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Minimum Standard:
HUMAN RIGHTS
Requirements for Investors

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CONTENTS

I. INTRODUCTION

"Sustainable finance is neglecting the defense of human rights, statutory proposals to guard human rights in supply chains are neglecting the financial markets."

Sustainable finance is a hot topic. At least since the Paris Climate Accords, no financial institution can afford to simply ignore sustainability issues – although there are big differences in the extent to which financial services providers incorporate sustainability into their products. This is true also and even especially with regard to human rights compliance. With attention focused on the urgent need to find solutions to the climate crisis, human rights often fade into the background.

To be sure, the European Union has recognized the potential for using the financial sector as a lever in the transition towards a sustainable economy. As early as 2018, it introduced the Sustainable Finance Action Plan and thus put in motion a process, which could revolutionize the European capital markets. Nevertheless, this process has thus far granted all too little priority to human rights due diligence obligations. Another shortcoming in the effort to enact comprehensive protections of human rights is the EU's preference for an approach to reform of the financial markets that focusses primarily on higher transparency requirements – an approach based on the principle of "comply or explain."

The primary standards defining the obligations of companies and states with respect to human rights are in the UN Guiding Principles on Business and Human Rights (UNGP). These guidelines described, as early as 2011, the relationship between the responsibility of states and the responsibility of the private sector for compliance with human rights – and expressly obligated investors, as well, to compliance.

A few states, e.g., Germany with its Supply Chain Due Diligence Act (*Lieferkettensorgfaltspflichten-gesetz*), have begun to promulgate national statutes based on the UNGP. Here, we observe a different picture: These statutory proposals have thus far taken financial actors inadequately into account. In the case of Germany, that has meant that the activities of German financial actors are largely excluded from the scope of the Supply Chain Due Diligence Act. And this despite the fact that they are entangled in twofold fashion: One the one hand, they constitute economic actors themselves and their services form a part of supply chains. On the other hand, they are in need of reliable and transparent information from the companies whose business activities they finance, in order to comply with their own human rights due diligence obligations.

It is imperative that the coming European Supply Chain Act close the gap between the principle of "comply or explain" underlying the various directives of the Sustainable Finance Action Plan, on the one hand, and the requirements which the UNGP also explicitly impose on financial actors, on the other.

II. THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The UN Human Rights Council promulgated the UN Guiding Principles on Business and Human Rights in 2011 and thus created the first global standard for the discouragement and remediation of human rights violations in connection with economic activity. They clarify the relationship between the responsibility of states and the responsibility of the private sector and define precisely what duties are incumbent on each. Their 31 guidelines refer to the International Bill of Human Rights and the ILO's Declaration on Fundamental Principles, building on the three pillars:

- "Protect" as the state's legal duty to protect human rights;
- "Respect" as the responsibility of businesses to respect human rights;
- "Remedy" as the duty of both states and companies to grant access to mechanisms serving the remediation and reparation of violations.

In subsequent publications, the UN High Commissioner emphasized the responsibility of the financial sector, including institutional investors with passive investments. Such actors, too, should take measures to implement human rights due diligence obligations, holistically analyze their links to human rights violations, and, as appropriate, carry out remedial measures. It is worthwhile to cast a glance at the guiding principles themselves, in order to understand just how short business practice today falls of the standard set by the UNGP: "*14. The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure." (UNGP 2011: 17)*

In the year 2013, the UN High Commissioner clarified that this obligation also applies to institutional investors with passive investments: "*There is nothing in the text of the Guiding Principles to indicate that their scope of application is limited to situations where institutional investors hold majority shareholdings. This may be relevant when considering the means through which a business enterprise meets its responsibility to respect human rights, including the leverage it can exercise in its business relationships, but it is not relevant to the question of the* existence of the responsibility*."* (OHCHR SOMO 2013: 2)

Likewise, the High Commissioner has affirmed that there is a business relationship between companies and their investors: *"In the context of a minority shareholder, there is a business relationship – through ownership – between the investor and the investee company. The relative size or percentage of a share an institutional investor holds in a company is* not *a factor in determining whether there is a business relationship for the purposes of Guiding Principle 13b."* (OHCHR OECD 2013: 6)

In what ways can institutional investors be responsible for human rights violations?		
As primary cause	As contributory cause	When directly linked by business relationships
Typically, in their own business operations, e.g., by violating core labor standards. But majority shareholders can also directly cause, by virtue of their decisions, human rights violations on the part of the companies in which they invest.	This is the case, for instance, when investors can reasonably be expected to have gained knowledge of human rights violations by the companies in which they invest but did not take action to minimize the damages.	Through activities, products, or services for a company or project in which they invest. This category includes, inter alia, minority investments in companies that violate human rights (cf. UN-PRI 2020: 11).

The UN Guiding Principles also stipulate that enterprises must take action on the following three levels to meet their responsibilities for compliance with human rights:

- A comprehensive policy commitment (UNGP 16);
- Processes appropriate for carrying out their human rights due diligence obligations (UNGP 17-21); and
- Processes to enable remediation (UNGP 22).

The UN Guiding Principles do not themselves impose any new obligations under international law. Accordingly, they had a limited impact on the conduct of enterprises in the first few years. 28 states have adopted National Action Plans for putting the UNGP into effect, while another 15 states are working on such plans (cf. DIHR 2021: no pagination).

The second international standard for investors and human rights are the OECD Guidelines "Responsible business conduct for institutional investors." (OECD 2017). Within this framework, the OECD member state express their expectations on key considerations for due diligence under the OECD Guidelines for Multinational Enterprises. The strength of the paper, published in 2017, lies in the fact that it is the first to relate the recommendations of the OECD guidelines aligned with the UN guiding principles to institutional investors formulating concrete recommendations. The main weakness of the guiding principles is that they are voluntary.

III. THE EU ACTION PLAN ON FINANCING SUSTAINABLE GROWTH

The EU, with its " EU Action Plan on Financing Sustainable Growth," initiated as early as 2018 a cascade of planned legislation, which will fundamentally influence the European capital markets. Overall, the EU strategy on sustainable finance focusses clearly on climate protection. This emphasis is well-founded and crucial, in light of the growing climate crisis; nonetheless, the EU risks losing its opportunity to give shape to social goals in connection with the planned transformation.

IV. THE TAXONOMY REGULATION

In order to effectively re-direct capital flows, it is first necessary to define what exactly constitute sustainable activities. To this end the EU has adopted, with the Green Taxonomy, the first binding classification system, valid across the EU, for environmentally sustainable financial investments. Products are deemed in conformity with the taxonomy when they contribute to reaching at least one of six defined environmental goals, without harming the others.

In July 2021, the sub-group "Social Taxonomy" of the EU's Platform for Sustainable Finance published an interim report, in which it described a structure for another planned taxonomy. According to the sub-group's proposals, the new Social Taxonomy is meant, on the one hand, to help evaluate, in terms of social issues and human rights, the effects of economic activities on workers, supply chains, consumers, and impacted communities. On the other hand, it is hoped that the Taxonomy will make it possible to evaluate the positive contribution made by products and services to meeting people's basic needs and putting fundamental infrastructure in place. This approach has great potential for enabling us to quantify, for the first time, the re-direction of capital towards social investments and to close, at least in part, the estimated gap of 2.5 to 3 trillion US dollars in the financing needed to achieve the UN's Sustainable Development Goals (SDG) (cf. UN 2021: no pagination).

While the EU, however, in its renewed sustainable finance strategy from July 2021, stated its intention in principle to add a social dimension to the Taxonomy, no timeline for taking further steps has been published.

The EU itself has best formulated the most commonly misunderstood fact about the Taxonomy Regulation: "*The taxonomy regulation does not force companies to do anything, they are free to ignore it. All it says is that companies can only say that an investment is "environmentally sustainable" if it meets defined criteria; extending the taxonomy to social would not change this principle, but simply the area covered (social to be added to environmental)"* (PSF 2021: 16)

It makes sense that companies are under no obligation to conform to the criteria of the Taxonomy Regulation, for the Regulation does not just define minimum standards; it is also intended to render quantifiable and comparable the positive contribution that enterprises make to protection of the climate, the environment, and biodiversity or – in the social Taxonomy – the positive contribution that enterprises make to a socially (more) just economy. What is lacking, nonetheless, are compulsory minimum standards that apply to all enterprises alike. It is to be hoped that the European Supply Chain Act will close this gap.

V. EU SUSTAINABLE FINANCE DISCLOSURE REGULATION (SFDR) FOR CAPITAL MARKETS PARTICIPANTS

On 10 March 2021, Regulation (EU) 2019/2088 (Sustainable Finance Disclosure Regulation or SFDR) went into effect. The SFDR sets forth unified rules on how capital markets participants and financial advisors must inform investors concerning the need to take sustainability risks into account. Because large parts of the Taxonomy Regulation will not be formulated or go into effect until 2022 and 2023, the SFDR's reporting requirements are updated on an ongoing basis. In October 2021, the European Supervisory Authority (ESA) presented a final report containing drafts of regulatory technical standards for the SFDR. In the revised standards, the status of human rights, with the UNGP, the UN Human Rights Instruments, and the ILO Core Labour Standards as exclusive points of reference, was strengthened relative to the first draft. Nevertheless, the SFDR – as with the EU's other legislative proposals within the framework of the Sustainable Finance Action Plan – is based on the principle of "comply or explain." In principle, it allows financial services providers to deem sustainability issues irrelevant to their products under Article 6, provided they briefly explain why their products do not conform to the requirements of the UNGP (cf. ESA 2021).

VI. THE CORPORATE SUSTAINABILITY REPORTING DIRECTIVE (CSRD)

In April 2021, the European Commission presented its proposal for a Corporate Sustainability Reporting Directive (CSRD) – a guideline, which would replace the Non-Financial Reporting Directive (NFRD) currently in force. In this way, the EU plans to integrate sustainability into financial reporting and gradually to place it on a par with financial assessments.

Besides gradual extension of the reporting requirements to all exchange-listed enterprises by 2026, the EU also plans to significantly tighten those requirements, in order to render the information provided by companies more comparable. Thus, for instance, it means to introduce the principle of double materiality, which measures, besides the financial effects, also the impact of an enterprise's activities on the environment and society. The European Financial Reporting Advisory Group (EFRAG) is to formulate the relevant standards, with reference to the Taxonomy Regulation, prior to the end of 2022. The requirements relative to reporting on social topics are to be expanded as well.

The EFRAG presented an initial proposal for reporting standards in March 2021. In it, the Advisory Group assesses investors explicitly in their roles both as enterprises subject to reporting requirements and as users of the information disclosed. It states that the reporting of companies should be adapted to the needs of investors (citing, among other things, unity in reporting methods, timely publication of information, and machine-readability of information). The planned expansion of the reporting obligation for enterprises is of fundamental importance for investors, to enable them to meet their own duties of transparency – also spelled out in this paper – relative to the companies they are financing.

The biggest shortcoming of the CSRD Initiative is its lack of any obligation for companies to adhere to fundamental standards. Here, too, the EU relies on the model of transparency and voluntary compliance, in order to effectuate the "just transition" to sustainable business practices. But there is no guarantee that companies – just because they are obligated to report on fundamental CSR factors – will also begin to actually implement these standards and meet minimum criteria.

VII. SUPPLY CHAIN LEGISLATION

1. The German Supply Chain Due Diligence Act

In June 2021, the German legislature adopted the Supply Chain Due Diligence Act (*Lieferkettensorg-faltspflichtengesetz*, SChDDA). The Act goes into force starting in 2023 for companies with more than 3 000 employees and starting in 2024 for companies with more than 1 000 employees. The Act stipulates that the due diligence obligations of enterprises extend to their entire supply chains and in principle includes financial services as part of the supply chain. The requirements imposed on companies are graded in accordance with placement along the supply chain, depending on whether the company's own business operations, those of a direct supplier, or those of an indirect supplier are at issue. Another gradation in the requirements depends on the nature and scope of the business activity, the company's leverage for influencing the party responsible for the violation, the gravity of the violation that can typically be expected, and the way in which the company contributes to causing the violation.

The SChDDA does apply to the large banks and wealth management companies in Germany. Its compliance obligation for financial services providers, however, is restricted to borrowers, secured parties, and the investment property. The Act moreover specifies that its provisions apply only to such financial transactions "as are so significant that they typically entail a special ability to access information and play a supervisory role," as, e.g., with large exposures within the meaning of Art. 392 of Regulation (EU) 575/2013 (Particular Part on § 2, Para. 5, SChDDA). A further restriction applies to the financial investments of insurance companies, which are explicitly exempted from the Act.

With these restrictions, financial services are de facto largely exempted from Germany's Supply Chain Due Diligence Act. That is problematic for two reasons: On the one hand, this contradicts a basic tenet of the UNGP, which demand application of their principles – as described above – to investors, as well, regardless of the amount of capital invested and regardless of the size of the investor. On the other, this will inevitably lead to a situation in which German enterprises are required to conduct due diligence on their suppliers and expect to pay fines in the event they fail to meet their obligations; while investments in these same supplier companies, e.g., via corporate stocks or bonds held in funds, will remain permissible – even if those companies commit human rights abuses.

Another point in which the German SChDDA inadequately covers financial services providers stems from its definition of the relevant size of companies. The German finance sector, with its numerous savings banks and credit unions, is highly fragmented in comparison with other countries. Very few of these financial institutions have more than 1 000 employees. One of the fundamental features differentiating the finance sector from other enterprises involves the leverage which financial services produce. In consequence, the criterion "number of employees" is inappropriate for assessing such a company's ability to influence compliance with human rights on the part of its business partners. By way of example, imagine a corporation with just a few (dozen) employees, which manages and invests assets worth billions of euros. Such a company would remain exempt from Germany's Supply Chain Due Diligence Act, even if it acquired a strategic share in an enterprise incorporated outside of Germany that commits human rights abuses.

2. The European Supply Chain Act

In March the European Parliament, with a large majority, adopted the "legislative report on corporate due diligence for human rights violations and environmental damages" and therewith recommended that the EU Commission introduce a Supply Chain Act applicable throughout the EU. The proposals put forth by the European Parliament go in their substance significantly farther than the German SChDDA. They foresee, for instance, an independent due diligence obligation relative to environmental concerns and clear provisions on civil law liability. Of special importance for the financial sector are its suggestions that the act include more companies within its scope and be applicable to the entire value chain. The European statute thus has the potential to eliminate the shortcomings of the German statute and create the conditions for more effective protection of human rights and the environment.

To fulfil the promise of the UNGP, the Act must require:	Current state of implementation:	Gaps in the legislation:
Policy		
A public commitment to human rights (International Bill of Human Rights, ILO Core Labour Standards): • With ratification, responsi-bility, and regular review at the top management level • This commitment must be binding for all operational processes and policies, e.g., corporate governance, investment policies, and management systems • and be publicly accessible and actively communicated to all stakeholders, including investee enterprises	**Germany** The SChDDA only applies to financial services providers with more than 3 000 / 1 000 (starting 2024) employees	**Germany** Financial services providers with fewer than 1 000 employees are not covered by the SChDDA. The SChDDA expressly exempts assets invested by insurance companies. **EU** It is not yet clear to what extent the planned European Supply Chain Act will apply to financial services providers.

To fulfil the promise of the UNGP, the Act must require:	Current state of implementation:	Gaps in the legislation:
	Due diligence processes	
Integration of human rights risks into general risk assessment,[1] building on the dimensions: degree, scope, and irreversibility of the negative effects of any human rights violations Assessment to be carried out prior to the investment decision (at least by elimination of bad actors; for SRI funds a positive assessment is required) Post facto review and monitoring during the entire holding period, in order to be able to address any human rights risks that arise in a timely fashion.	**Germany** BaFin Guidance Notice on Environmental, Social, and Governance Risks (ESG) as guideline for reporting **EU** Resolution adopted on integration of ESG Risks into SFDR and CSRD. Implementation under way.	**Germany** Provisions of the BaFin Guidance Notice only have the status of recommendations; minimum requirements on the level of detail in reporting are not defined. **EU** Current proposal of the European Banking Authority (EBA) inadequately addresses social risks (cf. EBA 2021). A comprehensive definition of risks, as already in place for climate change risks, is lacking with respect to social issues and human rights.
Creation of a black list oriented towards UN standards and con-ventions. As potential investees, the following should be per se excluded: • Companies that repeatedly and systematically violate human rights • Producers of weapons pro-hibited under international law (cluster bombs, land mines, NBC weapons) • Companies that deliver weapons to war and crisis zones • Repressive states, which systematically commit human rights abuses.	There are no black lists issued by governmental authorities. Financial services providers that exclude companies based on human rights considerations typically work with black lists produced by ESG rating agencies.	**Germany** The federal government plans to invest its dedicated assets in accordance with ESG criteria (EURONEXT 2021: no pagination). The black lists used for this purpose could potentially serve as point of reference for private financial services providers. **EU** It would also be conceivable for the EU to produce a human rights based black list – linked to the one already maintained and regularly updated by the EBA.

[1] On the identification of such risks, see "Menschenrechte sind Investorenpflichten," Schneeweiß, 2020. The Sub-Group Social Taxonomy is also working on defining criteria, which are to be made available starting in 2022.

To fulfil the promise of the UNGP, the Act must require:	Current state of implementation:	Gaps in the legislation:
Due diligence processes		
That financial services providers formulate an internal guideline for their human rights engagement. This should include: • Information on how they identify and select issues and set priorities • A description of their engagement process, with a clear protocol of steps for escalation, including the process of disengagement • Definition of criteria for evaluating results.	Up to now, the rights and alternatives for human rights engagement have been defined only generally in Germany's ARUG II statute.	Requirements or expectations that investors actively engage with stakeholders as described in the UNGP have not been defined.
That financial services providers regularly report on their human rights engagement: • Number of engagement processes • Key areas of engagement • Results (successes/failures) • Cases of disengagement • Assessment of effectiveness • Where appropriate, reports on specific cases	A few investors report on their engagement; no standard has thus far been established.	
For smaller investors: cooperation on engagement platforms, in order to heighten their influence.	Examples of successful cooperations include the Arbeitskreis Kirchlicher Investoren (AKI), Shareholders for Change, or the Investors Alliance for Human Rights.	

To fulfil the promise of the UNGP, the Act must require:	Current state of implementation:	Gaps in the legislation:
Access to remedy		
Where negative impacts are produced by the activities of investees, investors rarely cause or promote these negative impacts – they typically have only a direct link to them. For this reason, investors in such cases are not held liable for compensation of damages. The OECD Guidelines, however, emphasize that investors in such cases should use their leverage to influence the entity causing the adverse human rights impact to pay compensation, in accordance with its responsibility and with clearly defined priorities, in order to prevent or mitigate the negative effects. In those cases where an investor, e.g., in its role as equity investor, is implicated in causing harmful impacts, it needs to provide access to remedy as any other company.	The German Supply Chain Due Diligence Act applies in theory to financial services providers employing more than 3 000 / 1 000 persons. There are, however, no explicit liability obligations for cases in which financial services providers, e.g., *qua* equity investors, are implicated in causing harmful impacts. As of December 2021, the EU has not yet published any proposal for its planned Supply Chain Act.	**Germany** The implementing provisions for the Supply Chain Due Diligence Act – in which, it is to be hoped, the responsibilities of financial services providers as parties potentially implicated in causing human rights violations will be defined – have not yet been published. **EU** The European Supply Chain Act is not yet available.

VIII. STIPULATIONS FOR A EUROPEAN SUPPLY CHAIN ACT

The European Union must provide for comprehensive coverage of financial services providers in its planned draft of the statute. This is true in particular with regard to the following points:

- Financial services providers are defined as a risk sector under the sector report (*Branchenbericht*) of the German Federal Ministry of Labour and Social Issues BMAS (cf. BMAS 2020: 125ff). For this reason, finance companies need to be covered by the statute regardless of their size. Conditioning application of the law's obligations on a minimum of 3 000 / 1 000 employees, as under the German SChDDA, exempts too many influential enterprises.
- Insurance companies, too, need to be covered by the scope of the planned Supply Chain Act. Their investment assets cannot be granted a blanket exemption from compliance with human rights due diligence obligations.

- Fund products that are issued by non-European service providers but marketed in the EU must likewise fall within the scope of the law's provisions.
- The provisions on implementation of the Supply Chain Act must provide guidance for deciding when a financial services provider is deemed to have contributed to causing human rights abuses (e.g., as equity investor) and what kind of reparation it is liable for providing when that is the case.
- The law must stipulate minimum standards of human rights due diligence and minimum requirements for reporting on it; these standards must be adapted to the specific context of the financial sector and made binding on investors.
- To avoid "social washing" in connection with companies' engagement of stakeholders, the legislature must define minimum standards for such engagement and make it an integral part of the due diligence obligations incumbent on financial services providers. Such standards should include the following elements:
    - Guidance on how companies should identify and select issues and set priorities
    - A description of the desired process for human rights engagement, with a clear protocol of steps for escalation, including the process of disengagement
    - Duty to analyze and evaluate results in accordance with comparable standards
    - Duty to report on the number of stakeholder processes in which a company is engaged, its key areas of engagement, the results achieved, and any cases of disengagement. Reporting must moreover be oriented towards the reporting requirements of the SFDR and CSRD.
- The law must impose fines on financial services providers that do not appropriately meet their human rights due diligence obligations and cannot prove that they have carried out the corresponding risk assessments.

Further, the EU must reinforce the social dimension of its Sustainable Finance Action Plan:

- Drafting and adoption of a Social Taxonomy, which defines minimum standards for human rights and social guarantees and describes activities, products, and services that support the transition towards an economy that is just, i.e., socially sustainable and respectful of human rights.
- The revised SFDR must incorporate and precisely define human rights features in accordance with the requirements of the UNGP and OECD guidelines. A mere statement to the effect that such requirements must be observed is insufficient.
- The planned CSRD on non-financial reporting by enterprises must define the relevant human rights considerations on the basis of a Social Taxonomy corresponding to the standards proposed by the Working Group of the Sustainable Finance Platform.
- The role of the EBA as supervisory authority – and that of comparable agencies on the national level – should be strengthened, so that violations can be sanctioned.

IX. ABBREVIATIONS

CSRD:	Corporate Sustainable Reporting Directive (EU)
EFRAG:	European Financial Reporting Advisory Group
SFDR:	Sustainable Finance Disclosure Regulation
SDG:	Sustainable Development Goals of the United Nations
SFP:	Sustainable Finance Platform
UNGP:	UN Guiding Principles on Business and Human Rights

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