Dundee Law School
University of Dundee

CEECA Summer Academy

Corporate responsibility to respect human rights and due diligence

22 September 2022

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This session looks at:

1. Legal foundations of corporations' responsibility to respect human rights
2. The concept, scope and content of the 'corporate responsibilty to respect human rights' under the UN Framework and UNGPs specifically
3. Corporate human rights due diligence: concept and practice
4. Corporate Human Rights Impact Assessment (HRIA)

In this session, you should gain knowledge and understanding of:

1. Legal basis of expectations of corporate respect for human rights
2. Main dimensions of 'corporate responsibility to respect human rights' under the UN Framework and UNGPs, such as scope, content and leverage
3. How companies are expected to operationalise their 'responsibility to respect human rights' via 'human rights due diligence' processes

Questions

Corporate responsibility to respect human rights

Corporate responsibility to respect human rights: normative basis

- General rule: human rights instruments recognise only states as duty-bearers, and not private actors, such as businesses.

- IHRL does not impose **direct** obligations on corporate actors, with limited exceptions (COE Handbook, S.2.1)

- Businesses generally do not have human rights obligations that are enforceable via IHRL mechanisms

Corporate responsibility to respect human rights: normative basis?

- UDHR (1948), Preamble
- UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, UNGA 53/144, 9 Dec 1998
- Prohibition on destruction of human rights by nonstate Actors: Art 30 UDHR, Art 17 ECHR
- IHL, ICL – certain provisions may apply to business (COE Handbook, p70)
- State duty to protect against abuses by NSAs, principles of effectiveness, against impunity, effective remedy etc.

[Corporate responsibility to respect HR in the UN Framework (2008), UN Doc. A/HRC/8/5 (7 April 2008), paras. 51-81]

- No new legal obligations for states or corporations – based on explicit and implicit content of existing IHRL norms

Rationale

- Business enterprises “organs of society” specialised to perform “economic functions”
- Businesses cannot have identical HR obligations as governments given different constitutional and legal status, resources and competences (UNHRC 2008: 16)
- Diversity of businesses e.g. size, industry sector, corporate structure, location
- Businesses can potentially affect any HR, not just a limited sub-set defined in advance

Note

- Responsibilities of companies: comply with legislation and ‘respect’ HR by ‘doing no harm’
- Governments define scope of compliance; scope of responsibility to respect defined by ‘social expectations’ as part of ‘social licence to operate’
- No off-sets
- Responsibility to respect is operationalised through HR due diligence

FOUNDATIONAL PRINCIPLES UNGPS 11-15

- DEFINITION, SCOPE AND EXTENT OF CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHT

UNGP 11: Businesses should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved

- All states
- No offsets
- Independent of state duty and legislation

UNGP 12: Scope: all internationally-recognised human rights at minimum intenational Bill of Rights + ILO Core Labour Standards

UNGP 13:

a) Avoid causing or contributing to adverse impacts through own activities and address when they occur
b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

FOUNDATIONAL PRINCIPLES UNGPS 11-15

- DEFINITION, SCOPE AND EXTENT OF CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHT

UNGP 14: All business enterprises: all sizes, domestic and transnational, all sectors

- Proportionality of corporate efforts to company characteristics
- Severity of impacts depend on scale, scope and irremediable character

UNGP 15: Policies and processes required to fulfil corporate responsibility to respect human rights

a) Policy commitment

b) Human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;

(c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

Alignment of international and regional standards

Human rights bodies

- Committee of the Rights of the Child, General comment No. 16 (2013)
- Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017)

Regional human rights bodies

- Council of Europe, Recommendation CM/Rec(2016)3

Other international frameworks

- ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (ILO 2017: paragraph 10)
- OECD Guidelines for Multinational Enterprises (OECD 2011: Ch. IV);
- UN Global Compact's Ten Principles (UNGC 2000)

European Union frameworks

- Draft corporate human rights and environmental due diligence Directive

Reflective exercise:

Do you agree with the approach taken by the SRSG to defining the corporate responsibility to respect human rights?

What might be, in legal, policy and diplomatic terms, the advantages and disadvantages of:

a) Avoiding direct corporate human rights obligations?

b) Focusing on the context-specificity and proportionality of means required to implement the corporate responsibility to respect?

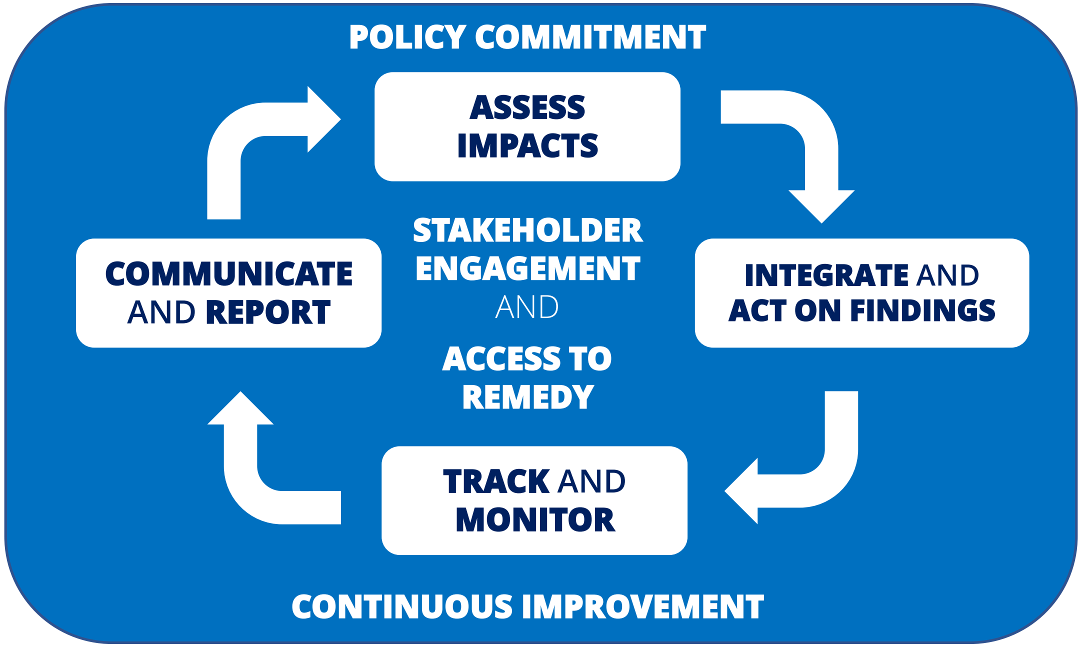
Corporate human rights due diligence

Operational Principles (UNGPs 16-24)

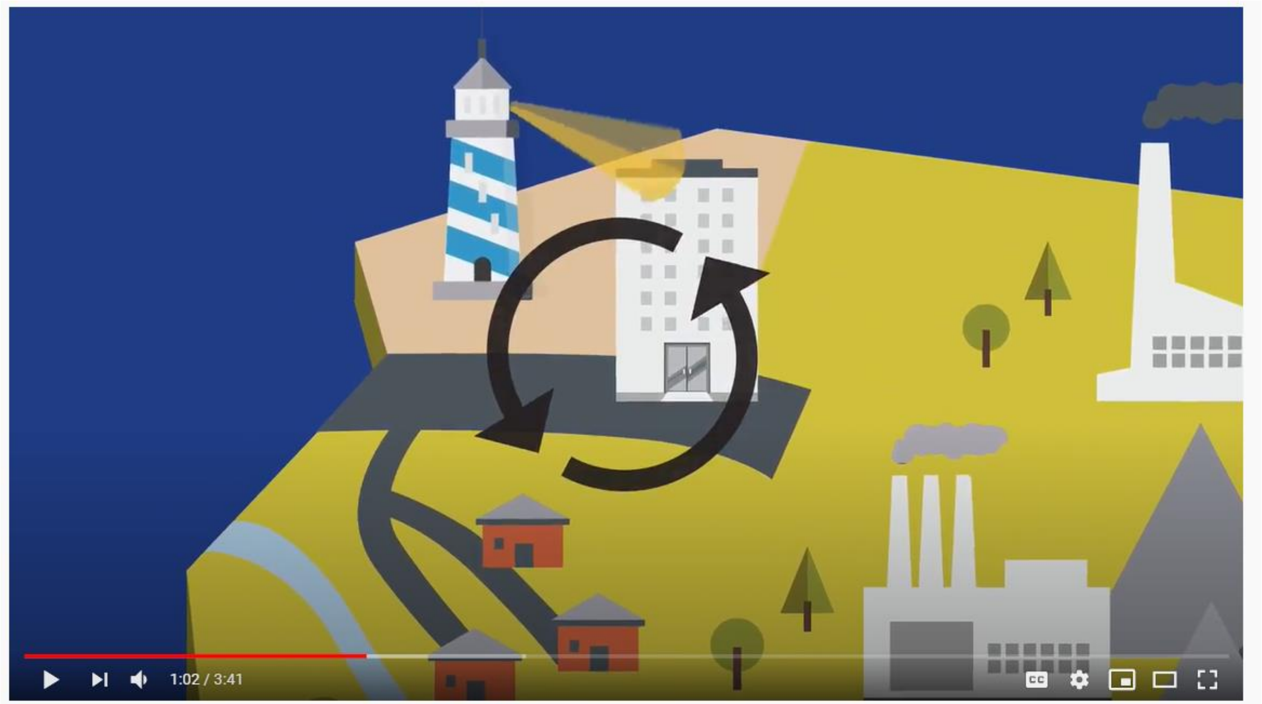
Policies and procedures for implementing human rights due diligence

- UNGP 16: Policy commitment
- UNGP 17: Human rights due diligence
- UNGP 18: Human right impact assessment
- UNGP 19: Integrating finding into corporate policies and practice
- UNGP 20: Monitoring impacts on human rights
- UNGP 21: Communication of results externally
- UNGP 22: Corporate remediation of adverse impacts
- UNGP 23: Contextual approach
- UNGP 24: Prioritisation on basis of severity, irremediability

Human rights due diligence



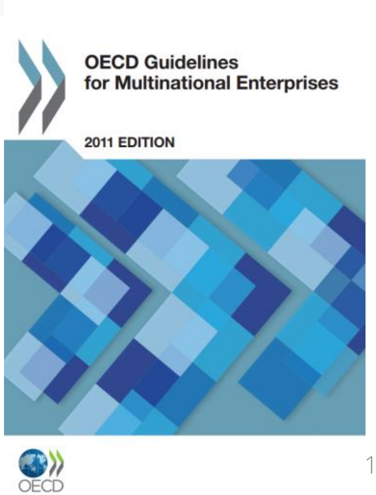
Further guidance material on due diligence



Due Diligence - Business and Human Rights

[OECD Guidelines for MNEs (2011)]

- [Office of the High Commissioner on Human Rights (OHCHR) webpage on due diligence]
- [OHCHR note on mandatory due diligence]



HUMAN RIGHTS DUE DILIGENCE

17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

    (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

    (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

    (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

Step 1: Policy Commitment (UNGP 16)

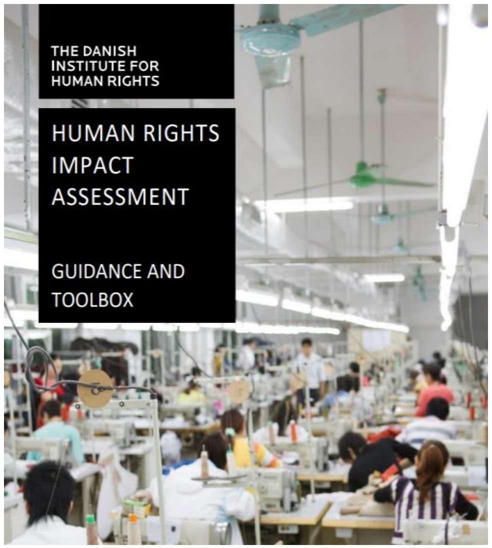
The company recognises human rights, and commits to upholding the corporate responsibility to respect

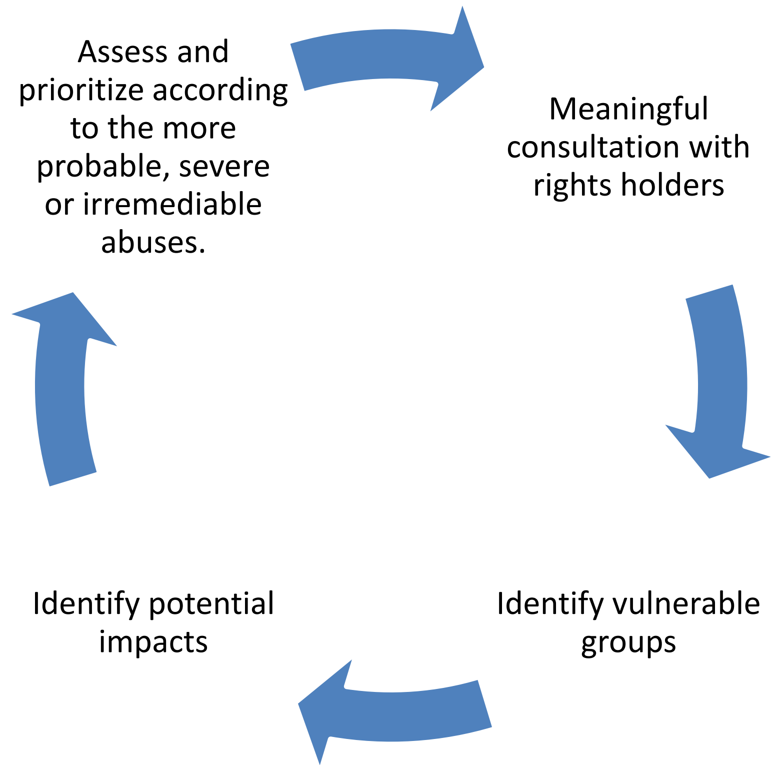
- Approved at the most senior level
- Informed by internal or external expertise
- Define expectations of personnel, business partners and other parties linked to its operations;
- Publicly available and communicated to all staff, business partners and other relevant parties
- Reflected in the policies and procedures necessary to embed it throughout the business

Business & Human Rights
Resource Centre

Step 2: Impact Assessment (UNGP 18)

Identify and assess any actual or potential adverse human rights impacts the company is involved with





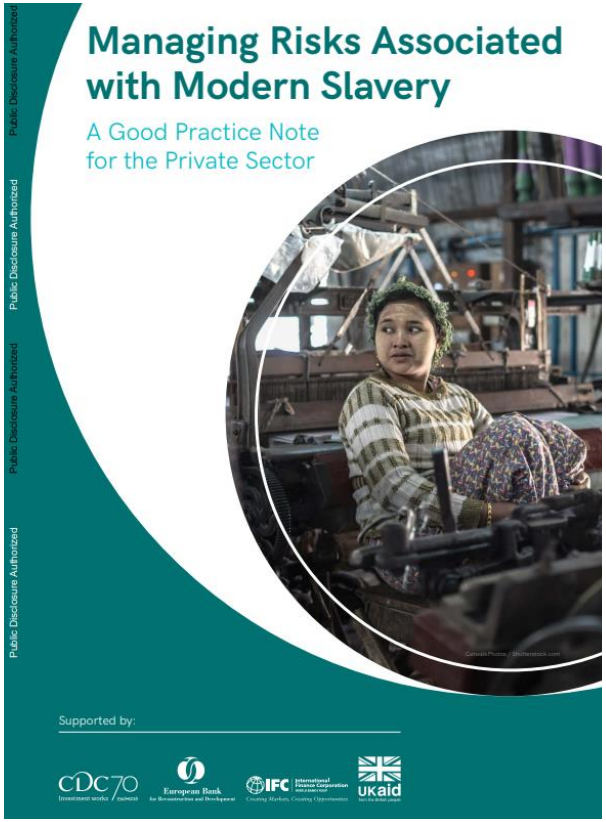
Case studies

Examples and dilemmas from the field, as explained by impact assessment practitioners.

Step 3: Integrate into Company Procedures (UNGP 19)

- Prevent or mitigate potential impacts
- Remediate actual impacts
- Consider business relationships
- Embed into all relevant business functions
- Reflect findings in internal decision-making, budget allocations and policies and procedures
- Human rights management system should be backed up by policies, procedures and training

Cf. [draft EC Directive on MHREDD]



Step 4: Monitor Implementation (UNGP20)

To ensure that human rights impacts are being addressed, track effectiveness of company response

- Base tracking on qualitative and quantitative indicators
- Draw on feedback from internal and external sources, including affected stakeholders and grievance mechanisms
- Continuous improvement
- Integrate tracking into relevant internal reporting processes.

Human rights indicators for business

Step 5: Communicate Human Rights Impact (UNGP 21)

Businesses whose operations pose risks of severe human rights impacts should report formally on how they address them

- Meetings, online dialogues, multi-stakeholder forums, public reports, integrated reporting
- Reports should be accessible to the intended audience, including affected stakeholders
- Provide enough information to evaluate the adequacy of responses to particular human rights challenges
- Should include the company's methods for identifying human rights impacts and vulnerable groups

EU sustainability reporting standards

The Commission's proposal for a Corporate Sustainability Reporting Directive (CSRD)Search for available translations of the preceding linkEN●●● envisages the adoption of EU sustainability reporting standards. The draft standards would be developed by the European Financial Reporting Advisory Group (EFRAG).

The standards will be tailored to EU policies, while building on and contributing to international standardisation initiatives.

The first set of standards would be adopted by October 2022.

•See the EFRAG reports on development of EU sustainability reporting standardsSearch for available translations of the preceding linkEN●●●

Step 6: Remediate Human Rights Impacts (UNGP 22)

If the company has caused or contributed to adverse impacts, it should provide for or cooperate in their remediation

Remediation can take many forms e.g. apology, compensation (financial or other), cessation of a particular activity or relationship

Company Grievance Mechanisms

- Whistleblower policies, complaint processes, hotline, worker comittees, customer services department
- Should be open to external stakeholders
- Should never undermine or substitute other legitimate processes like the role of legitimate trade unions or other judicial or non-judicial grievance mechanisms.

	Causes an impact	Contributes to an impact	Direct linkage
Fix	**The company itself should take** the necessary steps to **cease or prevent the impact.**	**The company itself should take** the necessary steps to **cease or prevent the impact.**	*Not applicable, since the company hasn't caused or contributed, so it is unable to take the necessary steps itself to cease or prevent.*
Influence	*Not applicable, since company is alone in its responsibility to cease, prevent and remediate.*	The company should influence others to tackle the harm. It should "**build and use** leverage to mitigate any remaining impact to the greatest extent possible".	The company should influence others to tackle the harm. It should "**build and use** leverage to mitigate any remaining impact to the greatest extent possible".
Provide Remedy	**The company itself should provide** for the remediation of impacts through legitimate processes.	**The company should cooperate with other entities** in the remediation of impacts through legitimate processes.	The company hasn't caused or contributed to the impact, so does not have a responsibility to provide or cooperate in remediation. Instead, **the company** is expected to **consider** (for salient human rights issues in particular) how to enable remedy, i.e. to enable those partners who have caused/contributed to the harm to provide remedy

Leverage: Ability of a business "to effect change in the wrongful practices of the party that is causing or contributing to [an] impact (UNGP19, Commentary)

> If unable to increase leverage, consider ending relationship
➢ If cannot end relationship, demonstrate continuing effort to mitigate

Purchasers should assess leverage with reference to:
- Degree of direct control
- Terms of purchase contract
- Proportion of total business
- Ability to incentivize supplier

Identifying Opportunities for Leverage (SHIFT 2013)

- ➢ Contract negotiation;
- ➢ Licensing agreements/renewal;
- ➢ Setting qualification criteria for bidding processes;
- ➢ Periodic reports on implementation of a service or plan of action;
- ➢ Renewal of service agreements;
- ➢ Services or products maintenance;
- ➢ Disbursement of funds;
- ➢ Monitoring/audit engagements;
- ➢ Technical or advisory assistance;
- ➢ Processes/investigations for addressing complaints.

Human rights due diligence laws

Influenced by the UNGPs, some states have recently enacted or are considering laws to require businesses to undertake and/or report publicly on corporate human rights due diligence processes.

Such laws aim to encourage companies **to internalise and institutionalise** respect for human rights within their organisations and activities.

This is important given the limited scope and resources for government authorities to monitor and enforce respect for human rights across **all aspects of business activity**, e.g. in their extraterritorial dimensions or in emerging areas of technology.

By undertaking **periodic due diligence**, whereby they **identify, assess and address** their actual or potential impacts on human rights, companies should be able to pre-empt adverse impacts on human rights through prevention and/or mitigation; as well as remedying actual or potential adverse impacts before these escalate. This may also benefit companies in terms of reducing operational, financial and reputational risks, for example.

Moreover, where governments **require companies to report publicly on due diligence**, this can help to increase transparency, accountability and access to remedy.

Under due diligence laws, where companies fail to meet procedural or substantive requirements, and this results in harmful impacts on human rights, **these failures can be linked to enforcement action, penalties or remediation**.

Corporate human rights reporting and disclosure laws

Human rights reporting and disclosure laws require businesses to **report publicly** on the **risks they pose to human rights** and **measures taken** by the company to address them.

Often human rights are included as a sub-category of broader “non-financial” risks or “sustainability” topics that laws require companies to report on.

In some cases, though, companies may be required **to report on human rights, or specific human rights risks**, such as modern slavery, by dedicated legislation.

Human Rights disclosure laws have a range of intended aims and objectives, including:

- **sensitising** companies to human rights risks and **encouraging** them to address them;
- making it easier for investors and other stakeholders to **evaluate** the impact of human rights risks for the company, its financial value and ethical performance;
- **raising profile** of human rights risks with company boards and other staff.

Indirectly, disclosure laws should also **increase respect** for human rights by businesses. They could also help victims and their advocates in seeking redress by facilitating **access to information** about company risks or measures taken to address them.

Such **issue specific** measures also give effect to the obligations of States under **other international instruments**, such as treaties relating to human trafficking, as well as general human rights obligations.

Due diligence and corporate accountability: new mechanisms

New initiatives use information extracted from companies' non-financial and human rights reports, together with other information, to **profile, evaluate and then rank** companies' performance on human rights.

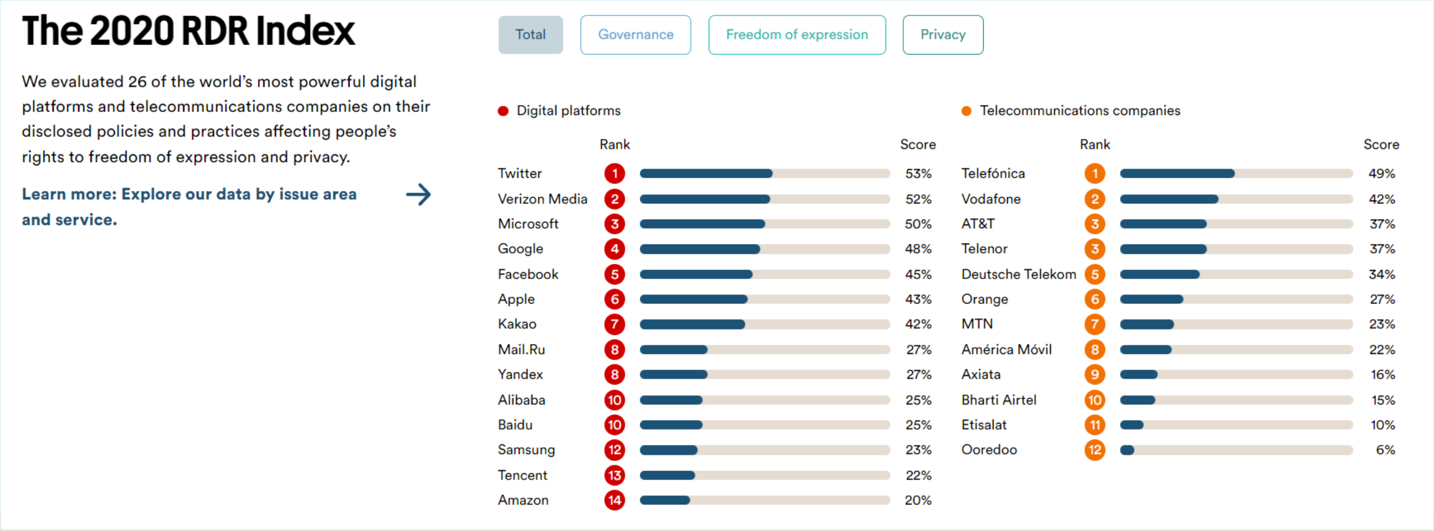
Such initiatives aim to increase transparency and to make it easier for investors, other businesses, and other stakeholders to inform their decision-making based on companies' approaches to addressing their negative human rights impacts.

In turn, such rankings may be referred to by investors in evaluating companies' share price, value and consistency with Environmental, Social, and Corporate Governance (ESG) investment policies.

Renewable Energy & Human Rights Benchmark

Ranking Digital Rights Corporate Accountability Index

Corporate Human Rights Benchmark



Trends and reflections

C Methven O'Brien, Business and human rights in Europe 2011-2021: A decade in review, *European Yearbook of Human Rights 2021.* Czech, P., Heschl, L., Lukas, K., Nowak, M. & Oberleitner, G. (eds.) Intersentia

1. Rapid evolution from soft (international) norms to hard (national, regional) laws concerning due diligence requirements for companies
2. Impacts on businesses and corporate governance: New company tasks, directors' duties functions, relations, corporate reform via (human rights) due diligence laws; remuneration;
3. 'Financialisation' of business and human rights
4. Diverse approaches to design and content of national due diligence laws
5. Horizontal versus sector-specific or thematic?
6. Enforcement and remedy

Knowledge check:

True or False

1. Human rights due diligence's primary purpose is to identify when human rights risks become business risks
2. HRDD focuses on building the company's abilty to identify where the company could adversely imapct people's human rights
3. HRDD only extends to first tier suppliers.

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