PUBLIC CONSULTATION

OECD Due Diligence Guidance for Responsible Business Conduct (Draft 2.1)

Implementing the due diligence recommendations of the OECD Guidelines for Multinational Enterprises

Deadline for response: 9 February 2017

Organisation for Economic Co-operation and Development
Investment Division, Directorate for Financial and Enterprise Affairs
Paris, France

Context

The OECD is currently developing a general *Due Diligence Guidance for Responsible Business Conduct* to provide practical support to companies on the implementation of the *OECD Guidelines for Multinational Enterprises*. The draft *Guidance* contains plain language explanations of the due diligence recommendations and associated provisions in the *Guidelines* and can be used by companies in any sector of the economy. In this context, the OECD is making two draft documents available for public comment:

- **OECD Due Diligence Guidance for Responsible Business Conduct**
- **OECD Due Diligence Companion** - a "living document" containing examples, tips and good practices that could be regularly updated with further examples as the Due Diligence Guidance is implemented

This document contains version 2.1 of the draft Due Diligence Guidance. Information about the public consultation can be found online at http://mneguidelines.oecd.org/due-diligence-guidance-for-responsible-business-conduct.htm.

Invitation to comment

Comments or any queries on the draft Due Diligence Guidance are welcome until **9 February 2017** and should be sent to investment@oecd.org.

Find out more about OECD work on responsible business conduct at: http://mneguidelines.oecd.org

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Introduction

Businesses can play a major role in contributing to economic, environmental and social progress, especially when they minimise the adverse impacts of their operations, supply chains and other business relationships. The *OECD Guidelines for Multinational Enterprises* set out recommendations that businesses are expected to take to avoid and address adverse impacts.

Basis for this Guidance

This Due Diligence Guidance for Responsible Business Conduct ("Guidance") is based on the recommendations contained in the *OECD Guidelines for Multinational Enterprises* (the "*Guidelines"*). In relation to human rights impacts, including impacts on the human rights of workers, it seeks to align with the *UN Guiding Principles on Business and Human Rights* (UNGPs),[1] the *ILO Declaration on Fundamental Principles and Rights at Work*,[2] relevant ILO Conventions and Recommendations,[3] and the *ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*.[4]

Purpose of this Guidance

This Guidance is not intended to reinterpret the *Guidelines* but seeks to provide practical support to enterprises on their implementation by providing a plain language explanation of the due diligence recommendations and associated provisions in the *Guidelines*. This Guidance can also serve as a reference for stakeholders to understand the measures businesses ("enterprises") are recommended to take with regard to managing their impacts. It may be used by National Contact Points (NCPs) for the OECD *Guidelines* to promote the OECD *Guidelines*.[5] This Guidance may be relevant for other parties, such as sector-wide and multi-stakeholder initiatives, that facilitate collaboration on some or all steps of the due diligence process.

Scope of this Guidance

TARGET AUDIENCE: This Guidance is addressed to all multinational enterprises (MNE)[6] in all sectors and of all sizes, including small and medium-sized enterprises (SMEs), operating or based in countries adhering to the *Guidelines.*[7] This includes state-owned enterprises.[8] The *Guidelines* apply to all the entities within the MNE enterprise group – parent and local entities, including subsidiaries.[9] This Guidance may also be useful for any domestic enterprise seeking to implement the OECD *Guidelines*[10] since the *Guidelines* reflect good practice for all enterprises and are not intended to introduce differences in treatment between domestic and multinational enterprises.[11]

BUSINESS RELATIONSHIPS: One of the defining characteristics of the international business environment is inter-connectedness.[12] These webs of business relationships are within the scope of the expectations to prevent or address adverse impacts under *Guidelines*. Enterprises often act through a network of subsidiaries and other entities located in different national jurisdictions. The enterprise itself and its subsidiaries and other entities in turn often have business relationships with a wide range of other enterprises and through a wide range of types of relationships – as suppliers, franchisees, licensees, joint ventures, minority investments, contractors, customers, consultants, legal counsel, etc. All of these diverse kinds of relationships are contemplated by and covered by the *Guidelines*[13] and this Guidance.

RESPONSIBLE BUSINESS CONDUCT (RBC) RISKS & IMPACTS: This Guidance outlines core concepts and actions to help enterprises identify and address impacts of their activities and business relationships on matters covered under the *Guidelines* and related to ***Disclosure, Human Rights, Employment and Industrial Relations, Environment, Combating Bribery, Bribe Solicitation and Extortion, and Consumer Interests***. It does not provide detailed recommendations for implementation of due diligence in each of these specific risk areas; the *Guidelines* themselves include a dedicated chapter for each of these issues. The separate Due Diligence Companion includes example boxes and additional information to help enterprises conduct due diligence in line with the actions and approaches outlined in this Guidance and with regard to specific RBC impacts covered by the *Guidelines*.

Links to other OECD Processes

OTHER OECD SECTOR GUIDANCE ON RESPONSIBLE BUSINESS CONDUCT: The OECD has specific due diligence guidance and good practice papers for the minerals, agriculture and garment & footwear supply chains, as well as the extractives and financial sectors. [14] These were developed closely with governments, business, workers and civil society. Approaches articulated under the sector guidance are intended to align with the approach of this Guidance, but provide more detailed recommendations tailored to specific contexts or sectors. This Guidance is not intended to replace or otherwise modify existing sector-specific or thematic OECD guidance on RBC, so where questions arise, enterprises should use the guidance that provides more specific relevance to their operations or sector.

OTHER OECD INSTRUMENTS: The *Guidelines* are referenced in a range of other OECD instruments that reinforce the interlinkages between responsible business conduct (RBC) and these other areas: the *G20/OECD Principles of Corporate Governance;*[15] the *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (SOEs);[16] *Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence;*[17] the *Policy Framework for Investment*;[18] and the *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009).*[19]

Box 1: Characteristics of the OECD *Guidelines* for Multinational Enterprises (MNEs)

The *Guidelines*:

- Are recommendations addressed by governments to MNEs concerning responsible business conduct.[20]
- Provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally-recognised standards.[21]
- Set out the shared expectations for responsible business conduct of the governments adhering to them and provide a common point of reference for enterprises and other stakeholders.[22]
- Are based on the shared views and values of adhering countries on all the major areas of business responsibility and highlight the positive contribution MNEs can make to sustainable development.[23]
- Provide a clearer understanding of the baseline standards for how businesses should understand and address the risks of their operations and how governments should support and promote such responsible business practices.[24]
- Create a more predictable business environment that equips enterprises with the necessary processes to meet their responsibilities and enables governments and other stakeholders to hold them accountable against reasonable expectations.[25]
- Both complement and reinforce private efforts to define and implement responsible business conduct.[26]
- Are consistent with other authoritative international instruments, such as the UN Guiding Principles on Business and Human Rights[27] and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.[28]
- Include a binding commitment by Governments adhering to the *Guidelines* to set up a National Contact Point (NCP) to further the effectiveness of the OECD *Guidelines* by undertaking promotional activities, handling inquiries, and contributing to the resolution of issues that arise relating to the implementation of the *Guidelines* in specific instances.[29]

Key Terms

Adverse impact	Adverse impacts refer to negative impacts (harm) to individuals, workers, communities and the environment in relation to matters covered by relevant chapters in the OECD *Guidelines:* disclosure; human rights; employment and industrial relations; environment; combatting bribery, bribe solicitation and extortion; and consumer interests. (See "RBC impacts" below)
Business relationship	Business relationships include relationships with business partners (any kind of business partner whether through a contractual or commercial relationship or some other kind of relationship, including a cascade of relationships), entities in its supply chain, and any other non-State or State entity directly linked to its business operations, products or services. Business relationships may include any supplier or other business partner in an enterprise's supply chain. (*Guidelines*, Chapter IV – Human Rights, Commentary para. 45)
Due Diligence	Due diligence is the processes through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts. (*Guidelines*, Chapter II – General Policies, para. 10). Due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the enterprise itself to include the risks of harm related to matters covered by the *Guidelines*. (*Guidelines*, Chapter II – General Policies, Commentary para. 14)
Leverage	Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that has caused the harm. (OECD Guidelines, II, Commentary, 19)
Meaningful stakeholder engagement	Meaningful stakeholder engagement is characterised by two-way communication and depends on the good faith of the participants on both sides. (*Guidelines*, Chapter II – General Policies, Commentary para. 25)
Mitigation	'Mitigation' of potential adverse impacts refers to actions taken to reduce the likelihood of certain adverse impact occurring, while mitigation with respect to actual adverse impacts refers to actions taken to reduce the extent of an impact. Any actual impact then requires remediation (*Guidelines*, Chapter II – General Policies, Commentary para. 14).
Prevention	Prevention are actions taken to avoid an impact happening. 'Prevention' of the kinds of adverse impacts set out in the *Guidelines* is the priority and may also be required under national law. These steps can range from the simple (installing a smoke detector) to complex (testing protocols on health products to protect consumer safety or engineering solutions to eliminate emissions). Prevention can also include decisions not to conduct activities where the risk of adverse impacts is considered too high.
RBC Impacts	RBC impacts refer to adverse impacts (harm) on matters covered by the *Guidelines*. Actual adverse RBC impacts are those impacts that have actually occurred or are occurring, whereas potential adverse RBC impacts that have not yet occurred by been identified as potentially likely to occur are referred to as "RBC risks."

RBC Risks	RBC risks refer to the risk of adverse impact (harm) to individuals, other organisations and communities on matters covered by the *Guidelines*. RBC risks can also be referred to as "potential adverse RBC impacts." This Guidance does not focus on risks to the business itself.
Remediation	Remediation and remedy refer to both the processes of providing remedy for an adverse impact and to the substantive outcomes that can counteract, or make good, the adverse impact, including: apologies, restitution or rehabilitation, financial or non-financial compensation (including establishing compensation funds for victims, or for future outreach and educational programs), punitive sanctions (whether criminal or administrative, such as fines), as well as prevention of harm through, for example, injunctions or guarantees of non-repetition.
Risk-based	Risk-based refers to the processes and management actions that an enterprise implements to conduct due diligence, which should be proportionate to the severity of the harm.
Stakeholder	Stakeholders include persons or groups who are or could potentially be directly or indirectly affected by the actions of the enterprise and their business relationships.

Structure of the Guidance

Part I
Core concepts for implementing due diligence under the *Guidelines*

This section sets out the "Core Concepts" underpinning the *Guidelines* and the implementation of their due diligence provisions. They should help enterprises understand, adapt and apply the due diligence provisions of the *Guidelines*.

Part II
Practical steps for implementing due diligence under the *Guidelines*

This section describes the practical actions enterprises can take to implement due diligence for responsible business conduct under *Guidelines*.

Annex:
Understanding "cause", "contribute" and "directly linked"

Introduces these concepts with practical questions to help enterprises assess their involvement with adverse impacts.

Due Diligence Companion - Additional tips and explanations for implementing the Due Diligence Guidance for Responsible Business Conduct

The Due Diligence Companion is separate tool intended to build on the Due Diligence Guidance by providing additional tips, examples and further explanations of the steps and key actions outlined in Part II of the Due Diligence Guidance. The Companion for the Due Diligence Guidance could be regularly updated with illustrative examples, cases, or further explanations as the Guidance is implemented.

Two-page summary: Due diligence for responsible business conduct

Enterprises can create or be involved with:

- **positive impacts** on society and contribute to sustainable development, for example through job creation, human capital development, raising investment and fostering innovation.
- **adverse impacts** related to human rights, workers conditions, the environment, bribery, disclosure and consumers through their own activities or their business relationships.

Enterprises should maximise positive impacts and avoid adverse impacts. For this purpose, they are expected to carry out due diligence.

WHAT IS DUE DILIGENCE? The process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts. Enterprises should carry out due diligence as a way of meeting the recommendations of the *Guidelines*, building on existing systems that underpin their management of risks. What may be new about this approach is orienting these systems towards responsible business conduct:

Expanding or reorienting their due diligence process to focus not only on risks to the enterprise, but also risks to the environment, to workers, to consumers, to people and their human rights and of unethical conduct.

- Identifying and managing not only risks associated with its own operations, but also the risks the enterprise may create or be involved in through its web of business relationships, for example through its supply chain.

CAPTURING THE "ESSENCE" OF DUE DILIGENCE:

- ✓ Covers the different risk areas mentioned in the Guidelines: Disclosure; Human Rights; Workers and Industrial Relations; Environment; Bribery, bribe solicitations, extortion; Consumer interests.
- ✓ A risk-based approach, means that efforts should be proportional to risk; the potential and actual severity of impacts are the driving force to scale up or down due diligence.
- ✓ Prioritisation is crucial to identify the relative severity of RBC impacts and focus due diligence efforts.
- ✓ Systematic approach, involving on-going, proactive and reactive processes with a focus on progressive improvement.
- ✓ Nature and extent of due diligence varies according to company circumstances and the situation, such as the size of the enterprise, its sector, operating environment or market, business model, position in the supply chain, etc.
- ✓ Stakeholder engagement is used to involve those potentially directly or indirectly affected by its operations or business relationships.
- ✓ Collaboration with enterprises at a sector-wide level, workers, home and host governments, and civil society enhances due diligence.
- ✓ Providing for or co-operating in remedy for adverse impacts the enterprise "caused or contributed to" (*see Annex for understanding these terms*) is an outcome of due diligence.

This Guidance is intended to help enterprises implement the Guidelines and meet expectations of their stakeholders by taking a more integrated approach to doing business responsibly. As enterprises turn the pages of this Guidance, they will find familiar approaches, with explanations of how they can be expanded to work towards eliminating adverse impacts. Some of it may be familiar, but other parts may be more challenging. The Guidance is intended to help with both.

Summary of "Key Actions" to put a due diligence process in place

I. Embed responsible business conduct into policy and management systems

1. Devise and adopt an RBC policy (or combinations of policies) that provide guidance to staff and business partners and a clear signal to stakeholders and publish the RBC policy (or policies) to support transparency.
2. Embed the RBC policy into its enterprise culture, approaches and management systems to make sure it is rooted in the enterprise and is actually implemented as part of everyday business.
3. Assign accountability for RBC matters to senior management, and for public companies, assign board level responsibilities; complement this by assigning responsibility across relevant departments.
4. Develop management system(s) with internal controls that are commensurate with the RBC risks of its operations and operating contexts to integrate RBC into its everyday business processes.
5. Support implementation by providing adequate resources & training to staff, and as appropriate, business partners.
6. Incorporate RBC expectations and policies into supplier or other business relationships, including through contracts or other forms of written agreements with business partners.

Due diligence process

II-A. Identify and assess adverse RBC impacts

1. Use a variety of tools/approaches to scope out and identify risks of harm on all matters covered by the Guidelines that may be likely to be in the enterprise's own operations and with its business relationships.
2. Use iterative processes to prioritise and hone in on RBC risks and impacts, moving from general areas of RBC risk to more specific RBC risks and impacts associated with its activities and its business relationships.
3. Assess whether those RBC risks or actual impacts would have the kind of adverse impacts covered by the Guidelines, by benchmarking against relevant laws and regulations and the Guidelines and assess the enterprise's relationship to the adverse impacts (i.e. cause, contribute or directly linked).
4. Repeat these processes on a regular basis, recognising that more complex an enterprise and/or the higher the RBC risks, the more in-depth these processes will need to be.

II-B. Prevent and mitigate adverse RBC impacts

1. Design response plans that are fit for purpose for the potential or actual RBC impacts and corresponds to the enterprise's involvement with the impact.
2. Prioritise responses as necessary, based on severity of the potential or actual impacts.
3. Use leverage with business relationships to prompt responses to potential or actual impacts.

II-C. Track performance

1. Develop or adapt systems to track how it is responding to RBC risks & impacts and monitor implementation of any management plan against established objectives, goals and timelines.
2. Seek to identify trends and patterns that highlight recurring problems and issues that have been missed.
3. Feedback lessons learned into improving due diligence and its outcomes in the future.

II-D. Communicate

1. Disclose timely and accurate information on all material matters regarding their activities, structure, financial situation, performance, ownership and governance as set out in the Guidelines 30 and the OECD Principles of Corporate Governance, if applicable.
2. Disclose additional information set out in the Guidelines31 to improve understanding of the enterprise's operations.
3. Communicate with stakeholders to account for how the enterprise has addressed actual and potential adverse RBC impacts, adapting communication channels as necessary to stakeholders.

III. Provide for or cooperate in remediation when appropriate

1. Enable remediation for harms caused or contributed to, using a variety of avenues.
2. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.

Part I: Core Concepts for Implementing Due Diligence under the *Guidelines*

1. Enterprise actions create responsibility to address adverse RBC impacts

The actions of enterprises have impacts – many of those impacts will be positive, such as job creation, efficiently turning natural resources, capital, technology and human resources into the products and services other businesses and consumers want to buy, and developing innovative solutions to sustainable development challenges.[32] However, enterprises can also create or be involved with adverse impacts – in other words, harms identified in the *Guidelines* (adverse RBC impacts) - through their own activities and business relationships. The *Guidelines* establish that enterprises have responsibilities to prevent or avoid such harms.

2. Enterprise actions and business relationships can have a wide range of adverse RBC impacts and they are often better managed in an integrated way

Under the *Guidelines* and as used in this Guidance, adverse RBC impacts are harms related to issues covered under selected chapters of the *Guidelines*.[33] Each chapter of the *Guidelines* provides more detail on the kinds of potential RBC impacts (risks) and actual RBC impacts enterprises should avoid and address and the kinds of positive impacts that enterprises can create. The *Guidelines* are based on and cross-reference a wide range of authoritative international instruments in the commentary sections; these international instruments and national laws[34] on these topics provide more detailed information on the types of RBC impacts concerned.

Box 1 provides examples to illustrate the kinds of issues discussed in the Guidance. The OECD Due Diligence Companion provides many more examples, including how due diligence may be tailored to different RBC risk areas.

Box 1: Examples of RBC Impacts Covered by the *Guidelines*

***Guidelines* Topic**	**Examples of Adverse RBC Impacts** *This list is illustrative and not intended to provide an exhaustive list of all types of RBC impacts that may be associated with enterprise operations and business relationships.*
Disclosure	➢ failure to disclose relevant information on material matters such as foreseeable risk factors and issues regarding workers and other stakeholders[35] ➢ providing inaccurate, unverifiable information that is not sufficient to enable consumers to make informed decisions[36] ➢ failing to provide the public and workers with adequate, measureable and verifiable (where applicable) and timely information on the potential environment, health and safety impacts of the activities of the enterprise[37]
Human Rights	➢ intensive use of land or water without considering impacts on local communities who use the land and water, impeding access and availability of food and impacting livelihoods[38] ➢ failing to take into consideration the rights of disabled persons, such as through reasonable accommodation[39] ➢ involvement in sexual harassment[40] or sexual violence in operations or sourcing[41] ➢ failing to identify and appropriately engage with indigenous peoples where they are present[42]
Workers and Industrial Relations	➢ retaliating, interfering with or discriminating against workers' representatives ➢ discriminatory or disciplinary action against workers who make bona fide reports to management or competent public authorities on practices that contravene the law or the OECD Guidelines[43]

	➢ payment of wages that do not meet the basic needs of workers and their families[44] ➢ exposing workers, third party and community to hazardous materials and substances[45] ➢ engaging business partners who contract temporary migrant workers required to pay a large recruitment fee for the job, which can result in forced labour / modern slavery
Environment	➢ ecosystem degradation through land degradation, water resource depletion, and/or destruction of pristine forests and biodiversity[46] ➢ operating with unsafe levels of biological, chemical or physical hazards in products or services[47] ➢ using harmful and hazardous chemicals and restricted chemicals in production[48] ➢ discharging waste water without regard to adequate wastewater infrastructure[49] ➢ failing to have in place an environmental management system appropriate to the enterprise[50]
Bribery, Bribe Solicitation and Extortion	➢ bribery of service-level bodies overseeing the land sector to obtain access to land[51] ➢ selling products to government agencies at an elevated price to provide public officials with a share of the profit[52] ➢ bribing environmental inspection authorities to ignore water use and pollution[53] ➢ providing gifts, meals and entertainment to those with whom the enterprise does business in foreign markets without adequate controls or records[54]
Consumer Interests	➢ putting on the market products that are unsafe for consumer use ➢ failing to take reasonable measures to ensure the security of personal data that is collected, stored, processed or disseminate[55] ➢ using deceptive marketing practices about the environmental impact of products to mislead consumers

Given the breadth of matters covered by the *Guidelines*, enterprises are likely to carry out a variety of different processes – some focused on controlling bribery, others focused on worker health and safety, others on controlling water discharges, etc. – and across a variety of departments to address these harms. However, many of them are interrelated:[56] labour rights are human rights; bribing environmental inspectors to obtain permits can have impacts on levels of corruption as well as environmental damage; etc. Therefore, enterprises may often find it more effective to take an integrated approach to identify and avoid these interlinked impacts.

3. "RBC due diligence" is a means for enterprises to meet their responsibilities to address adverse RBC impacts and differs in several ways from commercial or compliance due diligence

Carrying out due diligence is a means to an end; the process is intended to help enterprises meet their responsibilities to prevent and address their adverse RBC impacts under the OECD *Guidelines*, and other international standards, including the UNGPs and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. The *Guidelines* recommend that enterprises conduct due diligence to (i) identify, (ii) prevent or mitigate and (iii) account for how actual and potential adverse RBC impacts are addressed.[57] Due diligence should be carried out in good faith with the purpose of achieving the outcomes identified in the *Guidelines*.

The concept of "due diligence" combines the notion of "due" – meaning that it is commensurate with the RBC risks to be addressed - and "diligence" – acting with prudence and perseverance to address RBC risks in light of the circumstances. It is a way for enterprises to "know and show" what they are doing about their adverse RBC impacts in their own operations and their business relationships. As a result, RBC due diligence differs from commercial or compliance due diligence in two principal ways:

- RBC due diligence is about identifying and addressing RBC risks and impacts -- risk of harm created *by* enterprises and the consequences for society, for workers, and the environment. For many enterprises, "risk" is used to refer to risks *to* the enterprise – financial risk, operational risk, reputational risk, etc. Therefore RBC due diligence differs from traditional due diligence processes that are typically geared towards identifying risks *to* the enterprise, rather than risks *created by* it, although both are often related, as such harms are often coupled with reputational damage, exposure to legal liability, or operational or market risk. RBC due diligence processes can be included within broader enterprise risk management systems and it may be more effective to do so, provided that these systems are designed to go beyond simply identifying and managing material risks to the enterprise itself and include RBC risks.

- Second, RBC due diligence covers the full range of steps for identifying *and* managing *and* accounting for RBC risks and impacts. In other words, the steps go beyond just identifying risks as may be the case with some areas of commercial or compliance due diligence.

4. RBC due diligence can help enterprises obey domestic law and observe the *Guidelines*, which may go beyond the law in many cases

Enterprises are expected to obey domestic law *and* observe the *Guidelines* wherever they operate. Due diligence can be useful in identifying whether an enterprise is complying with domestic law. However, the *Guidelines* go beyond what may be required by domestic law in many cases – and in those cases, enterprises should seek to meet the expectations of the *Guidelines*.[58] In countries where domestic laws and regulations conflict with the recommendations of the *Guidelines*, enterprises should "seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law."[59] A conflict with domestic law does not arise where the *Guidelines* provide for more robust protections; rather, a conflict exists only when following the recommendations in the *Guidelines* would be illegal under domestic law. Due diligence can help enterprises to understand how domestic legal requirements intersect with their responsibilities under the *Guidelines* and to craft a way to meet both the legal requirements and those responsibilities.

5. RBC policies and strong management systems help drive effective RBC due diligence

The *Guidelines* highlight the importance of enterprises taking a systematic approach to addressing impacts under the *Guidelines* so that it becomes a regular part of doing business.[60] Having one or more RBC policies provides direction and guidance to management, staff and business relations and clarity to stakeholders. A management system provides the internal framework necessary to put the enterprise's RBC policies in practice. This includes controlling the enterprise's RBC impacts and integrating RBC considerations into business operations. The point is to make RBC a part of everyday business practices – not separate from them.

RBC due diligence also involves co-ordinating a variety of interrelated processes within an enterprise. Often, due diligence processes will occur simultaneously at various levels of an enterprise, or enterprises within an enterprise group. This is particularly true for larger enterprises, including parent companies with its subsidiaries, or companies with multiple large projects worldwide. Building systems and capacity of these subsidiaries or projects to conduct due diligence on their own while communicating and coordinating with headquarters on relevant outcomes and follow up will help ensure effective due diligence and appropriate use of resources.

6. RBC due diligence entails proactive, dynamic efforts with a focus on continuous improvement

The conditions and situations in which business operate often change, so due diligence processes should be designed to respond effectively to dynamic situations. Due diligence should be on-going, proactive and reactive throughout the entire life cycle of an enterprise and its operations, products and services. The Guidelines expect enterprises to commit to a systematic approach and to continuous improvement of its due diligence processes, the management systems underpinning them, and to the outcomes achieved. [61] The due diligence process itself will help identify where enterprises should prioritise their efforts for improvement.

7. The nature and extent of management systems and the RBC due diligence processes that operate within them varies according to company circumstances and the situation

How the overarching management systems are designed and the how the specific due diligence processes that operate within those management systems operate will depend on a number of factors – as a primary consideration, they should be commensurate with the risks of RBC adverse impacts concerned. The size of the enterprise is an important factor, as large enterprises may often have more exposure to RBC risks and so require more complex systems to manage RBC due diligence processes. However, smaller enterprises can also be linked to severe RBC risks, and where they are, they should put in place systems commensurate to the RBC risks rather than to their size. In the context of increasingly networked supply chain models, smaller enterprises can often form the bedrock of production linked to larger enterprises, which implies that the efficacy of larger enterprise due diligence may be interwoven with the robustness of the due diligence of its business relationships and their own systems for reviewing and supporting such robust systems.

Other factors that will affect the nature and extent of management system and their associated due diligence processes include the context of its operations, the position of the enterprise in its supply chain or value chain, whether it is involved in collaborative approaches, and the specific recommendations in the *Guidelines*[62] that set out specific expectations about particular RBC risks and how they should be managed. For example, the *Guidelines* set out specific considerations to be taken into account in conducting human rights due diligence.

8. RBC due diligence is risk-based and therefore involves prioritisation

Risk-based means the potential or actual severity of an enterprise's adverse RBC impacts is a driving factor in scaling up or down the RBC due diligence approach. Enterprises should seek to develop a systematic approach to due diligence, supported by appropriate management systems and internal controls, *commensurate with the risks of RBC adverse impacts concerned*. This is relevant in: (i) identifying general areas where the risk of adverse RBC impacts is most significant and prioritizing these for more detailed due diligence; and (ii) in prioritizing action to address (prevent, mitigate or remediate) actual or potential RBC impacts. The process of prioritisation is an on-going one – for both identifying potential RBC impacts for further due diligence and in prioritising action to respond

As a general principle, potentially severe RBC impacts should be prioritised over less severe RBC risks, even if the more severe risks are less likely to materialise into actual adverse impacts. This means that severity is a more important consideration than probability. This is particularly important to understand where risks to people and their rights are concerned (e.g. for human rights, including issues of employment and industrial relations). While not articulated in the *Guidelines* text themselves, the UNGPs provide a useful framework for identifying and comparing the relative severity of diverse RBC impacts: scale, scope and irremediable nature.[63]

9. Prioritising RBC due diligence on business relationships also involves taking a risk-based approach, taking into account practical circumstances and limitations

Where enterprises have large numbers of business relationships, such as a large number of suppliers, they are encouraged as a first step to identify *general areas* where the risk of adverse RBC impacts among its suppliers or other business relationships is most significant and, based on this risk assessment, as a second step, prioritise specific suppliers or other business relationships for more detailed due diligence.[64] To identify the general areas where RBC risks are likely to be most significant, an enterprise can look to the operating context, sectoral context, the nature of the products and services in its supply chain, etc. The complexity of the business relationship, including for example the supply chain concerned (e.g. number of "tiers" away upstream in the supply chain where impacts occur), means that due diligence should be adaptive, with dynamic approaches tailored to these complexities.

Once potential RBC risks or actual adverse RBC impacts with business relationships are identified, an enterprise has a responsibility to address those impacts – depending on its relationship to the impact (see Core Concept 10 below). Factors relevant to determining the appropriate response to the identified RBC risks include the severity and probability of adverse RBC impacts, the leverage the enterprise has or can create, and how crucial that supplier (or other business relationship) is to the enterprise.[65] There can be practical limitations on the ability of enterprises to effect change in the behaviour of business relationships by exercising its leverage. These practical limitations can be related to product characteristics, the number of suppliers, the structure and complexity of the supply chain, and the market position of the enterprise vis-à-vis its suppliers or other entities in the supply chain.[66] However, leverage is not a static concept and can be created through a range of mechanisms, including from the very start of the business relationship, for example by inserting contractual provisions related to RBC due diligence, but also later on the business relationship, for example through collaboration with others to build and exercise leverage.

10. Enterprises can be involved with adverse RBC impacts in three ways and their responsibility to address such impacts where they are involved depends on its level of involvement

i. Causing adverse RBC impacts through their own activities[67]

If an enterprise identifies that it is "causing"[68] or may cause an adverse RBC impact, then it should take the necessary steps to cease any actions causing the impact and prevent the recurrence of that impact in the future – in other words, stop what it is doing that causes harm. An enterprise can cause a harm through its own activities, including activities in its supply chain or other business relationships.[69] Preventing harm should be the priority; mitigation should be pursued where despite demonstrable efforts to prevent or avoid adverse impacts, some impact still occurs. That may mean for the enterprise stopping or changing some of its activities or the way it carries out its activities. Actual impacts or harms that cannot be mitigated are to be addressed through remediation.

ii. Contributing to adverse RBC impacts through their own activities[70]

If the enterprise identifies a risk of "contributing"[71] to an adverse impact, including through activities in its supply chain or with other business partners, then it should take the necessary steps to cease its own actions that are contributing to the harm. It should also prevent recurrence of the action that led to its contribution to adverse impacts.

In addition, it is expected to take action vis-à-vis its business relationship(s) to also persuade it to cease *its* contribution to the harm. In other words, the enterprise is expected to use its "leverage"[72] with its business relationship to mitigate any remaining impacts to the greatest extent possible and prevent further recurrence. If adverse RBC impacts nevertheless occur, all enterprises that contributed to the harm should contribute to remediating it.

iii. RBC impacts directly linked to enterprise operations, products or services by a business relationship[73]

Depending on the sector or the way an enterprise is set up, many of its impacts may be deeply intertwined with its business relationships – its franchisees, its licensees, its suppliers, the way its customers use its products. Even though an enterprise does not have control or even necessarily an immediate or contractual business relationship with all these businesses, it is nonetheless expected to proactively make efforts vis-à-vis potential or adverse RBC impacts caused or contributed to by these business relationships – because those harms are ultimately linked with its business.

Meeting this responsibility means that the enterprise, acting alone or in co-operation with other entities as appropriate, uses its leverage to influence the enterprise causing or contributed to adverse RBC impacts to prevent or mitigate that impact. This expectation is not intended to shift responsibility from the other enterprise that is causing or contributing to the harm to the enterprise with which it has a business relationship.[74] The other enterprise causing the harm retains its responsibility to prevent and mitigate and remediate the harm. But because there is a direct linkage to the harm through a business relationship,[75] the enterprise is also expected to take action as well – to seek to prevent or mitigate the situation by using its leverage.

The Annex provides more information, with examples and questions, to help enterprises understand these concepts better.

11. Providing for or co-operating in remedy enables enterprises to address adverse RBC impacts

A core purpose of conducting due diligence is to avoid actual adverse RBC impacts, but where adverse RBC impacts do occur and an enterprise has caused or contributed to them, remediation is expected.[76] When enterprises are directly linked to adverse RBC impacts caused by others, they are not expected to provide or cooperate in remediation, but may choose to do so and may collaborate with other enterprises in doing so.

The *Guidelines* have their own non-judicial mechanism – the National Contact Points (NCPs).[77] They provide a mediation and conciliation platform for resolving practical issues that may arise with the implementation of the *Guidelines* – called a "specific instance" under the *Guidelines*. Enterprises are expected to engage in this mechanism.[78]

12. Meaningful stakeholder engagement is a core part of implementing the *Guidelines*, including RBC due diligence

Meaningful stakeholder engagement is characterised by two-way communication that involves input and feedback and depends on the good faith of the participants on both sides.[79] For potentially affected stakeholders, it is a mechanism for influencing activities that may affect them and for assessing the adequacy of measures proposed to prevent harm. For enterprises, failing to listen to and take account of stakeholder concerns can become a source of conflict between the enterprise and its stakeholders. In contrast, stakeholder engagement can help ensuring that potential positive impacts are optimised for all stakeholders.

As part of the due diligence process, consultation with potentially affected stakeholders is an effective way of identifying and avoiding potential adverse RBC impacts by gaining different perspectives and insights into potential impacts and ideas on ways to prevent and mitigate adverse RBC impacts. Such consultations can be particularly helpful in the planning and decision-making concerning projects or other activities involving, for example, the intensive use of land or water, which could significantly affect local communities.[80] Hence the engagement should take place before the decision is made and information should be provided in a timely manner.[81] The most vulnerable or marginalised individuals or groups among those potentially impacted or threatened, such as whistle-blower or others who speak out about RBC harms, are often harder to see and least represented and special engagement efforts may be needed to involve and potentially protect them.

Consultations with potentially affected stakeholders as part of the due diligence process to address specific issues should be distinguished from wider engagement. Enterprises are encouraged to engage on a longer-term and more in-depth basis with those who may be impacted by their operations and business relationships including communities, consumers and other representatives working on RBC impacts, such as civil society organisations as part of a longer-term approach to building trust. Workers will often have their own representation through trade unions who engage in collective bargaining and other types of negotiations on conditions of employment. Enterprises may also choose to engage in discussions with a wider set of stakeholders about its overall performance more generally.

The *Guidelines* put a particular emphasis on disclosure of information to improve the understanding of the operations of enterprises and include a whole chapter on the kinds of information enterprises are expected to disclose, including matters covered under the *Guidelines*.[82] Disclosure of information is important for building effective engagement with stakeholders but should not be considered a substitute for such engagement.

13. Collaboration can enhance RBC due diligence

The *Guidelines* highlight opportunities for improving implementation through collaboration. Enterprises retain their own responsibility for undertaking due diligence. This responsibility cannot be shared or outsourced; however, in many contexts, due diligence may be more effective when conducted in collaboration with others, including enterprises at a sector-wide level, workers, home and host governments, and civil society. For example, enterprises may engage with suppliers and other entities in the supply chain to improve their performance, in co-operation with other stakeholders, including through personnel training and other forms of capacity building, and to support the integration of principles of responsible business conduct into their business practices. Sector and multi-stakeholder collaboration can take a number of forms, but in general is pursued in order to address "root causes" of adverse RBC impacts, pool knowledge, increase leverage, and scale-up effective measures resulting in cost sharing and savings benefits. Cost sharing and savings is often a benefit to sector collaboration. This can be particularly useful for SMEs. However, there may be legal constraints to working with others collectively around certain approaches or issues due to competition law concerns that must be taken into account.[83]

Part II.
Practical Steps for Implementing Due Diligence under the *Guidelines*

Sections cover:

- I. **Policies and Management Systems**
- II. **Due Diligence process:**
  - A. **Identify & Assess**
  - B. **Prevent & Mitigate**
  - C. **Track**
  - D. **Communicate**
- III. **Remediation**

Each section includes sub-sections that cover:

- A. **Purpose** of each step or supporting measure
- B. **Key Actions**
- C. **Explanation of Key Actions** to explain each "Key Action" in more detail

Expectations under the OECD *Guidelines*

"Enterprises should…carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent or mitigate actual and potential adverse impacts… The nature and extent of due diligence depend on the circumstances of a particular situation." (Chapter II – General Policies, para. 10)

"Enterprises should…avoid causing or contributing to adverse impacts on matters covered by the *Guidelines*, through their own activities, and address such impacts when they occur." (Chapter II – General Policies, para. 11)

"Enterprises should…seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship." (Chapter II – General Policies, para. 12)

I. Embed Responsible Business Conduct into Policy and Management Systems

A. PURPOSE

The *Guidelines* highlight the importance of enterprises taking a systematic approach to improving their performance under the *Guidelines* so that RBC becomes an integral and regular part of doing business. Having strong policies and management systems in place to drive proactive due diligence processes to identify and respond to the kinds of risks covered by the *Guidelines* helps enterprises to manage these RBC risks effectively. This first step is about putting the *"macro" policies and systems* in place that provide the framework and drive the "*micro" level* due diligence steps to address and manage RBC risks.

B. KEY ACTIONS

Enterprises can take the following actions to develop policies and management systems:

1. Devise and adopt an **RBC policy** (or combinations of policies) that provide guidance to staff and business partners and a clear signal to stakeholders. Publish and disseminate the RBC policy (or policies) to support transparency.
2. **Embed** the RBC policy into its **enterprise culture, approaches and management systems** to make sure it is rooted in the enterprise and is actually implemented as part of everyday business.
3. Assign **accountability** for RBC matters to senior management, and for public companies, assign board level responsibilities; complement this by assigning responsibility across relevant departments.
4. Modify or develop **management system**(s) with internal controls that are commensurate with the RBC risks of its operations and operating contexts to integrate RBC into its everyday business processes.
5. Support coherent and effective **implementation** by providing adequate resources and training to staff and as appropriate, business partners.
6. Incorporate RBC expectations and policies into supplier **or other business relationships**, including through contracts or other forms of written agreements with business partners.

C. EXPLANATION OF KEY ACTIONS

1. Devising, Adopting and Disseminating RBC Policy Commitments

- The OECD *Guidelines* explicitly recommend that enterprises establish RBC policy commitments on matters of disclosure,[84] human rights,[85] and bribery,[86] and also encourage enterprises to disclose value statements or statements of business conduct and information on the enterprise's policies relating to matters covered by the *Guidelines.*[87]
- Engage **relevant departments and staff in developing the RBC policy** helps identify RBC risks, build on their expertise and develop buy-in for the implementation of the policy.
- **Explicitly reference authoritative international RBC standards** to makes the enterprise's commitment to those standards clear and provides a common, accepted reference point with stakeholders.
- Set out the enterprise's expectations of **all the entities within the enterprise**,[88] of **workers** who perform work on behalf of the enterprise and of its **business relationships** and making the policy publicly available and communicated to all workers, business relationships and other stakeholders.[89]

2. Embedding an RBC Culture

- An RBC Policy (or policies) sends a **signal "from the top"** that the enterprise considers RBC important and lays the foundations for an **RBC business culture.** As such, it should be **approved at the most senior level** of the enterprise.

- The Board and senior management have **key roles in setting the ethical tone of an enterprise's wider corporate group**[90] and in ensuring that there is **coherence** across an enterprise's systems in dealing with RBC issues.

3. Assigning Accountability

- An RBC culture will also better take root when it is backed up by **systems for accountability** for RBC outcomes at board level (for public companies) or senior management[91] and operational levels.

4. Developing a Management System

- **The systems to manage the RBC risks – and the resources devoted to them - should be commensurate** with the nature and context of its operations. Design of appropriately scaled, sufficiently detailed and appropriately resourced RBC risk management systems should be driven by (i) the size and operating context of an enterprise; (ii) the specific recommendations in the *Guidelines;* and (iii) the **RBC risks with which it may actually be involved, including those inherent to an enterprise's business model.** RBC risk is the **driving factor** in designing appropriate systems, thus even smaller enterprises involved in higher risk (i.e. hazardous activities) will need more in-depth controls.
- In some cases, it may be most effective for enterprises to integrate RBC risk management **within broader enterprise risk management systems,**[92] as long as the systems go beyond simply identifying and managing material risks to the enterprise itself, but also cover the RBC risks covered by the *Guidelines*.[58] In other cases, **stand-alone systems to address specific risks** such as workers' health and safety or anti-bribery may be more appropriate and effective.
- Embed **internal controls**[93] in management systems to track progress in meeting the *Guidelines'* standards, throughout the **full life-cycle** of the enterprises operations, products and services.[94]
- Include RBC risk management as an **integral part of enterprise decision-making processes** so that the potential or actual adverse RBC impacts are routinely considered and given due weight in decisions**.**
- Reflect RBC policies in relevant **operational policies and procedures** necessary to embed them throughout the enterprise.[95]
- The **objectives** of the management system should include **continuous improvement** of performance in areas covered by the *Guidelines.* The issues they cover are evolving rapidly and should be usefully **kept under review**.[96]

5. Supporting Coherent and Effective Implementation

- Implementation should be supported by **leadership**, **management and personnel** with assigned responsibilities, **adequate support and resources** across all relevant departments and locations, including for stakeholder engagement.
- **Training relevant personnel** – employees, temporary workers, contractors – on relevant policies and procedures to build understanding and ensure implementation.[97] Dedicated resources and training[98] on specific issues will likely be necessary, and should be updated as due diligence processes evolve.

6. Integrating RBC standards into relationships with business partners

- Recognising that there will at times be **practical limitations**[99] to an enterprise's ability to incorporate RBC expectations into business relationships, the expectation is that enterprises make RBC an integral part of doing business with their business partners, and there are a **number of approaches** to doing so, individually and collectively, that can be used (See the OECD's Due Diligence Companion), particularly from the beginning of the relationship, such as bidding criteria that include requirements to disclose their RBC approaches or incorporating RBC requirements into contracts.

II-A. Due diligence: Identify and Assess Adverse RBC Impacts

A. PURPOSE

The purpose of identifying and assessing potential and actual adverse RBC impacts that the enterprise may be involved with helps it understand the scope of issues that need to be managed. This entails a dynamic, and on-going process. For due diligence undertaken before business activities have been initiated (e.g. in the case of an environmental impact assessment), the process of assessing potential adverse RBC impacts means understanding what harm may result from an enterprise's proposed activities or new business relationships, e.g., will there be more pollution, will working conditions improve or get worse? For due diligence undertaken once activities are underway and actual or potential RBC risks are discovered, enterprises may assess what new actions need to be taken and/or whether ceasing certain activities or business relationships is necessary to adequately address those risks. An enterprise will need to organise, adapt and direct potentially a wide range of internal processes and business units to do this on an on-going basis. These processes should cover the enterprise and its business relationships. Engaging in a proactive way with these processes means that enterprises are better prepared to prevent and mitigate potential and actual adverse RBC impacts.

B. KEY ACTIONS

Enterprises can take the following actions to identify and assess adverse RBC impacts:

1. Use a variety of tools/approaches to **scope out and identify risks of harm** on all matters covered by the *Guidelines* that may be likely to be in the enterprise's own operations and with its business relationships.
2. Use **iterative processes to prioritise and hone in on RBC risks and impacts**, moving from general areas of RBC risk to more specific RBC risks and impacts associated with its activities and its business relationships.
3. **Assess** whether those RBC risks or actual impacts would have **the kind of adverse impacts covered by the *Guidelines***, by benchmarking against relevant laws and regulations and the *Guidelines* and assess **the enterprise's relationship** to the adverse impacts (i.e. cause, contribute or directly linked).
4. Repeat these processes on a **regular basis**, recognising that more complex an enterprise and/or the higher the RBC risks, the more in-depth these processes will need to be and the more often they should be repeated.

C. EXPLANATION OF KEY ACTIONS

1. Building RBC risk-identification processes

- Enterprises should **proactively identify RBC risks and impacts** with which they may be involved either through its own operations and with its business relationships and they can use a variety of approaches.
- Enterprises should be prepared to **prioritise and work towards addressing the various RBC risks and impacts with which they are involved**, not just those they find of interest or choose to engage with or find the easiest to address. This then feeds into identifying risks – this should be done with an open mind, without excluding consideration of potential issues under the *Guidelines a priori* and looking beyond the obvious.[100]
- The **likelihood** of the presence and **severity** of RBC risks[101] will be influenced by various factors such as: (i) the ***sector*** (some are inherently more risky than others); (ii) the ***nature of the products or services involved*** (some may hold inherent RBC risks due to the nature of the activity (e.g. chemicals used in manufacturing processes, manufacturing that relies heavily on low-wage workers); (iii) the ***country and operating contexts*** (such as the strength of governance and rule of law, the socio-economic level, the presence of vulnerable groups or contexts); (iii) the enterprise's and its business partners ***business model*** (considering those with inherent RBC risk – high dependence on low-wage labour, sourcing in fragile states, etc); (iv) ***the business partner*** (whether business partners have RBC policies and systems in place or

not); (v) ***sourcing model risk factors*** (such as where sourcing is from areas with populations that are highly vulnerable). Some RBC risks may be more "hidden" – such as forced labour and trafficking – and therefore enterprises will also have to be careful to consider risks "in plain sight".

- The potential for involvement with **severe adverse RBC impacts** on issues covered by the *Guidelines* should be a driving consideration in helping to shape specific due diligence processes. This means that where there is a potential for severe impacts, the enterprise should prioritise the identification and response to those risks over less severe risks that are more likely – severity is more important than likelihood.
- Information about **past or ongoing impacts** is an important indicator of future RBC risks, including any unresolved, "legacy" issues. Identification processes should also focus on **future, potential impacts** (risks) and even long-term risks, considering the whole life cycle of the product, service, operation or relationship.
- The process of identifying and assessing impacts is an opportunity to engage a **cross-section of departments or functions, as well as subsidiaries,** and depending on how the enterprise is organised, different locations and different levels (HQ and local offices) and creating buy-in for the next step of due diligence.
- **Consultations with workers** about potential impacts or issues in the workplace should not substitute for workers' rights to bargain over terms and conditions of employment.[102]
- Consulting with **potentially affected stakeholders** in relation to planning and decision making for projects or other activities that may significantly impact them and providing meaningful opportunities for their views to be taken into account helps to understand their perspectives and insights, and respects their rights.[103]

2. Using iterative investigative approaches: starting wide and going deeper

- The **first step** often starts with a desk review and consulting experts, understanding what workers, or trade unions concerned and other stakeholders and systems tell about RBC risks and impacts to identify general areas of RBC risk (which could be around particular geographies, transactions, types of business partners, etc.). This should trigger ever **more detailed exploration**. Where the RBC risks are higher, enterprises will need to do more investigation.
- With respect to **business relationships**, recognising that some enterprises will have a vast array of business partners, the *Guidelines* suggest a principled but practical approach to narrowing due diligence efforts.[104] Where supply chains are extensive, enterprises should map the likely *structure* of their supply chains (e.g. manufacturing, component manufacturing, raw material production, etc.) as a start and then overlay this with these factors to pinpoint higher risk suppliers or general areas of RBC risk, and then move onto more detailed, iterative investigations on specific stages or suppliers, using a risk-based approach.
- Where RBC risks are identified **deeper in the supply chain or several layers removed among business relationships**, an enterprise is likely to need to use fit-for-purpose approaches to ensure that suppliers and their activities are being adequately assessed, such as using traceability approaches, or engagement with 'choke points'. This is an area where **collaborative approaches** to due diligence may be appropriate and are increasingly being used.

3. Assessing against the *Guidelines* as a benchmark

- Assessing means projecting how a proposed activity or associated business relationships could have impacts on the society, workers or environment **against the following benchmarks**: (i) *national law;* and (ii) *the Guidelines* and its referenced international standards (these are found throughout the Commentary to the *Guidelines*).
- Assessments will typically involve addressing compliance with domestic law **to assess** whether domestic laws and regulations **align with the *Guidelines***, are silent on matters covered by the *Guidelines* or undermine or conflict with the principles and standards of the *Guidelines*. **Enterprises are expected to honour the *Guidelines*' approach to the fullest extent** which does not place them in violation of domestic law.[105] The *Guidelines* can exceed the expectations placed on enterprises by domestic law

without creating a conflict; a true conflict exists only when the *Guidelines* call for action that violates or contradicts domestic law. The due diligence process should assess any gaps and propose prevention and mitigation steps to fill those gaps so that the enterprise can honour the *Guidelines* to the greatest extent possible. While starting with the most severe impacts is an effective approach under the *Guidelines*, this will not necessarily exempt an enterprise from responsibility under relevant domestic laws for other impacts not prioritised.

- Assessing should also include understanding an enterprise's involvement in a potential or actual adverse RBC impact – has it **caused, contributed to or is it directly linked** to the adverse RBC impact. This is highly relevant to the next steps of due diligence – deciding and designing steps to prevent and mitigate potential impacts, or to remediate action impacts. See Figure 1 below and the Annex for more guidance on this concept.

4. Regularly updating to stay on top of changing situations

- Due diligence is a dynamic process – assessments and prioritisation will need to be **updated** on a regular basis and as situations change. Impacts that initially would not be considered severe may evolve into more serious ones (or be perceived to do so) if not addressed properly.

II-B. Due Diligence: Prevent and Mitigate Adverse RBC Impacts

A. PURPOSE

This is the step where an enterprise turns the information gathered in the previous step into action to prevent and mitigate potential adverse RBC impacts identified and is therefore a crucial step in enabling an enterprise to meet its responsibility under the *Guidelines*. The findings from the assessment should be taken up by those in the enterprise responsible for addressing them, and turned into actionable steps that will provide an effective response. The objective in designing actions to respond should be to achieve the outcomes covered in the *Guidelines* (as well as compliance with domestic law), for example protecting workers' health and safety or ensuring that payments to any agents are for appropriate and legitimate services only.

B. KEY ACTIONS

Enterprises can take the following actions to prevent or mitigate adverse RBC impacts:

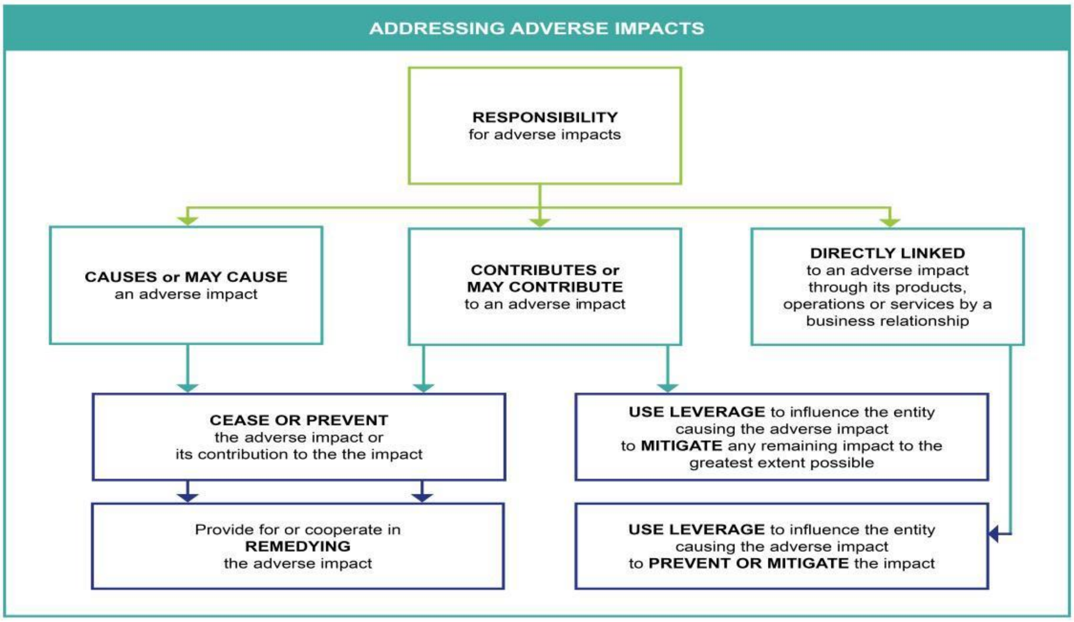
1. Design **response plans** that are fit for purpose for the potential or actual RBC impacts and that correspond to the enterprise's involvement with the impact.
2. **Prioritise responses as necessary**, based on severity of the potential or actual impacts.
3. **Use leverage** with business relationships to prompt responses to potential or actual impacts.

C. EXPLANATION OF KEY ACTIONS

1. Developing response steps / response plan that are fit for purpose

- **A specific response plan** composed of a set of specific measures to prevent and mitigate RBC impacts identified may work if the due diligence is focused on a particular transaction or localised project. For example, structured impact assessment processes, such as environmental and social impact assessments, result in **action plans** of specific actions to manage potential impacts that can be implemented and tracked against the *Guidelines*.
- **System-wide changes** may be needed to respond to broader assessment processes (for example across whole product lines, or entering new countries, across the supply chain) to ensure that due diligence processes are adjusted so that preventive measures becomes integrated into relevant processes, eliminating recurrence. This could include for example amending existing procedures, budget allocation and oversight processes.
- Effective responses will often involve **active, on-going collaboration** with workers, governments and stakeholders to fix harms done and prevent future harms, including by addressing root and underlying causes of the impacts.
- As noted above, the **objective** in designing steps to respond to the potential and actual adverse RBC impacts found should be to **achieve the outcomes** covered in the *Guidelines* (as well as compliance with domestic law).
- The identification and assessment process should identify whether the enterprise **has (a) caused or (b) contributed to potential or actual impacts, or (c) adverse impacts are directly linked** to its operations products or services. That will determine what actions an enterprise should take in response to the impact as a minimum baseline under the *Guidelines* (see Figure 1 below). However, **the distinction between each of the three situations may not always be crystal clear**. In such cases, enterprises should be guided by the spirit and objectives of the *Guidelines* in making choices and taking action.[106] (See also the Annex).

Figure 1 – Addressing Adverse Impacts under the *Guidelines*



2. Prioritising prevention & the most severe impacts

- In all cases, the key objective of the due diligence process is to **prevent** adverse RBC impacts from occurring in the first place or from recurring. The measures that must be put in place to both prevent those impacts from occurring in the first place, to prevent recurrence when they do occur and to mitigate any remaining residual impacts will depend on the particular circumstances and input from potentially affected stakeholders.
- **The potentially most severe impacts should be prioritised for action first.** The *Guidelines* recommend enterprises to prioritise potential severe adverse RBC impacts, for example highlighting concerns about serious damage to the environment, to human health and safety, to public health[107] and the human rights of groups at risk of further marginalization. Criteria for further identifying what severity means has been developed under the UNGPs and provide helpful guidance for enterprises for managing other RBC risks. Severity is a reflection of the scale, scope or irremediable nature (i.e. irreversibility) of the impact (See the OECD's Due Diligence Companion for further explanation).
- **Severe RBC risks should be prioritized even if they are less likely to happen**. Many risk management systems de-prioritize a severe risk if it is considered less likely to happen. At least for human rights, any potential severe human rights impact identified should be prioritized even if it is less likely to happen. Human rights that are at risk of being the most severe negative impact within the context of the enterprise's activities or business relationships are increasingly being referred to as "salient" human rights risks and prioritised for action.
- Risk prioritisation is about **sequencing** responses in the event that not all impacts can be addressed at once. It does not mean that other RBC risks or impacts identified do not need to be addressed at all. An enterprise is responsible for addressing all its actual and potential impacts and should consider the appropriate sequence - once the more severe RBC risks are dealt with, it should move on to the next ones.
- Enterprises will likely have to **simultaneously address** a range of different kinds of RBC risks that may be handled through parallel processing by different departments – across different types of risks (consumer protection versus environment), across different operations, different locations, etc.
- While traditionally enterprises may prioritise contractors or suppliers who hold the biggest contracts or are most important to its business, consistent with the approach under the *Guidelines*, the priority should be given to **business relationships where the severity** of potential RBC impacts is the **greatest**.

3. Understanding & exercising leverage with business relationships

- **Responsibility and leverage are separate concepts** and should not be confused but sometimes are; enterprises have responsibility for addressing their adverse RBC impacts under the *Guidelines* whether they have leverage or not. What this means in practice is that due diligence should not begin and end with business relationships where significant leverage exists and go no further; to the contrary, focused due diligence and subsequent steps towards prevention, mitigation and, if appropriate, remedy and building leverage should begin with the most severe impacts.
- If an enterprise does not have any leverage **it should try to create it**. Leverage is not a mathematical formula that, for example, necessarily equates with a minority investor's holding in a company or a partner's joint venture percentage or the purchasing power of a buyer vis-à-vis a supplier. Creating leverage can often most effectively be done at the start of relationships where there is often maximum leverage, such as through contractual arrangements, pre-qualification requirements for potential suppliers, voting trusts, and licence or franchise agreements.[108] There is also the soft power dimension of leverage that results from the perception of an enterprise in the market or its ability to bring along its peers.
- **Collaborating** with others to create leverage and collectively pressure for a change can be effective. The *Guidelines* specifically encourage enterprises to participate in private or multi-stakeholder initiatives and social dialogue, such as those undertaken as part of the *Guidelines* proactive agenda and to engage with suppliers and other entities to improve their performance.[109] While certainly not uniformly the case, severe RBC risks deep in the supply chain may reflect systemic risks, endemic to the sector or context, rather than being specific to particular business relationships. In such cases, a top-down, contractual cascading of RBC requirements may do little to stimulate the needed changes. Bottom-up engagement that involves collaboration with other enterprises, civil society and or government or existing on-the-ground initiatives in likely sourcing areas may prove more cost effective and sustainable in the long run in addressing adverse RBC impacts across the sourcing area.
- On the other hand, the *Guidelines* recognise that there may be **practical limitations** on the ability of enterprises to effect change in the behaviour of their suppliers resulting from product characteristics, the number of suppliers, the structure and complexity of the supply chain, or the market position of the enterprise vis-à-vis its suppliers or other entities in the supply chain, for example, where suppliers have a monopoly or dominant position or are larger than the enterprise making the purchase. Where **practical limitations** exist and the **enterprise has little to no leverage** and cannot create it, and is unable to persuade the business relationships to take action to prevent or mitigate adverse RBC impacts, then where there are potential or actual severe impacts, the enterprise should consider other options, including **disengaging**[110] from the business relationship as a last resort. In such circumstances, an assessment will be necessary of how crucial the supplier is, legal implications, and how cessation of activities might change impacts on the ground, taking into account potential social and economic adverse RBC impacts related to the decision to disengage. As long as the enterprise remains in the relationship while the harms continue, it should seek to demonstrate on-going efforts to use its leverage to mitigate the impact.

II-C. Due Diligence: Track Performance

A. PURPOSE

An enterprise should account for how it has addressed adverse RBC impacts throughout its operations and with its business relationships. It can only do that if it has sufficient information about the steps it is taking and whether its approaches are effective or need adjustment. Tracking also lays the groundwork for accurate disclosure and communications. It is part of the "know" of "knowing and showing" how the enterprise is managing RBC impacts.

B. KEY ACTIONS

Enterprises can take the following actions to track performance:

1. Develop or adapt **systems to track** how it is responding to RBC risks and impacts and monitor implementation of any management plan against established objectives, goals and timelines
2. Identify **trends and patterns** that highlight recurring problems and issues that have been missed
3. **Feedback lessons learned** into improving due diligence and its outcomes in the future

C. EXPLANATION OF KEY ACTIONS

1. Developing or adapting tracking systems

- Given the different areas covered by the *Guidelines*, enterprises will likely **need different types of systems to track their responses** and are likely to have the basics of some systems in place (such as quality control or human resource systems) that can be adjusted and maximised to cover the issues in the *Guidelines*, supported by appropriate resources and expertise.
- Designing tracking systems may provide opportunities to identify potentially conflicting approaches where different parts of the enterprise are working at cross-purposes with its RBC objectives and to achieve **greater coherence and integration** across systems to achieve a more nuanced picture of an enterprise's integrated impacts. For example, while an enterprise may track water usage for its industrial operations or as part of its environmental monitoring, particularly in water-stressed areas, this will be a relevant consideration as well on impacts on the communities' right to water. Managing both dimensions in an integrated response may be much more effective and efficient.
- Tracking impacts by **business relationships** or working with business relationships to develop their own systems to track adverse RBC impacts and report them to the enterprise can be built into contracts, purchase orders, procurement requirements.
- Many larger enterprises and an increasing range of industries have developed extensive systems of **supplier audits** for a range of issues covered in the *Guidelines* – environment, working conditions, bribery, quality control for consumer health and safety – in their own operations and in their supply chains in particular. While these systems can work well to track compliance with particular standards (for example hard data about supplier performance on issues such as emissions) they are often far less effective in tracking actual actual impacts around RBC issues (for example did labour rights improve or were communities effectively engaged). Consequently, some enterprises and some sectors are working towards more **collaborative and partnership-based initiatives** that seek to address the root causes of adverse RBC impacts that usually involve building supplier capacity and at times, government capacity as well, rather than focusing only on limited areas of auditing and tracking. The *Guidelines* encourage enterprises to participate in private or multi-stakeholder initiatives and social dialogue on responsible supply chain management, such as those undertaken as part of the *Guidelines* proactive agenda.[111]

2. Looking for patterns and trends

- **Tracking trends and patterns** can highlight recurrent problems that may require more systemic changes to policies or processes and detects good practices that can be shared across the enterprise.

- **Qualitative approaches** such as staff or user satisfaction surveys or focus groups, can provide useful insights from workers, customers, local communities on whether prevention and monitoring steps are effective – or not. **Quantitative data** that tracks trends and patterns can provide important insights on what systems are working well and which are not.

3. Feedback to earlier due diligence steps

- Tracking information **can help improve due diligence.** The analysis of what was missed, and what did not work well can and should be fed back into the previous due diligence steps so they can be adjusted: identification / assessment processes can be updated to look for RBC risks that had not been systematically identified previously and the prevention and mitigation step revised to prevent recurrence. Tracking should also help identify and assess unexpected RBC risks and impacts – points that were not anticipated in order to understand where systems have not been effective, as well as good practices that can be shared more widely.
- **Feedback from stakeholders** and through an enterprise's grievance mechanism (see next section) or from other avenues of remedy will be particularly valuable in picking up on adverse RBC impacts that were missed or not handled well and that should be included in the due diligence processes going forward. Customers and local communities may have a different perspective about whether prevention and mitigation actions have been effective or not in preventing risks to them. Engaging with stakeholders is an effective way for the enterprise to test its own assumption about how well it is doing and build trust with stakeholders by taking their views into account and adjusting systems as appropriate. Enterprises may seek to draw on expertise in developing indicators and tracking to follow some of the more "hidden" impacts identified in the *Guidelines* such as bribery, corruption, extortion, forced labour and discrimination.

II-D. Due Diligence: Communicate

A. PURPOSE

An enterprise should account for how it is addressing adverse RBC impacts throughout its operations and with its business relationships by communicating about what it is doing. Effective communication and disclosure requires that enterprises have put the previous due diligence steps in place to be able to understand and track their RBC risks and impacts so they can be accurately communicated, disclosed and reported. The *Guidelines* highlight the importance of disclosing clear and complete information on enterprises to a variety of users (from shareholders and the financial community to other constituencies such as workers, local communities, special interest groups, governments and society at large) to improve public understanding of enterprises and their interaction with society and the environment. This kind of disclosure can help build trust with workers and other stakeholders, demonstrate reliability as partners, and gain broader credibility in society. Communicating is about more than the act of disclosing or reporting information – it is also about engaging with stakeholders through a variety of different ways to provide fit-for-purpose information. Communication is the "show" part of "knowing and showing" how the enterprise is managing impacts.

B. KEY ACTIONS

Enterprises can take the following actions to communicate how it has addressed adverse RBC impacts:

1. **Disclose timely and accurate information on all material matters** regarding their activities, structure, financial situation, performance, ownership and governance as set out in the *Guidelines*[112] and the OECD Principles of Corporate Governance, if applicable.
2. **Disclose additional information** as set out in the *Guidelines*[113] to improve understanding of the operations of the enterprise.
3. **Communicate with stakeholders** to account for how the enterprise has addressed actual and potential adverse RBC impacts, adapting communication channels as necessary to stakeholders. This is particularly important when concerns are raised by or on behalf of affected stakeholders.

C. EXPLANATION OF KEY ACTIONS

1. Disclose timely and accurate information on all material matters

- The disclosure recommendations of the *Guidelines* concerning the adoption of disclosure policies and the content of material disclosures reflect the disclosure recommendations of the **OECD Principles of Corporate Governance** for public companies that were in place at the time the *Guidelines* were adopted in 2011; those Principles and their disclosure requirements have since been updated in 2015.[114]
- Information about **foreseeable risk factors** and issues regarding **workers and other stakeholders** are considered **material** information that should be disclosed.[115]
- Disclosure policies of enterprises should be tailored to the **nature, size and location of the enterprise**, with due regard taken of costs, business confidentiality and other competitive concerns.[116]

2. Disclose additional information

- Enterprises are **encouraged to disclose additional information** as set out in the *Guidelines* Disclosure Chapter on a broader set of issues than financial performance, to improve public understanding of enterprises and their interaction with society and the environment.[117] In addition, other chapters of the *Guidelines* include specific disclosure recommendations (See Box 30 in the OECD's Due Diligence Companion).
- Information should be maintained, disclosed and communicated in a way that is **relevant, accurate, timely, current, clear, user-friendly** and enables intended users to **access** information.[118] Enterprises are encouraged to make information available in plain language and in a format that is appealing to

consumers where this is relevant[119] and to provide easy and economical access to published information but also to take special steps to make information available to communities that do not have access to printed media (for example, poorer communities that are directly affected by the enterprise's activities).[120] Enterprises should not make representations or omissions, nor engage in any other practices, that are deceptive, misleading, fraudulent or unfair.[121]

- As a core part of **accounting for how impacts are addressed**,[122] enterprise should make information available about their RBC commitments and corresponding due diligence processes to address the adverse RBC impacts, and the outcomes achieved, including the RBC Policy,[123] information about the enterprise's due diligence management systems, information about the enterprise's RBC risk identification methodology and general findings of adverse RBC impacts and information about the enterprise's RBC risk prevention and mitigation strategy.[124]
- Where enterprise's actual or potential adverse RBC impacts involve their **business relationships**, they should include information on how they are addressing these within their disclosures.[125] The types of information that enterprises are recommended and/or legally required to disclose[126] about their business relationships is evolving, including around their supply chains. As the *Guidelines* prompt enterprises to encourage business partners to apply RBC approaches, this could include encouraging their disclosure and communication.
- For formal (i.e. public) reporting, the *Guidelines* draw attention to the use of **high quality accounting and reporting standards** and encourages reporting standards that enhance enterprises' ability to communicate how their activities influence sustainable development outcomes (for example, the Global Reporting Initiative).[127]

3. Communicating with stakeholders

- In addition to disclosing information in a formal manner, enterprises are encouraged to use a variety of approaches to communicate relevant information to different audiences (such as in-person meetings, online communications, and formal public reports). Communications should be **fit for purpose and tailored according to the audience** – whether it is communicating with workers or locally about a particular incident or with consumers about product safety or investors about its environmental management system.
- In addition, enterprises could put in place local feedback mechanisms where the risk profile of the operations warrant this so that local stakeholders can raise their concerns, and consequently, enterprises can **communicate and report** on those issues that are **significant to local communities and other key stakeholders** (See also next section).
- Communication should **not pose risks to affected stakeholders**. The *Guidelines* stress the importance of whistle-blower protection including protection of employees who report practices that contravene the law to the competent public authorities, noting that while of particular relevance to anti-bribery and environmental initiatives, such protection is also relevant to other recommendations in the *Guidelines.*[128] Protection from retaliation by the enterprise for engaging in or disclosing information for any stakeholder, beyond employees – is an important part of the ethos of the *Guidelines* in building meaningful engagement. Stakeholders may also require protection from others – authorities, police, competitors, etc. This may range from more simple steps of not disclosing the identity or information provided by at risk stakeholders to more specific steps so as not to draw attention to the location of stakeholders.
- **Consultation and communication should not be confused**. Communication and disclosure are about a one-way provision of relevant information. Disclosure of information about the activities of enterprises and about their business relationships and associated impacts is an important enabler for effective stakeholder engagement. Consultation with potentially affected stakeholders as part of the due diligence process requires two-way dialogue and taking stakeholders' views into account. Social dialogue structures provide a process for negotiation and consultation between or among, representatives of governments, employers and workers, which may be tripartite or consist of bipartite relations between management and labour. Broader stakeholder engagement may be used to discuss broader issues, build longer term relationships and benefit from new insights.

III. Provide for or Co-operate in Remediation when appropriate

A. PURPOSE

Providing remedy for harms the enterprise caused or contributed to, whether to workers, to consumers, to individual or communities, to the environment – closes the circle on an RBC approach. Remediation involves making good on any harm done. A core purpose of conducting due diligence is to prevent or avoid actual adverse RBC impacts. But where adverse RBC impacts do occur and an enterprise has actually caused or contributed to them, remediation is expected. When adverse impacts are directly linked to an enterprises operations, products or services, the enterprise is not expected to provide for or cooperate in remediation, but may choose to do so and may collaborate with other enterprises in doing so.

Remediation and **remedy** refer to both the processes of providing remedy for an adverse impact and to the substantive outcomes that can counteract, or make good, the adverse impact, including: apologies, restitution or rehabilitation, financial or non-financial compensation (including establishing compensation funds for victims, or for future outreach and educational programs), punitive sanctions (whether criminal or administrative, such as fines), as well as prevention of harm through, for example, injunctions or guarantees of non-repetition.[131]

The *Guidelines* Human Rights Chapter sets out explicit expectations on remedy for human rights harms but do not set the same expectations under other Chapters. However, the systems enterprises use to address adverse human rights impacts may be useful to address other kinds of impacts covered by the *Guidelines* as well.

B. KEY ACTIONS

Actions enterprises may take to provide for, or cooperate in, remediation (when appropriate) would likely include the following:

1. **Enable remediation** for harms caused or contributed to, using a variety of avenues.
2. Provide for or co-operate through legitimate processes in the **remediation of adverse human rights impacts** where they identify that they have caused or contributed to these impacts.

C. EXPLANATION OF KEY ACTIONS

1. Enable remediation for harms caused or contributed to

- Where an enterprise has caused or contributed to an actual adverse RBC impact, it should be **prepared to address those impacts and provide redress.**
- Where an enterprise has not caused nor contributed to an adverse RBC impact but where the impacts are **directly linked** to its operations, products or services through a business relationship, that business relationship should remedy the harm done. This is a reflection of the principle expressed in the *Guidelines* that they are not intended to shift responsibility from entities that are the source of harm -- the responsibility to remedy harm rests with the enterprise that caused or contributed to it. However, where an enterprise is directly linked to the harm through its business relationship, it still has a responsibility to use its leverage with the business relationship to try to prevent or mitigate the risk of such impacts continuing or recurring. It should raise the issue with the business partner concerned, request them to address it directly and confirm the outcome. It is not expected to participate in the remediation but may choose to do so, alone or in collaboration with other parties.
- Where providing or cooperating in remedy is appropriate, this can happen through a **number of avenues**. Which avenue is the most appropriate will depend on the circumstances but the core consideration should be to find the most effective way to provide or cooperate in providing a remedy that puts right the harm done. In some cases, this may be by providing options within the enterprise itself through

"operational level grievance mechanisms," or other types of mechanisms, or it may be through judicial mechanisms or state-based non-judicial mechanisms, other non-judicial mechanisms (such as through a multi-stakeholder initiative), or through the OECD NCPs. Where harms identified under the *Guidelines* overlap with national law, enterprises may be *required* to cooperate in state-based proceedings to address the harms.

- The *Guidelines* set out **specific expectations for providing remedy** that may not be required by law but which are expected under the *Guidelines* – to consumers,[129] for human rights impacts,[130] working with trade unions to address terms and conditions of employment.[131] Enterprises may therefore set up one or more **formalised means**, established or provided for by an enterprise, through which workers, individuals, or community groups can raise concerns about the impact a company has on them—including, but not exclusively, any impact on their human rights (see below). These mechanisms should be directly accessible to workers, individuals and communities that may be adversely affected.[140] These mechanisms can provide early warning for the enterprise and early remedy for those impacted. However the use of an enterprise's own mechanisms should not preclude access to other mechanisms.
- These mechanisms can also **play a role in feeding back into and improving the due diligence process**, in particular by feeding into tracking the effectiveness of a company's response to adverse RBC impacts and into communicating with stakeholders.
- In addition, enterprises are **encouraged to go beyond eliminating adverse RBC impacts**. Sometimes proactive measures to make positive contributions to livelihoods, the environment or governance can be effective tools for long-term prevention of adverse RBC impacts.[93] However, while some environmental impacts like greenhouse gas emissions can be "offset", it is not an appropriate response strategy for the other chapters of the *Guidelines*. Offsetting does not work when it involves people - harms to people in one area cannot be offset by positive contributions elsewhere or even in the same project. Providing for or cooperating in remediation for harm already done is a specific responsibility under the *Guidelines* that should not be confused with or mixed making positive contributions.

2. In the case of human rights grievances

- The *Guidelines* set out additional considerations to remedy human rights harms, including highlighting the option of establishing **operational level grievance mechanisms.** The *Guidelines* include specific "effectiveness criteria" that should guide the design and operation of any internal grievance mechanism that will address human rights grievances. These criteria are: **legitimacy, accessibility, predictability, equitability, compatibility with the *Guidelines* and transparency, and are based on dialogue and engagement with a view to seeking agreed solutions**.[132] They provide relevant criteria to build on in designing mechanisms for other areas of the *Guidelines* as well. (See the OECD's Due Diligence Companion).
- One of the most important advantages of such a mechanism is that those adversely impacted should be able to **receive remedy sooner** than they would receive in other processes but the choice of which process should be left to those making the claim – an operational level grievance mechanism should not preclude access to judicial or non-judicial proceedings.
- **Involving external stakeholders** who may potentially be affected by an enterprise's operations in discussing and designing its operational-level or company-level grievance mechanism is an effective way to begin to build trust in the mechanism and prompt its use as a channel to raise grievances early. Operational-level grievance mechanisms can be important complements to wider stakeholder engagement, but cannot be a substitute for it either; they should be just one part of a broader approach to stakeholder engagement.
- **In the case of employees and other workers represented by trade unions**, industrial relations processes involving management and the unions are themselves a form of operational-level grievance mechanisms. The most appropriate channels for addressing complaints are often through discussions between trade unions and the management. Operational-level grievance mechanisms can be an important complement to collective bargaining processes, but cannot substitute for it. They should not be used to undermine the role of legitimate trade unions in addressing labour-related disputes.[133]

Annex: Understanding "Cause", "Contribute" and "Directly Linked"

PURPOSE

This Annex helps explain the terms "cause," "contribute to" and "directly linked" as used in the *Guidelines*.[134] The *Guidelines* recognise that obeying domestic law is the first obligation of enterprises, but they also explicitly recognise that the expectations in the *Guidelines* may extend beyond domestic law in many cases.[135] These terms should therefore be read in light of their purpose rather than through a narrow, legalistic interpretation. Although many aspects of the Guidelines are normally covered in national law, the responsibility under the *Guidelines* are distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.

DEFINITIONS

"Cause"
This term describes situations where the actions or failure to act of an enterprise results in the adverse RBC impact. With respect to potential adverse RBC impacts, the enterprise may cause such impacts when its activities (or omissions) significantly increase the chances of an adverse RBC impact occurring and they would be sufficient to result in the impact. With respect to actual impacts, the enterprise causes the adverse RBC impacts when its actions or omission's result in the adverse RBC impact, even where there may be minor involvement by other enterprises or entities. Given the wide range of complex circumstances covered by the *Guidelines*, applying a strict test[136] around causality is likely to be too limiting to be helpful in advancing the kind of preventive thinking underpinning the *Guidelines*.

"Contribute to"
The *Guidelines* contain a specific definition of "contributing to": "a substantial contribution, meaning an activity that causes, facilitates or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions."[137] With respect to potential adverse RBC impacts, this term describes a situation where an enterprise's activities (or omissions) significantly increases the risk of an adverse impact even if they are not sufficient by themselves to result in the impact, because the combination of its activities and that of another entity[138] together are likely to result in the adverse impact.[139] With respect to actual adverse impacts, there may be many different ways that one or more enterprise's activities combine to result in an adverse RBC impact, including where numerous entities are engaged in the same type of actions in parallel that together build up or accumulate to result in an adverse impact.

"Omissions"
Omissions are not defined under the *Guidelines* but can be implied from the whole structure of the *Guidelines* themselves. Carrying out due diligence provides the knowledge and tools to avoid adverse impacts to the greatest extent possible. Thus, where due diligence shows or would have shown that action was necessary to prevent or mitigate an adverse RBC impact, and that action was not taken, then this would be an omission under the *Guidelines*. In addition, the *Guidelines* set out specific recommendations for actions expected of enterprises. Failing to take these actions would be considered an "omission" under the *Guidelines*.[140]

"Directly Linked"
This term involves adverse impact that are "directly linked" to an enterprises operations, products or services by a business relationship.[141] Enterprises deal with a wide range of business relationships, using a wide range of tools to ensure quality, price, timeliness, safety, etc. to organize the way

inputs into their products, services or operations are delivered and for certain enterprises, to direct the way their operations, products or services are used. The *Guidelines* do not seek to make an enterprise responsible for all that happens in its value chain, but they do seek build on these existing practices to reinforce business relationships as a transmission channel for RBC approaches and responsibilities within global value chains. A few additional points help to explain this concept:

- "Direct linkage" refers to the linkage between the harm and the enterprise's products, services and operations through another enterprise (the business relationship)[142] or chains of relationships, and does not refer to some causal relationship between the enterprise and the harm.

- Direct linkages are not limited to first-tier or immediate business relationships. Hence, even if the adverse impact is caused or contributed to by an entity deeper in the supply chain, the enterprise is still expected to seek to prevent or mitigate the adverse impacts arising in its entire supply chain. For example, despite multiple tiers of business relationships between the enterprise's end product (e.g. a computer) and the mine of origin where a serious adverse impact may arise (e.g. financing armed groups through mineral production and trade), there is nonetheless a direct link between the enterprise product (computer) and the adverse impact through the business relationship with its suppliers and sub-suppliers of products containing those metals. This direct linkage gives rise to the expectation of responsible mineral supply chain management in accordance with the *OECD Due Diligence Guidance*.[143]

- Under the *Guidelines* an enterprise's operations, products or services are either 'directly linked' to an adverse impact through a business relationship (or series of business relationships) or not linked at all - there is no "indirect linkage".[144]

- This terminology on 'directly linked' is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship. In this context, enterprises are not responsible for the actions of the entity with which they have a business relationship, but rather for their own conduct, including their efforts to influence or encourage that entity to prevent or mitigate the RBC impacts. The Guidelines envisage differentiated and mutually-reinforcing responses from enterprises that cause or contribute to adverse impacts, and those enterprises whose operations, products or services are directly linked to adverse impacts through a business relationship. Each enterprise is responsible for undertaking due diligence, which will vary in complexity with the size of the enterprise, the risk of severe human rights impacts, and the nature and context of its operations. Likewise the nature of risk responses will vary according to the relationship to an adverse impact. If an enterprise is made aware of its products or services being directly linked to an adverse impact through a business relationship, it has a responsibility to use its leverage to seek to prevent or mitigate that impact, however, the responsibility for addressing and remedying the impact rests with the entity causing the harm.[145] The responsibility is calibrated to the relationship to the harm and is not simply replicated for both business partners without regard to their respective roles.[146]

QUESTIONS TO HELP GUIDE THE ANALYSIS OF CAUSE – CONTRIBUTE – DIRECTLY LINKED

As noted in the Guidance, an enterprise may carry out due diligence around a specific situation (a specific transaction, a specific expansion project, a new type of product) or it may be carrying out broader due diligence (such as around areas of its supply chain or new country entry). The questions below should be asked within the context of each situation. In cases where the due diligence is focused on specific situations, the analysis can be more precise about the RBC risks and the enterprise's relationship to those risks. Where the due diligence covers broader activities, the analysis is likely instead to be based on information that helps identify the likelihood of RBC risks and the enterprise's potential involvement with that risk. As indicated in the Guidance, in these situations, updating the information and honing in on more detailed information to be able to assess for the enterprise's involvement with the RBC risk and plan for its response will be important.

Questions:

- Has the enterprise's due diligence identified potential adverse RBC impacts (either general areas of RBC risk or specific RBC risks) or actual adverse RBC impacts that have occurred? Or have other entities brought such RBC risks or impacts to the enterprise's attention?

- If so:
  - What role could the enterprise's activities[147] play in increasing the risk of those potential RBC risks materializing / maturing into actual adverse RBC impacts? Or if the adverse impacts have occurred, did the enterprise's activities result in those adverse impacts or were they the major reason for the adverse RBC impacts occurring?
  - If so, would the enterprise's activities be sufficient in and of themselves to result in that impact?

    - *If the answer is yes, this is likely to be a situation of **CAUSING***

- If the enterprise's activities are not sufficient in and of themselves to potentially or actually result in the adverse RBC impact, would or did the enterprise's activities nonetheless have the following effects in more than a minor or trivial way?[148] Has or could the enterprise's current or future actions or omissions in the context of the specific actual or potential adverse RBC impact combine with another enterprise's actions so that it:
  - **CAUSES** another entity[149] to take an action that has or could cause an adverse RBC impact?
  - Make it more likely that the impact would occur or occurred because it has **incentivised** another enterprise to take an action that caused an adverse RBC impact?
  - Make it more likely that the impact will occur or occurred because it has **facilitated** another enterprise in taking action that caused an adverse RBC impact?
  - **Overlap** with similar activities of other enterprises such that when combined, these activities could result in or resulted in the adverse RBC impact?

    - *If the answer to any of these is yes, this is likely to be a situation of **CONTRIBUTING TO***

- If neither of the above situations apply, but the enterprise has identified or been alerted to potential or actual adverse RBC impacts in connection with its operations, products or services, then it should ask the following:
  - Does it have a **commercial relationship (or a cascade / chain of commercial relationships)** with another entity(ies) (the business relationship) that provides operations, products or services for its own operations, products or services?
  - If so, when carrying out operations or providing products or services that are directly or eventually incorporated into or support the enterprise's operations, products or services, did the other entity (the business relationship) cause or could it cause an adverse RBC impact? **OR** If so, when **using the enterprise's operations, products, or services**, did the other entity (the business relationship) cause or could it cause an adverse RBC impact?

    - *If the answer is yes, this is likely to be a situation of being **DIRECTLY LINKED***

EXPECTED RESPONSES UNDER THE GUIDELINES

Once an enterprise has determined its position with respect to the specific potential or actual adverse RBC impacts along the cause – contribute – directly linked spectrum, the next step is to determine its response. The distinction between each of the three situations may not always be crystal clear. In such cases, enterprises should be guided by the spirit and objectives of the *Guidelines* in making choices and taking action.

- If the enterprise is **causing**, or may cause, an adverse RBC impact, it is expected to take appropriate action to:
    - Cease any activities it is taking that are causing the actual RBC impact.
    - Prevent any further occurrence or recurrence.
    - Provide for or cooperate in remediation of any actual impact that has occurred.[150]

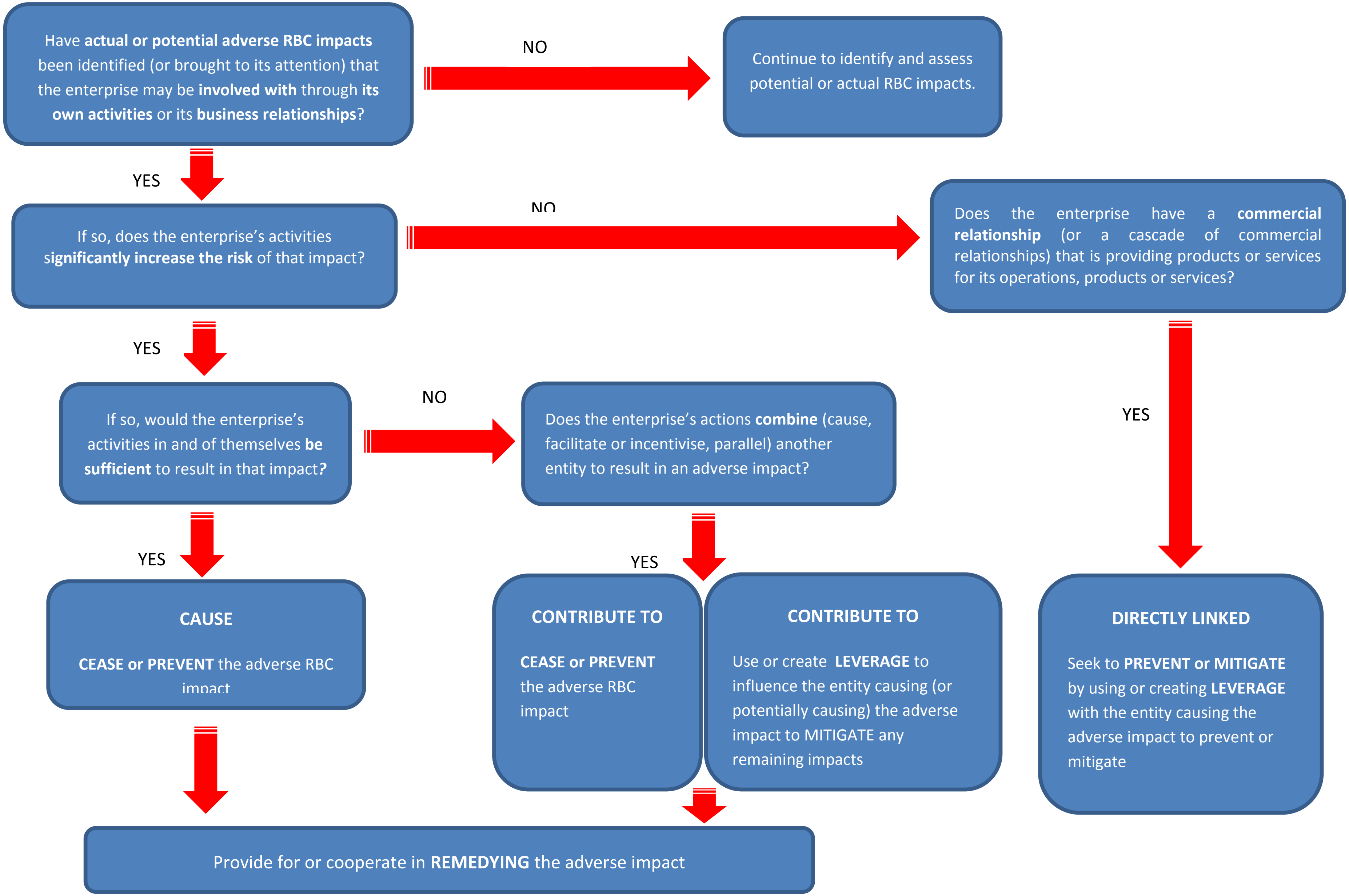
- If the enterprise is **contributing**, or may contribute, to an adverse RBC impact, it is expected to take appropriate action to:
    - Cease any activities it is taking that are contributing to the actual RBC impact.
    - Prevent any further occurrence or recurrence of its contribution.
    - Build or use its leverage with the other enterprise causing or contributing to the adverse RBC impact to mitigate any remaining impact to the greatest extent possible.[151]
    - Provide or cooperate in remediation – this can take a variety of forms and may often involve cooperation with the other enterprise(s) also contributing to the adverse RBC impact.

- If the enterprise is **directly linked**, to an adverse RBC impact, it is expected to take appropriate action to:
    - Seek to prevent or mitigate the adverse impact by building or using its leverage to try to change the wrongful practices of the business relationship that is causing or contributing to the harm (adverse RBC impact) alone or in cooperation with others.[152] The *Guidelines* encourage collaboration, particularly in addressing issues in their supply chains and other business relationships.

AS SITUATIONS CHANGE, SO MAY EXPECTED RESULTS

The *Guidelines* highlight that due diligence is an on-going process that should become an integral part of systematic business decision-making and risk management systems. Situations change, and as highlighted in the Guidance, responses should be adapted accordingly. Due diligence processes should alert the enterprise to situations where its relationship to the impact has or may change among the categories of involvement discussed above. For example, if an enterprise acquires another enterprise that was once a supplier, it is likely to change from being only directly linked or contributing to the supplier's adverse RBC impacts to causing the impacts as the new owner in control of the supplier (if it omits to take action to address the impacts as part of its acquisition process) or a bank steps into taking control of operations of a failing borrower responsible for severe pollution, it would likely go from directly linked to contributing if not causing any adverse environmental impacts of the borrower if it failed to take steps to stop the pollution.

Simplified Flow Chart of Questions on Cause-Contribute-Directly Linked



Notes

1 The UN Guiding Principles on Business and Human Rights, Implementing the UN Protect, Respect, Remedy Framework (2011) (UNPGs). The UNGPs were unanimously endorsed by the United Nations Human Rights Council in 2011 and also enjoy broad support from business, civil society and trade unions.

2 http://www.ilo.org/declaration/lang--en/index.htm

3 There are a number of ILO Conventions referenced in the text and commentary of Chapter V – Employment and Industrial Relations. See: http://www.ilo.org/global/standards/lang--en/index.htm

4 http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm

5 In accordance with the Decision of the Council on the OECD *Guidelines* for Multinational Enterprises as amended in 2011, National Contact Points are set up to further the effectiveness of the *Guidelines* by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the *Guidelines* in specific instances. This Guidance may be used by National Contact Points to promote the OECD *Guidelines* but is not intended to serve as a basis for the submission of specific instances. See OECD *Guidelines*, Commentary on the Implementation Procedures of the OECD *Guidelines* for Multinational Enterprises, 25.

6 The *Guidelines* note that a "precise definition of multinational enterprises is not required for the purposes of the *Guidelines*. These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may co- ordinate their operations in various ways." Chapter II - Concepts and Principles, para. 4.

7 There are 35 OECD countries, and 11 non-OECD countries have adhered to the *Guidelines*.

8 Chapter II – General Policies, Commentary para. 10.

9 Chapter II – General Policies, Commentary para. 9.

10 According to the *Guidelines*, MNEs and domestic enterprises are subject to the same expectations in respect to conduct wherever the *Guidelines* are relevant to both.

11 Chapter I – Concepts and Principles, para. 5.

12 OECD Brochure, Responsible Business Conduct Matters, p. 1. (*Guidelines* Brochure)

13 As part of these relationships, enterprises already use a range of approaches to convey their expectations and requirements to their business relationships. For example, by imposing certain environmental requirements or working conditions as part of the purchasing that are expected to be cascaded down supply chains; imposing anti-corruption measures on agents and sub-agents; or maintaining strict quality control requirements that apply down to the last rung of the supply chain to ensure consumer safety. This universe of an enterprise's business relationships in potentially all corners of the globe is therefore "in scope" for the due diligence expected under the *Guidelines*.

14 See: OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict- Affected and High-Risk Areas (Third Edition 2016); OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (Preliminary version 2016); OECD-FAO Guidance for Responsible Agricultural Supply Chains (Preliminary version 2016); Responsible Supply Chains in the Garment and Footwear Sector (Draft 2016); Responsible Business Conduct in the Financial Sector

15 In 2015, the *G20/OECD Principles of Corporate Governance* have been revised and embodied in a Recommendation of the Council on Principles of Corporate Governance [C(2015)84].

16 Recommendation of the Council on *Guidelines on Corporate Governance of State-Owned Enterprises* (SOEs) [C(2015)85].

17 *Recommendation of the Council on Commentary on Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence* ("the Common Approaches") [C(2012)101 as amended by C(2016)38].

18 Recommendation of the Council on the Policy Framework for Investment [C(2015)56/REV1]

19 *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009).*

[20] Preface, para.1. Decision of the Council on the OECD *Guidelines* for Multinational Enterprises [C/MIN(2011)11 and its ADD1].

[21] Preface, para.1.

[22] Preface, para.7.

[23] *Guidelines* Brochure p. 2. The *Guidelines* are aligned with international principles and standards that are highlighted in each chapter throughout the *Guidelines*.

[24] *Guidelines* Brochure, p. 5.

[25] *Guidelines* Brochure, p. 4.

[26] Preface, para.7.

[27] The UN Guiding Principles on Business and Human Rights, Implementing the UN Protect, Respect, Remedy Framework (2011).

[28] The ILO Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration) - 4th Edition (2014).

[29] Implementation Procedures of the OECD *Guidelines* for Multinational Enterprises, Part I, para. 1.

[30] Chapter III - Disclosure, para. 1.

[31] Chapter III - Disclosure, para. 2.

[32] Preface, para. 4.

[33] The due diligence provisions of the *Guidelines* do not apply to the Science and Technology, Competition and Taxation chapters. Chapter II – General Policies, Commentary para.14.

[34] Noting that domestic laws addressing these issues do not always transpose or apply the international standards fully or correctly or add more detail.

[35] OECD-FAO Guidance for Responsible Agricultural Supply Chains (2016), p. 51.

[36] OECD-FAO Guidance for Responsible Agricultural Supply Chains (2016), p. 22.

[37] Chapter VI – Environment, para. 2 a).

[38] Chapter II – General Policies, para. 11, Commentary para. 25.

[39] Chapter IV – Human Rights, Commentary, para. 40.

[40] OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, DRAFT (Feb 2016) Annex 5

[41] OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, 3rd Edition (2016), p. 21.

[42] OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (2016), pp. 75-81.

[43] OECD-FAO Guidance for Responsible Agricultural Supply Chains (2016), p. 51.

[44] Chapter V – Employment and Industrial Relations, para. 4 b).

[45] OECD-FAO Guidance for Responsible Agricultural Supply Chains (2016), p. 53.

[46] OECD-FAO Guidance for Responsible Agricultural Supply Chains (2016), p. 60.

[47] OECD-FAO Guidance for Responsible Agricultural Supply Chains (2016), p. 52.

[48] OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, DRAFT (Feb 2016), Annex 11

[49] OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, DRAFT (Feb 2016) Annex 12

[50] Chapter VI – Environment, para. 1.

[51] OECD-FAO Guidance for Responsible Agricultural Supply Chains (2016), p. 62.

[52] OECD-FAO Guidance for Responsible Agricultural Supply Chains (2016), p. 62.

[53] OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, DRAFT (Feb 2016). p. 106

[54] OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, DRAFT (Feb 2016). p. 117

[55] Chapter VIII – Consumer Interests, para. 6.

[56] *Guidelines* Preface, para 5, II para A.1.

[57] Chapter II - General Policies, Commentary para. 14.

[58] Chapter I – Concepts and Principles, para.2.

[59] Chapter I – Concepts and Principles, para. 2.

60 This is most clearly expressed with respect to one of the most "mature" areas of the Guidelines – the environment. See Chapter VI – Environment, Commentary para 61 which highlights the importance of taking a systemic approach.

61 Chapter VI - Environment, Commentary para 61.

62 Chapter II - General Policies, Commentary para. 15.

63 UNGPs, Commentary to Article 14.

64 Chapter II - General Policies, Commentary para. 16.

65 Chapter II - General Policies, Commentary para. 21.

66 Chapter II - General Policies, Commentary para. 21.

67 Chapter II – General Policies, para. 11.

68 "Cause" is not defined in the *Guidelines* but essentially means the actions or failure to act of an enterprise results in the adverse RBC impact.

69 Chapter II – General Policies, para. 11, Commentary paras. 17, 18).

70 Chapter II – General Policies, para. 11.

71 As set out in the *Guidelines*, 'contributing to' an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions. Chapter II – General Policies, Commentary para. 14.

72 'Leverage' is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm. Chapter II – General Policies, Commentary para. 19.

73 Chapter II – General Policies, para. 12.

74 Chapter II – General Policies, para. 12.

75 Chapter II – General Policies, Commentary para. 14.

76 Chapter II - General Policies, Commentary para. 14.

77 See: http://www.oecd.org/daf/inv/mne/ncps.htm

78 Part II, Procedural Guidance, Section C.

79 Chapter II - General Policies, para 14.

80 Chapter II - General Policies, Commentary para. 25.

81 Chapter III – Disclosure, paras.1 and .2 and Chapter V – Employment and Industrial Relations, paras. .2b, 2c and 6.

82 Chapter III - Disclosure.

83 For more guidance see Capobianco, Bijelic, Gillard, Competition Law and Responsible Business Conduct, OECD (2015).

84 Chapter III – Disclosure, para. 1.

85 Chapter IV – Human Rights, para. 4.

86 Chapter VII - Combating Bribery, Bribe Solicitation and Extortion, para. 5.

87 Chapter III – Disclosure, para. 3

88 Chapter I, Concepts and Principles, para 4 notes that "The *Guidelines* are addressed to all the entities within the multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the *Guidelines."*

89 Chapter II – General Policies, para 8. Chapter III - Disclosure, para 3.

90 Chapter II - Chapter II – General Policies, Commentary, para. 8 and G20/OECD Corporate Governance Principles (2015), Section VI, Responsibilities of the Board. The Principles contain numerous additional references to the OECD *Guidelines*.

91 Chapter II – General Policies, Commentary, para. 8.

92 Chapter II – General Policies, Commentary, para 14.

93 Chapter II – General Policies, Commentary para 12, Chapter VI –Environment MS, Chapter VII Combating Bribery, Bribe Solicitation and Extortion, Commentary para 77.

94 Chapter VI - Environment, para 3.

95 Chapter VI - Environment, Commentary para 44; UN Guiding Principles on Business and Human Rights, para. 16.

[96] For example, the OECD added an entirely new chapter to the *Guidelines* on human rights in 2011. Attention to that topic has grown significantly in the five years since adoption.

[97] Chapter II - General Policies, Commentary para. 15. Specific recommendations for human rights due diligence are provided in Chapter IV.

[98] Chapter VI - Environment, para 7, Commentary para. 73.

[99] Chapter II - General Policies para. 16 and 21.

[100] There is nothing *in principle* that precludes any enterprise from causing or contributing to adverse impacts on any internationally-recognized human right. It is therefore not possible to limit the application of the responsibility to respect human rights to a particular sub-set of rights for particular sectors.

[101] Chapter II – General Policies, Commentary para 15 & 16, para 21.

[102] Chapter V – Employment and Industrial Relations, Commentary para. 56.

[103] Chapter II - General Policies, para. 14.

[104] Chapter II – General Policies, Commentary para 16.

[105] Chapter I – Concepts and Principles, para. 2.

[106] Chapter I – Concepts and Principles, para. 2.

[107] Chapter VI - Environment, para 4.

[108] Chapter II – General Policies, Commentary para. 21.

[109] Chapter II – General Policies, Commentary para. 23.

[110] For further steps on responsible disengagement, see OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector

[111] Chapter II – General Policies, Commentary para. 23.

[112] Chapter III - Disclosure, para. 1.

[113] Chapter III - Disclosure, para. 2.

[114] The Corporate Governance Principles and the disclosure requirements were updated in 2015. See: G20/OECD Principles of Corporate Governance. See: G20/OECD Principles of Corporate Governance (2015)

[115] Chapter III - Disclosure, para. 1.

[116] Chapter III - Disclosure, para. 1.

[117] Chapter III - Disclosure, Commentary paras. 28 and 33.

[118] From Chapters III and VIII.

[119] Chapter VIII – Consumer Interests, Commentary para. 86

[120] Chapter III - Disclosure, Commentary para. 35

[121] Chapter VIII – Consumer Interests, para. 4.

[122] Chapter II – General Policies, para. 10.

[123] Chapter III - Disclosure, para. 3.

[124] Including Chapter III, Disclosure, para. 3, Chapter IV, Human Rights, Commentary para. 45, Chapter VI, Environment, para. 2, Chapter VII, Combating Bribery, Bribe Solicitation and Enforcement, para. 5, Chapter VIII, Consumer Interests, Commentary para. 86.

[125] Chapter VI - Environment, Commentary para. 65.

[126] With due regard also for legal requirements that may prohibit disclosure for competition purposes.

[127] Chapter II – General Policies, Commentary para. 34.

[128] Chapter II – General Policies, Commentary para. 13.

[129] Chapter VIII – Consumer Interests, para. 3.

[130] Chapter IV - Human Rights, para. 6.

[131] Chapter V – Employment and Industrial Relations.

[132] Chapter IV - Human Rights, Commentary para. 34. These draw directly on the UNGPs, Principle 31.

[133] Chapter V – Employment and Industrial Relations, Commentary para. 56 and UN Guiding Principle 29, Commentary.

[134] The 2011 revision of the OECD *Guidelines* included the introduction of the responsibility to carry out due diligence and the addition of a chapter on human rights, which is aligned with the UN Guiding Principles on Business and Human Rights. As part of those two changes, the *Guidelines* introduced the concept of an enterprise’s “involvement with” an adverse impact, using three levels of involvement: cause, contribute and directly linked to an adverse impact that draws from concepts developed i the UN Guiding Principles.

[135] Chapter I – Concepts and Principles, para. 2.

[136] Something like a “but for” test that is used in some jurisdictions as a legal test to determine causality in certain circumstances. The test sets a high bar. An action or omission is considered a cause only if “but for” that action or omission, the adverse impact would not occur. This test revolves around the question of whether the harmful result would also have occurred but for the enterprise’s actions or omissions, instead of considering whether an enterprise’s actions would have been sufficient to result in the harm.

[137] Chapter II – General Policies, Commentary para. 14. Note that the UN Guiding Principles do not include the same qualifier that a contribution must be substantial to be considered contributing to.

[138] This could be one or more other enterprises, other state or non-state entities.

[139] OECD Secretariat, “Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship” (2014), p. 3.

[140] For example, Chapter VII – Combating Bribery, Bribe Solicitation and Extortion, para. 3 provides: “[p]rohibit or discourage, in internal company controls, ethics and compliance programmes or measures, the use of small facilitation payments, which are generally illegal in the countries where they are made, and, when such payments are made, accurately record these in books and financial records.” A failure to prohibit or discourage facilitation payments and record them would be considered an “omission.”

[141] Chapter II – General Policies, para. 12.

[142] OHCHR, “Request from the Chair of the OECD Working Party on Responsible Business Conduct”, 27 November 2013, para. 9.

[143] OECD Secretariat, “Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship” (2014), p. 10.

[144] OECD Secretariat, “Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship” (2014), p. 5.

[145] OECD Secretariat, “Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship” (2014), p. 5.

[146] OHCHR, “Request from the Chair of the OECD Working Party on Responsible Business Conduct”, 27 November 2013, para. 12.

[147] When the term “activities” is used, this should be read to include activities, actions and omissions.

[148] The *Guidelines* refer to a substantial contribution. Note that the UNGPs do not make this distinction – they only refer to “contribute to” without requiring that it is a “substantial” contribution.

[149] Note that this could mean one or more other business enterprises, or a non-State or State entities.

[150] Chapter II – General Policies, para. 11 and Commentary para. 14.

[151] Chapter II – General Policies, para. 11.

[152] Chapter II – General Policies, para. 12 and Commentary para. 19 - 20.