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ECCJ reaction to the European Commission and External Action Service Staff Working Document on UNGPs implementation

ECCJ welcomes the publication of the European Commission's Staff Working Document (SWD) on the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs)¹ describing the Commission and the External Action Service's current regime relating to business and human rights².

The SWD is a technical and descriptive document that ECCJ believes could be a useful contribution to the policy debate. However, it lacks focus and a clear identification of policy priorities. ECCJ considers that the main value of the SWD is to inform the future process towards a real European strategy and action plan to implement the UNGPs – a robust process, with participation of stakeholders, which is, unfortunately, still to be initiated despite the commitment made in 2011.

We further welcome that the SWD primarily addresses Pillars 1 (State duties) and 3 (Access to remedies), the latter being neglected in past years by both the EU and its Member States. It is encouraging to see that many important issues are at least recognized through the publication of this scoping exercise.

On the other hand, ECCJ does not share the Commission's conclusion that much has already been achieved in the process of implementing UNGPs. While it is true that the EU has been one of the global frontrunners in embedding UNGPs in its policy framework, we believe that the Commission overstates the concrete effects of its actions. This includes, but is not limited to, the outcomes of its CSR strategy³.

ECCJ also disagrees with the SWD's assertion that the EU has a limited role and competences in the field, allowing it to adopt a back-seat approach and place the onus largely on Member States. Huge governance and legal gaps still remain unaddressed, preventing affected people from holding companies accountable and accessing remedies. The EU should not shy away from its competences to bridge these gaps, neither from the coordination role it can play, or the impetus for change it can place on Member States.

Regarding the content of this SWD, ECCJ recalls its position that:

- EU plans on access to judicial remedies should be further developed. The Commission needs to make a priority out of incorporating a business and human rights angle in the review of the Recommendation for collective redress (2017) and in the revision of Rome II Regulation, two issues mentioned in the SWD. In addition, the Commission must examine the harmonization of access to evidence, a major obstacle to access to justice which is not even mentioned in this paper.

¹ <http://data.consilium.europa.eu/doc/document/ST-10947-2015-INIT/en/pdf>

² The SWD aims to (1) describe the state of progress, (2) explain the existing competencies of the EU vis-à-vis Member States, (3) provide an update on various activities and (4) identify the potential gaps.

³ http://www.corporatejustice.org/IMG/pdf/ai_eccj_foee_statement_for_csr_ms_forum_-final.pdf

- The EU and its Member States must meet their duty to protect human rights by embedding corporate responsibility to respect human rights in law. ECCJ holds that there are three main areas needing immediate EU attention:
 - Reflecting on recent developments⁴, the Commission should further encourage and coordinate discussions with Member States on embedding corporate responsibility in civil/tort law. Fulfilling the moral responsibility and international law requirement to protect human rights will create a level playing field within the EU common market. The current lack of a level playing field within the EU undermines the efforts of companies that try to ensure high standards of human rights protection in their value chains.
 - The Commission should develop guidance for non-financial reporting, as required in the “Non-Financial Reporting Directive” adopted in 2014.
 - European human rights due diligence standards for business operations must be developed and enforced, especially for those situations where human rights are most at risk. The SWD correctly identifies existing unfinished work on conflict minerals and garment industry supply chains. Respecting and reporting on human rights due diligence standards must be required in these sectors, together with other risk sectors, from all companies operating in the EU market.
- The EU should set up a peer review process for EU Member States National Action Plans for implementation of the UNGPs as suggested in the SWD. Assuming active role in coordinating the debate among Member States would significantly improve the uptake of the UNGPs. In particular, it would encourage Member States to address issues they so far found difficult to tackle, such as alleviating barriers to access to justice. It would also help to identify those matters where a coordinated EU action is needed and the division of competencies needs to be thought over.
- Finally, in contrast to the SWD, future external EU actions need to take account of the Inter-Governmental Working Group established by the UN Human Rights Council to elaborate an international legally binding instrument. The EU is right to promote implementation of the UNGPs by all states. At the same time, the EU and its Member States should engage in the “UN Treaty” process and ensure it contributes to the mutually reinforcing objectives of protecting human rights in the globalized economy and building a level playing field for business worldwide.

⁴ The French Parliament is expected to adopt a new law on duty of vigilance inspired by the UNGPs. Under the new requirements, large French companies would have to implement and publish ‘due diligence plans’ prior to conducting business with companies in France and with subsidiaries, subcontractors or suppliers abroad. In case of human or environmental disaster, mother companies or subcontracting companies could be held liable if they have failed to comply with this duty of vigilance.