

EXPLORING THE CONCEPT OF PRIORITIZATION: AN EXPLANATORY NOTE FOR THE DUTCH SECTOR COVENANT PROCESS

Purpose of this Explanatory Note:

This explanatory note on the concept of prioritization of business and human rights risks has been prepared by Shift at the request of the SER to support the ongoing multi-stakeholder dialogue of the Dutch ICSR process.

The concept of prioritization was discussed as part of the initial capacity-building workshops on assessing and addressing “international CSR” (ICSR) risks for sector associations and their stakeholders, convened by the SER and facilitated by Shift in 2015. These workshops introduced a possible methodology for sector associations and their stakeholders to identify and prioritize ICSR risks at the sector level.

The UN Guiding Principles on Business and Human Rights (UNGPs) provide guidance on how individual businesses should prioritize risks to human rights, where that is necessary, which is also reflected in the OECD Guidelines for Multinational Enterprises (OECD Guidelines) in relation to a broader range of impacts that business may be involved with. The methodology proposed for sector level prioritization is grounded in these frameworks.

This explanatory note seeks to provide further clarity on the following questions:

1. What guidance do the UNGPs provide on the concept of prioritization of human rights risks?
2. What are the implications for individual companies in practice?
3. How does the possible methodology for prioritization at the sector level, as described in the SER workshops, build on the approach for individual companies in the UNGPs and OECD Guidelines?

1. The Concept of Prioritization in the UNGPs

Guiding Principles 11 defines the corporate responsibility to respect human rights. It states:

Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

This responsibility applies to all actual and potential adverse human rights impacts that a business may be involved with. However, the UNGPs recognize that it may not always be possible for a business to take effective action on all its human rights impacts simultaneously.

Guiding Principle 24 and its commentary explain how companies should prioritize impacts for attention, when such prioritization is necessary. It is worth quoting this guidance in full:

24. Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.

Commentary

While business enterprises should address all their adverse human rights impacts, it may not always be possible to address them simultaneously. In the absence of specific legal guidance, if prioritization is necessary business enterprises should begin with those human rights impacts that would be most severe, recognizing that a delayed response may affect remediability. Severity is not an absolute concept in this context but is relative to the other human rights the business enterprise has identified.

The Interpretive Guide on the corporate responsibility to respect, issued by the Office of the UN High Commissioner for Human Rights (OHCHR) with the support of Professor John Ruggie, provides further helpful clarification. Prioritization may be necessary, for instance, where a business operates in a large number of country contexts, has complex supply chains, or has a multitude of business partners and “legitimate resource and logistical constraints” may limit its ability to address all its impacts at once.¹ In such cases, the UNGPs expect the company to adopt a principled approach to prioritization, based on severity of impact – as opposed to an approach based, for example, on what it is easiest to address, or on what the company perceives as the most important impact from the perspective of the business.

The UNGPs (in the commentary to GP 14) define the concept of severity on the basis of three criteria: the scale, scope and irremediable character of an impact. Scale refers to the gravity of the impact; scope refers to the number of individuals that are or will be affected; and irremediable character refers to any limits on the ability to restore those affected to a situation at least the same as, or equivalent to, their situation before the impact. A shorthand way of summarizing these three criteria could be:

- How serious is the harm?
- How widespread is the harm?
- If the harm occurs, can it be put right?

To be considered severe, an impact does not need to have all three of these characteristics; any single one of them might make an impact severe. As the commentary to GP 24 highlights, a delay in addressing an impact may make it less remediable and this should be taken into account in any prioritization. The Interpretive Guide gives the following example: “if workers are unfairly dismissed, an extended delay in remediation may oblige them to move in search of other work, making their reinstatement more difficult”.²

Likelihood is the other relevant factor for prioritizing potential impacts. However, as the Interpretive Guide makes clear, “a low probability of a severe human rights impact alone cannot justify reducing the priority of efforts to mitigate the risk. ... [I]n the context of risk to human rights, the severity of actual or potential risks must be the dominant factor”.³

Finally, it is important to note the Interpretive Guide’s comment on what prioritization means for impacts that are not deemed severe:⁴

Addressing the issues deemed as the most severe in no way implies that other human rights impacts identified through the enterprise’s due diligence process do not need to be addressed. Rather, this principle is about sequencing responses in the

¹ OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 2012, p 82, available at <http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf>.

² Ibid, p 83.

³ Ibid.

⁴ Ibid, p 84.

*event that not all impacts can be addressed at once. An enterprise is still accountable for addressing **all** its actual and potential human rights impacts. It is also worth keeping in mind that even an impact that initially is not considered severe may evolve into more serious abuses (or be perceived to do so) if not addressed properly.*

2. Implications for Individual Companies in Practice

Based on our own experience working with a variety of actors to put the UNGPs into practice, we offer the following observations:

- a. **Consider whether prioritization is necessary:** Smaller companies and companies with simpler supply chains may face relatively less human rights risks and be able to address them in parallel. Prioritization tends to become necessary only when the range and type of risks to human rights that a company identifies is such that the company cannot reasonably apply the necessary resources to address them all at the same time.
- b. **Use the lens of risk to people, not risk to business:** The UN Guiding Principles and OECD Guidelines require that prioritization should start from the standpoint of risk to people, not risk to the business. This is often not straightforward when a company's wider risk management processes center on risk to the business. However, experience shows that companies' assumptions about whether and how human rights are connected with risk to the business are often very flawed, and that in practice it is where risks to human rights are greatest that related risks to the business are most consistently to be found, at least in the medium term. Recent crises and scandals around severe human rights impacts in supply chains have repeatedly illustrated this point. So the lens of risk to people improves business risk analyses as well.
- c. **Focus on severity, not leverage:** Companies often prioritize human rights issues in the first tier of their supply chains, where the business feels it has greater leverage and perhaps greater reputational exposure. If there are impacts that can be readily addressed in the first tier of the supply chain, then clearly companies should address these. However, where choices have to be made about where to focus resources, it is the severity of impacts that should drive the prioritization process and not the degree of leverage a company has. This ensures that effort is maximized where the risks to human rights are greatest. Where the most severe impacts are more remote in the supply chain or otherwise challenging to address, companies are expected to try to increase their leverage to affect the behavior of those causing the harm. This may include gaining leverage through collective action with others.
- d. **Severity is relative not predefined:** There is no abstract list of 'severe' and 'non-severe' impacts on human rights. The assessment is a relative one: which human rights are at risk of the most severe impact by a business relative to other human rights that could be impacted. And of course the definition of severity includes not only the gravity of an impact but also the numbers of people impacted and how hard it is to put the harm right. Some impacts are clearly severe in nature. The Interpretive Guide gives the examples of impacts on the right to life and health of individuals, or impacts that fundamentally affect the welfare of entire groups or communities.⁵ Examples of the latter could be continuing restrictions on the freedom of association of an entire workforce, or serious discrimination against all members of a minority group. Both these impacts can themselves lead to additional severe impacts on human rights, for example by making it harder for the affected individuals to earn a living wage and therefore enjoy a host of other economic and social rights.
- e. **The critical role of stakeholder engagement:** Meaningful stakeholder engagement is a central element in the assessment of human rights impacts under GP 18(b). The perspectives of those who may be impacted can be particularly important in

⁵ Ibid, p 83.

shaping a company's understanding of the potential severity of impacts, since this can depend on a number of factors, including other political, social or economic constraints under which they may live. Companies also need to test and validate their assessment and prioritization of impacts with independent stakeholders who have relevant expertise and insights, rather than making these determinations on their own.

- f. **Assessing and addressing impacts is ongoing, not static:** Businesses have a responsibility to address all human rights impacts with which they are involved, not only the most severe impacts. Prioritization is not about establishing a cut-off line for issues that will be addressed. It is about sequencing: the order in which issues will be addressed in order to deal first with the most severe impacts. As the risks of the more severe impacts are mitigated, businesses should then continue to address the next most severe and so on. Of course, in practice, different parts of a company may be able to address different risks in parallel – there is nothing in the UNGPs that indicates that risks should be addressed in a formalistic way, one at a time, and indeed this would make no sense in reality. Moreover, businesses need to keep their impact assessments under review to reflect changes over time; what does not appear to be a priority today, may become one tomorrow.

3. A Possible Methodology for Prioritization at the Sector Level

The OECD Guidelines and the UNGPs define the responsibilities and expectations of individual businesses. As described above, individual businesses should be guided in their own due diligence by the criterion of severity of harm (with likelihood as a secondary consideration). However, prioritization at the individual company level may not translate neatly to sector-based approaches for prioritizing risks. Sector-based approaches to assessing and addressing ICSR risks may need to consider additional criteria beyond severity, recognizing that certain types of severe risks may be more suitable for a sector-based response. Again, to be clear, this does not mean that issues that are not included in the covenant process should not receive attention through other means – including as individual companies in the sector seek to meet their own responsibilities.

In the workshops convened by the SER, Shift introduced a possible methodology for sector-based prioritization, grounded in the OECD Guidelines and the UNGPs, as a basis for dialogue between sector associations and their stakeholders under the ICSR covenant process. The methodology reflects the central importance of severity, while recognizing other factors that may be relevant in considering sector-based approaches, and which can be extended beyond human rights to also address other ICSR risks, as set out in the OECD Guidelines.

The proposed methodology involves primary consideration of:

- (i) **Severity:** Severity of impact on affected stakeholders (or the environment) remains the driving factor, in order to ensure that ICSR covenant processes focus on those impacts that involve the greatest actual or potential harm.

The methodology then recognizes that several secondary criteria (in addition to likelihood) might be relevant as sector associations and their stakeholders consider which ICSR risks to focus on in the covenant process. These possible secondary criteria are:

- (ii) **Likelihood:** When considering a number of severe ICSR risks, in line with the approach in the OECD Guidelines and UNGPs, sector associations and their stakeholders may choose to prioritize those risks that are the most likely to occur.
- (iii) **Prevalence:** Sector associations and their stakeholders might choose to focus on those severe ICSR risks that are more prevalent – that is, that are relevant to a larger number of their individual members. In this way, more individual

businesses are likely to participate in the strategies to address the identified risks, bringing greater collective leverage to bear.

- (iv) **Limited Individual Leverage:** Sector associations and their stakeholders might choose to focus the covenant process on those severe ICSR risks where individual companies acting alone would be least likely to have sufficient leverage to address the risks effectively. If individual companies could address the risk individually, then a sector-based response would be less necessary or meaningful.
- (v) **Existing Approaches:** If there are existing industry or multi-stakeholder initiatives to address particular risks, a covenant process might choose to leverage those initiatives, for example by encouraging sector association members to take an active role in the initiatives, or to help reform or strengthen them where they are not effective. Alternatively, a covenant process might choose to focus on other areas where such initiatives do not yet exist and the covenant process could itself provide the momentum to address an issue.
- (vi) **Opportunity:** Sector associations and their stakeholders might choose to prioritize ICSR risks where the sector and its stakeholders, acting together, see an opportunity to generate sufficient leverage to have a significant effect on an impact or set of impacts.

We hope that this note is useful to the ongoing discussions among the various stakeholders involved.