of the OMC process – features that the UNGP NAP process does not yet possess. These include, first, an infrastructure for States to conduct peer review on the performance of other States. In the OMC case, this is normally done within specialized committees, made up of national representatives and EU officials, who assess national plans according to common EU objectives and indicators. Peer review can be seen in terms of both negative and positive inducement. Negatively, peer review allows States to critically assess the performance of their neighbours, particularly in circumstances where negative national performance can have externalities on other States.⁹⁷ Here, peer review provides a reason (in

⁹² See e.g. M. Eckhardt, 'The Open Method of Coordination on Pensions: an Economic Analysis of its Effects on Pension Reforms' 15 *Journal of European Social Policy* (2005) 247; M. Lodge, 'Comparing Non-Hierarchical Governance in Action: The Open Method of Coordination in Pensions and Information Society' 45 *Journal of Common Market Studies* (2007) 2; M. Buchs, *New Governance in European Social Policy: The Open Method of Coordination* (Palgrave MacMillan: 2007).

⁹³ See the Kok Report, 'Facing the Challenge: The Lisbon Strategy for Growth and Employment' (Office for Official Publications of the EU: 2004).

⁹⁴ See ICAR & ECCJ Assessment (n 42) and further above, section three.

⁹⁵ On the OMC's national effects, see Dawson (n 82) 164-234; J. Zeitlin and M. Heidenreich, *Changing European Employment and Welfare Regimes: The Influence of the OMC on National Reforms* (Routledge: 2009).

⁹⁶ See above, section three.

⁹⁷ This is a key rationale behind the coordination of national budgets in the European Semester process – significant economic imbalances could de-stabilise the Eurozone, putting pressure on the interest payments and financial stability of others; see the explanations provided in the Commission Press Release, 'The European Semester: A New Architecture for the New EU Economic Governance', MEMO/11/14 (12 January 2011).

the absence of ‘hard’ legal obligations) for national officials to take seriously both the quality of their NAPs and the outcomes that domestic reforms produce over time. Yet peer review is about more than ‘negative’ shaming: empirical evidence from the OMC in the social policy field suggests that peer review mainly focuses on positive performers.⁹⁸ How have neighbouring States managed to successfully tackle endemic problems such as child poverty or long-term unemployment and how can their regulatory approach inform reform efforts elsewhere? Here, peer review exploits the positive aspects of interdependence: that other States are likely to face similar problems and may have innovative solutions that can be replicated.⁹⁹

Secondly, part of the OMC’s success has been associated with developing indicators and improving the information basis through which national policy-makers form their decisions. In the field of social policy, for example, the EU’s Social Protection Committee has developed a Social Protection Performance Monitor (SPPM), whose function is to track the performance of EU Member States according to different metrics of social performance (e.g. employment, health and material deprivation).¹⁰⁰ Crucially, the function of indicator development is not only cross-national comparison but also allows States to better understand causal relationships and correlations between different forms of regulation and social outcomes. What, for example, is the impact of early school-leaving on employment and productivity, or the effect of fiscal transfers to certain vulnerable groups on the poverty rate? The goal in this sense is not a convergence of social policies across States but a better understanding of the capacities and limitations of various policy tools to achieve a given goal. As highlighted in section three, the issue of indicators and benchmarks is one for which both the NAP guidance and NAP development in the EU Member States has thus far shown little interest.

Thirdly, one should reflect on the OMC’s failures as well as its successes. A frequently lamented feature of open coordination has been its poor record in terms of participation and transparency.¹⁰¹ This record has had a bearing not only on the OMC’s wider legitimacy but also on its effectiveness. The failure, for example, to include parliaments and regional bodies in the process of establishing national plans under the OMC gave rise to complaints that open coordination suffers from a lack of national and regional ownership, with ambitious goals set at the EU-level often forgotten or disappointed when ‘translated’ into national action.¹⁰² This is particularly so in certain types of constitutional order: in federal states (e.g. Germany where lower-levels of governance have strong regulatory powers) or states with strong forms of parliamentary control (e.g. in Scandinavia), government plans without wider institutional input risk being overturned by other bodies later in the policy-making process.

These factors – providing an appropriate institutional and procedural infrastructure for the OMC – have been key to open coordination’s successes and limitations. A policy coordination process that relies purely on national reporting, without any inducements to deliver on commitments made or improve performance over time, can easily slip into a box-ticking exercise that is increasingly unresponsive to its initial goals. Similarly, a national strategy without wide domestic buy-in, including from constitutionally significant bodies, cannot expect to deliver wide-ranging reforms. Finally, a process of

⁹⁸ J. Visser, ‘The OMC as Selective Amplifier for National Strategies for Reform’ in J. Zeitlin and P. Pochet (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (Peter Lang: 2005); S. Kröger, *Soft Governance in Hard Politics: European Coordination of Anti-Poverty Policies in France and Germany* (VS Verlag: 2008) 44-46.

⁹⁹ On learning under the OMC, see C.M. Radaelli, ‘Europeanization, Policy Learning and New Modes of Governance’ 10 *Journal of Comparative Policy Analysis: Research and Practice* (2008) 3.

¹⁰⁰ ‘Social protection performance monitor (SPPM) – Methodological Report by the Indicators Sub-group of the Social Protection Committee’ (17 December 2012), <http://ec.europa.eu/social/main.jsp?catId=758>.

¹⁰¹ M. Büchs, ‘How Legitimate is the Open Method of Coordination?’ 46 *Journal of Common Market Studies* (2008) 4; S. Kröger, ‘The End of Democracy as we know it? The Legitimacy Deficits of Bureaucratic Social Policy Governance’ 29 *Journal of European Integration* (2007) 5.

¹⁰² See ‘Kok report’ (n 93); Dawson (n 82) 199-206.

developing complex national strategies in response to transnational and global challenges is simply a wasted opportunity if no structures exist to compare national performance, to improve collective understanding of evolving shared problems, and to allow States to respond to the practices of their neighbours. Given the many features that the UNGP NAP process and the OMC share in common, the lessons learnt from the open coordination's existing history should be taken into account.

Towards an Open Method of Coordination for Business and Human Rights

An OMC for Business and Human Rights in the EU Governance Context

Many of the lessons of the OMC are relevant for the implementation of the UNGPs at a global level. The OMC's experience points to some deficiencies of the otherwise highly detailed existing guidance for National Action Plans. The lack of sufficient consideration for indicator development, benchmarking, peer pressure and mutual learning through peer review suggests concerns about the broader sustainability and effectiveness of the NAP process. Some lessons, however, may have more specific relevance to the European Union and the connections between the NAP process and the broader structure of EU governance. The vast majority of currently existing NAPs stem from EU Member States. This creates a unique opportunity for developing national measures in a coordinated manner within the European Union. One noticeable aspect of many of the NAPs produced by EU Member States is their frequent references, either to EU-wide strategies on CSR, or to EU legislative measures.¹⁰³ Moreover, the competence to implement a comprehensive business and human rights strategy is shared between the EU and the Member States. As a consequence, the EU has in some areas already developed legislation of its own, which raises issues concerning the coherence of EU and national measures and (by the operation of EU competence rules) limits Member States' own powers to set binding standards.¹⁰⁴

These considerations raise the prospect of developing a European OMC process for business and human rights. The idea of applying the OMC to the realm of EU fundamental rights more broadly is not a new one.¹⁰⁵ It has, however, faced two key obstacles in the past. First, the legal powers available to the Union to develop an autonomous fundamental rights policy have often been contested and remain unclear.¹⁰⁶ Second, Member States have tended to see open coordination processes as a bureaucratic burden, establishing potentially costly and time-consuming implementation structures without clear rewards.¹⁰⁷ These objections seem less pressing when considering an OMC in the more specific field of business and human rights. Regarding the competence-based obstacle, as discussed above, many issues relating to the UNGPs touch upon areas of shared competence. By implementing EU legislation on matters such as accounting standards for trans-national corporations or human trafficking, the Member States are implementing the UNGPs under the shadow of EU law. The OMC could be used to monitor national implementation of EU laws that carry a business and human rights dimension, ensuring consistency and coherence of these laws throughout the European Union. Some key EU Directives already establish a

¹⁰³ See e.g. Swedish NAP (n 49) 27; Finnish NAP (n 51) 16-19.

¹⁰⁴ See 'Commission Staff Document 2015' (n 27) and further above, section two.

¹⁰⁵ See O. de Schutter, 'The Implementation of the Charter of Fundamental Rights through the Open Method of Coordination' *Jean Monnet Working Paper* (2007) 4; S. Smismans, 'How to be Fundamental with Soft Procedures? The OMC and Fundamental Social Rights' in G. de Burca and B. de Witte (eds.), *Social Rights in Europe* (Oxford University Press: 2005)

¹⁰⁶ On this historical problem see P. Alston and J. Weiler, 'An Ever Closer Union in Need of a Human Rights Policy?' in P. Alston (ed.), *The EU and Human Rights* (Oxford University Press, 1999) 22-27.

¹⁰⁷ For example, the resistance to (and temporary abolition of) the social inclusion OMC from 2010-2012, described in M. Daly and D. Copeland, 'Poverty and Social Policy in Europe 2020: Ungovernable and Ungoverned' 42 *Policy and Politics* (2014) 351.

duty of the European Commission to monitor their national implementation for this very reason.¹⁰⁸ While such a coordination process would lack a distinct legal basis in the EU Treaties, this has not prevented the establishment of OMCs in other policy areas (such as social inclusion), provided open coordination is used as a mechanism to support and complement, rather than entirely harmonise, the laws of the Member States. Secondly, it is questionable whether an OMC on business and human rights would constitute a significant additional bureaucratic burden. The vast majority of Member States have produced, or have committed to producing, NAPs on business and human rights and/or CSR. Moreover, the European Commission has already dedicated expertise and resources to organising peer reviews on CSR and business and human rights,¹⁰⁹ and the European Council's Working Group on Human Rights (COHOM) in any case monitors the national implementation of the UNGPs as part of its work on implementing the EU's Strategic Framework on Human Rights and Democracy.¹¹⁰

The Role and Added Value of an OMC for Business and Human Rights

What would be the role and added value of an explicit OMC process then? First, an OMC on Business and Human Rights could contribute to avoiding duplication, overlap and inconsistency in the implementation of different business and human rights processes at EU and Member State level. As mentioned in some of the NAPs, the obligations created under the UNGPs mirror a number of other international instruments binding EU Member States, such as the OECD Guidelines for Multinational Enterprises,¹¹¹ or the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.¹¹² At the same time, the Commission's CSR strategy tends to focus on ensuring coherence between different branches of EU action rather than between EU, international and national policies.¹¹³ By establishing a forum of institutionalised cooperation between national and EU actors in which divergent approaches to business and human rights can be monitored and addressed, an OMC process could be a central vehicle in delivering policy coherence across the European Union.

Second, an OMC process could act as a means of identifying where further EU action to implement the UNGP may be necessary. This relates to the point regarding shared competences above. While some reforms necessary to implement the UNGPs can be delivered via purely national action, a coordinated European approach may be more effective in addressing those business and human rights challenges with a strong cross-border element. To take the example of accounting discussed above, EU rules in this area are likely to have far greater influence in encouraging corporations to disclose information about human rights-related standards than domestic regulation – which may be perceived as creating incentives for corporations to re-locate to other EU Member States with less intrusive standards.¹¹⁴ In simple terms, by providing a comparative overview of how EU Member States are implementing the

¹⁰⁸ For example, the duty contained in EU accounting directives (establishing duties on the disclosure of non-financial information for large enterprises) for the Commission to review national implementation prior to 2018; see Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings.

¹⁰⁹ See above, section two.

¹¹⁰ See 'Commission Staff Document 2015' (n 27) 8.

¹¹¹ OECD Guidelines for Multinational Enterprises (2011 edn.), <http://mneguidelines.oecd.org/guidelines/>.

¹¹² Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2014, 4th edn.), http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm.

¹¹³ See 'Commission Staff Document 2015' (n 27) 16-21.

¹¹⁴ This is a long-standing issue in EU human rights law – that regulatory competition between EU Member States could lead to a race to the bottom in social or other standards, demanding EU intervention that sets 'minimum' base-line rules for inter-state competition; see S. Deakin, 'Regulatory Competition after Laval' 10 *Cambridge Yearbook of European Legal Studies* (2008).

UNGPs, an OMC process would allow actors at the European and national level to identify the potential and limitations of future EU action on business and human rights.¹¹⁵

Third, the OMC could act as an incentive structure for Member States to deliver on the content of their NAPs. Depending on the design of the process, an OMC procedure would set-out specific timetables and feedback mechanisms for NAPs on business and human rights. Timetabling could encourage States to make actionable commitments through specific deadlines (a concern mirrored in the lack of ‘SMART’ measures in current NAPs), exerting particular pressure on those States that have repeatedly promised NAPs but failed to deliver them. Feedback mechanisms, such as peer reviews, would also allow Member States to nudge each other into following prior commitments outlined in the NAPs.¹¹⁶ Furthermore, the OMC’s history indicates some evidence of open coordination facilitating rights of ‘structural entry’ for NGOs and civil society actors in national strategies, potentially building a coalition of national actors to encourage governments to deliver NAP promises.¹¹⁷

Fourth, the OMC could act as a space for mutual learning and the exchange of good practices between EU Member States.¹¹⁸ Those peer reviews that have been conducted on Member States’ CSR strategies demonstrate the usefulness of peer review in understanding common challenges (such as regulating business and human rights in times of austerity) and identifying emerging strategies to meet these challenges (such as establishing training networks for small and medium-sized enterprises).¹¹⁹ A peer review process for business and human rights was considered by the European Commission in its 2011 CSR Strategy, but not followed-up in a systematic manner, in spite of some indications of Member State support.¹²⁰ As discussed in the previous section, the purpose of peer review under an OMC process is not just ‘peer pressure’ but also the identification of innovative strategies to meet shared problems under conditions of mutual interdependence, that is, to productively use the diversity of national implementation strategies regarding the UNGPs as an experimental advantage from which the EU as a whole may benefit.

Fifth, the drafting history of the German NAP in particular illustrates that the process through which a NAP is adopted is an essential factor in determining the outcome of the UNGP implementation process at the national level.¹²¹ In this regard, the structural features of the OMC could contribute to enhancing the substantive quality of EU Member State NAPs. As concerns achieving a smart regulatory mix through a proper alignment of the three pillars, many existing NAPs appear preoccupied with securing a favourable business climate and ‘level playing field’ for national corporations.¹²² Leaving aside allegations of direct corporate bias, this is not an illegitimate concern. However, a pan-European OMC could ensure a more balanced consideration of the views and interests of all affected stakeholders at home and abroad by strengthening cross-sectoral and transnational allegiances between the different

¹¹⁵ On this argument in relation to a broader OMC in fundamental rights, see de Schutter (n 104).

¹¹⁶ A 2013 UK-based peer review of national CSR strategies offers some examples of critical scrutiny by government officials concerning the plans of other States; see European Commission & UK Department for Business, Innovation & Skills, ‘Report: Peer Review on Corporate Social Responsibility’ (London: 2013).

¹¹⁷ See Dawson (n 82) 192-195; K. Jacobsson, ‘Trying to Reform the Best Pupils in the Class? The Open Method of Coordination in Sweden and Denmark’ in Zeitlin and Pochet (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (Peter Lang: 2005).

¹¹⁸ Which is one of the goals highlighted in the EU’s 2001 CSR strategy, see ‘2011 CSR Strategy’ (n 18).

¹¹⁹ See ‘CSR peer review’ (n 116).

¹²⁰ See ‘Commission Staff Working Document 2015’ (n 27) 34 and above, section two.

¹²¹ See above, section three.

¹²² For example, the Dutch NAP envisages scrutinizing the existing Dutch legal framework on business and human rights in the light of ‘the situation in neighboring countries (level playing field), and the effects of legislation on companies and business climate’; see Dutch NAP (n 68) 28. The German NAP provides that the Government will campaign for a global level playing field, based on a shared international understanding of the corporate responsibility to respect and sustainable supply chain management; see German NAP (n 48) 35.

stakeholder groups. An important rationale for introducing the OMC was the insight that creating a common European market had significant spill-over effects on domestic social policy that needed to be addressed at the EU level to resolve collective action problems between the Member States and avoid a regulatory ‘race to the bottom’. Where legal harmonization proved undesirable or unfeasible given legitimate national diversity, an OMC-based peer review process enabled Member States to nonetheless scrutinise and influence each other’s policies to avoid negative externalities and undue competitive advantages gained through negative national performance. Over the past decade we have witnessed a progressive ‘hardening’ of initially voluntary CSR initiatives in the European Union, including (at the European level) through the introduction of mandatory non-financial reporting and the concretisation of corporate human rights due diligence requirements and (at the Member State level) various initiatives to give legal teeth to the corporate responsibility to respect human rights and other international CSR agreements.¹²³ In this regard, an OMC on Business and Human Rights could function as an important platform for sharing and evaluating best practices and ensuring policy coherence through avoiding duplication of, and inconsistencies between, policy efforts at the European and national levels.

Sixth, various NAPs emphasise that the policy drivers behind and the effects of extraterritorial measures remain rather poorly understood,¹²⁴ including the impacts of such measures on the domestic business climate.¹²⁵ Apart from being warranted from a human rights perspective to avoid double standards of protection in home- and host states of corporate investment, experiences from other policy areas with a strong market nexus (anti-corruption, securities and antitrust) suggest that extraterritorial instruments can contribute to creating a global level playing field.¹²⁶ Partly due to its ‘*sui generis*’ legal and political structure somewhere between a state and an international organisation, the European Union is replete with examples of laws and policies that reach out beyond state borders, both internally and in relation to wider world.¹²⁷ It thus constitutes a privileged site of authority for further experimenting with extraterritorial instruments in the business and human rights domain. In this regard, the OMC can play an important role in enhancing European and national policy-makers’ understanding of the usefulness and effectiveness of extraterritorial measures in addressing human rights challenges brought about by conditions of increased global interdependency.

Designing an OMC for Business and Human Rights

How would an OMC on business and human rights look in practice? As discussed above, the history of the OMC suggests that there is no ‘one size fits all’ model.¹²⁸ In this sense, the very advantage of an open coordination process is that it need not fit within existing legal categories but can be shaped to meet the preferences and needs of the actors involved. Some core minimum requirements, however, should be:

¹²³ A German proposal for legislation envisages imposing human rights due diligence obligations on German-based corporations through domestic administrative law with extraterritorial effect; see R. Klinger et al., *Verankerung menschenrechtlicher Sorgfaltspflichten von Unternehmen im deutschen Recht* (Amnesty International, Brot für die Welt, Germanwatch & Oxfam Germany: 2016), <https://germanwatch.org/de/11970>. As part of its commitments made in the National Action Plan, the Dutch government has supported and facilitated the development tripartite agreements that bind corporations in different risk sectors to international CSR initiatives (ICSR Covenants). The Dutch Ministry of Economic Affairs currently considers legislation to render these ICSR Covenants legally binding for whole sectors, including companies not headquartered in the Netherlands; see http://mvoplatfom.nl/publications-nl/Publication_4307-nl.

¹²⁴ See for example Dutch NAP (n 68) 39; Danish NAP (n 58) 16.

¹²⁵ See specifically on the allocation of jurisdiction in private international law J. Trachtman, ‘Conflict of Laws and Accuracy in the Allocation of Government Responsibility’ 26(5) *Vanderbilt Journal of Transnational Law* (1994) 975.

¹²⁶ See Zerk (n 78).

¹²⁷ See Augenstein (n 15) and J. Scott, ‘The New EU “Extraterritoriality”’ 51(5) *Common Market Law Review* (2014) 1343.

¹²⁸ See B. Laffan and C. Shaw, ‘Classifying and Mapping OMC in Different Policy Areas’ *NEW-GOV Working Paper* (2005) 2.

- Establishing a common time-table for the production and revision of NAPs as part of a bi-annual or tri-annual cycle;
- Tasking a specific institution (e.g. a committee of national representatives within the Commission or Council) with overseeing the NAP process and conducting state-to-state peer review;
- Building up qualitative and quantitative indicators to allow the comparative benchmarking or indexing of national performance on business and human rights (including *via* existing indicator systems for CSR built by other international organisations);¹²⁹
- Facilitating civil society involvement, both at the EU level (e.g. *via* the EU's multi-stakeholder platform on CSR) and at the national level (e.g. through incorporating into EU peer review an indicator concerning national civil society participation in the development and review of NAPs);
- Establishing mechanisms connecting the NAP process with the EU's ongoing CSR strategy (to ensure that those responsible for designing EU initiatives in the field of business and human rights are included in the monitoring and peer-review process).

The schema above provides only a first sketch of what an OMC process for business and human rights might look like. One should not over-estimate its potential – as much as the OMC's history in the social policy field provides lessons, these are not easily generalizable to other policy fields. Given the *potential* benefits of such a process, however, an OMC for business and human rights ought to be seriously considered. It may provide one means to provide new energy and impetus to the implementation process of the UNGPs, which is where current attention should be directed to.¹³⁰

¹²⁹ For example, the UNDP methodology for CSR country-level assessment, <https://business.un.org/en/documents/9472>; the Global Reporting Initiative standards, <https://www.globalreporting.org/standards>; or the ISO 26000 Social Responsibility Index, <http://www.iso.org/iso/home/standards/iso26000.htm>.

¹³⁰ See Thielbörger & Ackermann (n 3).

