

Mind the Gap Submission to the UN Working Group on Business and Human Rights

Input to information note on ensuring business respect for human rights in the political and regulatory sphere and preventing “corporate capture”

November 2021



Introduction

The [Mind the Gap project](#) advances research and analysis relevant to the corporate responsibility to respect human rights, as set out by the UN Guiding Principles on Business and Human Rights. The [Mind the Gap consortium](#) welcomes the information note that is being prepared by the UN Working Group, and is keen to share its perspective on the harmful effects of corporate lobby, which when excessive can easily lead to corporate capture.

Corporate capture occurs when corporate interests extremely influence a certain policy issue, agenda or new legislation, often from the beginning and on an ongoing basis¹. Corporate lobbying happens on a large scale, characterized by lacking transparency, and unequal access to policy makers compared to other stakeholders such as civil society groups. In this manner, corporate lobbying opens the door to corporate capture and should therefore be addressed. It undermines human rights protections, environmental protections, equality in the widest sense and can fundamentally undermine the public interest in policy making. Hence, it hinders the efforts of states to achieve sustainable and fair policy outcomes, such as the Sustainable Development Goals.

In this submission, the Mind the Gap consortium focuses on the widespread tolerance of corporate lobbying. To provide a background context in which this submission has been prepared, first our framework outlining strategies that corporations use to avoid responsibility for human rights abuses will be explained. The submission will then problematise the practice of corporate lobbying as a harmful strategy. Two examples are provided to explain how this corporate lobby has been undertaken with the aim to avoid responsibility for negative human rights impacts. The submission concludes with a call to the UN Working Group on business and human rights to provide recommendations to UN member states to decrease the ability of corporations to abuse their power.

About Mind the Gap

Mind the Gap is a five-year research project involving civil society organizations from around the world working on business and human rights, responsible business conduct and corporate accountability. The project involves research on, and analysis of, protracted business-related

¹ <https://www.alter-eu.org/stop-corporate-capture>

human rights conflicts. The work has resulted in the identification of harmful strategies that corporations use to avoid responsibility, and of related governance gaps and barriers to justice at national and international level. Insights from research will be used to help civil society organisations and rights holders to become more aware of and successful in countering harmful strategies employed by companies. To stop harmful strategies from being implemented, close identified governance gaps, and remove other systemic barriers to justice, the Mind the Gap consortium advocates for effective policies and measures at the national and international level that are aimed at ensuring respect for human rights and the environment.

Harmful strategies to avoid responsibility

The way the global economic system has evolved, combined with a lack of rules and their enforcement, creates a permissive environment, or even an incentive structure, in which companies are able to operate with impunity. The Mind the Gap consortium has established an innovative framework that identifies corporate strategies leading to the avoidance of responsibility for harmful effects on people and communities around the world. Through a collaborative research process – including literature studies, surveys and consultations – a harmful corporate strategy has come to be defined as: a series of actions taken by a company that results in avoidance of responsibility for human rights or environmental impacts.

The Mind the Gap framework identifies a total of [25 harmful strategies](#) that can be grouped into five main categories:

- Constructing deniability
- Avoiding liability through judicial strategies
- Distracting and obfuscating stakeholders
- Undermining defenders and communities
- Utilising state power

The strategies identified are not inherently illegal, nor may they always be designed with the specific aim of avoiding responsibility. Still, evidence shows that their use has resulted in limited accountability for negative impacts caused by companies. This is harmful for both victims and the public interest.

Harmful effects of corporate capture and corporate lobby

At the heart of many cases of corporate impunity and bad practice is the stark reality of huge power imbalances between multinational companies and the people their activities affect. Companies use their power and influence to deny responsibility or to offer tokenistic remedies. The use and abuse of their powerful position is a feature of many of the harmful strategies used by companies. Within the category "[Utilising state power](#)" and sub-category "Corporate lobbying" our research has observed that companies have successfully leveraged their power with states to their advantage. Where corporate interests have influenced a certain policy issue, agenda or new legislation in the extreme, this is deemed "capture" of the state or its agents. Where the corporate interests are contradictory to the rights and interests of communities, human rights defenders and other rights holders, those latter groups' fundamental protections and access to justice are threatened or effectively undermined.

There is a wide spectrum of corporate political engagement. Legislators may be business owners, there are revolving doors between government bodies and board rooms, and companies are directly funding political parties. Corporate lobbying, in its many forms, is also part of that spectrum and can ultimately lead to corporate capture depending on the nature, intensity and effectiveness of the lobbying and power dynamics in relation to the targeted state institution(s).

Corporate lobbying is a practice that is common and widely accepted. Some companies lobby against regulation that protects human rights, but they also engage in campaigns more indirectly and less visible as an individual company, whether through lobby groups, business associations or purpose-built think tanks.² Such lobbying is conducted through various official and unofficial channels, from lobby letters and meetings to more subtle techniques of influencing policy-makers during dinners and social events. From a business and human rights perspective corporate lobbying is problematic because regulations originally intended to protect human rights or the environment, but that potentially harm business interests, can be effectively derailed or watered down by means of corporate lobbying at local, national and international levels.

At the national level, corporate lobbying often occurs in response to or anticipation of industry-specific regulations, consumer protections laws or corporate law itself.³ At the international level, corporate lobbying efforts focus on agreements between states that have implications for corporations, such as trade and investment agreements, and on treaties that are aimed to improve human rights and environmental protection obligations, such as the [UN binding instrument on business and human rights](#). In case of the latter, companies often seek to minimise future responsibilities and liability for the impacts of business operations.⁴

Lobbying itself is not illicit. However, when the aim of that lobbying is to undermine a regulation that would protect human rights, the company's strategy is likely to have long-term harmful human rights impacts for rights holders. Furthermore, lobbying campaigns may aim to maintain the status quo of non-binding obligations and thereby frustrate the closing of governance gaps.

Example: The German car industry's regulatory capture

The German car industry has been [allowed](#) to shape environmental regulations within the European Union. This exemplifies how corporations use lobbying in order to limit their liability for human rights and environmental abuses.

A 2018 report from Alter-EU – Europe's campaign for lobbying transparency – outlined the extent to which the German car industry had succeeded in regulatory 'capture' at the EU and German national levels. The report revealed that "whenever German car producers have faced tougher measures from the EU, the German government has done everything it could to protect them by delaying or watering down the new rules".⁵

Before the [Dieselgate scandal](#), in 2010, research groups indicated to the EU that differences between emissions on the road and during tests could be explained by some sort of deception device. Civil society organisations and researchers notified the European Commissioner for Industry as well as the Kraftfahrt-Bundesamt (KBA), the German authority responsible for authorising car manufacturing. The director of the KBA later claimed he never suspected illegal

² Corporate Europe Observatory, "Captured states: when EU governments are a channel for corporate interests", February 2019, https://corporateeurope.org/sites/default/files/ceo-captured-states-final_0.pdf (accessed June 29, 2020).

³ van Teeffelen, Jasper and Roeline Knottnerus. "Een Giftige Lobby?" Lobbywatch Nederland. Accessed July 4, 2020. https://lobbywatch.nl/wp-content/uploads/2016/12/Rapport_lobbywatch_online2.pdf (accessed July 4, 2020); Corporate Europe Observatory. "Big Oil and Gas Buying Influence in Brussels: With Money and Meetings, Subsidies and Sponsorships, the Oil and Gas Lobby Is Fuelling the Climate Disaster," October 24, 2019. <https://corporateeurope.org/sites/default/files/2019-10/FFP%20Briefing%20-%20Big%20Oil%20and%20Gas%20buying%20influence%20in%20Brussels%20-%20Oct%202019.pdf>. (accessed June 29, 2020)

⁴ For example, see the written and oral submissions of the International Organisation of Employers (IOE) and the International Chamber of Commerce (ICC) in the context of the negotiations for a legally binding instrument on transnational corporations and other business enterprises with respect to human rights here: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntNC.aspx>

⁵ Nina Katzemich, "Dieselgate and the German Car Industry, Corporate Capture in Europe: When big business dominates policy-making and threatens our rights", (Brussels: Alliance for Lobbying Transparency and Ethics Regulation in the EU, 2018), p. 91-92, <https://www.alter-eu.org/corporate-capture-in-europe> (accessed November 6, 2019).

activity, despite having been warned by civil society groups and the Commission about potential defeat devices.

Early 2015, the European Commission proposed more accurate tests for diesel cars, but Germany delayed the adoption based on a position that was similar to the one taken by the German car industry.⁶ Lobbycontrol has revealed close relationships between the car industry, German regulatory authorities and the government itself, and convincingly argues that the economic weight of the industry in Germany combined with its close access to decision makers create the conditions for close alignment of positions of the car industry and the German government at the expense of public health and environmental concerns.⁷

The German car lobby has privileged access to the Ministers and MEPs to shape regulations to best fit their interests. In the wake of the Dieselgate scandal, in July 2017 alone, Chancellor Merkel met exclusively with the car industry many times, including five times with BMW, three times with Volkswagen, twice with Daimler, once with the German car lobby association VDA, and once with Ford. In this same time period, Chancellor Merkel did not have any meetings with environmental or consumer organisations. Similarly, other ministers and secretaries met with the car industry 325 times in the period between September 2015 and May 2017, compared to 58 meetings with consumer protection groups and 21 times with environmental organisations. These patterns of exclusive and repetitive access by the German car industry points towards increased potential for undue influence and regulatory capture.⁸

Several reports have also provided indications of regulatory capture of sections of the European Commission by the car industry. From secret exchange of information between the European car manufacturers' lobby association and Commission staff,⁹ to shaping regulation through the European Commission advisory group 'CARS21' (which stands for 'Competitive Automotive Regulatory System for the 21st Century' group).¹⁰ From these reports a picture emerges of a close relation between the car industry and legislators, allowing the car industry to help shape the regulatory environment to their own benefit, while putting public health interest and the environment on the back row.

Example: Facebook lobbying against data protection regulations

In 2018, tech giant Facebook claimed to be seeking better data protection but continued [lobbying](#) against binding regulations, showing how companies use lobbying to avoid a stricter regime for safeguarding human rights.

In March 2018, whistleblower Christopher Wylie revealed to *The Observer* how the data firm Cambridge Analytica was exploiting private user data from Facebook.¹¹ Cambridge Analytica worked with both President Donald Trump's election campaign as well as the Brexit 'Leave'

⁶ LobbyControl. "Abgas-Testverfahren: Bundesregierung Blockiert Reform," September 29, 2015. https://www.lobbycontrol.de/wp-content/uploads/15_9_29-PM-VW.pdf (accessed July 9, 2020).

⁷ Katzemich.

⁸ Corporate Europe Observatory, "Leak exposes Commission attempt to delay policing of diesel emissions", November 7, 2016, <https://corporateeurope.org/en/environment/2016/11/leak-exposes-commission-attempt-delay-policing-diesel-emissions> (accessed November 6, 2019).

⁹ Corporate Europe Observatory. "Leak Shows Commission Giving inside Information to Car Lobby on New Emissions Tests," March 16, 2016. <https://corporateeurope.org/en/power-lobbies/2016/03/leak-shows-commission-giving-inside-information-car-lobby-new-emissions-tests> (accessed July 9, 2020).

¹⁰ Fabian Hubner, "Driving into Disaster: How the EU's Better Regulation agenda fuelled Dieselgate", (Brussels: Corporate Europe Observatory, 2017), p. 2, <https://corporateeurope.org/en/power-lobbies/2017/02/driving-disaster> (accessed November 6, 2019).

¹¹ Carole Cadwalladr and Emma Graham-Harrison, "Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach", *The Guardian*, March 17, 2018, <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election> (accessed November 6, 2019).

campaign in the UK, and is now under investigation for its potential influence over these results and misuse of data.

Britain's Information Commissioner's Office found that Cambridge Analytica violated British law in its data harvesting.¹² Internal documents leaked from Cambridge Analytica and Facebook revealed that Facebook was aware of the data breach, but did not take sufficient steps to notify users and secure the data of more than 50 million Facebook users.¹³

In the wake of the public relations fall-out from the Cambridge Analytica scandal, Facebook and its founder Mark Zuckerberg launched a massive public relations campaign and apology tour. Facebook immediately mobilised its internal PR team and hired Definers Public Affairs to downplay and apologise for Facebook's involvement in the scandal.¹⁴

As part of this apology campaign, Facebook took out full-page ads in British and American newspapers stating, "We have a responsibility to protect your information. If we can't, we don't deserve it." In these ads, Zuckerberg said that Facebook was committed to "limiting the data apps get".¹⁵ Zuckerberg agreed to testify in a US Congressional hearing and declared the company was "ready for new federal regulations".

However, the public pledges to do better fly in the face of Facebook's continuous lobbying efforts to avoid increased data protection legislation.¹⁶ Documents obtained by the New York Times in December 2018 showed that Facebook allowed certain companies to access data they claimed was restricted. Apart from breaching the right to privacy and public trust, Facebook may have also violated a 2011 agreement with the US Federal Trade Commission (FTC) that requires explicit consent from users before sharing their data.¹⁷ The report based on an inquiry of the British parliamentary Digital, Culture, media and Sport Committee into disinformation and fake news includes an even stronger allegation, stating that Facebook "intentionally and knowingly violated both data privacy and anti-competition laws".¹⁸

Despite public apologies and a massive PR campaign, Facebook's actions behind the scenes suggest that the tech giant remains committed to avoid a stricter regime when it comes to respecting the right to privacy. [Lobbying disclosure filings](#) show that Facebook spent almost as much on lobbying as the entire D.C. lobby industry combined.

¹² Adam Satariano and Nicholas Confessore, "Cambridge Analytica's Use of Facebook Data Broke British Law, Watchdog Finds", *The New York Times*, November 6, 2018, <https://www.nytimes.com/2018/11/06/technology/cambridge-analytica-arron-banks.html> (accessed November 6, 2019).

¹³ Lauren Aratani, "Facebook, Facing Backlash, Fires PR Firm It Hired To Discredit Soros, Other Critics", *Forbes*, November 15, 2018, <https://www.forbes.com/sites/laurenaratani/2018/11/15/facebook-facing-backlash-fires-pr-firm-it-hired-to-attack-soros-other-critics/> (accessed November 6, 2019).

¹⁴ Aratani.

¹⁵ Sheena McKenzie, "Facebook's Zuckerberg says sorry in full-page newspaper ads", *CNN*, March 25, 2018, <https://edition.cnn.com/2018/03/25/europe/facebook-zuckerberg-cambridge-analytica-sorry-ads-newspapers-intl/index.html> (accessed November 6, 2019).

¹⁶ Sheera Frenkel and others, "Delay, Deny and Deflect: How Facebook's Leaders Fought Through Crisis," *The New York Times*, November 14, 2018, https://www.nytimes.com/2018/11/14/technology/facebook-data-russia-election-racism.html?utm_campaign=The%20Interface&utm_medium=email&utm_source=Revue%20newsletter (accessed November 6, 2019).

¹⁷ Gabriel J.X. Dance, Michael LaForgia and Nicholas Confessore, "As Facebook Raised a Privacy Wall, It Carved an Opening for Tech Giants", *The New York Times*, December 18, 2018, <https://www.nytimes.com/2018/12/18/technology/facebook-privacy.html> (accessed November 6, 2019).

¹⁸ Digital, Culture, Media and Sport Committee, "Disinformation and 'fake news': Final Report", the House of Commons to the United Kingdom, February 18, 2019, p.42 <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmumed/1791/1791.pdf> (accessed July 7, 2020)

Conclusion

Although the strategies corporations use to avoid responsibility for human rights abuses identified by Mind the Gap are not inherently illegal, the wide prevalence and acceptance of these strategies is problematic. Corporate lobbying is in fact legal and widely applied and accepted by managers, consultants, legal advisors, policy makers and other stakeholders as a way to protect corporate and shareholders' interests. While serving business interests, these strategies have harmful effects on society or the environment.

Mind the Gap supports exposing corporate lobbying practices and promotes lobby transparency to help decrease corporations' ability to abuse their power. The consortium welcomes further scrutiny into the issue by the Working Group in order to encourage responsible political engagement and avoid undue political influence by businesses.

To effectively prevent and counter corporate capture, one of the underlying causes - corporate lobbying using privileged access to key decision-makers and government officials – needs to be addressed. National, regional and inter State bodies need to adopt and enforce effective measures to this end. We hope the UN Working Group on Business and Human Rights can play a supportive, advising role by issuing guidance on appropriate and effective measures.

Some of the recommendations to States, for positive policy changes, safeguards and alternatives, which Mind the Gap supports are listed below:

- Ensure that politicians and officials expressly agree to a clear commitment that they will serve the public interest and not corporate interests;
- Establish robust ethics rules for politicians and officials to prevent corporate capture;
- Enact legally binding rules on lobby transparency which places strict requirements on lobbyists to prevent unethical lobbying, including the requirement of full transparency of the funding sources of lobby actors. These actors can be companies, NGOs, but also think tanks (which often masquerade as independent but receive significant corporate donations), front groups, and trade associations. Full transparency should also be required regarding the lobby clients of law firms and lobby consultancies;
- Put in place a compulsory lobby register that captures lobby activities by organisations (including corporations) and proactive transparency of all lobby meetings held by politicians and officials;
- Publish a 'legislative footprint' when legislation and other policies are adopted, which registers and summarises the external input that was provided during the development and negotiation of the legislation/policy, by whom, and how this was integrated in the new the legislation/policy;
- Prohibit former politicians, policy makers and staff of monitoring bodies to engage in lobby activities towards their former employers about subjects which were covered under their previous employment;
- Enact comprehensive freedom of information rules which enable stakeholders to follow the policy-making process in a detailed way, and to assess how a proposal is being influenced;
- Initiate truly open consultation processes which proactively reach out to civil society and local communities and which could be accompanied by meetings and hearings to explain policy proposals and to allow in-depth discussion. In the long term, rolling back undue industry influence requires a broader democratisation that empowers the engagement of citizens' groups in decision making.