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 NORTON ROSE FULBRIGHT

Key findings from our empirical research

Introduction

Our survey and interviews sought to clarify existing business practices to understand what companies are currently doing in relation to human rights due diligence, with a particular focus on the three primary elements of implementing due diligence as required in GP 17:

- Identifying actual or potential human rights impacts;
- Taking action to address these impacts; and
- Tracking or monitoring the effectiveness of these actions.

We set out below a summary of the key findings from our empirical research.

Brief overview of findings

1. Importance of using a **human rights lens**

Where companies undertake **express human rights due diligence**:

- most do so with reference to the Guiding Principles;
- actual or potential human rights issues are more likely to be detected;
- impacts linked to the activities of third parties are more likely to be identified;
- findings are more likely to be reported both internally and externally;
- the CSR function, which has a company-wide mandate, will most often have responsibility for the identification, response to and monitoring of human rights impacts often in co-operation with other functions, particularly the legal department;
- human rights experts are more likely to be engaged; and
- the effectiveness of actions taken in response to identified issues is more likely to be monitored.

Where companies do not undertake express human rights due diligence, but rather incorporate human rights issues into **other due diligence processes**:

- the exercise is more likely to result in highly regulated human rights issues, such as health and safety and labour related rights being considered, most likely in response to the prevailing legal imperatives;
- issues which are connected to unregulated or less regulated areas are unlikely to be identified or monitored at all (including the impacts of third party relationships);
- the human resources function will usually be responsible for human rights-related work, which likely correlates to focus on regulated issues highlighted above; and
- the effectiveness of the company's human rights-related actions are unlikely to be monitored.

2. There is a higher tendency to undertake **express human rights due diligence among companies which have in the past been connected to allegations of human rights impacts** or where allegations were made against businesses in the same sector, industry or context.

3. The most commonly used methods for **identifying human rights impacts** were desktop research and studies, audits, (internal or external) investigations, independent expert reports and stakeholder and supplier consultations. Grievance mechanisms seem to be under-utilised.
4. **Codes of conduct** and **contractual provisions** were the most commonly used method for preventing or addressing human rights impacts.
5. **Training** is frequently limited to non-human rights specific topics such as health and safety or other regulated areas. Given the ease with which training can be rolled out within a company which already has training sessions in place, relative to the potential preventative and comprehensive impact of training, it appears that companies are not currently capitalising on the full advantage of human rights training.
6. **Leverage** over the human rights impacts of business partners is generally perceived to be higher with suppliers and retailers or distributors, and lower with governmental entities (but in the mining sector 55% of respondents acknowledged 'some', 'reasonable' or 'significant' leverage over governmental entities).
7. **Consultations** with employees are routine in most sectors, and the same is true of consultations with local communities by extractives. Certain stakeholders may be overlooked across all sectors, e.g. product end-users or transportation providers.
8. Many companies indicated that a **collective approach** between companies assists significantly where individual company action is unlikely to result in change.
9. We identified the **following prevalent challenges**:
 - Many companies have difficulty in managing responsibility for human rights impacts caused by third parties.
 - Linked to the above, determining "how far is far enough" when engaging in **supply chain due diligence** is a common issue.
 - Information on third parties' or country-specific human rights risks may not be readily available.
 - It can be difficult to change a company's focus from risk to the business to impacts/risks to rights-holders, as required by the Guiding Principles.
10. Our research showed that, although individual companies and sectors differ, **human rights due diligence looks similar across sectors and corporate structures** which is likely the function of wide acceptance of the Guiding Principles.

Findings in further detail

1. The importance of using the human rights lens

Almost half of survey respondents had never undertaken a process which was expressly phrased as being human rights due diligence or a human rights impact assessment. Many of these had, however, conducted processes which included human rights, such as with workplace health and safety, labour rights, equality and non-discrimination, and forced labour rights in the supply chain. Few other human rights were considered by these respondents, other than some mention of indigenous or land rights.

The survey results strongly suggest that where express human rights due diligence is undertaken, human rights are more likely to be detected. Of those survey respondents which have undertaken human rights due diligence or human rights impacts, 77% indicated that they did identify actual or potential human rights impacts linked to their operations during the process. In stark contrast, only 19% of companies using non-human rights specific due diligence identified adverse impacts linked to their operations. Similarly, 74% of the express human rights group did identify adverse impacts

linked to the activities of third party business relationships, whereas only 29% of the non-human rights specific group identified these.

It would seem to be the case that, where human rights are indirectly taken into consideration through other due diligence processes, such as for labour, health and safety issues, adverse human rights impacts are significantly less likely to be identified. It also appears that existing non-human rights procedures may not be adequate for raising awareness of third party impacts.

Companies who have undertaken express human rights due diligence process

- 77% identified adverse human rights impacts linked to their operations
- 74% identified adverse impacts linked to the activities of their third parties
- 93% used human rights experts to advise on, conduct or evaluate the process.
- 74% monitor the effectiveness of actions taken related to human rights impact

Companies who have not undertaken an express human rights due diligence process

- 19% identified adverse human rights impacts linked to their operations
- 29% identified adverse impacts linked to the activities of their third parties
- 79% see human rights as included in workplace health and safety processes and 70% see human rights as incorporated in labour rights
- 33% monitor the effectiveness of actions taken related to human rights impact

In addition, of those survey respondents which **have undertaken express human rights due diligence**, 74% **monitor** or track the effectiveness of actions taken to address human rights impacts. Of the non-human rights specific group, 66% indicated that they do not do such tracking or monitoring. This indicates a correlation between undertaking human rights due diligence expressly in terms of the Guiding Principles and the prevalence of tracking or monitoring the effectiveness of any actions taken in response to identified impacts.

The reliability of these survey results was confirmed during the interviews. For example, interviewees from a few large multinational companies indicated that, before they used a human rights lens, they were confident that their various processes covered all relevant human rights impacts. However, after they undertook intensive human rights impacts assessments they realised that there were human rights impacts which they had been missing and were not covered by siloed or “piecemeal” existing processes.

2. Awareness of risks of human rights impacts

Our survey results indicate that there is a higher tendency to undertake express human rights due diligence among those companies which had in the past been connected to allegations of human rights impacts, or which have had concerns about their own risks after allegations were made of human rights impacts regarding peers in the same sector, country or context.

These findings correlate with the understanding of human rights due diligence in accordance with the Guiding Principles as a method whereby adverse impacts can be avoided. It is worth noting that of those respondents who had undertaken express human rights due diligence, 81% had conducted the process with reference to the Guiding Principles.

It may also reflect the awareness that where well-known human rights risks exists in the industry, country or contexts, a company may be held liable even for what it had not known - but ought to have known - about its own impacts. This, in turn, explains the trend identified in interviews that there seems to be a move away from the assumption that less knowledge protects against liability, towards a proactive approach of identification and prevention.

3. Identification of human rights impacts

Interviewees underscored the importance of regular human rights impact assessments for the identification of human rights impacts. Methods for identifying human rights impacts most commonly used across sectors were desktop research including media and non-governmental organisation (NGO) reports, high risk country searches, review of policies and training records, legislation, industry guidance and best practice documents, Consultations with stakeholders including employees and suppliers were used as well as audits (internal or external), investigations and independent expert reports. Audits and investigations were mostly not specifically human rights-orientated and were therefore highlighted as not in themselves sufficient to identify and address human rights impacts.

Grievance mechanisms used by survey respondents were mostly limited to whistleblowing channels, workplace complaints systems and anti-corruption and money-laundering mechanisms. The lack of grievance mechanisms available to rights-holders outside of the company suggest that this is one aspect of human rights due diligence which is currently under-utilised by companies towards the identification of their human rights impacts.

Most interviewees use risk-based methodologies which typically categorise suppliers, customers, or other third party business partners into high, medium or low risk, often through an initial questionnaire. If the questionnaire highlighted a party as medium or high risk, further questionnaires and investigations are triggered. This risk assessment process would usually not be a standalone human rights process but integrated into existing risk assessment questionnaires and processes. Interviewees also emphasised the importance of human rights impact assessments before a product or service is discontinued, a business sold or its presence reduced, or a market exited.

4. The effect of regulation

Our survey results show that human rights which are highly regulated, including health and safety and labour rights, have a higher likelihood of being considered as part of due diligence processes, most notably by companies which are not undertaking comprehensive or express human rights due diligence. This meant that many other human rights were not identified or monitored at all.

Of those survey respondents which had undertaken express human rights due diligence, 81% had conducted the process with reference to the Guiding Principles. Of the same group, 75% referred to the Universal Declaration of Human Rights and 64% to the ILO Core Conventions, both of which are instruments referred to in the Guiding Principles. In contrast, only 35% of those survey respondents who had considered human rights only as part of other processes made reference to the Guiding Principles. Instead, the instruments most often referred to in this group's due diligence processes were national legislation (42%) and the ILO Core Conventions (38%). Notably, these are the two types of legal instruments where the majority of labour and employment regulation can be found, which again corresponds with this group's indication that they predominantly considered human rights as part of employment-rights related processes.

5. Operationalisation across functions

Where companies have undertaken express human rights due diligence, the department or function most often responsible for the identification, response to and monitoring of human rights impacts is **CSR**, often together with **Legal**. In contrast, where human rights was considered as part of other non-human rights processes, the function most often responsible for identification and response is **human resources**, which corresponds with the indication that these processes are predominantly employment-rights focused. In the latter group, the function most frequently responsible for monitoring is operations management. The survey results therefore suggest that where human rights due diligence duties are located within a corporate-wide department such as CSR, in some instances linked to the legal department, this enables a human rights due diligence process which is more effective at identifying human rights impacts. Respondents and interviewees which had a cross-functional steering or working group on human rights in their company praised the ease with which

company-wide buy-in can be achieved, and the confidence they have in the resulting human rights due diligence process. These findings also identify an opportunity for a rethink of corporate governance strategy in organisations which have, to date, focused primarily on human rights indirectly on a piecemeal basis, such as through employment or health and safety related issues and therefore have relied on human resources departments. Teams with a broader remit to address human rights issues more generally could be created incorporating team members from human resources as well as operations, supply chains, external relations, compliance and risk.

A key recurring theme amongst interviewees was the need to “**operationalize**” or translate the human rights agenda for internal staff and directors who may not have a human rights background. This does not simply entail dissemination of the relevant policies and translating them into local languages, but requires reinforcing the message as to how they apply at the relevant operational level. Similarly, improved mechanisms to ensure that internal decision-making enabled relevant actions to be implemented were needed. Examples included management committees or task forces aimed at human rights or ethics, direct reporting or dotted lines to CEOs, boards or compliance and ethics committees. Reference was made to the need for board decision-making, board agenda items, board reporting and CEO and COO support, as well as specific budget allocations for human rights, including for the legal counsel.

6. Human rights expert advisers

93% of those survey respondents which had undertaken express human rights due diligence had used human rights experts (whether internal or external, including legal advisers) to advise on conduct or evaluate the process, whereas 76% of the non-human rights specific group did not use human rights experts. This suggests a strong correlation between the use of human rights experts and the identification of human rights impacts. These external parties range from lawyers, auditors, specialised consultants, NGOs and business organisations to international organisations such as UNICEF.

7. Reporting

Those companies which undertake express human rights due diligence are more likely to report their findings internally and externally than companies who consider human rights only as part of non-human rights processes. Where reporting does take place externally, 81% of overall respondents indicated that only portions of the findings were communicated. The main reason cited for partial reporting across all sectors is confidentiality. Reporting most frequently takes place in CSR reports, followed by other methods such as annual reports, standalone human rights reports, community meetings and financial reports and websites or social media.

8. Taking Steps

Our research showed that, although individual companies and sectors differ, human rights due diligence looks surprisingly similar across sectors and corporate structures. The following steps were highlighted as being the most prominent components of human rights due diligence:

- Initial identification through human rights impact assessment, desktop research or gap analysis, perhaps followed or complemented by interviews;
- Risk assessment of human rights risks, including risks to rights-holders;
- Prioritisation of human rights issues;
- Development of action plans;
- Strategic direction at the board level;
- Cross-functionality: steering groups, working groups, interaction between relevant functions;
- Integration of human rights into internal compliance mechanisms, scoring and tools;
- Translation and application of human rights to apply to each function;

- Inclusion in contractual provisions;
- Having codes of conduct and operational policies;
- Providing training; and
- Ensuring that there are effective grievance mechanisms.

These components are applied differently within each company. In some companies, compliance with human rights standards will take place centrally, at headquarters level. In other companies where operations are decentralised according to country, region, or individual business operations, compliance may be overseen at those levels instead.

9. Codes of conduct and contractual provisions

Human rights clauses were the primary method identified in the survey for preventing or addressing human rights impacts: 77% of respondents across all sectors selected contractual conditions. This figure rises to 100% in the mining and technology sectors, and 83% in the energy sector. Contractual provisions can also facilitate the other top methods for implementation, such as inspections, training, engagement with business partners, and termination of business relationships.

Codes of conduct, which generally set out the main principles of a company's ethical expectations (usually referring to more detailed and specific operational policies directed at employees and business partners) were identified as the second most important tool. Such codes are particularly useful when dealing with supply chains. They would often form part of a contractual obligation and a breach would result in a contractual remedy such as a refusal to renew a contract, termination, compensation or implementation of enforcement mechanisms.

Engagement with external parties prior to entering into the contract and during the term of the contract, including when outside the strict terms of the contract, was also considered as a valuable tool for managing third party relationships.

10. Training

Training was another prominent mechanism selected for implementation by 58% of all survey respondents. However, despite the frequent emphasis which survey respondents and interviewees placed on the importance of training, we found that few companies presently provide training specifically around human rights. Instead, training is frequently limited to non-human rights specific topics such as health and safety or other regulated areas. Given the ease with which training can be rolled out within a company which already has training sessions in place then, relative to the potential preventative and comprehensive impact of training, it appears that companies are not currently capitalising on the full advantage of human rights training.

We noted that some companies do have specific training on their human rights policies, and how these are to be implemented. These training sessions are sometimes complemented by guidelines, instructions and other materials being available internally, for example on the intranet, to provide more detailed guidance on the implementation of the policy. A few companies of those we interviewed had internal training aimed specifically at human rights education, where the questions of what human rights are, and how to identify them, were included.

11. Leverage over third party business relationships

Our survey showed that leverage over human rights impacts of third party business partners is generally perceived to be higher with suppliers and retailers or distributors, and lower with governmental entities, except in the mining sector where 55% seemed to acknowledge that at least they had some leverage over governmental entities.

Termination of a business relationship will in most instances only be considered after significant attempts were made to increase leverage through negotiation and capacity-building. Measures

which incentivise human rights compliance and prevent risks are pursued where possible.

Where these clauses are included, it is important they are utilised, in order to reinforce the message that they are binding. For example, where monitoring and inspection rights are provided for, they should be exercised. In this way, these clauses drive the obligation to monitor.

12. Stakeholder engagement

In order to obtain effective feedback towards the identification and monitoring of human rights impacts, it is essential to identify correctly the various relevant groups of stakeholders. Our Study has shown that consultations with employees are fairly routine in most sectors, presumably as a result of this being commonly required by regulation. Similarly, in certain sectors such as extractives, consultations with local communities are fairly commonplace, presumably because of the operational risks connected to community dissent. However, across all sectors certain stakeholder groups, such as end users or transportation providers, may be frequently overlooked, which in turn may result in a company missing valuable information regarding the effectiveness of its human rights due diligence. The Guiding Principles use the concept of 'stakeholders' to refer to a wide group of affected individuals. Stakeholders in this context potentially include employees and their representatives, suppliers, retailers, consumers and end users, transportation and shipping providers, local communities, indigenous communities, NGOs representing affected individuals, governmental and intergovernmental bodies, investors and shareholders, and industry bodies.

In our survey it is clear that some sectors only considered a few stakeholders. In particular, the technology sector had a very limited view of its stakeholders. This confirms a concern that 'many (though not all) ICT companies consistently undervalue [stakeholders]'.¹ Engagement with rights-holders may be particularly challenging in the ICT sector because there may be 'hundreds of millions (or even billions) of users spread across the world using diverse products, services, technologies, and applications in vastly different human rights environments'.² However, unless relevant human rights are identified in this sector, as in others, then many actual or potential human rights impacts might not be discerned. In order to be most effective, a company should pay close attention to identifying its relevant stakeholders, as well as the methods by which they can most appropriately be consulted.

13. Collective approach

In certain circumstances, human rights issues are so prominent and complex that a single company could not be expected to provide a solution through due diligence. In these cases, many companies indicated that a collective approach assists significantly where individual company action is unlikely to result in change. Companies have also highlighted the benefits of collective engagement with non-business stakeholders, including NGOs, governments and international organisations such as the ILO.

However, more than one company highlighted that collective action also has its disadvantages. It usually takes time and resources to engage with others, and often a compromised approach is required in order to achieve consensus. Accordingly, where there is urgency a company may need to consider carefully whether taking an active approach on its own would be feasible, as results may be achieved sooner, and it would have more control over the process.

14. Challenges

A few challenges of human rights due diligence were highlighted by interviewees. Many identified managing responsibility for the human rights impacts of third parties as a common issue. One interviewee referred to the failure to 'drill down far enough' into supply chains as one of the main challenges. Even though no contractual relationship exists with second tier suppliers onwards, legal and reputational risks may still arise. Many companies struggle to satisfy themselves as to 'how far is far enough' into a supply chain.

Another challenge highlighted was that in some contexts, information on third parties' or country-

specific human rights risks may not be readily available. There may be practices of withholding or hiding of information.

Many interviewees interviewed indicated that their companies either recently adapted or are currently adapting existing compliance and auditing mechanisms to include human rights risks. However, a few highlighted the challenge of changing the focus from risk to the business to impacts/risks to rights-holders, as required by the Guiding Principles. One company indicated that when risk is expressed as risk to business, it does not represent the seriousness of the issues and the severity with which they affect rights-holders.

15. Work to Do

Those interviewed were all at various stages in the components listed above in the “Taking Steps” section. Most interviewees are currently at the beginning phases of at least one or two of the components identified, and identify finalising and rolling these out as part of their main mandate for the next year or two. Most have moved further on one or two components than others. **None of those interviewed viewed themselves as having already completed all the work that they intend to do on all the components.**

¹ BSR ‘Applying the Guiding Principles on Business and Human Rights to the ICT industry, Version 2.0: Ten Lessons Learned’ (September 2012) available at http://www.bsr.org/reports/BSR_Guiding_Principles_and_ICT_2.0.pdf, 5 and 14.

² BSR and Centre for Democracy and Technology (CDT) ‘Legitimate and Meaningful, Stakeholder Engagement in Human Rights Due Diligence: Challenges and Solutions for ICT Companies’ (September 2014) available at http://www.bsr.org/reports/BSR_Rights_Holder_Engagement.pdf, 5.

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