

Human rights and business



**Recommendation CM/Rec(2016)3
of the Committee of Ministers
to member states**

COUNCIL OF EUROPE



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HUMAN RIGHTS AND BUSINESS

(RECOMMENDATION CM/REC(2016)3
OF THE COMMITTEE OF MINISTERS TO MEMBER STATES
ADOPTED ON 2 MARCH 2016)

Council of Europe

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Recommandation CM/Rec(2016)3
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Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business

The Committee of Ministers,

Considering that the aim of the Council of Europe is to achieve a greater unity among its member States, *inter alia* by promoting common standards and carrying out activities in the field of human rights;

Believing in economic and social progress as a means to promote the aims of the Council of Europe;

Recalling member States' obligation to secure to everyone within their jurisdiction the rights and freedoms defined in the European Convention on Human Rights (ETS No. 5) and the protocols thereto, including providing an effective remedy before a national authority for violation of those rights and freedoms, and where relevant their obligations arising from the European Social Charter (ETS No. 35), the European Social Charter (revised) (ETS No. 163) and from other European and international human rights instruments;

Reaffirming that all human rights and fundamental freedoms are universal, indivisible, interdependent and interrelated;

Recognising that business enterprises have a responsibility to respect human rights;

Considering the United Nations (UN) "Protect, Respect and Remedy" Framework, welcomed by the UN Human Rights Council on 18 June 2008, and the UN "Guiding Principles on Business and Human Rights:

Implementing the UN ‘Protect, Respect, and Remedy’ Framework”, endorsed by the UN Human Rights Council on 16 June 2011 (“the UN Guiding Principles on Business and Human Rights”);

Considering the UN Committee on the Rights of the Child’s General Comment No. 16 on State obligations regarding the impact of the business sector on children’s rights addressed in 2013 to all States that have ratified the UN Convention on the Rights of the Child;

Recalling its Declaration on the UN Guiding Principles on Business and Human Rights of 16 April 2014 and, in particular, that their effective implementation, by both States and business enterprises, is essential to ensure respect for human rights in the business context;

Stressing, through this recommendation, its commitment to contribute to the effective implementation of the UN Guiding Principles on Business and Human Rights at the European level,

Recommends that the governments of the member States:

1. review their national legislation and practice to ensure that they comply with the recommendations, principles and further guidance set out in the appendix, and evaluate the effectiveness of the measures taken at regular intervals;
2. ensure, by appropriate means and action, a wide dissemination of this recommendation among competent authorities and stakeholders, with a view to raising awareness of the corporate responsibility to respect human rights and contribute to their realisation;

3. share examples of good practices related to the implementation of this recommendation with a view to their inclusion in a shared information system, to be established and maintained by the Council of Europe, and which is to be accessible to the public, including through reference to existing information systems;
4. share plans on the national implementation of the UN Guiding Principles on Business and Human Rights (“National Action Plans”), including revised National Action Plans and best practice concerning the development and review of National Action Plans in a shared information system, to be established and maintained by the Council of Europe, which is to be accessible to the public, including through reference to existing information systems;
5. examine, within the Committee of Ministers, the implementation of this recommendation no later than five years after its adoption, with the participation of relevant stakeholders.

Appendix to Recommendation CM/Rec(2016)3

I. Implementation of the UN Guiding Principles on Business and Human Rights

a. General measures

1. Member States should effectively implement the UN Guiding Principles on Business and Human Rights as the current globally agreed baseline in the field of business and human rights, which rests on three pillars:
 - States' existing obligation to respect, protect and fulfil human rights and fundamental freedoms ("the State duty to protect human rights");
 - the role of business enterprises as specialised organs of society performing specialised functions, required to comply with all applicable laws and to respect human rights ("the corporate responsibility to respect human rights");
 - the need for rights and obligations to be matched to appropriate and effective remedies when breached ("access to remedy").
2. They should implement the UN Guiding Principles on Business and Human Rights and this recommendation in a non-discriminatory manner with due regard to gender-related risks.

3. In their implementation of the UN Guiding Principles on Business and Human Rights, member States should take into account the full spectrum of international human rights standards and ensure consistency and coherence at all levels of government. Member States which have not expressed their consent to be bound by a convention referred to in this recommendation should consider doing so.
4. Member States should give due consideration to statements, general comments, recommendations and thematic commentaries, provided by the competent monitoring bodies, relating to the human rights provisions of relevant international and regional conventions.
5. In addition to their own implementation of the UN Guiding Principles on Business and Human Rights, member States should set out clearly the expectation that all business enterprises which are domiciled or operate within their jurisdiction should likewise implement these principles throughout their operations.
6. Where necessary, member States should foster the translation and dissemination of the UN Guiding Principles, particularly in specific sectors or with regard to certain types of business enterprises where awareness is not yet sufficiently advanced, or in relation to which the risk of human rights abuses is high.
7. Member States should encourage third countries to implement the UN Guiding Principles on Business and Human Rights and other relevant international standards. They should also consider developing partnerships with or offering other forms of support to countries seeking to implement those standards.

8. Member States should offer advice and support to third countries wishing to strengthen, in line with the UN Guiding Principles on Business and Human Rights, their own judicial and non-judicial grievance mechanisms and to reduce barriers to remedies against business-related human rights abuses within their jurisdiction.
9. Member States should support the work of the UN, including the UN Working Group on Business and Human Rights, to promote the effective and comprehensive dissemination and implementation of the UN Guiding Principles on Business and Human Rights.

b. National Action Plans

10. If they have not yet done so, member States should develop and adopt plans on the national implementation of the UN Guiding Principles on Business and Human Rights (“National Action Plans”) which address all three pillars of those principles and this recommendation. They should ensure their publication and wide distribution.
11. In the process of developing such National Action Plans, member States should refer to the available guidance, including that provided by the UN Working Group on Business and Human Rights and seek the expertise and involvement of all stakeholders, including business organisations and enterprises, national human rights institutions, trade unions and non-governmental organisations.
12. With the participation of all stakeholders, member States should continuously monitor the implementation of their National Action Plans and, periodically evaluate and update them. Bearing in mind that a suitable model may vary from State to

State, member States should share their best practices concerning the development and review of National Action Plans with each other, with third countries and relevant stakeholders.

II. The State duty to protect human rights

13. Member States should:
 - apply such measures as may be necessary to require business enterprises operating within their territorial jurisdiction to respect human rights;
 - apply such measures as may be necessary to require, as appropriate, business enterprises domiciled in their jurisdiction to respect human rights throughout their operations abroad;
 - encourage and support these business enterprises by other means so that they respect human rights throughout their operations.
14. Member States should ensure that everyone within their jurisdiction may easily have access to information about existing human rights in the context of corporate responsibility in a language which they can understand.
15. Within their jurisdiction, member States have a duty to protect individuals against human rights abuses by third parties, including business enterprises. This includes their positive and procedural obligations under the European Convention on Human Rights, as applied and interpreted by the European Court of Human Rights. Such obligations consist of requirements to prevent human rights violations where the competent authori-

ties had known or ought to have known of a real risk of such violations, to undertake an independent and impartial, adequate and prompt official investigation where such violations are alleged to have occurred; to undertake an effective prosecution, and to take all appropriate measures to establish accessible and effective mechanisms which require that the victims of such violations receive prompt and adequate reparation for any harm suffered.

16. The European Social Charter, the European Social Charter (revised) and the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (ETS No. 158) are other key instruments that afford protection against business-related human rights abuses, in particular with regard to the rights of workers. Member States which have ratified these instruments accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which all the rights and principles set out in Part I of the European Social Charter (revised) may be effectively realised, and should consider increasing the number of accepted provisions.
17. In line with their international obligations, member States should ensure that their laws relating to employment are effectively implemented and require business enterprises not to discriminate against workers on any grounds, as reflected in Article 14 of the European Convention on Human Rights and interpreted by the European Court of Human Rights in its case law.
18. Member States should ensure that their legislation creates conditions that are conducive to the respect for human rights by business enterprises and do not create barriers to effective

accountability and remedy for business-related human rights abuses. They should evaluate new relevant legislation with regard to any impact on human rights.

19. Member States should pay particular attention to the rights and needs of, as well as the challenges faced by, individuals, groups or populations that may be at heightened risk of becoming vulnerable or marginalised.

III. State action to enable corporate responsibility to respect human rights

20. Member States should apply such measures as may be necessary to encourage or, where appropriate, require that:
 - business enterprises domiciled within their jurisdiction apply human rights due diligence throughout their operations;
 - business enterprises conducting substantial activities within their jurisdiction carry out human rights due diligence in respect of such activities;

including project-specific human rights impact assessments, as appropriate to the size of the business enterprise and the nature and context of the operation.

21. Member States should encourage and, where appropriate, require business enterprises referred to in paragraph 20 to display greater transparency in order to enable them to better “know and show” their corporate responsibility to respect human rights. Member States should also encourage and, where

appropriate, require such businesses to provide regularly, or as needed, information on their efforts on corporate responsibility to respect human rights.

22. Member States should apply additional measures to require business enterprises to respect human rights, including, where appropriate, by carrying out human rights due diligence, that may be integrated into existing due diligence procedures, when member States:
 - own or control business enterprises;
 - grant substantial support and deliver services through agencies, such as export credit agencies and official investment insurance or guarantee agencies, to business enterprises;
 - grant export licenses to business enterprises;
 - conduct commercial transactions with business enterprises, including through the conclusion of public procurement contracts;
 - privatise the delivery of services that may impact upon the enjoyment of human rights.

Member States should evaluate the measures taken and respond to any deficiencies, as necessary. They should provide for adequate consequences if such respect for human rights is not honoured.

23. When concluding and during the term of trade and investment agreements or other relevant conventions, member States should consider possible human rights impacts of such agree-

ments and take appropriate steps, including through the incorporation of human rights clauses, to mitigate and address identified risks of adverse human rights impacts.

24. In order not to facilitate the administration of capital punishment or torture in third countries by providing goods which could be used to carry out such acts, member States should ensure that business enterprises domiciled within their jurisdiction do not trade in goods which have no practical use other than for the purpose of capital punishment, torture, or other cruel, inhuman or degrading treatment or punishment.
25. Member States should, when business enterprises referred to in paragraph 20 are represented in a trade mission to member States and third countries, address and discuss possible adverse effects future operations might have on the human rights situation in those countries and require participating companies to respect the UN Guiding Principles or the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD).
26. Member States should advise, for example, through their competent ministries or diplomatic or consular missions, business enterprises which intend to operate or are operating in a third country on human rights issues, including challenges faced by individuals from groups or populations that may be at a heightened risk of becoming vulnerable or marginalised, and with due regard to gender-related risks.
27. Member States should be in a position to inform business enterprises referred to in paragraph 20 on the potential human rights consequences of carrying out operations in conflict-affected areas, and in other sectors or areas that involve a high risk of a negative impact on human rights, and provide assistance to

these business enterprises, in line with relevant international instruments, such as the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones or the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. Member States should facilitate business enterprises' adherence to sector-specific standards, such as the Voluntary Principles on Security and Human Rights and the International Code of Conduct for Private Security Providers. Member States should consider performing a sector-risk analysis in order to identify the sectors in which activities are most at risk of having a negative impact on human rights.

28. Where appropriate, member States should promote, support and participate in training and workshops for business enterprises and their local trading partners, including on human rights due diligence in their business activities in third countries. This should be done in co-operation with business organisations and enterprises, national human rights institutions, trade unions and non-governmental organisations.
29. Member States should offer training on business and human rights for government officials whose tasks are relevant to the issue of corporate responsibility, for example diplomatic and consular staff assigned to third countries with a sensitive human rights situation.
30. Member States should adopt effective enforcement measures with respect to human rights and business standards, and ensure that relevant regulatory bodies are engaged to this end.

IV. Access to remedy

a. Access to judicial mechanisms

31. Member States should ensure the effective implementation of their obligations under Articles 6 and 13 of the European Convention on Human Rights and other international and European human rights instruments, to grant to everyone access to a court in the determination of their civil rights, as well as to everyone whose rights have been violated under these instruments, an effective remedy before a national authority, including where such violation arises from business activity.

i. Civil liability for business-related human rights abuses

32. Member States should apply such legislative or other measures as may be necessary to ensure that human rights abuses caused by business enterprises within their jurisdiction give rise to civil liability under their respective laws.

33. Member States which have not expressed their consent to be bound by the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 (the “Lugano Convention”) should consider initiating the procedure for accession.

34. Member States should apply such legislative or other measures as may be necessary to ensure that their domestic courts have jurisdiction over civil claims concerning business-related human rights abuses against business enterprises domiciled within their jurisdiction. The doctrine of *forum non conveniens* should not be applied in these cases.

35. Member States should consider allowing their domestic courts to exercise jurisdiction over civil claims concerning business-related human rights abuses against subsidiaries, wherever they are based, of business enterprises domiciled within their jurisdiction if such claims are closely connected with civil claims against the latter enterprises.
36. Where business enterprises are not domiciled within their jurisdiction, member States should consider allowing their domestic courts to exercise jurisdiction over civil claims concerning business-related human rights abuses against such a business enterprise, if no other effective forum guaranteeing a fair trial is available (*forum necessitatis*) and there is a sufficiently close connection to the member State concerned.
37. Where a member State owns or controls a business enterprise, or contracts with a business enterprise to provide public services, each member State should apply such legislative and other measures as may be necessary to ensure that civil claims in connection with human rights abuses by such enterprises may be brought before its domestic courts, and that it will refrain from invoking any domestic privileges or immunities in such cases.
38. Member States should apply such legislative and other measures as may be necessary to ensure that civil claims concerning business-related human rights abuses against business enterprises subject to their jurisdiction are not unduly restricted by the application of doctrines such as “the act of State” or “the political question”.
39. Member States should consider adopting measures that allow entities such as foundations, associations, trade unions and other organisations to bring claims on behalf of alleged victims.

40. Member States should apply such legislative or other appropriate measures as may be necessary to ensure that their domestic courts refrain from applying a law that is incompatible with their international obligations, in particular those stemming from the applicable international human rights standards.
41. When alleged victims of business-related human rights abuses bring civil claims related to such abuses against business enterprises, member States should ensure that their legal systems sufficiently guarantee an equality of arms within the meaning of Article 6 of the European Convention on Human Rights. In particular, they should provide in their legal systems for legal aid schemes regarding claims concerning such abuses. Such legal aid should be obtainable in a manner that is practical and effective.
42. Member States should consider possible solutions for the collective determination of similar cases in respect of business-related human rights abuses.
43. Member States should consider revising their civil procedures where the applicable rules impede access to information in the possession of the defendant or a third party if such information is relevant to substantiating victims' claims of business-related human rights abuses, with due regard for confidentiality considerations.

ii. Criminal or equivalent liability for business-related human rights abuses

44. Member States should consider applying such legislative and other measures as may be necessary to ensure that business enterprises can be held liable under their criminal law or other equivalent law for the commission of:

- crimes under international law caused by business enterprises;
- offences established in accordance with treaties such as the Criminal Law Convention on Corruption (ETS No. 173), the Convention on Cybercrime (ETS No. 185), the Council of Europe Convention on Action against Human Trafficking (CETS No. 197), the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201), the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210), the UN Convention against Transnational Organised Crime of 15 November 2000, the UN Convention against Corruption of 31 October 2003, and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of 25 May 2000;
- other offences constituting serious human rights abuses involving business enterprises.

Such measures should also ensure that business enterprises can be held liable for their participation in the commission of such crimes.

45. Irrespective of whether business enterprises can be held liable under criminal or other equivalent law, member States should consider applying such legislative and other measures as may be necessary to ensure that representatives of business enterprises can be held criminally liable for the commission of crimes under international law, offences established in accordance with international agreements and other offences that would constitute serious human rights abuses involving business enterprises.

46. Irrespective of whether they are directed against natural or legal persons, investigations must satisfy the effectiveness criteria under the European Convention on Human Rights, namely that they must be adequate, thorough, impartial and independent, prompt, and contain an element of public scrutiny, including the effective participation of victims in the investigation. Member States have a duty to prosecute where warranted by the outcome of an investigation. Given that victims are entitled to request an effective official investigation, any decision not to start an investigation, or to stay an investigation or prosecution, must be sufficiently reasoned.

iii. Administrative remedies

47. Member States should apply such legislative and other measures as may be necessary to ensure that decisions of competent authorities such as those granting support, delivering services or granting export licenses to business enterprises:
 - a. take into account human rights risks, for example, on the basis of a human rights impact assessment;
 - b. are disclosed, as appropriate; and
 - c. are subject to administrative or judicial review.
48. Member States should provide for appropriate measures to address credible allegations of human rights abuses in connection with the business activities that form the basis of the decisions referred to in paragraph 47.

b. Access to non-judicial mechanisms

49. Member States should assist in raising awareness of and in facilitating access to non-judicial grievance mechanisms, and contribute to knowledge sharing of the available non-judicial grievance mechanisms.
50. Member States should provide for State-based non-judicial grievance mechanisms that meet the effectiveness criteria listed in Principle 31 of the UN Guiding Principles on Business and Human Rights and facilitate the implementation of their decisions. They should ensure that non-State-based non-judicial grievance mechanisms also meet these effectiveness criteria.
51. Member States should evaluate the adequacy and availability of State-based non-judicial mechanisms, such as labour inspectorates, consumer protection authorities, environmental agencies, national human rights institutions, ombudsperson institutions and national equality bodies, in addition to the remedies they may provide for. This could include extending the mandate of existing State-based non-judicial bodies or creating new ones with the capacity to receive and adjudicate complaints of business-related human rights abuses and afford reparation to the victims.
52. Member States which have not yet done so should take steps to adhere to and/or implement the OECD Guidelines for Multinational Enterprises. They should support the effective implementation of the Tripartite Declaration of principles concerning multinational enterprises and social policy of the International Labour Organization (ILO).

53. Those member States which have implemented the OECD Guidelines should ensure the effectiveness of their National Contact Points (NCPs) established under these guidelines, in particular by making available human and financial resources so that they can carry out their responsibilities; ensuring that the NCPs are visible, accessible, transparent, accountable and impartial; promoting dialogue-based approaches; considering whether to make public the recommendations of NCPs; and ensuring that such recommendations are taken into account by governmental authorities in their decisions on public procurement, export credits or investment guarantees.
54. Member States should encourage business enterprises referred to in paragraph 20 to establish their own grievance mechanisms in line with the effectiveness criteria in Principle 31 of the UN Guiding Principles. Where such mechanisms are put in place, it should be ensured that they are not used to impede the alleged victim's access to the regular court system or State-based non-judicial mechanisms.

c. General measures

55. In order to improve access to remedies for victims of business-related human rights abuses, member States should fulfil their obligations of judicial co-operation with each other or with third countries, including criminal investigations, mutual legal assistance, exchange of information and data, collection of evidence and the recognition and enforcement of judgments, in a manner consistent with the human rights of all parties involved in the proceedings. To this end, member States are encouraged to intensify their co-operation, with each other, with third countries and with non-State-based non-judicial grievance mecha-

nisms, beyond their existing obligations. Moreover, member States should undertake more efforts to support each other through technical co-operation and the exchange of experience.

56. Member States should provide for sufficient resources and consider developing special guidance and training for judges, prosecutors, inspectors, arbitrators and mediators to deal with business-related human rights abuses, in particular those which have a transnational component.
57. Alleged victims of business-related human rights abuses within the territorial jurisdiction of member States should have general access to information about the content of the respective human rights and about existing judicial and non-judicial remedies in a language which they can understand.

V. Additional protection of workers

58. Member States should require business enterprises to respect the rights of workers when operating within their territorial jurisdiction and, as appropriate, throughout their operations abroad when domiciled in their jurisdiction.
59. Member States should reinforce efforts to meet their obligations with regard to workers under the UN Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, the European Social Charter, the European Social Charter (revised) and the fundamental conventions of the International Labour Organization concerning in particular freedom of association, the right to collective bargaining, the prohibition of discrimination, child and forced labour, and all other relevant international instruments, including those relating to the health and safety of workers and people working in the informal economy.

60. Member States should involve social partners in the drafting and implementation of policies on matters which are particularly sensitive with regard to workers' rights.

VI. Additional protection of children

61. Member States should require that business enterprises respect the rights of children when operating within their territorial jurisdiction and, as appropriate, throughout their operations abroad when domiciled in their jurisdiction.
62. When implementing the UN Convention on the Rights of the Child of 20 November 1989 and its optional protocols, member States should give due consideration to General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights adopted by the United Nations Committee on the Rights of the Child. Member States should also reinforce efforts to meet their obligations with regard to children under the European Convention on Human Rights, the European Social Charter (revised), the conventions of the International Labour Organization concerning child labour, and other relevant international instruments, and give consideration to the Children's Rights and Business Principles developed by UNICEF, the UN Global Compact and Save the Children.
63. Member States should involve all relevant stakeholders in the elaboration and implementation of policies on matters which are particularly sensitive with regard to children's rights, such as measures provided for by the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.
64. Recognising that children often lack access to relevant information and face particular difficulties in exercising their right to be heard, member States should, in particular:

- a. encourage or, where appropriate, require that business enterprises specifically consider the rights of the child when carrying out human rights due diligence;
- b. implement measures to remove social, economic and juridical barriers so that children can have access to effective judicial and State-based non-judicial mechanisms without discrimination of any kind, in accordance with the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice;
- c. specifically consider the rights of children in their National Action Plans.

VII. Additional protection of indigenous peoples

65. Member States should require that business enterprises respect the rights of indigenous peoples, in accordance with international standards, when operating within their territorial jurisdiction and, as appropriate, throughout their operations abroad when domiciled in their jurisdiction.
66. Member States should reinforce efforts to meet their commitments with regard to business and the rights of indigenous peoples under the UN Declaration on the Rights of Indigenous Peoples of 13 September 2007, the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries of 27 June 1989, and any other international instrument that protects the rights and culture of indigenous peoples.
67. Member States should apply such legislative and other measures as may be necessary to encourage or, where appropriate, require business enterprises domiciled within their jurisdiction to:

- a. respect the rights and interests of indigenous peoples; and
- b. consult and co-operate in good faith in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.

With regard to business enterprises conducting substantial activities within their jurisdiction, member States should apply such measures in respect of those activities.

68. Member States should pay special attention to the rights of indigenous peoples in their National Action Plans.

VIII. Protection of human rights defenders

69. Member States should ensure that the activities of human rights defenders within their jurisdiction who focus on the adverse effects of business-related activities on human rights are not obstructed, for example through political pressure, harassment, politically motivated or economic compulsion. In particular, the fundamental rights enjoyed by human rights defenders in accordance with Articles 10 and 11 of the European Convention on Human Rights must be protected.
70. Member States should protect and also support, for example through their diplomatic and consular missions, the work of human rights defenders who focus on business-related impacts on human rights in third countries, in accordance with existing international and European standards.

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