

ACTION COALITION ON RESPONSIBLE TECHNOLOGY ROUNDTABLE ON DUE DILIGENCE, TECH AND HUMAN RIGHTS

INTRODUCTION

On June 3rd, the Danish Institute for Human Rights hosted a roundtable with the Action Coalition on Responsible Technology on due diligence, tech and human rights, in support of the coalition's work on policy coherence in connection with regulatory developments in the ICT sector. This multi-stakeholder event brought together interested parties from several geographic regions with participation from government, public authorities, the business community, civil society and academia.

The discussion highlighted the challenges of identifying all the relevant mechanisms the EU is exploring to develop the legislative framework and institute greater oversight in the regulation of new digital technologies. Broader proposals, such as the Digital Services Act (DSA), intersect and complement sector-specific legislation in the areas of consumer protection, content moderation and preventing the dissemination of terrorist content online, adding to the complexity. Participants in the debate underscored that efforts in the policy sphere, and amongst lawmakers too, continue to strengthen the meaningful engagement of civil society actors to manage the potential and actual adverse human rights impacts stemming from the activities of technology companies. Despite this progress, several participants also highlighted how further work is necessary to improve communication between stakeholders in order to share the outcomes and results of civic participation more effectively, particularly as such endeavours are vital in assisting the development of more coherent and consistent regulation.

Reactions shared by both the members of the Action Coalition and other participants emphasized how valuable this open roundtable format proved in providing a forum encouraging direct, candid discussion from diverse perspectives. The event forms part of the coalition's workstream that contributes towards developing stakeholders' understanding of synergies and complementarities, as well as conflicts, of the various regulatory initiatives on tech connecting to the support of responsible business practices.

The roundtable examined how broader efforts to support the work of companies in response to regulatory developments are evolving and discussed how progress in company practice links to current policy initiatives to require companies to respect human rights in the ICT sector. With a total of 24 attendees engaged in the event, each of the respective presentations solicited useful insights and salient input to feed into the development of the deliverables in the work stream on policy coherence.

INSIGHTS

In an especially extensive, wide-ranging discussion, the following topics were explored:

- The challenges for lawmakers in ensuring regulatory responses anticipate and address the influence of new and emerging digital technologies, given the challenges already encountered in the tech sector where innovation continues to create novel capabilities and functionality. These developments increasingly impact a broad range of interdependent human rights in ways that can prove complex to discern and distinguish. Businesses, then, are increasingly being required to adopt a far broader and holistic perspective that necessarily considers much more complex, longer terms scenarios as they develop their digital products and services.
- The approach to performing due diligence in the tech sphere should be tailored to consider the broad gamut of end uses and scenarios that may develop and potentially impact human rights over time; given

both the inherent adaptability of digital technologies currently being created and also the changing contexts that evolve within different communities across their lifespan.

- Greater effort must be made to ensure the requisite coherency and consistency in the move to regulate business conduct. Efforts aimed at mandating a more rigorous process of review of company conduct regarding human rights must reflect the guidance provided by the UNGPs. Alignment at the national, regional and international levels are key to ensuring a logical and workable framework of regulation is achieved. Such an approach is key to developing a 'level playing field' of rights-respecting business conduct globally.

- Development of due diligence in the ICT sector must continue to focus on securing its application to effectively identify salient risks, and address their potential impact, avoiding establishing processes that may too easily be conceived of as a 'tick box' exercise.

- Investors are increasingly engaged in determining the impact of moves to enact regulations, recognising that tech companies face real, tangible risks in their business activities connected to safeguarding human rights, and appreciate the intrinsic value of due diligence to address possible regulatory and legal risks. Greater recognition of these risks has led to more candid discussion of any gaps in oversight that employees have identified in existing practice: prompting constructive discussion on further developing implementation of human rights due diligence at the company level. At the same time, investors would still like to see more transparency and have the means to better inform themselves of the risks present in tech companies' operations.

Delivering on this requirement is nonetheless made more difficult by the increasingly complex nature of many of the value chains that have developed as the tech sector grows and diversifies. In this regard, key challenges going forward consist of providing investors with concise information on salient human rights concerns, and to presenting practical and instructive case studies that can help illustrate different approaches to addressing identified risks to human rights. Notwithstanding the importance of providing these insights to inform, it is however important not to flood investors with an unmanageable deluge of documentation, but rather focus on high quality of information than quantity.

- Stakeholder engagement remains a key challenge to achieving effective participation and ensuring sufficient attention is given to discovering potential concerns and impacts on rights holders. Even where inclusion is mandated, gaps remain in the transparency of the processes operationalised to solicit input from civil society and rights holders, and in sharing the output and results of these interactions. Greater openness is needed to help foster stronger, more productive relations between the different stakeholders. More broadly, greater transparency is a prerequisite to inform the further development of an efficacious and consistent regulatory framework.

- Discussion also highlighted the challenges for businesses to develop a coherent strategy to apply due diligence practices; this is especially the case when inconsistent and disjointed approaches to constructing an overarching regulatory framework are initiated by policymakers with a short-term perspective.

- Efforts to strengthen laws that protect children online, including reinforcing greater regulatory oversight and measures to prevent the distribution of child sexual abuse material (CSAM) in the European Union, risk development of a legal framework that could potentially jeopardise the right to freedom of expression. Balancing the different needs of safeguarding interdependent human rights may be made more complex with the increasingly complex interaction of provisions across new regulations including the Digital Services Act and the GDPR.

- In particular, many questions remain as to how the DSA will effectively direct the content governance activities of tech companies. In effect, businesses must discern how to comprehensively assess their products and services in a consistent manner so as to lessen any liability risk that could otherwise result from infringements of provisions relating to the dissemination of harmful content online whilst at the same time also taking adequate steps to ensure their actions avoid over-censorship. A detailed examination must therefore include a robust and comprehensive appraisal of the practices employed to curb proscribed materials being disseminated across online platforms, whilst at the same time adequately safeguarding users of such services from the chilling effect on pluralism and of disallowing the legitimate debate of contentious issues.

- Questions persist as to how the different processes to identify, assess and mitigate human rights impacts are, in turn, to be subject to audit, thereby ensuring a consistent approach to regulatory compliance is maintained. Thus far, efforts to transpose the processes developed in other industries to the tech sector have again highlighted the difficulties of applying methods that have been refined in very different contexts and industries.

- Deliberation amongst the stakeholders also underscored the importance to develop greater transparency for the as yet opaque workings of many of the algorithms that effect decision making in complex systems, given the very often significant impact that the determinations they make can have across human rights. In this respect, further work is necessary to better explain how they are developed and articulate the processes that underpin their development, testing and deployment.

- Within Europe, various different States persist in developing legislative approaches, often articulating quite different perspectives in terms of the scope of the businesses the provisions intend to regulate, and indeed to the nature of the due diligence obligations to be applied. There exists a need therefore for further dedicated guidance for policy makers to better ensure that the regulation of digital technologies is more effectively aligned with the UNGPs. Discussion also underscored that tech-related policies and regulation must reflect the expectation that technology companies prioritise preventing and mitigating of the most salient human rights risks, while also still ensuring that the responsibility to respect rights applies to all internationally recognised human rights.¹ The presentation by the B-Tech Project also highlighted a tendency seen in some regulation to apply an inconsistent use of human rights due diligence terminology, which results in a vast interpretative scope of the actions required by companies in the technology space. In addition, it was also noted that certain regulatory efforts had applied too narrow a scope as regards a focus on specific tiers in the value chain, neglecting the fact that in a digital ecosystem harms can manifestly cascade up or down the value chain of a business. The presentation by the B-Tech Project highlighted their work on reviewing the suitability of provisions made with recent regulation with respect to providing robust enforcement and support mechanisms, which can serve to facilitate maintaining a level-playing field of good corporate practice in the technology sector regarding human rights protection. Also discussed was the UNGPs' focus on addressing and taking action on risks to people or rights holders stemming from, or being linked to, business activities. It was noted that the guidance of the UNGPs articulates a requirement that regulatory provisions regarding business conduct specifically designed for the technology sector must correspond to the dynamic and evolving nature of developments in the deployment of technologies, thus necessitating a process-oriented approach. Further discussion also highlighted the need for stronger commitment by policy makers to better ensure that stakeholder

¹ See further: Geneva Academy & OHCHR B-Tech Project, Research Brief, Regulating business conduct in the technology sector: gaps and ways forward in applying the UNGPs, April 2022, Available at: <https://www.geneva-academy.ch/joomlatools-files/docman-files/Regulating%20business%20conduct%20in%20the.pdf>

engagement channels are open, accessible and inclusive to genuinely provide a means of participation for affected rights holders and groups. Gaps in legislative provisions covering tech regulation have also been discovered with respect to a lack of precision on how affected stakeholders can seek access to remedies, and to having their grievances effectively addressed. Furthermore, much of the work to establish further legislation on due diligence requirements has accentuated the trend towards divergence in specific disclosure requirements. In addition, these individual efforts to strengthen oversight continue also to highlight a lack of consensus on the need to integrate a procedural mechanism for compliance, and how both enforcement and access to remedy are to be administered consistently across different jurisdictions. A key concern here, therefore, is also the consideration that the various pieces of legislation, either in effect or currently being developed, articulate quite dissimilar approaches in their scope of application as regards the size of business to which they apply.

- Recent efforts by particular States has also further underscored the possibility that businesses may face quite different obligations in respect of the scope of the requirements they must comply with, depending upon the jurisdiction and legislative provisions. A holistic and coordinated approach is imperative. Potentially most challenging are the divergences in the scope of application of due diligence, given that current and prospective legislation mandates, in certain cases, a more limited scope of review extending to a company's own operations and immediate business relationships, whilst in other instances the reach of due diligence is extended deeper across the whole value chain. Similarly, reporting and disclosure requirements also evidence a considerable degree of deviation; dialogue between stakeholders will need to clarify concerns and address these gaps.

- One approach that may be adopted within a company is to create a core team that is charged with broadly overseeing all activities that concern the businesses that seek to identify and address human rights concerns across the value chain, to better ensure a consistent and comprehensive approach is maintained. This approach can also assist in developing management systems that contribute toward the performance of due diligence within the company, and to ensuring expertise is better shared across the organisation.

- Going forward, States may therefore need further encouragement to consider how best they can coordinate efforts so as to better develop a consistent regulatory environment at the domestic, regional and international level based on a 'smart mix' of complimentary legislative measures and initiatives to encourage good practice. Similarly, States' monitoring of activities and enforcement also requires consistent application so that States can develop an enabling environment that supports businesses in their compliance activities and with their adherence to the framework of regulations in place.

Businesses also need appreciate that, given their responsibilities, their approach must manifest a meaningful commitment to identifying any salient risks to human rights their activities present, and to mitigate and circumvent their realisation: as opposed to diminishing the conduct of assessing risk to human rights as a reductive 'tick box' exercise. Stakeholder engagement is therefore a key element to ensuring that comprehensive due diligence that addresses all those potentially impacted.

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KEY POINTS/TAKEAWAYS

1. Businesses now need to adopt a far broader perspective, longer term perspective on identifying and mitigating the potential risks to human rights that stem from their activities. As such, companies should

consider more complex and evolving scenarios in the use of digital technologies as they develop and implement products and services across different markets.

2. The transfer of established methodologies developed in the practice of compliance within other industry sectors may struggle to address distinct, yet often less visible or tangible, human rights impacts in the domain of digital technologies. Such short-sighted and expedient approaches may lead to an incoherent and disjointed approach inhibiting more rigorous, exhaustive appraisals of prospective risks.

3. Businesses in the ICT sphere should continue to develop and promote the uptake of more effective mechanisms to engage with stakeholders in civil society, making use of active participation to identify salient risks through constructive dialogue. Greater transparency is required in communicating the results of stakeholder engagement by all parties to enable more consistent oversight of the various activities engaged in, thereby facilitating the ongoing review and evaluation of decisions taken. This approach can help counter the risk of reverting to a 'tick box' exercise.

4. Joint efforts, by all stakeholders, to ensure the requisite coherency and consistency in the move to regulate business conduct and mandate greater compliance by companies with the UNGPs must be prioritised. Ensuring the requisite alignment at domestic, regional and international levels is key to securing a logical, workable and effective framework of regulation globally.

5. Efforts at developing more effective policy coherence can also draw from work being conducted on digital ecosystem mapping; this activity can serve to facilitate a more thorough approach to stakeholder engagement as a key integral feature of enterprises' efforts to proactively manage potential and actual adverse human rights impacts as they conduct their business.