BUSINESS, HUMAN RIGHTS AND THE ENVIRONMENT

The NOVA BHRE Blog

https://novabhre.novalaw.unl.pt/redressing-business-related-human-rights-and-environmental-harm-and-doing-it-the-right-way/

Redressing Business-Related Human Rights and Environmental Harm, and Doing it the Right Way

February 16, 2023

A Critical (Snapshot) Assessment of the European Commission's Proposal for a Corporate Sustainability Due Diligence Directive in Light of International Standards on the Right to Effective Remedy and Reparation

About the author: Emma is a PhD student in International and Public Law, Ethics and Economics for Sustainable Development (LEES) at the University of Milan. Her research focuses on access to justice and reparations for business-related human rights abuses. Emma holds a Law Degree from the University of Milan and an LL.M in International Human Rights Law specializing in Business & Human Rights from the University of Essex. Before enrolling on the LESS PhD programme, Emma worked as a Business & Human Rights Programme Coordinator at the UN Global Compact Network UK. Emma is an alumna of the European Centre for Constitutional and Human Rights and the Essex Human Rights Centre Clinic. Since January 2022, Emma is also an associate member of the Italian association Human Rights International Corner.

Setting the Scene

It is a well-established principle of international human rights law (IHRL) that if a human right is breached, the holder of the right should be able to seek and obtain an effective remedy for the harm suffered. Remedies should entail equal and effective access to justice; adequate, effective, and prompt reparation; and access to relevant information. The right to an effective remedy for business-related human rights and environmental abuses is also a central tenet of the United Nations Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines), which represent the key international standards on business & human rights (BHR). Under Pillar III of the UNGPs – which is also reflected in the Human Rights chapter of the OECD Guidelines – victims should have access to both procedural (state-based and non-state-based, judicial and non-judicial) mechanisms capable of reviewing their claims regarding corporate misconduct and substantive reparations aimed at redressing the harm.

Against this background, the Proposal for a Corporate Sustainability Due Diligence Directive by the European Commission (the Commission Proposal) aims to 'increase corporate accountability' and 'improve access to remedies for those affected by adverse human rights and environmental impacts' (see, Explanatory Memorandum). To foster the achievement of these goals, the Commission Proposal puts forward a mix of remedies

consisting of (i) a non-state-based remedy (i.e., the 'complaints procedure' under Article 9); (ii) a state-based non-judicial remedy (i.e., the 'substantiated concerns' process under Article 19); and (iii) a state-based judicial remedy (i.e., the civil liability regime under Article 22).

While the provision of such a 'bouquet of remedies' is a major step forward towards greater corporate accountability and victim's access to justice, the 'remedial package' envisaged by the Commission also presents challenges in the way it understands and implements international human rights and BHR standards on the right to an effective remedy. This blog post aims, therefore, to assess the extent to which the Commission Proposal's provisions on remedies comply with the principles set out under IHRL, the UNGPs, and the OECD Guidelines and make modest proposals for a better alignment.

Non-Judicial Remedies

The Commission Proposal (Article 9) provides for the establishment of a company-based 'complaints procedure' to receive grievances based on 'legitimate concerns regarding actual or potential adverse human rights impacts and adverse environmental impacts'. This is – in itself– a positive feature of the Commission's legislative initiative, which, in this respect, proves to be in line with both, the UNGPs and the OECD Guidelines. In conformity with international standards, the Commission Proposal also provides that resorting to the company-based procedure 'should not prevent the complainant from having recourse to judicial remedies' (see, recital 42).

Despite these positive elements, other aspects of Article 9 raise concerns due to a misalignment with relevant international standards. First, the Commission Proposal places an undue restriction on standing, by establishing that, in addition to affected or potentially affected persons, only 'trade unions and other workers' representatives *representing individuals working in the value chain concerned*' and 'civil society organizations *active in the areas related to the value chain concerned*' can submit complaints. Considering the crucial – and the frequently risky – role that civil society organisations (CSOs) play in helping victims access remedies, preventing them from bringing complaints because they are not involved in the economic sector at issue would critically hinder redress and accountability.

As observed here, here, and here, the Commission Proposal similarly fails to set out requirements for the effectiveness of the envisaged company-based grievance mechanism, notwithstanding relevant international standards calling for non-judicial grievance mechanisms to be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue (see, UNGPs, Principle 31; OECD Guidelines, Commentary on Human Rights; ARP III Main Report). For instance, the Commission Proposal falls short of accepted principles on meaningful and *proactive* stakeholder consultation concerning the design, operationalisation, and evaluation of the grievance mechanism (on stakeholder engagement, see Céline da Graça Pires and Daniel Schönfelder). Equally, the proposal lacks provisions addressing the problems arising from power imbalances between the parties, supporting the needs of people at heightened risk of vulnerability, marginalisation, and discrimination, as well as ensuring the safety of rightsholders raising grievances. As noted here and here, while the Commission suggests extending the Whistleblower Directive to the reporting of business-related abuses, this would leave those stakeholders – such as human rights and environmental defenders – who do not qualify for 'whistleblower protection' under EU law without adequate safeguard against retaliation.

Finally, despite existing guidance (see, UNGPs, Principle 31 and the ARP II Main Report), similar gaps exist in relation to the 'substantiated concerns' mechanism envisaged in Article 19 as part of the mandate of the proposed supervisory authorities (see, Articles 17-21). Again, this lack of alignment with international standards critically risks preventing a

future CSDDD from achieving the objectives of enhancing corporate accountability and access to remedy.

The Civil Liability Regime

Article 22 of the Commission Proposal provides for companies' civil liability for breaches of their obligations to prevent or mitigate and bring to an end adverse impacts (see, Articles 7 and8), which resulted in harm. Article 22 thus establishes a fault-based liability regime which, in line with the UNGPs, combines human rights and environmental due diligence (HREDD) obligations with a standard of expected conduct (on the reasonableness standard and HREDD, see Odile Dua and Leonard Feld). Since state-based judicial remedies are 'at the core of ensuring access to remedy' for victims of business-related abuses (see, UNGPs, Commentary to Principle 26), the establishment of a civil liability regime is undoubtedly of significant importance.

Nonetheless, several aspects raise concerns with respect to ensuring that victims have effective access to justice. First, while Article 22 principally seems to cover a broad category of adverse impacts, the scope of the civil liability regime is implicitly limited – and so are the non-judicial remedies under Articles 9 and 19 – by the fact that the obligations under Articles7 and 8 apply to companies' own operations, those of their subsidiaries, and those in their value chains, but, in the latter case, only with regard to 'established business relationships' (see, Article 6(1)). Additionally, under the Commission Proposal, only breaches of the obligations under Articles7 and 8 could give rise to companies' civil liability, whereas no liability would arise from those damages that, according to the proposal, should have been, e.g., identified or remedied.

As widely criticised by CSOs (see, e.g., here), the Commission Proposal fails to adequately address the legal, practical, and financial barriers (see, here and here) that victims routinely face in accessing judicial remedies in – particularly transnational – BHR cases. To start with, contrary to what had authoritatively been recommended, the proposal does not address the question of allocating the burden of proof. In the absence of national laws explicitly providing for a reversal thereof (see, recital 58), claimants will therefore continue to bear the heavy burden to prove: (1) the company's failure to comply with its HREDD obligations (i.e., that had the company taken appropriate actions they would not have suffered the harm); (2) the harm; and (3) the causal link between the non-compliance and the harm. Equally, the Commission Proposal does not introduce rules on disclosure by establishing companies' obligation to release and victims' right to access relevant information and documents supporting potential claims. Nor does the draft establish the requirement of reasonableness concerning limitation periods applicable to BHR civil claims, which, in the past, have proven to be a major barrier to justice. Moreover, the Commission Proposal remains silent on recourse to injunctive measures – which are part and parcel of the French Duty of Vigilance Law –, representative actions and collective redress, and accompanying measures to support claimants, particularly those at heightened risk of vulnerability and marginalisation or facing financial hardship.

Article 22 prescribes the overriding mandatory application of its civil liability regime 'in cases where the law applicable […] is not the law of a member state'. In the absence of an immediate and realistic prospect of amending the Rome II Regulation to allow claimants in BHR cases to choose the most favourable law, opting for the mandatory application of the CSDDD's civil liability provisions regardless of the law otherwise applicable arguably appears the second-best solution. Nevertheless, as observed here and here, Article 22(5) proves problematic in that it risks reinforcing colonial power relations while also preventing stronger national regulatory frameworks from emerging outside of the EU (on this, see Caroline Lichuma).

Finally, Article 22(2) provides a defence for damages caused by indirect partners with which defendant companies have an 'established business relationship' when they sought

contractual assurances and verified compliance therewith. While CSOs have rightly cautioned against overreliance on contractual assurances and Article 22(2) as a means for companies to escape civil liability, it should also be noted that the provision does not offer companies a 'safe harbour'. Indeed, in line with the UNGPs' approach to HREDD, the exemption would not apply if it was unreasonable to expect that the actions taken would have been adequate to prevent, mitigate, or end the adverse impact. Accordingly, given that audits and certification schemes have proven insufficient to ensure respect for human rights, the reliance on these types of contractual assurances would, as such, arguably not allow companies to benefit from the defence under Article 22(2) in cases where relevant measures are clearly ineffective. At the same time, in the absence of uniform provisions on a thoughtful allocation of the burden of proof, it will still be up to claimants to prove the unreasonableness of companies' actions.

Substantive Reparations: The Missing Piece

In line with IHRL standards, the UNGPs recognise – albeit without providing much detail – that effective remedies for business-related abuses require both procedural mechanisms and substantive reparations (see, UNGPs, Commentary to Principle 25). While reparations should consist of a range of measures aimed at redressing the harm suffered by victims, in BHR the focus has, so far, largely been on financial compensation as the primary – and in many cases only – form of reparation excluding other modalities of redress, such as acknowledgements and guarantees of non-repetition.

As noted here, here, and here, the Commission Proposal falls critically short of the international standards on comprehensive reparations. It refers to 'the payment of damages […] and of financial compensation' as the only way to '*neutralise*' – i.e., redress – the adverse impacts of business activities (see, Article 8(3)(a)). In doing so, it fails to detail the different forms of reparation victims of business-related abuses should be entitled to under IHRL and the UNGPs, as well as to recognise the need to meaningfully engage with rights-holders about the type or types of redress that, depending on their preferences and the circumstances of the case, should be delivered.

Conclusions

Accountability and remedy for business-related human rights and environmental abuses remain elusive. While the Commission Proposal represents a noteworthy step forward and seemingly adopts the United Nations Working Group on BHR's '*all roads to remedy*' approach, it will be crucial, in the upcoming 'trilogue' negotiations, to ensure significant improvements and better alignment with international human rights and BHR standards on the right to effective remedy and reparation.

Notably, amendments to the Commission Proposal have already been issued in the Draft Report of the European Parliament's JURI Committee, led by rapporteur Lara Wolters, and the General Approach of the Council of the EU. Positively, both documents seem to agree on the need to introduce specific provisions particularly on the effectiveness of non-judicial remedies and the company-based complaints mechanisms. By contrast, a wide divergence of opinions among the EU institutions emerges in relation to civil liability and substantive reparations. The Draft Report of the JURI Committee shows a commitment to broadening the scope of the civil liability regime and addressing hurdles to holding companies liable. It also expressly refers to a wide range of modalities to redress business-related abuses. The Council Proposal, on the other hand, seems to take another route insisting to keep the civil liability regime to the bare minimum and limiting victims' right to reparation to financial compensation only. In conclusion, there is still a long way ahead to ensure that a future CSDDD delivers on the promise to 'increase corporate accountability' and 'improve access to remedies for those affected by adverse human rights and

environmental impacts'.

Suggested citation: E. Baldi, 'Redressing Business-Related Human Rights and Environmental Harm, and Doing it the Right Way: A Critical (Snapshot) Assessment of the European Commission's Proposal for a Corporate Sustainability Due Diligence Directive in Light of International Standards on the Right to Effective Remedy and Reparation', Nova Centre on Business, Human Rights and the Environment Blog, 15th February 2023.