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Arms and conflict-affected areas in the Corporate Sustainable Due Diligence Directive

ISSUE SHEET

On 1 June 2023, the European Parliament agreed its compromise text for the Corporate Sustainability Due Diligence Directive (CSDDD). This agreement means that the European Parliament has formed its negotiating position for the trialogue that is now underway between the Parliament, European Commission and Council of the European Union for the co-legislators to discuss the final text of the Directive.

This issue sheet focuses on the applicability of, and implications for, the CSDDD to the arms industry and in relation to conflict-affected areas.

ARMS AND CONFLICT WITHIN A DUE DILIGENCE FRAMEWORK

Far from being a theoretical exercise, the issue of arms[1] is relevant to discussions on human rights due diligence. A recent study by Amnesty International, "Outsourcing responsibility", documents that the arms industry is currently not carrying out any due diligence related to the use of its products. This is despite the clear global consensus that companies have a responsibility to respect all human rights wherever they operate. In addition, the nature of the arms industry poses specific human rights concerns: defense companies supply large volumes of military equipment to some of the most violent and unstable parts of the world, which carries with it the inherent risk that this equipment will be used unlawfully in contexts of armed conflicts and political unrest marred by serious violations of international human rights and humanitarian law.[2]

There are numerous recent case examples highlighting the relevance of due diligence to arms and conflict-affected areas. In 2014, national security forces in the federal state of Guerrero in Mexico attacked college students from Ayotzinapa. During the police operation, seven students were killed and 43 were forcefully "disappeared" and reportedly handed over to a criminal syndicate. The whereabouts of the entire group of students remains unresolved. Between 2006 and 2009, German weapons manufacturer Heckler & Koch sold Type G36 rifles to the police in Guerrero.

1 For the purposes of this issue sheet, "arms" refers to weapons (comprising small arms, light weapons and conventional weapons), ammunition/munitions and parts and components of the above.

2 Amnesty International (2019) Outsourcing responsibility: Human rights policies in the defense sector. Available at: https://www.amnesty.org/en/documents/act30/0893/2019/en/ And see also Schlieman C. and Bryk L. (2019) Arms Trade and Corporate Responsibility. Available at: https://library.fes.de/pdf-files/iez/15850.pdf

The export authorization of the more than 4,200 assault rifles had been obtained by using intentionally inaccurate end-user certificates.[3]

Despite extensive evidence of war crimes and other violations of international humanitarian law carried out by members of the Saudi-led Coalition in Yemen since March 2015, several European companies have continued to sell arms to these actors. For example, RWM Italia (a subsidiary of German arms manufacturer Rheinmetall AG), operating under an export license, sold its products to Coalition members even when it could and should have identified the severe human rights risks associated with these sales to parties known to have carried out airstrikes targeting civilians and civilian infrastructure.[4] In March 2023 the judge for preliminary investigations in Rome held that this export license had been issued in violation of national and international arms trade regulations.[5] Other arms companies such as Airbus Defence and Space GmbH, BAE Systems Plc., Dassault Aviation S.A., Leonardo S.p.A. and Rheinmetall AG have also supplied Saudi Arabia and the UAE with weapons, ammunition and logistical support, on the basis of licenses granted by national export authorities.[6]

Beyond military equipment, dual-use items should also fall within the scope of due diligence. Surveillance software used by the Syrian government is a case in point. Syrian intelligence services, especially military intelligence, have collected information about political opponents, members of the opposition and human rights activists with this software, which has been used to perpetrate human rights violations. Numerous reports indicate that the government of Bashar al-Assad used the intercepted data to identify, arrest, interrogate and torture critics. This was made possible by software provided by German firm Utimaco and its French and Italian partner firms Qosmos SA and Area SpA.[7]

The German company FinFisher provided similar digital capacities to repressive regimes, such as Egypt, Myanmar and Turkey. Since 2015, it had sold its FinSpy product without obtaining an export license for surveillance software.[8]

In the Syrian armed conflict an extensive war economy has been established that involves nearly all the parties to the conflict. Between 2012 and 2014 the French company Lafarge and its subsidiary Lafarge Cement Syria made arrangements with Islamic State (IS) and several other armed groups to keep its Jalabiya cement factory plant open and running in northeastern Syria. As a result of providing funding to IS to keep its factory running, Lafarge was charged with financing of a terrorist enterprise, complicity in crimes against humanity and endangering the lives of its employees.[9] If Lafarge had carried out heightened due diligence, it would have identified the additional risks resulting from operating in a conflict setting, and could have developed mitigation measures in response, including an exit strategy.[10] Even though adopting such measures would not have shielded Lafarge against criminal liability after the fact, it could have provided a preventative strategy for the company.

WHAT DO THE INTERNATIONAL SOFT-LAW STANDARDS SAY?

The UN Guiding Principles (UNGPs) and the OECD Guidelines for Multinational Enterprises represent a broad international consensus on responsible business conduct that addresses human rights abuses connected to business activities. The UN Guiding Principles and the OECD Guidelines apply to all business and economic actors, irrespective of size or sector. However, the international normative framework does provide that the measures companies can take to respect human rights can be adapted to their size and sector.

ARMS AND DUAL-USE ITEMS

Within this framework, corporate responsibility exists in parallel to the state duty to protect human rights, notably because not all states are always able to fully deliver on this obligation. In particular, the licensing of arms exports by the state is one area where gaps and deficiencies have been identified. An information note published by the UN Working Group on Business and Human Rights clearly states, however, that export controls cannot replace human rights due diligence.

3 https://www.ecchr.eu/en/case/brutal-police-operation-in-mexico-responsibility-of-german-arms-manufacturer-heckler-koch/
4 https://www.ecchr.eu/en/case/european-responsibility-for-war-crimes-in-yemen/
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9 https://www.ecchr.eu/en/case/lafarge-in-syria-accusations-of-complicity-in-grave-human-rights-violations/
10 PAX and ECCHR (2023) Funding Conflict Heightened human rights due diligence in conflict-affected areas, with a case study on Lafarge and its investors. Available at: https://www.ecchr.eu/fileadmin/user_upload/PAX_ECCHR_Rapport_Lafarge_2023.pdf

Yet many arms companies use their compliance with national laws as a substitute for human rights due diligence, arguing that obtaining state approval fulfils their risk assessment responsibilities. This is in stark contrast to the idea in the UNGPs that the corporate responsibility to respect human rights exists independently of States' abilities and/or willingness to fulfil their own human rights obligations.[11] For example, the existence of a licensing regime does not have the consequence that businesses have no responsibility for the safety and foreseeable misuse of their products.[12]

HEIGHTENED DUE DILIGENCE AND INTERNATIONAL HUMANITARIAN LAW

The international standards also recognize the broader scope of due diligence in conflict-affected contexts, introducing the concept of enhanced or heightened human rights due diligence.[13] Human rights due diligence should be carried out in a way that is appropriate to and commensurate with the specific context, the saliency of the impact, the nature of the business and sector, etc. Given the specificities of corporate operations in conflict-affected areas, the international standards mention the role of enhanced due diligence. This means that companies should adopt a broader understanding of the conflict when identifying human rights risks and impacts.

This analysis should include identification of the root causes and triggers of the conflict, a mapping of the "main actors in the conflict and their motives, capacities and opportunities to inflict violence", and business' impacts upon the tensions through their operations, products and services, as well as the impact on their own staff of operating in a conflict area.[14] Additionally, active and meaningful stakeholder engagement (possibly engaging different stakeholder groups than those involved in standard due diligence) that takes into account the specific needs of vulnerable stakeholders and human rights defenders, is key. It is also important to tailor the appropriate measures to the nature of the conflict, which would necessitate the development of an exit strategy.[15]

Finally, when it comes to the human rights that companies need to respect, the international framework makes no distinction between the types of human rights, stating that businesses need to respect the whole spectrum of human rights. The standards provide a non-exhaustive starting point with the International Bill of Human Rights, but equally mention that "in situations of armed conflict enterprises should respect the standards of international humanitarian law".[16]

WHAT ARE THE POSITIONS OF THE EU INSTITUTIONS?

Although the initial proposal for the CSDDD by the European Commission differentiates between some sectors (high-impact sectors, adapted duty for the financial sector), it does not make this distinction for arms or dual-use items. In other words, the arms sector would fall within the scope of the due diligence obligation. The proposal also foresees a due diligence duty that applies to the full value chain (including downstream) of the so-called established business relationship. However, it does not include any specific provisions regarding the duty (no heightened due diligence) or the normative scope (no reference to international humanitarian law in the Annex).

For its part, the Council's general approach does single out weapons, munitions, war materials and dual-use items, by excluding export control relating to these items from the definition of "chain of activities". Furthermore, it fully excludes the use of any product or service from the due diligence duty, regardless of the sector. The Council also does not foresee an enhanced due diligence duty for conflict-affected areas, and places additional limitations on the human rights scope.

11 UN Working Group on Business and Human Rights (2022) Responsible business conduct in the arms sector: Ensuring business practice in line with the UN Guiding Principles on Business and Human Rights. Available at: https://www.ohchr.org/sites/default/files/2022-08/BHR-Arms-sector-info-note.pdf

12 The UNGPs already make reference to international criminal law when it relates to corporate activities in situations of conflict. This has been translated in a growing litigation within the field (international-) criminal law consolidating the consensus that the supply of arms may amount to aiding and abetting international crimes despite the existence of an administrative license. The Human Rights Due Diligence obligations may actually become thus a means to avoid criminal liability.

13 UN Working Group on Business and Human Rights (2020) A/75/212: Report on business, human right and conflict-affected regions: towards heightened action. Available at: https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/75/212&Lang=E See also UNDP (2022) Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide. Available at: https://www.undp.org/publications/heightened-human-rights-due-diligence-business-conflict-affected-contexts-guide

14 UN Working Group on Business and Human Rights (2020) A/75/212: Report on business, human rights and conflict-affected regions: towards heightened action. p. 10 Available at: https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/75/212&Lang=E

15 Ibid.

16 UN Guiding Principles (2012), Principle 12, Commentary.

The European Parliament's proposal includes arms and dual-use items and does not foresee any exclusions for licenced products. The Parliament also adopts a broader approach than the Council: on the one hand expanding the number of downstream services and activities that are taken into consideration, and on the other hand requiring due diligence over the business relationship itself, not merely the narrow set of services and products delivered. However, the Parliament's position is somewhat limited given that the due diligence duty only applies up to the point of sale. As a result, it is unclear whether due diligence would cover potential impacts related to end consumers' use or misuse.

The Parliament's proposal emphasises that stakeholders living in conflict-affected and high-risk areas should be classified as vulnerable stakeholders.[17] Furthermore, it imposes an additional requirement on companies operating in locations in a state of armed conflict or a fragile post-conflict situation, to conduct heightened, conflict-sensitive due diligence on their operations and business relations by integrating a conflict analysis.[18] Arguably, this element might be better integrated within the identification and assessment of risks rather than within the article that defines the structure of due diligence. Finally, in terms of normative scope, the four Geneva Conventions are included within the Annex.

Beyond the negotiating mandate for the trialogue, the European Parliament recently went even further following its investigation of the use of the Pegasus spyware. In a recommendation issued in June 2023 it called for dual-use items to be subject to strict human rights due diligence requirements and for licensing processes to be amended to require ongoing human rights due diligence.[19]

CONCLUSION

The international normative framework is clear: the corporate obligation to respect human rights applies irrespective of the sector or the type of products and services. Given the significant risks that are associated with the sale of arms and dual-use items, as well as operations in conflict-affected contexts, the soft law doctrine has paid additional attention to these issues. Firstly, by clearly establishing corporate responsibilities related to the sale of arms even in the presence of a state export license; and secondly by the specific care required of any company operating in conflict-affected areas.

The position of the European Parliament provides the most appropriate basis for the CSDDD to align with this international framework. However, there are some areas that could be improved upon. For example, by explicitly extending the due diligence duty downstream to include the use of products or services, and by integrating enhanced due diligence within the section on identifying and assessing risks and impacts.

17 Article 3

18 Article 5, paragraph 2(b) states that companies operating in areas in a state of armed conflict or fragile post-conflict have to conduct "heightened, conflict-sensitive due diligence on their operations and business relations through integrating into their due diligence, a conflict analysis based on meaningful and conflict-sensitive stakeholders' engagement, of the root causes, triggers and parties driving the conflict, and of the impact of the company's activities on the conflict".

19 European Parliament recommendation of 15 June 2023 to the Council and the Commission following the investigation of alleged contraventions and maladministration in the application of Union law in relation to the use of Pegasus and equivalent surveillance spyware (2023/2500(RSP)). Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0244_EN.html

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