



CONFERENCE REPORT OF THE THUN GROUP OF BANKS ANNUAL MEETING ON 19 JUNE 2017

1. Introduction

More than 80 representatives of banks, civil society, governments, international governmental organizations, academia, law and consulting firms plus other business enterprises gathered in Thun on 19 June 2017 for the Thun Group of Banks Annual Meeting. The aim of the meeting was i) to share knowledge on crucial developments around business and human rights with a focus on the banking sector and ii) to discuss the Thun Group's January 2017 publication titled "Discussion Paper on the Implications of UN Guiding Principles 13 and 17 in a Corporate and Investment Banking Context" (hereinafter 2017 Discussion Paper). The latter had prompted critical responses from the former UN Special Representative on Business and Human rights, Prof. John G. Ruggie, the UN Working Group on Business and Human Rights and 38 civil society organizations and individuals.¹ A few days before the Thun meeting, the UN Office of the High-Commissioner for Human Rights issued a note on the application of certain aspects of the UN Guiding Principles on Business and Human Rights (hereinafter UNGPs) in the context of the banking sector² that was also referenced in the day's debates.

The meeting opened with an address by State Secretary Marie-Gabrielle Ineichen-Fleisch, Director of the Swiss State Secretariat for Economic Affairs (SECO), who stressed the importance of private sector initiatives and open multi-stakeholder dialogues to help operationalize the UNGPs and reach constructive solutions in times of increasing regulatory pressures. The rest of the day was structured into four panel discussions that explored some of the more sensitive issues regarding the responsibilities of the banking sector under the UNGPs and the OECD Guidelines for Multinational Enterprises from different perspectives (see program attached). The discussions were held under the Chatham House Rule and this report provides an overview of the points and outcomes highlighted.

¹ The 2017 Discussion Paper and responses by stakeholders are to be found on <https://www.business-humanrights.org/en/thun-group-of-banks-releases-new-discussion-paper-on-implications-of-un-guiding-principles-for-corporate-investment-banks#c153851>

² <http://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>

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2. Discussions

On wider (legal) trends and developments

There was general agreement that there is a trend towards the hardening of soft law into new national or supranational legislation relevant to business and human rights. This could potentially impact substantially on the banking sector, although there are still many open questions as to how the trend might affect the wide range of financial services and products in practice. It was advised that banks should take a proactive approach by establishing strong human rights due diligence policies and processes to prevent or mitigate human rights infringements to rights-holders. Parallels were drawn to the development of anti-corruption regulation from soft law to hard law in the past 15 years and how banks (and other businesses) could make full use of this precedent. It was also emphasized several times that embeddedness of human rights policies and due diligence processes across all parts of the organization (including top management, compliance and legal teams) is crucial to successful human rights due diligence, exploitation of synergies and subsequent prevention of harm to people.

Against the background of the wider trend in society to question and judge the legitimacy of certain business behavior, it was indicated that a shift in the notion of (legal) liability could not be ruled out in the future. Banks are in the position of being judged (by society) and judging (their clients' behavior) at the same time – it was recommended that they develop and apply policies and practices to business relationships that adequately protect the human rights of rights-holders potentially affected by their products and services (e.g. through integration into contracts with clients).

Some consideration was also given to recent and future projects relevant to the financial sector, in particular the OECD Responsible Business Conduct due diligence guidance for institutional investors, the forthcoming OECD project phase on corporate lending and corporate finance as well as other international developments in the area of business and human rights (e.g. UN treaty process, work of development finance institutions).

On the 2017 Discussion Paper

The most intensely debated issue concerned the three categories of potential business involvement in human rights harm (cause, contribute, directly linked) and the applicability of UNGP 13a in the banking sector, namely whether banks can, in principle, cause or contribute to human rights harm outside the realm of employee-related (or purely internal) matters. The 2017 Discussion paper was interpreted to categorically exclude this possibility and restrict a bank's potential involvement with human rights harm to situations of direct linkage only (UNGP 13b). Besides conceptual struggles on the definition of the involvement categories depending on the type of financial service, there was also discussion around whether or not the three involvement categories were fixed or if there was a continuum between contribution and linkage under certain circumstances. Against this backdrop and the crucial distinction between the involvement categories, some discussion was held on the implications for the

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banks' responsibilities under the UNGPs' third pillar (Access to Remedy), in particular how and under what circumstances remedies should be provided by banks. Furthermore, some thought was given to the requirements regarding the scope of human rights due diligence, whether these depend on the type of financial product or service provided and the challenges that practitioners face when trying to implement the UNGPs in a day to day environment.

During the discussions, the bank representatives acknowledged the possibility of contribution to human rights harm through own activities (which should not be understood as limited to personnel related matters), though they considered these as rare when providing financial products & services. A consensus was not reached on i) the definition of the three involvement categories in a banking context and ii) the topic of a continuum between contribution and linkage (whether it exists or what the preconditions would be to shift from one category to another). It was argued that a definition *ex ante* of the categories and a definite mapping of what services would fall into them was not possible. In this context, concerns were raised that focusing too much on such theoretical aspects which might never be fully resolved would hinder progress in implementation of the UNGPs. It was also suggested that the concept of proximity introduced in the 2017 Discussion Paper was comparable with the definition of leverage already described in the UNGPs and associated guidance and may therefore be confusing. However, it was agreed that an adequate due diligence process and appropriate human rights risks mitigation actions (where indicated) were key with regard to assignment to, and any subsequent shifting between, involvement categories since the UNGPs are intended as a standard of conduct rather than outcome. It was stressed that banks generally cannot be considered responsible for every human rights impact caused by their clients or companies in which they are invested, but that they should take precautionary measures by means of good due diligence and/or use of leverage to avoid the funds or services they are providing being used for purposes that cause adverse impacts on human rights. This raised further questions on the scope and quality of human rights due diligence and how to manage sometimes limited access to relevant information due to confidentiality rules, unavailability or imprecise self-declaration by clients. On the issue of access to remedy in situations in which a bank would be regarded as contributing, there was also dissent as to how providing (access to) remedy should be realized in practice, especially in cases where many different actors were involved as potential contributors to the harm (construction companies, insurance companies, law firms, banks etc.). The possibility of developing an overarching remedy architecture, separately contributed to by various stakeholders and with due consideration to subsidiarity (where applicable) was suggested as a topic for future reflection.

A further concern discussed was the perception that the 2017 Discussion Paper was written with the intention to avoid legal liability. This was vigorously rebutted by the banks present who confirmed that legal advisers were not the driving force behind the paper. Furthermore, the Thun Group acknowledged that access to remedy might be provided in certain situations of direct linkage and was not solely relevant to the cause and contribute categories – there was no intention of avoiding responsibilities in this respect.

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Based on the outcomes of the panel discussions, the Thun Group agreed to clarify some of the statements in the 2017 Discussion Paper that had led to misunderstandings, especially about the interpretation of UNGP 13a, as well as a clarification that the Paper was drafted from the perspective that financial institutions will generally be directly linked in the case of adverse human rights impacts (UNGP 13b). The Group further recognized the need to make appropriate reference to the requirement of the UNGPs to review risks to rights-holders when providing financial services to corporate clients in order to better reflect the spirit of the UNGPs.

On collaboration with other stakeholders

A point made several times was that the Thun Group should engage further with stakeholders from civil society, other industry sectors as well as financial institutions outside of Europe and North America and those having business models other than universal banks. This was considered beneficial to gaining a broader picture of the challenges and complexities related to the implementation of the UNGPs, learning from each other's experiences and sharing best practices. It was noted that most sectors and businesses still struggle with the implementation of good due diligence practices and would benefit from better clarification on these issues through direct engagement with experienced leading companies or as a result of ongoing multi-stakeholder debate and authoritative guidance by competent bodies. It was also proposed that the Thun Group retained their "bottom-up" approach reflected in the 2017 Discussion Paper and explored the possibility of creating more case studies (beyond the scope of direct linkage or investment and corporate banking) to share views on what good human rights due diligence could look like in practice based on the banks' longstanding experience in these processes. Concerns regarding the risk of violating anti-trust and competition laws if collaborating too closely with competitors to increase standards related to client engagement were partly dispelled referring to guidance published by the OECD in 2015 on that subject.³

3. Conclusion

The Thun Group of Banks' Annual Meeting was marked by an open and constructive dialogue across a diverse group of stakeholders which allowed some of the controversial points of view that existed prior to the meeting to be reconciled, especially relating to the application of UNGP 13b in the banking context. Despite the many unsolved differences on conceptual and legal issues pertaining to the implementation of the UNGPs and differing approaches in general, it was highlighted that all participants shared the same goal, namely the protection of rights-holders from harm. The debates revealed that – as always – the "devil is in the detail" and there remains much to be clarified on the definitions and implications of the three involvement categories and what they mean in an investment and corporate banking context and beyond. It was also emphasized that the outcomes of the debates in Thun and other future discussions will potentially have broad implications for other sectors,

³ <http://mneguidelines.oecd.org/global-forum/2015GFRBC-Competition-Law-RBC.pdf>

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particularly other service providers. It is therefore important that all stakeholders remain actively engaged in dialogue around the development and consideration of best practice in implementing the UNGPs in daily business decision-making. This will help ensure as much consistency as possible in identifying and mitigating potential adverse impacts so that the human rights of individuals and communities are respected.

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