The commentary is a product of the UN Human Rights B-Tech Project and is part of a series focused on the intersection between human rights and the responsibilities of technology technology companies

The Feasibility of Mandating Downstream Human Rights Due Diligence: Reflections from technology company practices.

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In a recent statement, UN Human Rights raised concern about the possibility that the EU *Corporate Sustainability Due Diligence Directive* (CS3D) will exclude downstream[1] impacts on people. This proposal would mean that companies would be required to conduct human rights due diligence (HRDD) only in relation to their own operations and supply chains.

As the UN Human Rights statement explains, excluding downstream HRDD would run counter to both the spirit and letter of the UNGPs, as well as to the stated policy objectives driving this landmark initiative. This UN B-tech project commentary reinforces an additional conclusion in that statement that "**[c]ompanies are already demonstrating that it is important and feasible to implement downstream human rights due diligence. A law that excludes such activities lags behind the status quo of corporate conduct**".

I. DOWNSTREAM HRDD IN TECH: THE "ART OF THE POSSIBLE"

Since 2019, the B-Tech project has been working to advance the implementation of the *UN Guiding Principles on Business and Human Rights* (UNGPs) in the technology sector with a focus on **how to address end-use impacts on human rights** including but far beyond privacy and freedom of expression.

Extensive interaction with States, digital rights NGOs, and in particular companies from different sub-sectors of the technology industry, has demonstrated a body of emerging practice – summarised below – that signal how much downstream HRDD is within the realm of the possible, even if not yet perfected. The following examples of company practices are for illustration only and do not convey an endorsement of the human rights performance of the named companies. B-Tech continues to engage companies and other stakeholders to spotlight approaches that need to be improved.

[1] "Downstream" refers to the part of the value chain that involves the production, sale/licensing and distribution of goods and services.

Growing downstream-oriented policy commitments and increasing investment in embedding those commitments. For some time, telecommunications companies – such Ericsson, Vodafone, Telenor, and BT – have had in place **human rights policies that signal a commitment to address end-use human rights risks**. In recent years, similar public commitments have been made by high-profile technology companies including Microsoft, Apple, Meta, and Google. Equally important, many companies in other parts of the tech eco-system such as web hosting, artificial intelligence, IT infrastructure, cyber security, cloud services, and software companies, have been doing the same. Examples include Hewlett Packard Enterprise (HPE), Salesforce, and Cloudflare.

These same companies and their peers have been **increasing leadership attention and internal capacity to embed this commitment** to address downstream risks to people. For example, companies have developed governance oversight and cross-functional committees comprised of executives and senior managers such as Cisco's Human Rights Advisory Committee. In addition, many companies now have in place individual human rights leads and teams tasked with working on and rolling out internal guidance and training for colleagues to embed human rights risk awareness and accountability with **product counsels, engineering, responsible innovation, and export control.**

Identifying and assessing downstream risks to human rights including via engagement with stakeholders. Technology companies' company-wide **saliency analyses are consistently spotlighting the need for deeper end-use due diligence**. By way of illustration, IBM, Meta, Telefonica, and Microsoft have all published their conclusions from such analyses. The issues they have prioritized included: **Product and Research Misuse; Discrimination via Product Design; Freedom of Expression; Right to Privacy; Online and Digital Safety; Network Deployment** and **Risk related to Artificial Intelligence.** Many companies also disclose their overall approach to conducting human rights due diligence and human rights impact assessments across a number of topics. See, for example Verizon.

In addition, **technology companies have begun to conduct human rights assessments related to specific aspects of their product and service portfolio, and to significant business transactions and decisions.** There is certainly room for improvement in the processes used to implement these types of assessments, not least by deepening engagement with expert and affected stakeholders to establish mitigations and tackle dilemmas. But action in the right direction has begun. Some assessments – in full or in summary form – have been made public, for example: Ericsson's 5G Human Rights Assessment, Google's Celebrity Recognition API Human Rights Assessment, and Meta's End-to-End Encryption Assessment. The B-Tech Project is also aware of other assessments such as those covering market entry or geo-expansion prospects, and changes to product/service functionality.

Engaging affected stakeholders and other key voices as part of human rights due diligence is also on the rise in the technology industry. There is a long way to go in improving these practices, in particular to avoid fleeting requests for inputs around standalone impact assessments[2]. A positive approach is Twitter's Trust and Safety council, "a group of independent expert organizations from around the world that together advocate for safety and advise Twitter as the company develops products, programs, and rules". The Council is made up of several advisory groups, each dedicated to specific issues including **Online Safety**

[2] B-Tech will release a short report in the final months of 2022 that identifies pathways for improved stakeholder engagement by tech companies as part of their downstream / end-use HRDD.

and Harassment, Human and Digital Rights, Suicide Prevention and Mental Health, Child Sexual Exploitation, and **Dehumanization.**

Addressing human rights risks in design, development, and sales process...and applying leverage with customers and other key actors. Technology companies have started to embed **human rights risk identification, mitigations and tracking into the conceptualization, design, development/testing, marketing and sales of products, services, and solutions**. Such efforts, some more mature than others, are consistent with the UNGPs and intend to tackle both: a) a company's own practices, decisions and actions that may be at the root of causing or indeed mitigating downstream risks; and b) the conduct and behaviour of actors through the downstream value chain.

This can include **triggering considerations at key decision-points in the conceptualization, design and approval of products, services, and solutions**. This often involves human rights leads working with "product counsels" or equivalent leaders in product teams to support them in identifying human rights risks and putting in place technical mitigations. An example of such work is Salesforce's Office of Ethical and Humane Use, which sits within its product organisation and has achieved changes such as "elevating inclusive product language, building privacy safeguards for vaccine management solutions and launching mechanisms to flag potential bias in data for customers".

Adapting sales processes to include human rights risk reviews and implementing contractual, technical, and other mitigations is a prevalent practice among many technology companies. One example is Ericsson's Sensitive Business Process, about which the company notes on its website "when risks are identified in a sales opportunity, each case is evaluated according to the sensitive business risk methodology and may be approved, approved with conditions, or rejected. Conditional approvals include technical and/or contractual mitigations, and its implementation is monitored to ensure adherence". A similar approach is taken by HPE. The company **screens sales transactions that have a high risk of irresponsible use, and where necessary** works "with the business to avoid or mitigate transactions with risk of potential misuse, which can be through blocking sales, establishing contractual requirements, limiting use, training service engineers and sales staff to spot red flags, and ongoing monitoring of use". The company reports publicly on the number of these assessment carried out each year. It conducted 24 in 2020 and 41 in 2021. HPE has also been identifying, with the support of BSR, good practices and opportunities to advance due diligence by actors across the sales channel including distributors and resellers.

Technology companies also have to respond to public and investor demands to **conduct technical assessments of their technologies and business relationships in certain customer segments**. A high-profile example of this is Microsoft commissioning a human rights assessment of the company's products and services and business relationships with regards to law enforcement, immigration, and other government contracts. As Microsoft notes "In advance of the Microsoft Annual Shareholder Meeting on November 30, we received a request to explore how Microsoft products licensed to public sector entities are experienced by third parties, especially Black, Indigenous and People of Colour (BIPOC) and other vulnerable communities. We agree this is a question that warrants greater attention and are contracting an independent third-party to help us identify, understand, assess, and address actual or potential human rights impacts of our products and services. In conducting investigations like this, we are guided by the UN Guiding Principles on Business and Human Rights"

Increasing collaboration, transparency and public policy advocacy as a form of leverage. Just as an ever-growing number of companies in the apparel, electronics, food and beverage and other industries are applying creative forms of leverage to address complex and systemic human rights issues, some technologies are doing the same. The pioneering and foremost example of this is the multi-stakeholder Global Network Initiative, a non-governmental organization with the dual goals of preventing internet censorship by authoritarian governments and protecting the Internet privacy rights of individuals.

The B-Tech Project is also aware that some technology companies regularly communicate and collaborate with civil society organisations about the ways in which technologies can be abused by third parties. The aim of such efforts is usually to **offer insight for use by human rights defenders, advocacy organisations working on legal protections and even those engaged in public interest litigation**.

Finally, some technology executives have been public about the need for, and actively engaged in the development of, regulation concerning certain high-risk technologies. This has been most prevalent with regards to surveillance technologies more widely. For example, as far back as 2018, Microsoft's President Brad Smith spoke out about the need for the regulation of facial recognition technologies.

II. IS MANDATING DOWNSTREAM HRDD FEASIBLE?

Yes. Downstream HRDD is not only possible, it is already happening. While there is a long journey ahead to determine and improve the efficacy of the types of policies, systems and practices summarized above, work is already underway to implement downstream HRDD consistent with the expectations reflected in the UNGPs.

Moreover, a small step back from the details of the emerging practices in the technology sector reveals **a landscape of very similar tools, techniques and tactics that States are already regulating in supply chain contexts such as: policy commitments, saliency analyses, targeted impact assessments, integrating human rights considerations into relevant controls and systems, establishing and using leverage with third parties before and after business transactions, industry collaboration, and being transparent about progress and challenges.**

As such, regulating end-use HRDD may pose some challenges, but it is simply challenging in different ways than the task of conducting HRDD in relation to a company's potential and actual impacts across complex, ever-shifting global supply chains. While questions about how lawmakers can practically mandate downstream HRDD within the CS3D or other laws are understandable, current practice makes clear that downstream HRDD can and should be done.

** The Guiding Principles were unanimously endorsed by UN member states in 2011. They have also been affirmed by global and national business organisations, trade unions, civil society organisations and National Human Rights Institutions. This global support, including from business, makes the Guiding Principles the authoritative global framework for preventing and addressing human rights risks involving business, including in the technology sector.*