

## Business and Human Rights: Switzerland's new yet incomplete action plan

The document « United Nations Guiding Principles on Business and Human Rights. Switzerland's National Action Plan (NAP) 2020-2023 » was published by the Swiss Federal Council on 16 January 2020. It follows an initial action plan for the 2016-2019 period which was drafted and published by the Federal Council in December 2016, in response to a parliamentary request.

The Federal Council based its document on a study commissioned by the Federal administration « Bestandaufnahme über die Umsetzung der UNO-Leitprinzipien für Wirtschaft und Menschenrechte durch den Bund und durch Schweizer Unternehmen ». This study sets out the current status and contains a series of recommendations, only part of which have been included in the NAP. Civil society actors and private sector actors were invited to provide inputs and submit comments on a first draft in August 2019.

Although the 2020-2023 NAP contains some improvements, it does not constitute in the eyes of Swiss civil society organizations a solid framework for ensuring that Swiss companies respect human rights in their activities, and those of their business partners abroad.

### 1. Business and Human Rights: no conflicts of interest?

The Federal Council's strategy is based on the incomplete assumption that economic interests and human rights are mutually reinforcing. Although these two dimensions can certainly go hand in hand, the experience of non-governmental organisations on the field show that there is no automacy. On the contrary, numerous reports and media coverage of human rights violations by Swiss companies abroad demonstrate the scale of existing issues. Such reports highlight the need for a clear political framework to ensure that Swiss companies respect human rights, even if this entails a cost or if companies at stake do not see it in their economic interest to do so. Regrettably, the NAP does not address possible conflicts of interest nor does it convey political solutions regarding that issue.

### 2. An action plan without objectives nor precise indicators

The NAP states that the Federal Council expects Swiss enterprises to « duly respect their responsibilities with regards to human rights, independently of the place where they operate and that they integrate reasonable human rights due diligence procedures. Accordingly, Swiss companies must prevent all negative incidents with regards to human rights.<sup>1</sup> » The Federal Council also stresses that its duty to protect human rights extends to companies and therefore

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<sup>1</sup> See NAP point 1.2

the Swiss government must take proactive measures to prevent violations of human rights by Swiss companies.<sup>2</sup>

However, when it comes to assessing the impact of measures taken in the 2016-2019 NAP, the Federal Council remains vague. Moreover, when it comes to defining precisely its objectives for the new four-year period, nowhere does it quantify its expectations. It merely states that the objective will be achieved by 2023 if « more companies know and apply the United Nations Guiding Principles (see objective 3 indicator)<sup>3</sup>. What does « more companies » mean? What is the minimum number of businesses, particularly large multinational corporations, that would have to have a human rights due diligence policy in place by 2023 for the Confederation to be satisfied with its efforts? The NAP does not answer that question. Even for those sectors of the Swiss economy that are most at risk, such as the raw material extraction industry and the gold trade, the NAP merely sets the objective: « To prevent the risk of human rights violations related to the extraction and sale of gold<sup>4</sup> ». One may ask by how much this risk should be reduced? Or, which particularly serious violations should be completely eradicated and what are the Federal Council's expectations in terms of compensation for victims? Again, no details are provided.

This lack of rigour contrasts with NAPs of other countries, such as Germany for example. In 2016, the German government set a target objective to measure the success of its NAP, issuing a four-year deadline for 50% of German big corporations to adopt a human rights due diligence policy. This objective was to be evaluated by means of an independent assessment by the end of 2019. If the target was not met, the government were to consider taking binding measures.

### **3. Smart mix: inadequate answers to human rights challenges posed by Swiss business**

In the United Nations Guiding Principles (UNGPs), it is stated that to implement the duty to protect human rights, States must adopt a mixture of voluntary and regulatory measures. The UNGPs state their expectations very clearly:

« To fulfil their obligation to protect, States must:

- a. apply the laws which insist that business respect human rights, or which have that effect and periodically, evaluate the validity of these laws and address any gaps;
- b. ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law does not constrain but rather enables business respect for human rights;
- c. provide effective guidance to business enterprises on how to respect human rights throughout their operations;

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<sup>2</sup> See NAP point 2.1.1 « the Federal Council considers that the prevention of human rights violations committed by Swiss companies abroad and access to grievance remedies form an integral part of their obligation to protect ».

<sup>3</sup> Target objective 3, page 10

<sup>4</sup> Target objective 7, p. 12

d. encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.<sup>5</sup> »

The NAP recognises the smart mix principle, but states that it is important for the Federal Council that the adoption of new rules does not create « disadvantages for Switzerland from an international perspective ». <sup>6</sup> In other words, the protection of human rights should not have a negative economic impact on Switzerland.

While the previous NAP reiterated that the Federal Council did not wish to oppose a counter-proposal to the Responsible Business Initiative, the current version contains the new proposals put forward by Federal Counsellor Karin Keller-Sutter during the parliamentary debate. The introduction of these two measures at a time when the parliamentary debate is not over yet, is rather surprising.

The measures put forward by the Federal Council contain three axes:

- non-financial reporting: this measure recaps the 2014 directives of the European Union on non- financial reporting
- conflict minerals: a due diligence regulation with special attention to four conflict minerals, tungsten, tantalum, pewter and gold. It should be noted that a much more detailed regulation was adopted by the EU in 2017 with regards to these minerals.
- due diligence with regards to child labour, which is inspired by the model adopted by the Netherlands, only weakened: indeed, the proposal of the Federal Council does not contain the monitoring and penalties contained in the Dutch legislation.

For civil society organisations, this proposal is a patchwork of different elements of foreign legislation assembled arbitrarily. It mixes thematic (child labour) and sectoral (conflict minerals) approaches rather than being based on a coherent implementation of OECD/UN standards. It gives the impression of hastily drawn up proposals in response to a political emergency, rather than a coherent law that responds to a steady analysis of the Swiss economy and the risks posed by human rights violations.

Let us consider two examples:

- Cobalt, a mineral whose extraction is linked to many serious human rights violations. Swiss companies hold a dominant share of the global cobalt marketplace but as this mineral is not covered in the new legal proposals, the companies will not be obliged to have due diligence policies in place.
- Switzerland is a major hub of the gold trade: 70% of this mineral transit through our country. Swiss big gold foundries are however only expected to put in place a due diligence policy with regards to gold that comes from conflict zones. This leaves a serious loophole for gold extracted elsewhere in violation of human rights.

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<sup>5</sup> UNGP Principle 3

<sup>6</sup> NAP p. 8

#### 4. Government-linked companies: leading by example

A report commissioned by the Federal Administration<sup>7</sup> in 2018 highlighted the lack of integration of the UNGPs in companies close to the Confederation. In Switzerland, government-linked companies generally have very clear policies with regards to their employees. However, a large majority of them lack a human rights policy vis-a-vis their suppliers and commercial partners abroad. They have not designated internal responsibilities nor do they conduct human rights trainings or have due diligence procedures. Moreover, they do not communicate publically on the subject. This shortcoming represents a major reputation risk for the Swiss government, a fact that was already highlighted in a parliamentary interpellation tabled by V. Amherd in December 2016.<sup>8</sup>

Despite this situation, the Federal Council is content to simply promote measures to sensitise and favour good practices between government-linked companies in the NAP. No clear incentives or policital framework measures are proposed for these companies, even though they should set the example.

The need for governments to establish clear guidelines for responsible conduct by public companies is underlined in the OECD Guidelines on Corporate Governance of Public Enterprises: « State-Owned enterprises should observe high standards of responsible business conduct. Expectations established by the government in this regard, should be publically disclosed and mechanisms for their implementation clearly established ».<sup>9</sup>

For Swiss civil society organisations, clear and efficient meausres must be taken in this area. In order for government-linked companies to serve as good examples, it would be necessary:

- a. to enrich the « Report on Corporate Governance » with a paragraph which clearly requiring the establishment of human rights due diligence for government-linked companies;
- b. to require such a duty of due diligence in the context of government-linked companies' strategic objectives, which takes place every four years;
- c. to organise trainings for boards of directors and management of government-linked companies on the UNGPs and human rights due diligence.<sup>10</sup>

These measures are particularly important for companies such as Swisscom, la Poste, CFF, SERV, Ruag, or SUVA. It is also critical to include public pension funds as part of the objectives.

#### 5. Coherence: a guarded first step

In the introduction to the NAP, the Federal Council announces that policy coherence is one of the three priorities of its policy until 2023. In order to ensure this coherence, it explains that « departments in charge of these action plans meet regularly to exchange information about their respective activities and to coordinate such activities. The interdepartmental group

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<sup>7</sup> « Bestandaufnahme über die Umsetzung der UNO-Leitprinzipien für Wirtschaft und Menschenrechte durch den Bund und durch Schweizer Unternehmen » twentyfifty ltd, 2018

<sup>8</sup> 16.4052 Interpellation V. Amherd- Bundesnahe Betriebe. Vorbildfunktion im Bereich Menschenrechte sicherstellen

<sup>9</sup> ODCE guidelines Corporate Governance of State-Owned Enterprises. Explanation notes chapter v, D 2015

<sup>10</sup> For example, such trainings exist in Sweden

analyses the conflicts of interest and structures the political discussion to reach a coherent application of the UN Guiding Principles within the Administration.<sup>11</sup> It also announces that a federal interdepartmental group, consisting of representatives of various offices responsible for human rights conventions, will serve as a platform for exchange in which « activities related to the NAP will be regularly presented. <sup>12</sup>» The existence of such an interdepartmental platform is to be welcomed. Other countries such as Denmark and Germany have already taken the step. However, the mission of this working group should be clarified and its decision-making processes explained in a more transparent way. Indeed, as described here, the group refers to a platform for information exchange. The process used to address and resolve conflicts of interest that may exist between the promotion of Switzerland's economic interests and respect for human rights is not explained. The NAP does not explain by which mechanisms tensions or contradictions that may exist between policies of different departments, or within the same department, will be addressed and resolved.

From the point of view of civil society, it would be necessary:

- a. to define clearly how the administration intends to resolve any conflicts of interest that may exist between the promotion of Switzerland's economic interests and the promotion of human rights;
- b. to systematically include a paragraph on the implementation of the UNGPs in the various strategies and reports of the Federal Council to Parliament, especially in the foreign economic policy reports and in the sustainable development objectives;
- c. for the Swiss Centre for Human Rights (CSDH) systematically assesses the compliance of new laws relating to economic policy with the UNGPs;
- d. to organise trainings for members of the Swiss public administration on the meaning and application of the UNGPs<sup>13</sup> ;
- e. to carry out impact assessments prior to the conclusion of any new trade agreement (bilateral or multilateral).

## 6. Access to legal remedies: a central issue for the UNGPs

The establishment of policies and effective legislation to ensure access to legal remedies for victims of human rights violations is a central element of the NAP. Further specific measures would need to be developed to address the need for victims of violations to have access to effective remedies. The report commissioned by the Federal administration in 2018 specified that the 2016-2019 NAP did not answer « the question of how effective access to legal remedies can be guaranteed by measures that are completely voluntary ». <sup>14</sup> The 2020-2023 NAP does not answer this point.

However, Swiss civil society organizations welcome the new measures advocated by the Federal Council to improve access to legal remedies, notably in connection with facilitating class actions. In this area, it would be important to take into consideration additional measures within the context of the revision of the Code of Civil Procedure (CCP), such as the reduction of costs for access to courts by victims of violations.

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<sup>11</sup> See NAP step 16, p. 18

<sup>12</sup> See NAP step 16, p.18

<sup>13</sup> For example such trainings exist in Germany, Italy and Holland

<sup>14</sup> « Bestandaufnahme über die Umsetzung der UNO-Leitprinzipien für Wirtschaft und Menschenrechte durch den Bund und durch Schweizer Unternehmen » twentyfifty ltd, 2018



With regards to the establishment of non-judicial redress mechanisms, the NAP does not specify what the Federal Council expects from Swiss companies. In order to be effective, these expectations should be legitimate, accessible, predictable, equitable, transparent, compatible with the law, a source of continuous learning, as well as based on engagement and dialogue (see UNGPs 31). It is crucial that this be reiterated in the NAP.

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Translation : Mary Mayenfisch-Tobin and Beatrix Niser