

## Comments from the Global Network Initiative on the Draft Guidance for the ICT Sector on the Corporate Responsibility to Respect Human Rights



February 2013

Protecting and Advancing  
Freedom of Expression and  
Privacy in Information and  
Communications Technologies

The Global Network Initiative (GNI) welcomes the European Commission's Directorate-General for Enterprise and Industry project to develop guidance on the corporate responsibility to respect human rights in the Information and Communication Technology (ICT) sector. We appreciate the opportunity to provide comments on the draft guidance.

GNI is a multi-stakeholder group of companies, civil society organizations (including human rights and press freedom groups), investors and academics, who have created a collaborative approach to protect and advance freedom of expression and privacy in the ICT sector. GNI provides resources for ICT companies to help them address difficult issues related to freedom of expression and privacy that they may face anywhere in the world. GNI has created a framework of principles and a confidential, collaborative approach to working through challenges of corporate responsibility in the ICT sector.

Developing detailed guidance that is of practical use to companies across the sector is a challenging task, and we have been pleased to have the opportunity to contribute to the work of the project team at the Institute for Human Rights and Business and Shift, particularly with regards to freedom of expression and privacy rights. GNI is represented on the ICT Sector Advisory Group by Executive Director Susan Morgan and GNI Board members Rebecca MacKinnon and Lewis Segall, and participated in the recent roundtable discussion of the draft in Brussels.

### Categorizing the segments of the ICT sector

The objective of providing ICT sector-specific guidance on the corporate responsibility to respect human rights is ambitious and entails covering a wide range of companies, from telecommunications operators to software providers. Each segment of the industry faces a different, if interrelated, set of human rights risks. Many companies operate in multiple segments of the sector, which complicates efforts to describe the sector.

We recommend that the description of the ICT sector in section A.2 be revised to more effectively describe the segments of the sector. Sources we recommend include the eight segment approach used in the GNI-commissioned report "Protecting Human Rights in the Digital Age," by Dunstan Allison Hope of the corporate responsibility consultancy BSR<sup>1</sup>, as well as the descriptions of ICT products and services used by the OECD.<sup>2</sup> A version could include the following:

1. Telecommunications services (including consumer-facing wireless and ISP services as well as backbone service providers)

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<sup>1</sup> Dunstan Allison Hope, "Protecting Human Rights in the Digital Age: Understanding Evolving Freedom of Expression and

<sup>2</sup> OECD Guide to Measuring the Information Society 2011, available at <http://browse.oecdbookshop.org/oecd/pdfs/free/9311021e.pdf>.

2. Web and cloud based services/platforms (cloud computing, social networks, “web 2.0” services, search, etc.)
3. Software (physically packaged, digitally downloaded, or pre-installed) on computers, or other networked devices
4. Consumer and business end-user devices of all kinds
5. Telecommunications components, device components, and network equipment

We recommend providing a list of illustrative companies together with the description of each segment of the sector, and using these categories consistently through the document to avoid confusion. For example:

- In Box 1 on page 13, it is not immediately clear what companies fall into the “network and service providers” category. Does this include telecommunications services and Internet service providers (ISPs), software and web services, or all of the above?
- In Box 3 on page 21 the term “over-the-top service providers” is not defined and may cause confusion. Also, it is not clear why this section applies only to these service providers and not other companies such as telecommunications services.
- In Box 4, “mass intercept technology” and “legitimate dual-use” terms are not defined, and the term “legitimate” is likely to be highly contested.
- In Box 18, page 43, there are so few companies sharing data about content removal requests that the report would benefit from naming them or providing numbers by type of company.<sup>3</sup>

### Dealing with different human rights risks

The wide range of human rights risks that affect the ICT sector pose a challenge for developing practical guidance. To improve the guidance, we recommend the following:

1. **A more rigorous mapping of the specific risks facing different companies operating across the ICT value chain.** The guidance refers to risks ranging from supply chain-related issues such as sourcing of raw materials, e-waste, labor rights, as well as freedom of expression and privacy rights, among others. Although many ICT sector companies will need to contend with many of these risks, by grouping together issues with fundamentally different dynamics, the usefulness of the guidance diminishes.
2. **Provide separate sections on specific human rights risks and issues that reflect the unique combination of company, government, civil society, and other stakeholder knowledge, attitudes, and practices.** For different issues, the regulatory response may potentially need to be very different to minimize human rights risks. For example, on page 7 the guidance makes a connection between international regulatory challenges related to the Internet and freedom of expression and privacy with those related to e-waste. These issues are very

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<sup>3</sup> For more information transparency reporting see James Losey and Grady Johnson, “Don’t censor censorship: why transparency is essential to democratic discourse,” Global Information Society Watch 2012, available at [http://www.giswatch.org/sites/default/files/gisw\\_12\\_in\\_preview\\_web.pdf](http://www.giswatch.org/sites/default/files/gisw_12_in_preview_web.pdf).

different as are the risks associated with government regulation. For example, there is a significant risk for free expression and privacy rights arising from government interest in regulation of Internet governance. For some human rights issues, states sometimes do not hold companies accountable when they fail to meet legal standards. However, with regard to freedom of expression and privacy risks, sometimes the opposite can be true—that states making requests of companies based on legislation or regulatory requirements (for example network shutdowns) can risk involving companies in serious human rights violations. This nuance seems to be missing from the guidance and should be included.<sup>4</sup>

3. **Focus the “questions to ask” around specific human rights risks, to help make the guidance more useful to companies in the ICT sector.** By collecting resources dedicated to specific issues and making these available in an appendix (cross referenced with the Activity-Stakeholder matrix) we believe the guidance would most effectively reflect the different levels of guidance and work that has already been done on specific issues. We understood that reflecting this difference between new, emerging issues and more well documented and established ones would be a critical part of this project.

### Specific points by section

Please see the following specific edits and suggestions by section:

#### Introduction

One page 8, the human rights relevance of the Council of Europe Cybercrime Convention should be explained.

#### Policy Commitment

On page 12, “political dissidents” should be changed to “citizens” as these impacts are not restricted to political dissidents.

#### Human Rights Due Diligence

Regarding Box 4, page 22, on “know your customer” guidelines for dual-use technologies, we recommend providing more information regarding the development of this approach. The recent submission of comments to the U.S. State Department by a coalition of civil society organizations with regard to guidance on “sensitive technology” provides a useful summary.<sup>5</sup>

Box 7, page 28 should be corrected to refer to Mutual Legal Assistance Treaties

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<sup>4</sup> For more on this see Ian Brown and Douwe Korff, “Digital Freedoms in International Law,” pp 22-23, available at <https://globalnetworkinitiative.org/sites/default/files/Digital%20Freedoms%20in%20International%20Law.pdf>.

<sup>5</sup> Comments Regarding Sensitive Technologies Guidance by Access Now, the Center for Democracy and Technology, Collin Anderson, the Committee to Protect Journalists, and the New America Foundation's Open Technology Institute, available at [http://oti.newamerica.net/publications/resources/2013/comments\\_regarding\\_sensitive\\_technologies\\_guidance](http://oti.newamerica.net/publications/resources/2013/comments_regarding_sensitive_technologies_guidance).

(MLATs).<sup>6</sup>

In Box 9, Page 30, we recommend highlighting that human rights risks arise from both government demands and from actions related to companies' own terms of service. At a minimum, we suggest clarifying that the last bullet refers to actions taken in response to government requests or in the course of enforcing internal terms of service, or community guidelines.”

### **Remediation and Operational-Level Grievance Mechanisms**

The guidance on grievance mechanisms is particularly generic and includes relatively little information specific to the ICT sector. This section particularly focuses on issues arising from human rights impacts in the supply chain, such as raw material extraction and in manufacturing facilities, rather than issues affecting the freedom of expression and privacy rights of users. In some ways this is to be expected these issues are relatively new issues and grievance mechanisms would not usually be the first things that are developed.

GNI has been working Shift on the development of an engagement and complaints mechanism for GNI. GNI's Governance Charter details our commitment to establishing an effective process, but also notes the particular challenges regarding the complexity of the global landscape on free expression and privacy issues and the potential scale of complaints. For example, together there are nearly one billion users combined between Hotmail, Gmail, and Yahoo mail. Guidance reflecting (or at least acknowledgement of) the challenges of effectively scaling an appropriate mechanism for the sector would be particularly useful.

We would be happy to discuss these comments with you in more detail and we look forward to continuing to work with the European Commission and the Project Team on this important project as it reaches its conclusion.

For more information, please contact David Sullivan, Policy and Communications Director, at [dsullivan@globalnetworkinitiative.org](mailto:dsullivan@globalnetworkinitiative.org).

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<sup>6</sup> See *Digital Freedoms in International Law*, p. 31.