

DEVELOPMENTS IN THE FIELD

Evaluating the Polish NAPs: Lessons for the Future Implementation of the UN Guiding Principles on Business and Human Rights

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Abstract

Since their adoption, the UN Guiding Principles on Business and Human Rights have become crucial to intensify actions to protect human rights in the context of business conduct. Numerous countries, including Poland, have adopted National Action Plans (NAPs). Taking into account the years that have passed, it is worth assessing the implementation of their goals. Guidelines for the preparation of NAPs on business and human rights of the United Nations Working Group on Business and Human Rights (UNWG) are helpful in assessing the Polish NAPs. This Development in the Field piece concludes that every NAP should begin with an assessment that would help identify areas where there is a need to implement necessary policies. Such an assessment could be used to compare the initial stage with future achievements. It should rely on clear milestones mentioned in NAPs, and on key performance indicators to assess effectiveness while also relying on inclusive decision-making processes. Unfortunately, this was not the case with the two Polish NAPs.

Keywords: Assessment; NAP; Poland; UNGPs; UNWG

I. Introduction

Over the past decade, numerous countries and international organizations including the UN, OECD, the European Union and the Council of Europe have taken steps to protect human rights more effectively. The UN Guiding Principles on Business and Human Rights (UNGPs)¹ play a special role in this process. Since their approval, they have become a point of reference for systematizing and intensifying actions to protect human rights in business practices, especially through the adoption of National Action Plans (NAPs).

In Poland, the first NAP for 2017–2020 was adopted in 2017. The coordinator role for the NAP was given to the Ministry of Foreign Affairs.² Taking into account the years of work since the adoption of the 2017 NAP, the mid-term and final report (and knowledge about the activities undertaken by government and individual ministries), it is worthwhile to assess the first Polish NAP's role in the implementation of the UNGPs,

¹ Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework', A/HRC/17/31 (21 March 2011).

² The Ministry of Foreign Affairs was the only one that agreed to take this task.

and to examine the second NAP for 2021–2024.³ Guidance on NAPs on Business and Human Rights of the United Nations Working Group on Business and Human Rights (UNWG) may be helpful in assessing the NAP.⁴ In its Guidance, the UNWG indicates that when preparing the NAP, four basic recommendations should be taken into account. First, the NAP should be based on the UNGPs. Second, it should be relevant to the context and address both actual and possible business-related human rights violations. The NAP should indicate the problems, the governmental actions intended to solve them, the authorities responsible for those actions, and the time frame. Third, the NAP should result from an inclusive and transparent decision-making process. Fourth, the activities listed in the NAP should be regularly reviewed and updated. Reading the UNWG Guidance in conjunction with the content of the first Polish NAP and taking into account the development of the NAP, can facilitate in answering the question, namely, whether or not the Polish government used the opportunity to prepare a document capable of becoming an actual action plan that is clear, precise and sets the pace of introduced changes. We can respond by mostly referring to the first NAP and partially to the second NAP as there are not yet any reports that evaluate the realization of its goals. Compliance with the four above-mentioned recommendations will be examined in the following sections so future authors of NAPs can have a greater awareness of the impact of NAPs on the failure or success of implementing the UNGPs.

II. The Polish NAPs in Light of the First and Second UNWG Recommendations

The NAP adopted by Poland from 2017 to 2020 was meant to ‘increase the protection of human rights and expand the possibilities of seeking justice in a situation where these rights are violated by business’.⁵ It announced possible changes to Polish law, and actions intended to improve the protection of human rights.⁶ Among them, the following are mentioned: the act on whistleblowers, the amendment to the act on tourist services, regulations related to the liability of internet intermediaries for hate speech and violations of the freedom of speech. However, the document does not precisely indicate numerous loopholes in the legal provisions, nor did it present the challenges existing at the time of its creation. As a consequence, it did not list the most serious violations of human rights in business activities as a priority. These include various forms of exploitation: forced labour, child labour, slavery, human trafficking, illegal work, discrimination, and unequal treatment. Instead, the document lists actions already included in the plans of individual ministries or institutions, and announces that individual ministries are obliged to prepare timetables for the implementation of individual measures, but the NAP does not mention them in detail.⁷ Moreover, the proposed actions are scattered throughout the document, and most of them do not respond to the issues pointed out in individual UNGPs. In fact, those which are indicated are formulated broadly, as is the possibility of achieving them. The activities mentioned are mostly voluntary in nature and focus on undertaking promotional, educational and training activities.

³ Of course, a NAP is not the only tool for establishing a basis for the implementation of the UNGPs, but it is the key one. The failure to prepare a valuable NAP may have consequences, including the inability to make progress in the implementation of the guidelines.

⁴ UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights* (Geneva: UN Working Group on Business and Human Rights, 2016).

⁵ Ministerstwo Spraw Zagranicznych, ‘Krajowy Plan Działania na rzecz wdrażania Wytucznych ONZ dotyczących biznesu i praw człowieka na lata 2017–2020’, <https://www.gov.pl/web/dyplomacja/ch-onz-dotyczacych-biznesu-i-praw-czlowieka-2021-2024> (accessed 9 May 2022).

⁶ *Ibid.*, 24–29.

⁷ *Ibid.*, 58–59.

When creating a document of this scope, it is worth using the Guidance of the UNWG, as well as the Toolkit by the Danish Institute for Human Rights (DIHR) and the International Corporate Accountability Roundtable (ICAR) (which includes descriptions of tools for developing, implementing and reviewing government commitments in the area of business and human rights).⁸ The purpose of presenting the four basic recommendations by the UNWG and the DIHR/ICAR toolkit was to provide guidance to governments and other stakeholders involved in the development of the NAP. Unfortunately, the division adopted in the Polish NAP for 2017–2020 is different from that proposed by the UNWG, and it refers instead to the three pillars of the UNGPs. This might have been acceptable if within those pillars the government had reflected on the UNWG's Guidance and DIHR/ICAR guidelines and presented a more comprehensive approach to achieving the UNGPs. The NAP, however, does not cover the full range of issues highlighted by the UNWG's Guidance, and lacks an in-depth analysis of the existing shortcomings. The identified priorities do not correspond to detailed, measurable, achievable, relevant and time-defined activities; and they are not an intelligent mix of mandatory and voluntary, international and national measures as suggested by the UNWG. As a result, it has little value in planning for and implementing the UNGPs because it is difficult to consider, as such, this several-page reminder of Polish legal regulations found in the Civil Code regarding liability for damages (ignoring, for example, the complex problems of liability for violation of human rights by enterprises in other parts of the world, i.e., the problem of jurisdiction). Therefore, it can be said that the NAP for 2017–2020 pays attention to specific legal provisions, but identifies gaps to a poor, if not non-existent degree.

In retrospect, the structure of the NAP for 2017–2020 was undoubtedly a key obstacle to completing the implementation of the UNGPs as the lack of an effective structure dilutes content, which should be composed of some core elements which any action plan should have. Not having a point of reference (which would indicate the necessary steps), and the lack of an appropriate method to evaluate actions presented a serious impasse. As a result, there was no measurable progress in any field mentioned by the NAP because of a lack of relevant start and progress data. This is exemplified by the legal provisions to protect whistleblowers, the development of legal regulations counteracting forced labour and human trafficking, as well as the amendment to the act on tourist services protecting children from sex abuses and protection of freedom of speech. As seen in the mid-term report, at the end of 2018, the first two mentioned issues had no in-depth analyses or proposals for legal changes in the area of whistleblower protection. The report states that the Department of National Security of the Chancellery of the Prime Minister 'is preparing the act on transparency in public life, the draft of which includes comprehensive solutions for the protection of whistle-blowers in Polish law'.⁹ The authors of the mid-term report additionally noted that 'due to many comments and proposals that were submitted to the bill, both from state offices, local governments, as well as from organizations and associations, the draft is currently being analyzed in terms of taking into account as many comments as possible while keeping the main principles guiding the creation of the act'.¹⁰ It could be assumed that the efforts would be continued in the following years. The final report, however, on the implementation of the NAP for 2017–2020 (published in October of 2021), did not mention these efforts and even took a step back because – as it

⁸ The International Corporate Accountability Roundtable (ICAR) and the Danish Institute for Human Rights (DIHR), *National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks* (Copenhagen: DIHR and ICAR, 2014).

⁹ Ministerstwo Spraw Zagranicznych, *Raport śródkresowy z realizacji Krajowego Planu Działania na rzecz wdrażania Wytycznych ONZ dotyczących biznesu i praw człowieka na lata 2017–2020* (Warsaw: Ministerstwo Spraw Zagranicznych, 2021).

¹⁰ Ibid.

indicated – in the light of the adopted Directive (EU) 2019/1937 of the European Parliament, and of the Council on 23 October 2019 on the protection of persons reporting breaches of EU law, ‘the issue of determining the competent authority responsible for the legislative process of the future law is pending’.¹¹

Since then, not much has changed. The new NAP for 2021–2024 only mentions that the minister responsible for labour affairs was appointed to carry out legislative work at the governmental level to implement the directive, and does not state when the directive will be implemented or by what legislative measures.¹²

Efforts to amend the legal provisions on counteracting forced labour faced different circumstances. Adjustments in this area were carried out by the Working Group for Relations with Workers and had the participation of representatives from numerous ministries, and members of the Team for Sustainable Development and Corporate Social Responsibility (established at the Ministry of Investment and Development). Through the high involvement of non-governmental organizations, business associations, trade unions and business entities’ representatives – and after broad consultations with both practitioners and academics specializing in criminal law – it was possible in 2020 to develop recommendations for the defining and criminalizing of forced labour.¹³ Practical support tools were also developed for entrepreneurs to minimize the risk associated with the occurrence of forced labour in their operations and supply chains. In addition, provisions of clauses have been prepared which can be included in contracts concluded by entrepreneurs with temporary work agencies or employment agencies’ employees, especially foreigners.¹⁴ Unfortunately, due to a lack of decisiveness from the Ministry of Justice with regard to introducing the recommended changes to the legal system, no full success can be announced. The 2021 report on the implementation of the NAP for 2017–2020 stated that ‘the Ministry of Justice is currently considering the possibility of undertaking measures for the criminalization of forced labour as a prohibited act situated between the violation of labour rights and human trafficking. The work is at an early analytical stage’.¹⁵ In contrast to that, the NAP for 2021–2024 at least mentions that the Ministry of Justice received the definition of forced labour developed by the Working Group and that it ‘will analyze the possibility of undertaking work on the criminalization of forced labour’.¹⁶ However, once again, it does not provide a time frame for its work.

It is worth adding, in the end, that the issue of an amendment to the act on hotel services to prevent sexual abuse of minors in hotel facilities did not move forward either. The second NAP only repeats that the Ministry of Development and Technology plans to conduct work in order to specify in detail the provisions relating to the prevention of sexual abuse of minors.¹⁷ Nothing has changed for the past 4 years since development of the first NAP.

III. The Polish NAPs in Light of the Third and Fourth UNWG Recommendations

When analysing the Polish NAP for 2017–2020 further, in light of the third and fourth UNWG recommendations, it must be noted that the document was not the result of an inclusive and

¹¹ Ministerstwo Spraw Zagranicznych (February 2021), note 9, 89.

¹² Ministerstwo Spraw Zagranicznych, ‘Krajowy Plan Działania na lata 2021–2024’, <https://www.gov.pl/web/dyplomacja/ch-onz-dotyczacych-biznesu-i-praw-czlowieka-2021-2024> (accessed 9 May 2022).

¹³ B. Faracik et al., *Praca przymusowa. Poradnik: jak ją rozpoznać i jej przeciwdziałać* (Warsaw: Ministerstwo Funduszy i Polityki Regionalnej i Polski Instytut Praw Człowieka i Biznesu, 2020).

¹⁴ *Ibid.*, 49–52.

¹⁵ Ministerstwo Spraw Zagranicznych (February 2021), note 9, 40.

¹⁶ Ministerstwo Spraw Zagranicznych (October 2021), note 12, 25.

¹⁷ *Ibid.*, 14.

transparent decision-making process. In addition, the activities listed in the NAP were not evaluated by selected monitoring mechanisms and were not updated even though they were reviewed twice: in the mid-term report in 2018 and in the final report in 2020. However, the value of the reviews can be questioned when looking, for example, at the progress made to protect whistleblowers or the development of legal regulations counteracting forced labour and human trafficking (as mentioned in the previous section). It was a lost opportunity that during NAP drafting, no attention was paid to how the implementation of its generic list of voluntary activities could be monitored. This resulted in a missed opportunity; progress monitoring of set goals (based on a clear point of reference, set of indicators, and milestones) was not established. Monitoring was additionally made more difficult because the preparation of periodic reports was planned among selected ministries and the positive role that could have been played by non-governmental organizations during the evaluation process was not taken into account.

There were hopes that the Polish administration would have drawn lessons from the first NAP when drafting the second NAP for 2021–2024, such as the use of precise phrases, both in terms of the description of the initial situation and the inclusion of concrete and precise commitments, along with the inclusion of the time frame for their achievement. As mentioned above, the plans listed in the NAP should indicate activities that will be specific, measurable, achievable, relevant and timed so that the goals indicated in the UNGPs can be achieved more effectively. Unfortunately, once again, the new NAP for 2021–2024 is not such a document. During the work on this document – in accordance with the third UNWG recommendation – there were many voices discussing what should be included in it and what actions should be taken; these came from public online consultations conducted by Polish Institute of Human Rights and Business (PIHRB), but also included official submissions to various ministries by the CSR Watch Coalition.¹⁸ None of them was taken seriously under consideration during the drafting of the second NAP. What can be done at this point is to ensure that during implementation, the administration will develop more concrete schedules and use some key performance indicators (KPIs) to fulfil the fourth UNWG recommendation. Without specifying what change is expected and knowing how to measure progress, there can be no real progress. Additionally, the change will be more difficult when not all stakeholders are invited to be part of the decision-making process. If Poland is a country focused on ‘cooperation, partnership and joint responsibility of public entities, business and citizens for the course of development processes’,¹⁹ it is necessary to allow these partners to participate in decision-making processes. By increasing the role of consultations with civil society organizations, trade unions, business associations and business itself – which will be conducted under the conditions of dialogue and recognition of the equality of the parties – many potential problems with the implementation of the UNGPs can be avoided. Such dialogue and extensive cooperation can be valuable at the initial stage of preparing NAPs and monitoring the effectiveness of actions taken.

IV. Conclusions

Despite the availability of the UNWG Guidance and DIHR/ICAR Toolkit, they were not used judging by the lack of the four mentioned recommendations in the process of creation of the

¹⁸ Polski Instytut Praw Człowieka i Biznesu and Koalicja CSR Watch Polska, ‘Konsultacje społeczne – projekt Drugiego Krajowego Planu Działań dot. wdrożenia Wytucznych ONZ dot. biznesu i praw człowieka’, PIHRB, Letter No. PIHRB/2021/28 (1 July 2021), <https://pihrb.org/wp-content/uploads/2021/08/2021-07-Uwagi-Koalicji-CSR-Watch-do-projektu-2-KPD-uwzg.-wyniki-ankiet.pdf> (accessed 9 May 2022).

¹⁹ Ministerstwo Rozwoju, *Strategia na rzecz Odpowiedzialnego Rozwoju do roku 2020: z perspektywą do 2030 r.* (Warsaw: Ministerstwo Rozwoju, 2017).

first and second Polish NAP and their final texts. The state could organize its NAPs differently, but it should ensure coverage of all core elements that NAPs should have. Given the status of the UNGPs as a Human Rights Council adopted standard, the NAP should ensure that it provides a sufficient legal and policy basis, as well as presenting anticipating, absorbing and reshaping the framework so that it can strengthen effective protection, respect and promotion of human rights in the context of business activity.

The 2017–2020 Polish NAP resembles a rather poorly constructed national basic assessment that the state should carry out before even issuing the NAP. This is also the case with the 2021–2024 NAP which maintains the same problems with structure and lack of analysis of the present situation. It was also developed without transparency in the decision process, and without cooperation with multiple stakeholders during the process of drafting the document. Everyone would benefit by beginning with an assessment that would help identify areas where there is a need to prepare, adopt and implement necessary policies and legislation. Then, the assessment could be used to compare the initial stage with future achievements as a benchmark for the subsequent assessment of the effectiveness of actions taken – in order to eliminate obstacles and legal loopholes. During that process, it should rely on clear milestones, as mentioned in NAPs, and KPIs to assess effectiveness while also relying on inclusive decision-making processes.

Conflicts of interest. The author declares none.