

Banks and Human Trafficking: Rethinking Human Rights Due Diligence

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I. INTRODUCTION

Picture the following scenario: two owners of a restaurant in the Netherlands are convicted of human trafficking. The victim, who worked in the restaurant as a cook, was housed on the second floor of the building. As he did not know the alarm code, he could not leave the house at night. His employment contract was in Dutch, a language he did not understand. Both his debit card and bank statements were kept by the employer. The wage that was paid out was below what had been contractually agreed and the employer occasionally made cash withdrawals, payments to suppliers and even one large payment to a relative, all from the cook's bank account. Now imagine that all these activities took place using ABN AMRO bank accounts.

Cases like this raise a fundamental question: does ABN AMRO's responsibility to prevent or mitigate adverse human rights impacts by its business relationships extend to cases like this one? We argue that it does. In fact, the banking sector is uniquely positioned to contribute to the abolition of human trafficking. Our sense is that the sector takes its responsibility seriously. In fact, many banks have published statements under the UK's Modern Slavery Act describing how human trafficking is addressed in their existing policies and procedures on client human rights due diligence. They also note that the issue, like anti-money laundering, is taken up by financial crime units.¹ Addressing human trafficking appears to have become business as usual for the banking industry. ABN AMRO also conducts human rights due diligence on its corporate clients, and the bank has systems to track down and report unusual transactions. However, in our experience, the fight against human trafficking requires a different perspective.

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¹ Under the UK's Modern Slavery Act banks have to report on the steps they have taken 'to ensure that slavery and human trafficking is not taking place – (i) in any of its supply chains, and (ii) in any part of its own business.'

In this piece we draw on the work of ABN AMRO in the area of human trafficking. Part II outlines the general responsibilities of banks under the United Nations Guiding Principles on Business and Human Rights (UNGPs). Part III explains how human trafficking has changed our understanding of human rights due diligence, and how ABN AMRO has implemented these lessons in practice. Part IV looks at the use of data analysis to identify ‘red flags’ of human trafficking. It discusses which indicators banks are looking for, and explains why these efforts need to be informed by a human rights perspective. Our conclusions are set out in Part V.

II. BANKS AND HUMAN RIGHTS DUE DILIGENCE

Since the publication of the UNGPs there has been much debate about the responsibility of banks to respect human rights. While banks’ services may have an adverse impact *on* their clients,² most attention is being paid to the adverse impact created *by* their clients. This means, in the language of the UNGPs, that the banks’ services are often somewhere on the spectrum between ‘directly linked to’ and ‘contributing to’, rather than between ‘contributing to’ and ‘causing’ human rights abuses.³

Irrespective of their degree of involvement, the UNGPs require companies to have in place ‘a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights’.⁴ Most banks, including ABN AMRO, fulfil this requirement by conducting client assessments based on information provided by the client and what is available in ‘the public domain’.⁵ This includes screening of prospective clients or transactions as part of the know-your-customer (KYC) or credit process, as well as annual or event-driven reviews of existing clients. The concept of ‘salience’ is central. Our due diligence aims to identify risks to people, not risks to the bank.

It is always tacitly assumed that ‘clients’ means corporate clients, active in high-risk sectors and/or countries. This is what non-governmental organizations (NGOs) mostly approach banks about. Also, the Dutch Banking Sector Agreement on Human Rights, which is arguably the most comprehensive multi-stakeholder initiative in the banking industry, has limited its scope to ‘corporate lending and project finance’.⁶ We certainly think that banks could improve their human rights efforts in these areas. However,

² See ABN AMRO Human Rights Report 2016, pp. 12–18 on privacy and non-discriminatory access to finance in relation to our retail operations, and pp. 19–22 on labour rights and workplace discrimination concerns in relation to our role as an employer.

³ Ruggie notes that: ‘There is a continuum between contribution and linkage. A variety of factors can determine where on that continuum a particular instance may sit. They include the extent to which a business enabled, encouraged, or motivated human rights harm by another; the extent to which it could or should have known about such harm; and the quality of any mitigating steps it has taken to address it.’ John G Ruggie, ‘Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 & 17 in a Corporate and Investment Banking Context’, 21 February 2017, at 2.

⁴ UNGP 15, 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). The nature of the due diligence varies between the degrees of involvement, however.

⁵ This includes everything from Sustainalytics, RepRisk, internet search strings, NGO reports, Business and Human Rights Resource Centre.

⁶ Dutch Banking Sector Agreement on international responsible business conduct regarding human rights (October 2016).

if banks are serious about addressing human trafficking, they need to look further and recognize that the variety of clients that may link them to these practices is enormous. While ‘traditional’ means of human rights due diligence may allow a bank to identify human trafficking risks in relation to multinational corporations that source shrimp from Southeast Asia, they are not able to expose private individuals that run illicit recruitment agencies in cities like Amsterdam. The characteristics of human trafficking therefore require a different approach.

Two elements of banks’ current human rights due diligence approach need to be rethought from a human trafficking perspective: (1) the focus on clients that are active in less regulated countries, and (2) the focus on large corporates instead of small and medium-sized enterprises (SMEs) and retail clients. Equally, the human trafficking work of banks’ financial crime or forensic units would benefit from a human rights perspective. Using data analysis is not merely a logical extension of anti-money laundering investigations, but a means of conducting human rights due diligence by combining qualitative information with data analysis. Banks’ traditional human rights due diligence and their data analysis efforts should therefore have a common approach, as both activities are intended to fulfil banks’ responsibilities under the UNGPs.

III. RETHINKING DUE DILIGENCE IN THE CONTEXT OF HUMAN TRAFFICKING

A. Human Trafficking is Taking Place Close to Home

Banks typically prioritize their due diligence efforts based on a risk classification that takes into account sector and country risks and the likelihood that these risks will materialize. As a consequence, more time is spent on assessing the performance of construction companies that build football stadiums in Qatar than on their competitors that build roads in the Netherlands, despite the fact that also in the latter context there have been examples of labour exploitation.⁷ Also, our ability to contribute to the prevention or mitigation of human trafficking is greater in the Netherlands than it is abroad.⁸ If ABN AMRO discovers that a corporate client is contributing to human trafficking in the shrimp sector in Southeast Asia, the bank will engage with the company to improve the situation. ABN AMRO could also decide to end its business relationship with the client, but whether this changes the situation on the ground often remains unclear.⁹

In the Netherlands, on the other hand, the information that ABN AMRO can provide to law enforcement authorities may be the missing pieces needed to successfully prosecute a case.¹⁰ Criminal law is binary, one is either convicted or acquitted. Evidence

⁷ Netherlands Institute for Human Rights, ‘Portugese en Poolse A2-bouwers hebben recht op cao arbeidsvoorwaarden’ (31 August 2015).

⁸ Although our contribution does not aim to provide a conceptual reflection on the UNGPs, the ability to take certain actions certainly affects one’s responsibility; see UNGP 19(b)(ii).

⁹ The Dakota Access Pipeline is arguably the most prominent example in which a number of banks decided to end their relationship with companies involved, or backed out of the project finance. Leverage is also discussed in the context of the Dutch Banking Sector Agreement on human rights. A final paper is expected this autumn.

¹⁰ It should be noted that cases that occur in the Netherlands also have an international context due to the transboundary element in human trafficking cases.

in human trafficking cases thus has a peculiar arithmetic: $0 + 0 + 0 + 0 = 1$. While individual pieces of information may not be sufficient to craft a successful court case, they may be crucial to constructing the full picture. Banks thus need to understand which pieces of information law enforcement authorities may need, and law enforcement authorities need to understand which pieces of information banks can offer. This is especially important as victims do not often come forward; the police has to build a case from the ground up. Too often, extensive human rights due diligence is necessary because states fail to fulfil their obligations under the first pillar of the UNGPs. In this case, it is possible to realize cross-fertilization between the state's duty to protect and the corporate responsibility to respect human rights. This enables the prosecution of perpetrators and effective remedy for victims. ABN AMRO thus learns from the police and the Dutch Public Prosecution Service to determine which zeros to look for, and where to find them.

B. Looking for Zeros at SMEs and Retail Clients

The recent discussion paper by the Thun Group of Banks poses that banks 'will undertake due diligence scaled according to the complexity and/or size of the client's business and the severity of the actual or potential human rights impacts identified'.¹¹ However, companies that are involved in human trafficking in 'destination countries' like the Netherlands are often small, and operate under the radar. Risks are most prevalent in sectors with many SMEs, such as agriculture, construction, recruitment agencies, cleaning, transportation and the leisure industry. Clients in these sectors should not be ignored just because of their size or because they only operate in the Netherlands. ABN AMRO has therefore started to include tailor-made questions on labour practices in its due diligence process. Companies are asked, for example, whether they have foreign subsidiaries that are involved in the recruitment process, whether recruitment agencies they work with are certified, and whether labour agreements are drafted in the employee's native language.

As in the KYC and credit process for our large clients, these questions are asked on an annual basis as part of the regular client review process. However, whereas a relationship manager of palm oil clients will usually visit a company's headquarters instead of its plantations, his or her counterpart who is responsible for Dutch crop farmers regularly sees what is going on at the farm. Our colleagues are not labour inspectors, but if they notice that employees are not being treated the way they should be, they raise their concerns with the clients. To equip them with sufficient knowledge, we have organized two training courses in cooperation with the Dutch police. Thus far, the Environmental and Social Risk department has received two notifications of relationship managers that have noticed something out of the ordinary. This year, ABN AMRO has organized a similar course focused on sexual exploitation in hotels.

It is not enough for banks to widen their focus from 'far away' to 'close to home', and from large corporations to SMEs. The responsibility of banks *vis-à-vis* private individuals who are associated with human rights violations is only marginally

¹¹ The Thun Group of Banks, 'Discussion Paper on the Implications of UN Guiding Principles 13 & 17 in a Corporate Banking and Investment Banking Context' (January 2017) at 10.

addressed in the UNGPs context¹² and receives little attention from civil society organizations. However, perpetrators and victims of human trafficking may have personal bank accounts or otherwise use financial products and services. Many signals of human trafficking would go unnoticed if banks ignored retail banking activities. As such, ABN AMRO's front-office staff fulfil an important role. There might be no reason to refuse a bank account to a 21-year-old woman from Bulgaria who walks into an ABN AMRO branch in the city centre of Amsterdam, accompanied by a shifty individual. While some elements of this situation could be indicative of human trafficking, it is not a clear case that warrants an immediate police report. Making a note of this 'zero' in our systems, however, could later prove to be crucial if the police start an investigation on the shifty individual. It is therefore important that banks train their front-office staff and develop procedures for when and how to report cases to the police. There is much potential for banks to jointly develop this training, as it becomes more effective when based on real-life situations. So far, there have been no examples of successful prosecutions in which ABN AMRO provided crucial information, but we will report on progress in this area in our bi-annual Human Rights Reports.

IV. IDENTIFYING HUMAN TRAFFICKING THROUGH DATA ANALYSIS

A. Indicators of Human Trafficking

The main innovation that ABN AMRO and other banks are looking at in the context of human trafficking is the use of data analysis. This started with the establishment of the Bankers' Alliance Against Trafficking in 2012 by New York District Attorney Cyrus Vance Jr. There are currently a growing number of alliances, initiatives and task forces that focus on improving 'transaction monitoring and data analytic capabilities to support the pressing need for improved evidence that could boost [human trafficking] related prosecutions'.¹³ This is a natural fit. Banks have extensive obligations to report suspicious transactions to the authorities. Indeed, governments and international organizations are also keen to emphasize the links between human trafficking and criminal activities such as money laundering and terrorism finance.¹⁴

Financial institutions already develop systems to identify 'red flags' in the vast amount of financial data that they hold. Irregularities are reported to the Financial Intelligence Unit of the Dutch police. Analysis of transaction activity and client data has enormous potential. Often, human trafficking takes place behind the veil of legitimate business conduct. Victims' salaries are paid to their personal bank accounts. Subsequently, however, the revenues are funnelled back to the perpetrator. Payments are made from the victim's bank account to the company, stating 'rent,' 'meals' or 'expenses'. Many other

¹² The Thun Group of Banks, 'UN Guiding Principles on Business and Human Rights: Discussion Paper for Banks on Implications of Principles 16–21' (October 2013) at 12–13 is a rare example.

¹³ Tom Keatinge and Anne-Marie Barry, 'Disrupting Human Trafficking: The Role of Financial Institutions' (RUSI Whitehall Report 1–17, March 2017) at vii.

¹⁴ In December 2016, the United Nations (UN) Security Council adopted its first-ever resolution on human trafficking. It asks member states to consider reinforcing its legislative framework to facilitate data sharing between law enforcement authorities and the private sector 'to help identify and detect suspicious financial activity related to trafficking in persons *that finances terrorism*'. UN Security Council Resolution 2331 (2016), emphasis added.

indicators have been documented. This includes (1) ‘individuals with an excessive number of personal accounts’, (2) ‘payments to multiple cell phone/utilities companies or multiple payments to the same company’, and (3) ‘significant and frequent gasoline station credit card charges between 11 pm and 6 am’.¹⁵ Indicators may differ from one local or national context to another and may give many ‘false positives’. ABN AMRO is researching whether these indicators are the right ones for the Dutch context. Banks can thus not merely implement the learnings from reports of the European or American bankers’ alliances, but must actively work with local stakeholders in order to discover and refine what they have to look for.

B. The Importance of a Human Rights Perspective

The specificity of the above-mentioned indicators also means that banks need to establish internal partnerships between their existing ‘investigations and intelligence infrastructure’¹⁶ and their human rights experts. The latter often work in the Environmental and Social Risk departments that conduct human rights due diligence in the context of corporate lending and project finance. Banks’ statements under the UK’s Modern Slavery Act do not specify whether the work of financial investigation teams is informed by a human rights perspective. Identification of human trafficking ‘red flags’ often appears to be the by-catch of general efforts to protect the financial system against criminal activities.

The lack of a human rights perspective has been flagged in other contexts as well. The UN Office of the High Commissioner for Human Rights (OHCHR) identified the same pitfall in relation to states’ human trafficking activities. In 2014, the OHCHR warned that ‘[while] the link between human rights and human trafficking is clear, it does not necessarily follow that human rights will naturally be at the centre of responses to trafficking’.¹⁷ The OHCHR therefore advocated a ‘human rights-based approach’ that puts victims centre stage.

In addition to the role that internal human rights experts can play in identifying the specific indicators of trafficking, there are three additional benefits to developing a holistic approach to human trafficking. First, it will facilitate banks’ cooperation with external stakeholders. This includes not only victims’ organizations or human rights NGOs, but also government agencies such as labour inspectorates with which financial investigation units do not often work. Second, in addition to identifying cases of trafficking, banks can also actively help victims. In the Netherlands, many foreign victims lack basic financial literacy. Banks can provide help, but it is unlikely that they will spot opportunities when looking at human trafficking from a compliance or financial crime perspective. Third, applying data analysis to identify ‘red flags’ of human trafficking in clients’ financial data raises privacy concerns. It is crucial that we prevent negative impacts. Sometimes this may slow down progress. ABN AMRO does not have definitive answers to the dilemmas that arise, but the best way to find them is by holding frank and open discussions with our stakeholders.

¹⁵ The Bankers’ Alliance Against Trafficking, ‘Human Trafficking: Customer and Financial Transaction Traits That May Present Risk’ (17 February 2014).

¹⁶ HSBC, Modern Slavery and Human Trafficking Statement 2016, 21 February 2017.

¹⁷ OHCHR, ‘Human Rights and Human Trafficking’, Fact Sheet No. 36 (2014) at 7.

V. CONCLUSIONS

The UNGPs and transparency requirements such as the UK's Modern Slavery Act provide a great opportunity for banks to think about how they are associated with human trafficking and to share information on their efforts to encourage a 'race to the top' in the financial sector, as this legislation intends to do.¹⁸ However, there is a risk that banks will simply tick the box of the legislative requirement and report what they are currently doing in relation to human rights or financial crime at large, rather than thoroughly reflect on their activities from a different perspective. The holistic approach we have developed at ABN AMRO has changed the way we perform human rights due diligence. Human trafficking is not something that occurs in distant supply chains. SMEs in sectors like agriculture or construction are now also covered by our policies and procedures. Through a combination of data and qualitative analysis, ABN AMRO aims to identify trafficking activities in the vast amounts of data that it possesses. Instead of operating on separate tracks, the work of the bank's Compliance, Crime & Integrity department is strongly informed by a human rights perspective. Needless to say, holistic approaches can never be developed in isolation. The external and internal partnerships we have established will enable us to continuously improve our efforts and make a meaningful contribution to the fight against human trafficking.

¹⁸ UK Government, *Transparency in Supply Chains etc – A Practical Guide*, at 5.