



Public Consultation on the Due Diligence Guidance for Responsible Business Conduct: Compilation of responses

February 2017

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

Context

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 recommend that enterprises conduct due diligence in order to identify, prevent or mitigate and account for how actual and potential adverse impacts are addressed.

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 Due Diligence Guidance contains plain language explanations of the due diligence recommendations and associated provisions in the OECD Guidelines and can be used by companies in any sector of the economy.

This document presents a compilation of responses received to the public consultation conducted by the Working Party on Responsible Business Conduct (WPRBC) from December 2016 to February 2017. Information about the public consultation can be found online at <http://www.oecd.org/corporate/mne/due-diligence-guidance-for-responsible-business-conduct.htm>

TABLE OF CONTENTS

Contents

AMNESTY INTERNATIONAL	5
ARGE.....	12
ASSOCIATION FRANÇAISE DES ENTREPRISES PRIVÉES.....	13
BIAC.....	19
BUSINESS SOCIAL COMPLIANCE INITIATIVE (BSCI)	33
CANADA.....	34
Canadian Labour Congress	40
CATALYST SOCIAL MANAGEMENT	42
CENTRAL ORGANISATION OF FINNISH TRADE UNIONS	45
CHAMBER OF LABOUR, AUSTRIA	51
COMMISSION NATIONALE CONSULTATIVE DES DROITS DE L'HOMME.....	52
CORA NETWORK FOR CORPORATE ACCOUNTABILITY	54
CSR EUROPE	57
DANISH INSTITUTE FOR HUMAN RIGHTS, THE NATIONAL COUNCIL OF HUMAN RIGHTS OF MOROCCO AND THE FRENCH COMMISSION ON HUMAN RIGHTS.....	58
DEBEVOISE & PLIMPTON AND ENODO RIGHTS	62
ELECTRONIC INDUSTRY CITIZENSHIP COALITION AND THE CONFLICT-FREE SOURCING INITIATIVE	99
ERASMUS UNIVERSITY ROTTERDAM, ERASMUS SCHOOL OF LAW.....	103
ESTELLE LEVIN LTD.	105
ETHICAL TRADING INITIATIVE - NORWAY (IEH)	111
FACILITECH INTERNATIONAL.....	113
FELLOW NYENRODE BUSINESS UIVERSITEIT	118
FINN WATCH	119
FRENCH RSE PLATFORM - PRIME MINISTERS OFFICE	122
GLOBAL WITNESS	126
GRI	127
HUMAN RIGHTS WATCH	130
ICAR.....	134
ISO 20400	137
LEARN2IMPROVE YOUR PLANET	141
LIBERTY ASIA	145
LINKLATERS	147
MINISTRY OF ECONOMIC AFFAIRS AND EMPLOYMENT, FINLAND.....	149

MINISTRY OF FOREIGN AFFAIRS OF THE UNITED STATES OF AMERICA	150
MINISTRY OF FOREIGN AFFAIRS, NORWAY.....	151
MONKEY FOREST CONSULTING	154
NBIM	156
NEI INVESTMENTS.....	159
NETHERLANDS NCP SECRETARIAT	162
OECD NCP – GERMANY	163
OECD WATCH	164
PUBLIC EYE	176
RAOUL WALLENBERG INSTITUTE OF HUMAN RIGHTS AND HUMANITARIAN LAW	185
SANOFI	188
SAVE THE CHILDREN SWEDEN	193
SECRÉTARIAT GÉNÉRAL DES AFFAIRES EUROPÉENNES - FRENCH PRIME MINISTER'S OFFICE	195
SHERPA.....	198
SIEMENS	201
TRANSPARENCY INTERNATIONAL	201
VALCAMBI	202
INDIVIDUAL 1	203
INDIVIDUAL 2	205
INDIVIDUAL 3	207
INDIVIDUAL 4	207

AMNESTY INTERNATIONAL

Gabriela Quijano, Business and Human Rights Legal Adviser, Global Thematic Issues:

Dear Investment Division,

Please find attached Amnesty International's comments and observations on the OECD's draft Due Diligence Guidance for Responsible Business Conduct (Draft 2.1).

Please note that these comments focus primarily on human rights standards and principles. We have chosen to focus on priority issues, but are happy to provide further inputs on either the points we raise in the attached or additional ones on your request.

Kind regards,
Gabriela

Amnesty International welcomes the opportunity to provide its observations and suggestions on the OECD's draft Due Diligence Guidance for Responsible Business Conduct (Due Diligence Guidance or Guidance). This submission focuses primarily on standards and principles in relation to human rights. We have chosen to focus only on key priority issues raised in the draft Guidance. However, we would be happy to provide further inputs on these points and others upon request by the OECD.

General Comments

1. Reflecting the highest Responsible Business Conduct (RBC) standards

We welcome the stated intention of the OECD to draw from the due diligence approaches contained in sector-specific guidance already developed by the organisation.¹ In doing so, the Guidance should reflect the highest existing standards in these documents. Not doing so would create inconsistencies across OECD instruments and lead to a confusing and unwarranted divergence in expected standards of conduct depending on the document that is being consulted or the industry sector.

We also agree that the Guidance should be consistent with the OECD Guidelines for Multinational Enterprises (OECD Guidelines) and the UN Guiding Principles on Business and Human Rights (UNGPs). However, while maintaining consistency with these instruments, the Guidance should also seek to clarify, expand or further elaborate concepts and standards in these documents, in line with relevant external developments and guidance in the fields of human rights, transparency and corruption.² This is critical to ensure the Guidance is relevant, up-to-date and effective in dealing with present-day human rights challenges (for example, in relation to standards for due diligence, transparency, reporting, participation and meaningful consultation and the right to information).

The Guidance should also draw from and be fully consistent with international human rights laws and standards. Both the OECD Guidelines and the UNGPs refer to "internationally recognised human rights" as the standards companies should seek to respect and be guided by in the design and implementation of human rights due diligence. The draft Guidance itself currently states that, in relation to human rights impacts, it is

¹ <http://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>

² The author of the UNGPs himself, Professor John Ruggie, noted in his presentation of the principles to the UN Human Rights Council in June 2011 that the principles marked "*the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step...*" Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, para 13

intended to be aligned with the UNGPs (Basis for this Guidance, p1). It is critical that the Due Diligence Guidance draw from international human rights standards and that the advice given to companies on human rights due diligence is fully in line with these standards.³

2. Transparency in the development of the Guidance

We welcome the steps taken by the OECD to ensure the process of development of this Guidance is participatory and inclusive. However, the OECD should also publicly request and ensure that all comments, observations and recommendations in relation to the Guidance are made in writing. All contributions should then be published on the OECD website, in line with common practice among UN Human Rights Treaty Bodies.⁴ This is to ensure that all stakeholders taking part in this process can see all viewpoints presented to the OECD and assess the extent to which they are considered, adopted or rejected in the final text. Please note that this submission will be made publicly available on our website at: www.amnesty.org.

Specific Comments

1. The Two-page Summary (p5)

Capturing the “essence” of due diligence (p5)

We would recommend eliminating this section.

The list of features and elements under this heading is problematic. Firstly, it fails to indicate that the main purpose and function of due diligence is to avoid or prevent harm. In the human rights field, this is to prevent human rights abuses, consistent with the corporate responsibility to respect human rights. This section should articulate clearly and prominently that due diligence in general (and human rights due diligence in particular), should be designed and implemented with the principal aim of avoiding harm (or human rights abuses).

In connection to this point, the last bullet point of the list addressing remediation is also problematic. In the absence of a clear principle that establishes prevention as the main purpose of due diligence, this bullet seems to suggest that remediation is just as acceptable and outcome of due diligence as prevention. Remediation is critical but should only come into the picture when, despite all genuine efforts to avoid it, harm still occurs. As currently drafted, this statement can be read as suggesting that companies are free to choose *a priori* between prevention and remediation of harm depending on what might suit their activity or project best.

The second and third bullet points in the list seem to suggest that the probability and severity of impacts should define the due diligence process from the outset. This misses the critical point that a due diligence process must be general and continuous and capable of identifying all potential and actual impacts (see more comments on this in point 3 below).

Two additional concepts currently missing in this section relate to the ongoing, proactive nature of due diligence and its importance to enable companies not only to comply with the recommendations in the Guidelines but also with national and international law. Some of the missing elements highlighted here are adequately addressed elsewhere in the text. However, given their centrality for an adequate due diligence process, they should not be missing from a section that is intended to describe the essential features of due

³ For example, many UN Special Rapporteurs have recently addressed the human rights responsibilities of business in relation to certain groups of rights-holders, specific human rights or in specific contexts. See for example: Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/29/25 (28 April 2015); Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Başkut Tuncak, A/HRC/30/40 (8 July 2015), Report of the Special Rapporteur on the situation of human rights defenders, Michel Forst, A/71/281 (3 August 2016).

⁴ See for example: <http://ohchr.org/EN/HRBodies/CESCR/Pages/Submissions2017.aspx>

diligence.

As a whole, given the various omissions and the overall risk of over-simplification, we would recommend eliminating this section altogether.

Summary of “Key Actions” (p6)

We would also advise against listing the “Key Actions” under each of the due diligence steps in a short summary section at the beginning of the Guidance. There is a risk that with time this becomes the only reference point for companies and other stakeholders. This is concerning because much of this Guidance’s critical advice and explanations is provided elsewhere in the text. Many principles and explanations contained in the “Explanation of Key Actions” under each of the due diligence steps are just as critical as the “Key Actions” and should be read in conjunction. Read in isolation the “Key Actions” are over-simplified and can be highly unclear and misleading. The risks of having this summary outweigh the benefits and the overall objective of this document would be better served by removing it from the final document.

2. “Directly linked” vs “Contribute”

As currently drafted, the Guidance is too simplistic in the way it addresses responsibilities under “directly linked” scenarios (for example, in Core Concept 10). The text fails to acknowledge and warn that a company that may initially only be “directly linked” to abuses can swiftly move to a “contributing” scenario depending on the adequacy of its own due diligence practices and nature of its trading relationship.

Recently, Amnesty International published the report “The Great Palm Oil Scandal”.⁵ The report documents serious labour abuses in plantations in Indonesia that belong or provide palm oil to Wilmar, the world’s largest processor and merchandiser of the product. Amnesty traced palm oil from plantations owned by Wilmar and its suppliers to nine global food and household goods companies. None of Wilmar’s buyers had taken measures to identify, prevent, address or account for the severe labour abuses documented by Amnesty International before being contacted by the organisation.⁶ This is despite labour abuses being well-known risks within the industry and most of them being long term buyers. The report concludes that these companies were contributing to and benefiting from these abuses in their palm oil supply chain.

As this example illustrates, a company that may initially only be seen as “directly linked” to an abuse can in fact be contributing to that abuse because of the nature of the trade relationship (for example, length, high degree of leverage, proximity, membership in collaborative initiatives, etc.) and their failure to do adequate due diligence in the circumstances. In these cases, the company will share in the responsibility to remediate the harm. The draft attempts to note these dynamics in some parts. For example, it warns that the distinction between “cause”, “contribute” and “directly linked” “*may not always be crystal clear*” (e.g. fifth bullet point of Section C.1, “Developing response steps” under Part II.B). This is insufficient without further explanation. The Guidance should avoid being overly simplistic and offer more nuanced, practical advice to companies in this regard.

In addition, it would be useful if the Guidance warned against a common assumption that because a company is in a value/supply chain relationship, it will only ever be “directly linked” to an abuse. This

⁵ Amnesty International, Indonesia: The Great Palm Oil Scandal: Labour abuses behind big brand names. Executive Summary, 30 November 2016, Index number: ASA 21/5243/2016. Available at: <https://www.amnesty.org/en/documents/asa21/5243/2016/en/>.

⁶ Wilmar’s buyers include well-known companies such as: Unilever, Nestlé, Procter & Gamble, Reckitt Benckiser and Kellogg’s. All of the severe labour abuses documented by Amnesty International constituted breaches of Indonesian law and ILO standards. These included: use of child labour, forced labour, the non-payment of the minimum wage, use of exceedingly high targets and piece rate payments and abuse of casual workers. Amnesty International: “Palm Oil: Global brands profiting from child and forced labour”, 30 November 2016, available at: <https://www.amnesty.org/en/latest/news/2016/11/palm-oil-global-brands-profiting-from-child-and-forced-labour/>

assumption often results in companies not identifying or understanding the way in which they themselves are contributing to an abuse.

The clarifications suggested above could be made in Core Concept 10, in Part III (especially Section C.1, “Enable remediation for harms caused or contributed to”) and in the Annex addressing “cause”, “contribute” and “directly linked”.

3. Risk-based approach and prioritisation of severe risks

Severity should not be the starting point, but one way for companies to prioritise action

Severity should not be the starting point for designing and developing due diligence policies and processes. Companies should have in place adequate measures that are capable of identifying and assessing all risks. As a result of doing this properly, a company should be in a position to know where potential and actual human rights impacts exist, and their severity. Severity is relevant once a company has identified all of its risks and in case it needs to prioritise its responses.⁷ However, even at a more advanced stage of prioritisation, a company’s systems and procedures should still be able to capture evolving or new risks.

The draft Guidance is inconsistent in its advice in this regard. Although parts of the text correctly indicate that due diligence policies and systems should be wide or general and capable of identifying and managing all levels of risk, other parts appear to suggest that “severity” is the starting point. This is the case for example in relation to the definition of “risk-based” in the Key Terms section (p4), the references to a “risk-based approach” and “prioritisation” under the “essence” of due diligence (p.5), the first sentence under Core Concept 8, “RBC due diligence is risk-based and therefore involves prioritisation” and subsequent Core Concept 9, “Prioritising RBC due diligence...” (p10).

The text should clearly and consistently state that due diligence policies and systems should be capable of identifying all risks to and abuses of human rights at all times. This is consistent with both the UNGPs and OECD Guidelines,⁸ and Step 1 of the due diligence process under the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (OECD Minerals Guidance). The definition of “risk-based” and all other relevant parts of the text should be revised and adjusted to ensure this advice is consistent and unequivocal throughout the text.

Companies are responsible for all risks and harms arising from their operations

Also in relation to human rights due diligence, the text should be clear that the need to prioritise responses according to the severity of the risks or harms is relevant only in so far as companies are genuinely unable to deal with all risks simultaneously, and that companies nevertheless remain responsible for all of their risks and harms. There is an attempt to clarify this in some parts of the text (for example, in Section C.2, “Prioritising prevention and the most severe impacts” (p20) but not in others where it would be useful to do so (for example, in Core Concept ⁸, “RBC due diligence is risk-based...” (p10) and in Section II.A Due Diligence: Identify and assess adverse RBC impacts). To avoid misinterpretations on such a critical issue, the text should be revised and adjusted so it is clear at all times that, despite the possible need for prioritisation, companies remain responsible for all of their risks to and impacts on human rights.

4. RBC policy and management systems

The draft Guidance correctly advises companies to “devise and adopt an RBC policy” in Key action 1 under Section I. Embed responsible business conduct into policy and management systems. However, the guidance suggests that companies “can” but not “should” adopt this policy.⁹ In relation to human rights, this is inconsistent with both the UNGPs and the OECD Guidelines which clearly state that companies “should” adopt a human rights policy.¹⁰

⁷ Consistent with UNGPs, Principle 24 and its Commentary.

⁸ UNGPs, Commentary to Principle 12, and OECD Guidelines, Commentary on Human Rights, p.30, both indicating that “all human rights should be the subject of periodic review”.

⁹ The use of “can” instead of “should” is a problem with regard to all “Key Actions” in the current draft.

¹⁰ UNGPs, Principle 16 and OECD Guidelines, Chapter IV on Human Rights, paragraph 4.

In addition, the Guidance must indicate that the policy should, at a minimum, meet the standards in the OECD Guidelines. This includes international human rights law and standards which the OECD Guidelines refer to in its Human Rights Chapter. This clarification will avoid misinterpretation and undermining the effectiveness of the Guidance as a whole.

Transparency and disclosure

Provisions on transparency and disclosure throughout the text should be significantly strengthened. In addition, given the importance of transparency and its cross-cutting nature, it should be added as a Core Concept in Part I of the draft Guidance.

Transparency and disclosure of information are critical in at least three areas: (i) as a key component of an adequate human rights due diligence process; (ii) to enable meaningful stakeholder participation and, in particular, consultation with individuals affected by corporate activities and; (iii) as a means of respecting specific human rights. The Guidance should elaborate further on what companies should disclose, when and how to help them meet standards and expectations in all three areas.

(i) Transparency/disclosure of human rights risks and abuses as a key component of due diligence

The draft Guidance specifically deals with disclosure of information in Section II.D. Due diligence: Communicate. It considers disclosure as the “showing” part of the “knowing and showing” that a due diligence process entails. However, the advice it gives to companies on what to disclose to show they are respecting human rights is unclear and insufficient, and fails to highlight the centrality of disclosure for effective due diligence.

It must be clear that disclosure of this information is not optional or discretionary. The use of terms such as “can” in the chapeau line of Section B, “Key Actions” or “are encouraged” in the first bullet of Section C.2, “Disclose additional information”, suggest that disclosure of this information is discretionary and not necessary for an adequate due diligence process. We recommend the Guidance use the term “should” to refer to disclosure responsibilities throughout the text. The Guidance should also highlight the centrality of transparency as a means for stakeholders to measure a company’s progress over time and point to the critical role that an adequate flow of information within the supply chain plays in helping other business partners behave responsibly. Finally, the Guidance should acknowledge that the disclosure of certain non-financial information might also be required under domestic law.

A general reference to the Disclosure Chapter of the OECD Guidelines to deal with non-financial reporting, which would include human rights due diligence reporting, is inappropriate, especially since this Chapter provides very little guidance in this regard. The third bullet point of Section C.2, “Disclose additional information”, attempts to address some of these gaps by specifying certain elements that should be disclosed, but is still insufficient. It misses some critical elements such as actual risks and impacts. To be of use to companies wishing to demonstrate that they are respecting human rights in practice, this list should be expanded to include, at a minimum:

*A company’s policy on human rights, and how this policy is communicated internally and externally and operationalized throughout the enterprise and in relation to business relationships;

*Human rights due diligence systems and procedures to identify and address risks to and impacts on human rights, including those in the value/supply chain;

*Specific risks to human rights identified and measures to prevent/mitigate them;

*Actual impacts on human rights and measures to remediate them and avoid recurrence;

*The methodology to identify risks and impacts as well as to assess their likelihood and severity, and consultations held in this regard.

Note that some of the elements listed above which are not included in the draft Guidance are expressly mentioned in the OECD Minerals Guidance. For example, the OECD Minerals Guidance requires communication of risks identified in the supply chain and risk management plans, including risk mitigation, monitoring and involvement of affected stakeholders.¹¹

(ii) Transparency/Disclosure for Stakeholder Engagement

In relation to “stakeholder engagement” and consultation, the draft correctly indicates in Core Concept 12, “Meaningful Stakeholder Engagement is a core part of implementing the Guidelines, including carrying out RBC due diligence”, that “information should be provided in a timely manner”. However, given the importance of access to information to enable meaningful consultation, this provision should be considerably strengthened. The Guidance should clarify that meaningful consultation with local individuals and communities requires the timely disclosure of all relevant information concerning the activity or project likely to impact on their human rights. This should be done in an accessible manner, for example, by translating information into relevant local languages and convening meetings at times and locations people can actually attend. Some of this is also recognised in the draft “Due Diligence Companion” (fourth bullet point under “Improving the process through consultation”, pp 14 and 15). However, the language should be strengthened and brought to the main Guidance document. In addition, it would be important to list some of the critical information that companies should disclose such as investment and other agreements with governments, the terms of all relevant licences and permits, all risk assessments conducted, risk prevention/mitigation measures and incident reports.

(iii) Transparency/Disclosure required to respect specific human rights

Depending on the nature of the information, its disclosure might be required to ensure respect for certain human right. For example, disclosure of health-related information or information concerning water and the environment are necessary to meet the human rights to health and water.¹² A company that is planning a project with potential impacts on water sources that communities rely on for domestic use will be infringing on their right to water if it does not disclose all information related to its water management plans.

Finally, the draft highlights and overstates the need to consider “*business confidentiality and other competitive concerns*” in relation to disclosure of material information (third bullet point of Section C.1, “Disclose timely and accurate Information on all material matters” in Part II.D). This need must be overridden by human rights requirements. As stated above, the Guidance should emphasise that companies must disclose information when access to this information is itself a human right or is necessary for the realisation of other human rights. The Guidance should make clear that as a default, companies must disclose all information relevant to human rights impacts. Companies should justify in specific terms what, if any, information with implications for the effective protection of human rights, is not disclosed.

6. Participation in decision making/consultation

Amnesty International welcomes the specific references to consultation with affected stakeholders under Core Concept 12. It also welcomes the clarification that consultation with potentially affected stakeholders is part of the due diligence process and distinct from wider stakeholder engagement. However, the draft Guidance fails to acknowledge that participation in decision-making is itself a human right in many circumstances,¹³ while also necessary for an effective, genuine and robust due

¹¹ Pages 52 and 53 (third edition)

¹² General Comment 14 on the right to the highest attainable standard of health, para 11 and 35 and General Comment 15 on the Right to Water, para 48. See also Committee on the Elimination of Discrimination against Women, General Recommendations No. 23 (1997) women in political and public life and No. 24 (1999) women and health. See also Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002 and the Aarhus Convention on Access to Information, Public Participation in Decision- Making and Access to Justice in Environmental Matters. See also the UN Basic principles and guidelines on development-based evictions and displacement.

¹³ Article 25 of the International Covenant on Civil and Political Rights (ICCPR) establishes the right and the opportunity of citizens to take part in the conduct of public affairs without discrimination on any ground.

diligence process. The language used in the draft suggests that participation and consultation are helpful or advisable, but not, as it should, critical for effective due diligence and often required under international human rights standards. This is somewhat acknowledged in the draft “Due Diligence Companion”, at the end of the third bullet point under “Improving the process through consultation” (p14). However, this principle must be stated clearly and prominently in the main Guidance document and the language used to describe and address consultation should be adjusted to reflect the relevant human rights standards.

7. Remediation

The state has a duty to ensure remedy for human rights abuses, including those caused or contributed to by companies. When state-based mechanisms of redress (judicial or non-judicial) operate as they should, a company’s principal responsibility is to cooperate. Amnesty International has shown through its research how lack of remedy is often the result of companies actively evading, obstructing or failing to collaborate with official mechanisms of redress.¹⁴ The “Key Actions” under Part III, “Provide for or co-operate in remediation when appropriate” must highlight and give pre-eminence to the responsibility of companies to cooperate with state-based accountability and remedial processes.

In addition, the use of the phrase “be prepared to” in relation to remediation for abuses caused or contributed to in the first bullet point of Section C.1, “Enable remediation for harms caused or contributed to” is totally inappropriate. Where a company has caused or contributed to human rights abuses, it must remediate the harm caused (and it might be required to do so by state institutions).

8. Remediation in “directly linked” scenarios

The draft text repeatedly states that in “directly linked” cases there is no responsibility to remediate. It also states several times that the expectation placed on companies that are “directly linked” to abuses is “not intended to shift responsibility from entities that are the source of harm” (for example, in the second bullet point of Section C.1, “Enable remediation for harms caused or contributed to” under Part III). The text fails to recognise the practical reality that in many cases the company “directly linked” to the abuse will be the only actor capable of facilitating remediation. For this reason, rather than providing companies in this position with an excuse not to act, the draft Guidance should proactively encourage them to remediate or collaborate with others in remediation.

According to the UN Human Rights Committee, the conduct of public affairs “... is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.” UN Human Rights Committee, General Comment No. 25 on Article 25: “The right to participate in public affairs, voting rights and the right of equal access to public service”, para 5. See also article 7(b), Convention on the Elimination of All Forms of Discrimination against Women. See also rights of specific types of communities to participate in decision-making that affects them: Article 27 of the ICCPR, General Comment No. 23 on Art. 27 of the UN Human Rights Committee and Articles 2(2) and 2(3) of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Article 15 of the European Framework Convention for the Protection of National Minorities. Indigenous Peoples enjoy enhanced consultation rights under the ILO’s Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention 169) and the UN Declaration on the Rights of Indigenous Peoples. See also right to participate in decision-making in relation to specific rights: General comment No. 23 (2016) on the right to just and favourable conditions of work, para 56 and General Comment No. 14 (2000), on the right to the highest attainable standard of health, paras 11, 17 and 54.

¹⁴ See Amnesty International, “Injustice Incorporated: Corporate Abuses and the Human Right to Remedy” (March 2014), accessible at: <http://www.amnesty.org/en/library/asset/POL30/001/2014/en/33454c09-79af-4643-9e8e-1ee8c972e360/pol300012014en.pdf>

ARGE

Dr. Yılmaz Argüden and Dr. Erkin Erimez:

Companies are facing multiple challenges in doing business and achieving the expectations of stakeholders in current business environment. Companies disclose their business principles to commit to behave responsibly. Stakeholders expect them to be good corporate citizens.

Responsible Business Conduct becomes more and more important in today's global business environment. Increasing numbers of investors consider responsible business conduct as an essential part of their investment decisions.

Responsible business conduct is; making positive contribution to economy, environment and society in other words acting in such a way that creating value for all stakeholders (including shareholders, investors, financial institutions, employees, local communities, society, government, suppliers, customers, etc..) in short, medium and long term and addressing adverse impacts and mitigating those adverse impacts.

Companies need to make continuous due diligence to determine risks related with their business activities and take necessary measures to mitigate adverse effects of their activities for a responsible business conduct. A company should form its due diligence process in such a way that it can analyze all relevant issues in an integrated manner. All the departments in the organization in general and all the related departments in a specific issue must act together, form task forces for an effective due diligence activity. After risks and adverse impacts have been determined again task forces by the participation of different departments of organization must be formed to mitigate these adverse consequences.

The above approach is in line with **integrated thinking** approach. Integrated thinking is the active consideration by an organization of the relationships between its various operating and functional units and the resources and relationships that the organization uses or affects. Integrated thinking leads to integrated decision-making and actions that consider the creation of value over the short, medium and long term.¹⁵ In the Integrated Reporting Framework it is stated that; Integrated thinking takes into account the connectivity and interdependencies between the range of factors that affect an organization's ability to create value over time, including:

1. The resources (financial, natural, intellectual, human resource, manufactured, relationships) that the organization uses or affects, and the critical interdependencies, including tradeoffs, between them,
2. The capacity of the organization to respond to key stakeholders' legitimate needs and interests,
3. How the organization tailors its business model and strategy to respond to its external environment and the risks and opportunities it faces,
4. The organization's activities, performance (financial and other) and outcomes in terms of the resources – past, present and future.

For a successful RBC due diligence process integrated thinking approach will very useful to reach satisfactory outcomes.

Disclosure is an important tool for communicating the efforts of the organization for responsible business conduct. In the guidance it is stated that; "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."¹⁶

Integrated reporting would be a suitable tool to communicate all this due diligence and value creation processes. An integrated report benefits all stakeholders interested in an organization's ability to create value over time, including employees, customers, suppliers, business partners, local communities, legislators, regulators and policy-makers.¹⁷ When we look at the guiding principles of Integrated Reporting¹⁸:

¹⁵ International Integrated Reporting Council "International Integrated Reporting Framework".

¹⁶ OECD Due Diligence Guidance for Responsible Business Conduct (Draft 2.1).

¹⁷ International Integrated Reporting Council "International Integrated Reporting Framework".

- **Strategic focus and future orientation:** An integrated report should provide insight into the organization's strategy, and how it relates to the organization's ability to create value in the short, medium and long term, and to its use of and effects on the capitals
- **Connectivity of information:** An integrated report should show a holistic picture of the combination, interrelatedness and dependencies between the factors that affect the organization's ability to create value over time
- **Stakeholder relationships:** An integrated report should provide insight into the nature and quality of the organization's relationships with its key stakeholders, including how and to what extent the organization understands, takes into account and responds to their legitimate needs and interests
- **Materiality:** An integrated report should disclose information about matters that substantively affect the organization's ability to create value over the short, medium and long term
- **Conciseness:** An integrated report should be concise
- **Reliability and completeness:** An integrated report should include all material matters, **both positive and negative, in a balanced way** and without material error
- **Consistency and comparability:** The information in an integrated report should be presented: (a) on a basis that is consistent over time; and (b) in a way that enables comparison with other organizations to the extent it is material to the organization's own ability to create value over time.

Which are in line with disclosure requirements of RBC due diligence process.

We could state that integrated thinking must be in the core of due diligence process. Integrated reporting would be an appropriate disclosure, transparency and accountability tool for RBC due diligence process.

ASSOCIATION FRANÇAISE DES ENTREPRISES PRIVÉES

Elisabeth Gambert, Directeur RSE et Affaires internationales :

Dear Madam, Dear Sir,

The large French companies, members of Afep, welcome the opportunity to comment on the **OECD Due Diligence Guidance for RBC**.

Please find attached Afep comments which we would be very pleased to discuss with you in person over the next weeks. In a nutshell, **the Due Diligence Guidance is an urgently needed and valuable explanation of what is expected of companies**. However, **some rewriting is needed to ensure consistency between the sections and avoid any misinterpretation**. Cautious and balanced wording is essential, especially when hard law initiatives explicitly referring to OECD guidelines are emerging, such as in France.

Best regards,
Elisabeth Gambert

Afep, who represents the top 120 multinational companies operating in and from France, welcomes the opportunity to respond to the public consultation on OECD Due Diligence Guidance for Responsible Business Conduct (hereafter "the Guidance") and the Draft Due Diligence Companion (hereafter "the Companion").

¹⁸ International Integrated Reporting Council "International Integrated Reporting Framework".

General comments

- *Large French companies are already strongly committed to Due Diligence for RBC*

Afep's member companies (hereafter "the companies") are among the recognised **world leaders** in terms of adopting, implementing and being accountable for their RBC policies. Vigeo's 2015 report found that **French companies present the highest level of non-financial information** compared to a panel of more than 1000 companies worldwide. Vigeo Eiris' 2017 study on Human Rights and companies is finding that **French companies obtain the best results** among the 3000 companies under review.

Due Diligence for RBC has been on the top of the companies' agenda for the past several years and will continue to be a great challenge due to the difficulties it presents. **Collaboration is key** here - by opposition to constraint or, worse, legal sanction - to successfully prevent and mitigate adverse RBC impacts. Also, companies believe that RBC is not only about preventing negative impacts but also about increasing positive ones. They would like this message to be reinforced throughout the document.

- *OECD cross-sector Due Diligence Guidance is urgently needed*

The companies are in favour of well-balanced OECD Guidance, rather than national guidance which could lead to potentially diverging national sets of recommendations. In addition, soft and hard law tend to gradually converge, requiring all multinational companies to set up Due Diligence processes. Companies urgently need cross-sector due diligence guidance to tackle difficulties linked to risk identification and assessment, prevention and mitigation of adverse RBC impacts, remediation and communication.

- *The proposed Guidance is a valuable explanation of what is expected of companies*

The proposed Guidance provides **welcome support to enterprises on how they should implement due diligence recommendations contained in the OECD Guidelines for Multinational Enterprises** (MNE Guidelines). The proposed Guidance is the first publicly available detailed cross-sector guidance specifically designed to help companies implement due diligence processes. As such it is highly useful and meets a growing demand for guidance in this field. Yet, it is essential that the Guidance also clarifies and repeatedly states:

- the **importance for companies to prioritise their most severe risks**, acknowledging the fact that it is **practically impossible to address all other possible risks**; this is especially important for SMEs who would otherwise face inefficient processes and administrative burdens;
- the **practical limitations of due diligence**, specifically with complex supply chains.

Cautious and balanced wording is essential, especially when hard law initiatives that explicitly refer to OECD guidelines are emerging, such as in France.

- *OECD Guidance should be fully in line with MNE Guidelines*

The Guidance should be fully in line with the MNE Guidelines and should **not impose additional requirements on companies**. There are some changes Afep specifically proposes here-after to avoid any misinterpretation or lack of clarity, especially in the two-page summary which should be as solid and unequivocal as possible, because it will serve as a reference for those who do not have time to read the full Guidance, or for law-makers who wish to introduce legal requirements to establish due diligence.

- *OECD Guidance and the Due Diligence Companion should be user friendly and easy to read*

The Guidance should ideally make things easier and simplify complex concepts. The companies welcome the fact that the Guidance offers **different levels of granularity** of a due diligence process, from the “Two-page summary” to the “Core Concepts” and finally the “Practical Steps”. This is essential to allow users with different levels of expertise (and time) to grasp what is useful for them.

However, **further rewriting is needed** to ensure consistency between the 3 sections. The reader should find added value as he digs deeper into the document and should not be faced with repetition.

- *The Due Diligence Companion is not useful in its current version*

Companies regret to say that they are **dissatisfied with the repetitive and lengthy nature of the Companion**. Indeed, the Companion entirely reiterates the “key actions” as well as parts of the further “explanations of key actions”. This causes **considerable confusion for the reader** who doesn’t distinguish the difference between the initial guidance and the purpose of the companion.¹⁹

The companies therefore suggest leaving out the repetitive portions and **concentrating on the good practices, toolboxes, graphs, charts, tables and examples**. Another option would be to postpone the publication of the Companion to a later stage when more examples of good practices and illustrations will be available. It is also essential that the companion be **based on tested practices**. It should not promote practices unless they have been clearly identified as successful to avoid wasted resources, frustration and a possible backlash against the guidance.

- *The role of National Contact Points (NCPs) is of key importance*

NCPs are key to promote the implementation of the MNE guidelines. The Guidance could recap how they are organized and work and how they implement the specific instances in accordance with the procedural guidance for NCPs.

Companies believe that **NCPs should become the recognized bodies handling and resolving stakeholder's grievances relating to OECD, UN and ILO standards for corporate responsibility**, consistent with the objective of functional equivalence highlighted by the OECD. In that context, national regulators would not need to invent or create new grievance mechanisms if they adhere to OECD guidelines and have NCPs in place.

The Guidance could also set out a standard for practical implementation capitalizing on the good practices of the most active NCPs such as the French one.

Specific comments on the Guidance

KEY TERMS (p. 3):

- **Leverage:** add “*Leverage may be limited or hindered by legal and practical obstacles such as the prohibition of unlawful interference in the management of a subsidiary, of a sub-contractor or a supplier, or anti-trust issues (anti-competitive collusion against a common business relationship)*”.

¹⁹ The Guidance and the Companion have a seemingly identical structure, but then there are significant differences at the same time. For example, titles change slightly (I.C.6.) or are completely missing (II-A.C.4 “Regularly updating”... doesn’t appear in the Companion). This incoherence in structure, combined with large repetitions, makes the reading very confusing.

- **RBC impacts:** the term « adverse RBC impacts » - which is used throughout the document - is confusing because RBC stands for responsible business conduct which aims precisely at avoiding adverse impacts. The expression “adverse RBC impacts” suggests that responsible business conduct may cause adverse impacts which is generally not the case. Use the term “adverse impact” instead.
- **Risk based:** add “... *and based on the prioritisation of the most severe risks that have been identified*”.

TWO-PAGE SUMMARY (p. 5 and 6):

Capturing the “essence” of due diligence:

- “**Prioritisation** is crucial to identify the relative severity of RBC impacts and focus due diligence efforts *on the most severe risks identified by the enterprise.*”
- “*Stakeholder engagement is key in the due diligence process, both to identify potential or actual adverse impacts and to communicate on the due diligence conducted and how the enterprise has addressed actual and potential adverse RBC impacts*” rather than “Stakeholder engagement is used to involve those potentially directly or indirectly affected by its operations or business relationships “.
- “*The strongest efficiency of due diligence will be reached through* collaboration with enterprises at a sector-wide level, workers, home and host governments, and civil society *enhances due diligence.*”

Add: “Practical and legal limitations that companies can encounter in their ability to act, in particular towards business relationships should be duly taken into consideration.”

Summary of key actions:

This part of the draft guidance should be clarified and simplified for greater efficiency; it should be made more operational and add references to each corresponding section for an easy and quick use.

When speaking about the identification and assessment of adverse RBC impacts, it is necessary to clearly present – in the simplest possible way – the different questions that guide the analysis of “cause” versus “contribute” and “directly linked”, which is fundamental at this stage. It is proposed to add a concise version of the questions that are outlined on page 30 and which should be clear from the beginning to understand the underlying concepts.

II-A.3.: “Ask 3 questions to guide the analysis of cause – contribute – directly linked:

CAUSE: *Would the enterprise’s activities be sufficient in themselves to result in an adverse RBC impact?*

CONTRIBUTE: *Do the enterprise’s actions combined with those of another entity result in an adverse RBC impact?*

DIRECTLY LINKED: *Does the enterprise have a commercial relationship (or a cascade of commercial relationships) with an entity causing a negative RBC impact while providing products or services for the enterprise’s operations, products or services?”*

When it comes to prevention and mitigation of adverse RBC impacts, it should be clearly stated at this

stage that **legal and practical** limitations to the use of leverage exist. The Guidance describes these limitations in the Core Concepts (p. 10) and in the Practical Steps (p. 21). The Two-page summary needs to also address this issue.

- II.B.3.: “Use leverage with business relationships to prompt responses to potential or actual impacts. *Collaborating with others may be the most effective means in cases of little or no leverage due to practical or legal limitations.*”

With regards to remediation, **it should be clearly stated that there is no shift of responsibility from the entities that are the source of harm** to the enterprise that is only directly linked to it. This is explained in the Practical Steps (p. 26) but needs to be said in the summary as well.

- III.: 1. Enable remediation for harms caused or contributed to, using a variety of avenues. *In case of harms caused by a business relationship directly linked to the enterprise, the latter is not expected to participate in the remediation but may choose to do so, alone or in collaboration with other parties.* “

PART I: CORE CONCEPTS

- **Title 1.** (p. 7)

The first heading “Enterprise actions create responsibility to address adverse RBC impacts” should be reworded to a softer formulation, considering the different degrees of responsibility of enterprises (depending on whether the adverse impact is caused, contributed to or only directly linked). A possible suggestion is: “*Enterprises’ role to address adverse impacts*”.

- **Box 1** (p. 7)

The box with a list of examples of RBC impacts covered by the Guidelines is **especially useful** for the reader and will allow efficient internal communication within the company to illustrate negative impacts associated with an enterprise’s operations. It is greatly appreciated by the companies.

- **Paragraph 8** (p. 10)

Modify the following sentence: “*This is relevant in: (I) identifying general areas where the risk of adverse impact is most significant and prioritizing these for **appropriate level of more detailed due diligence***”.

- **Paragraph 9** (p. 10)

When referring to practical limitations, it should also be referred to **legal** ones. A clear acknowledgement of such limitations is needed, in a manner which is balanced with the explanation of the influence and the requirement to create or exercise leverage: see for instance section 3 p. 21. In the same section, it should be explicitly mentioned that “*collaborating with others is the most effective way forward*” (by contrast to the current wording which is just “*can be effective*”).

- **Page 11 Paragraph 10 i** (p. 11)

Afep proposes to delete the end of the following sentence as it includes supply chain relationships: “*An enterprise can cause harm through its own activities, ~~including activities in its supply chain or other business relationships...~~*”. The same comment applies for **paragraph**

10 ii “Contributing to adverse RBC impacts through their own activities”.

If the definitions of “cause” and “contribute” included supply chain relationships, this would mean that companies are obliged to remedy the harm caused by these supply chain relationships. This is neither consistent with the MNE Guidelines nor with the explanations of the terms “cause” and “contribute” provided for in the Annex of the Guidance (p. 28).

The only location where a mention of “supply chain or other business relationship activities” should be acceptable is in **paragraph 10 iii** “RBC impacts directly linked to enterprise operations...”

PART II: PRACTICAL STEPS

- II-B.C.2.: Prioritising prevention & the most severe impacts (p. 20): The companies would like it to be made clear in this paragraph that the process of prioritisation means that **not all risks that have been identified can be addressed**. The impression when reading page 20 is that **all risks need to be addressed, if not simultaneously, then at least one after the other**. This would go beyond the capacity of enterprises who may have hundreds of thousands of suppliers across the world. **Prioritisation means making a choice and honing in on the most severe impacts that have been identified**. Some sentences need to be rephrased to make this clear, according to the spirit of due diligence outlined in the two-page summary:
 - “The potentially most severe impacts should be prioritised for action *first*.”
 - “Risk prioritisation is about sequencing responses in the event that not all *of the most severe* impacts can be addressed at once.”

ANNEX: UNDERSTANDING “CAUSE”, “CONTRIBUTE” AND “DIRECTLY LINKED”

These concepts still need to be reformulated or further simplified to effectively help the analysis of the terms “cause” – “contribute” – “directly linked” (p. 30 to 32).

The explanation of these terms is fundamental and would gain in clarity if it were illustrated by concrete examples or case studies. The questions supposed to help guide the analysis are not always perfectly clear and need to be simplified. Especially the explanations of the concept of “causing” adverse RBC impacts are not always clear. What does “incentivise another enterprise” or “facilitate another enterprise in taking action that cause adverse impacts” mean? An example for each situation should be given to be sure the reader understands the meaning.

The simplified flow chart on page 32 needs some reformulations to make it clearer. For example, what does the question “If so, would the enterprise’s activities *in and of themselves* be sufficient to result in that impact” mean? The difference between “in themselves” and “of themselves” is not evident.

Also, the following questions contained in the flow chart need to be reformulated to be clear:

- “Does the enterprise have a commercial relationship (or a cascade of commercial relationships) *with the entity causing the negative impact while providing* products or services for the enterprise’s operations, products or services?”
- “Does the enterprise’s actions (~~cause, facilitate or incentivise, parallel~~) *combined with those*

of another entity ~~to~~-result in an adverse impact?”

At last, it should be noted that the **concept of “Omission”** is not dealt with in the Guidance, but “surprisingly” introduced in the Annex as being another form of responsibility of the company.

BIAC

Hanni Rosenbaum, Senior Director, Policy and Strategic Planning:

Dear colleagues,

Please find attached our comments on the draft due diligence guidance and companion, which are based on input received from a wide range of our member organizations and companies. We hope that our comments can be taken into consideration.

We would be pleased to discuss these comments further or provide additional information if needed.

Thank you and best regards,
Hanni

Due Diligence Guidance for Responsible Business Conduct **Overarching comments**

- Business at OECD (BIAC) supports effective and balanced implementation of the OECD Guidelines for Multinational Enterprises (MNEs). Our member organizations and our member companies are actively engaged in efforts to ensure responsible business conduct. We therefore attach a lot of importance to the development of the OECD Due Diligence Guidance for Responsible Business Conduct, which should be of practical value to companies on how to implement the due diligence recommendations of the MNE Guidelines, while also clarifying realistic expectations and limitations companies might face in having concrete influence in their global supply chain. We call upon the OECD to **allow for sufficient time and adequate dialogue with the business community** for which this guide is intended and to take our comments below into consideration so that the final result will have the buy-in from business and will be used in practice.
- While we welcome efforts to enhance readability, clarity and accessibility of key principles, including a shorter main text and a two-page executive summary, we believe that there is **still room for shortening the texts**, avoiding **repetition and putting additional parts of the text in a reader-friendly format**, e.g. bullet points, check-lists and schematic diagrams. This is particularly important for smaller companies, which lack time and resources to review a long document. Some of the text could be replaced by boxes summarizing key points. The language should be accessible and the use of non-practical expressions such as ‘iterative process’ should be avoided.
- While the guidance is addressed to all MNEs, we are concerned that despite the addition of some references to SMEs in the text, neither the guidance nor the companion seem to have been drafted in a way that is aimed at SMEs in practice. The question to be addressed is whether **SMEs will be able to understand and get value out of the documents**, bearing in mind their resource and capacity constraints.
- Considering the new structure proposed by the OECD, it is important to **clarify up-front what the purpose** of the two draft texts is. The **guidance should provide structured practical assistance to companies in implementing the due diligence provisions** of the OECD MNE Guidelines. The focus should be on practical recommendations, rather than “expectations” or anecdotal recommendations. The due diligence **companion should provide non-binding practical examples**.

It should be clearly stated that the documents should **not be understood as reference documents for national contact points (NCPs) when assessing specific instances.**

- If the separation into two documents is maintained, the **companion** should mainly include **practical examples**, and avoid repetition with the guidance document (which is currently the case, making the paper too long and complex). If as stated in the “context section”, the companion is a “living document containing examples, tips and good practice that should be regularly updated”, it should be clearly stated up-front that the companion includes non-prescriptive best practice examples, and the accompanying language should be streamlined and made fully consistent with the guidance document. Our comments on the guidance should be fully reflected in the companion.
- It should be more explicitly stated in several parts of the text, including in the most visible ones (executive summary) that **companies cannot be realistically expected to address all risks in the supply chain.** It should be more clearly stated that ensuring legal compliance is a core element of RBC in addition to mitigation of risk, and the guidance should provide suggestions on how to combine them both in operational practice instead of focusing on the distinction. In addition to severity, likelihood of occurrence should be considered a key factor. Companies should prioritize and focus on the risks directly linked to their activities which show the highest severity profile and highest likelihood of occurrence and where the company has actual leverage. This ability to focus and prioritize in good faith is key to ensure efficiency. To avoid business disruption unless really necessary, actions have to remain proportionate and commensurate to these risks, in order not to lead to massive and largely inefficient processes and administrative burden, in particular for SMEs.
- More generally, **cautious and balanced wording is essential in each section of the text, including in the executive summary.** Although the new text mentions in different headings that it recognizes the challenges that companies may face, we believe it is necessary for the document to **state more explicitly up front and more prominently that there are practical limitations to address all the risks** arising from the activity of a company’s suppliers and contractors, and that the focus should be on the ones with manifestly more critical profiles which companies are capable to influence effectively. The executive summary should also clearly state that this does not shift responsibility from the entity causing or contributing to the harm to the MNE with which it has a business relationship.
- As currently drafted, the **scope with regard to business relationship is still too extensive** and requires additional qualifiers. A key question for all companies is **how far into the supply chain the “directly linked” concept extends.** It should be more duly stated that there are often legal and practical limitations on what level in the supply chain companies can plausibly reach through their due diligence efforts and that these should be duly taken into account. Companies can have contractual clauses imposing duties of responsible action on suppliers and require that suppliers impose similar duties on their own suppliers. They can undertake audits of suppliers and selected sub-suppliers, but it should be recognized that already the second layer of audits can be challenging, in particular for companies, which have limited resources to go deep down in the supply chain. The guidance should therefore emphasize that **leverage can be severely limited by practical business constraints.**
- We would like to underline that **more time is needed to discuss the concepts of “contribute” and “directly linked”** as well as the concept of “omission”, in particular as this annex was only added to the last version issued for public consultation and was not included in previous versions of the document. It is a concept that requires further discussion and careful thought as it could have considerable implications for companies and their practices. Among others it should be clarified that it is not related to “directly linked”.
- We strongly recommend carefully checking the documents to ensure that **provisions do not go beyond the specific wording of the MNE Guidelines.** While the Guidelines give companies sufficient space to develop their tailor-made human rights due diligence, as currently drafted, some

of the requirements in the draft guidance are too prescriptive and would be unrealistic for many companies, especially smaller ones.

Additional specific comments on the OECD Due Diligence Guidance

The comments below should not be considered instead of the above-mentioned overarching comments, but as an illustration of some of the general comments, which should be applied throughout the text.

Page 1:

Basis for this Guidance: “Relevant ILO Conventions and Recommendations” should be deleted since it is not clear which Conventions and Recommendations are covered. Instead of “seeks to align with” the wording “seeks to consider” should be included.

Business relationships: One of the defining characteristics of the international business environment is inter-connectedness. These webs of business relationships are within the scope of the expectations **recommendations** to prevent or address adverse impacts under *Guidelines*.

Para 3: Purpose – add that it is not intended as an interpretation for NCP specific instances.

Purpose of the Guidance: add that it is not intended as an interpretation for NCP specific instances. In footnote 5 the words “the submission of” should be deleted.

“This Guidance is not intended to reinterpret the *Guidelines*” should be made more authoritative, e. g. “shall not be used for ...”

Target Audience: In the first sentence after “including small and medium-sized enterprises (SMEs)” the word “which are MNEs” should be added.

Para 5: Business Relationships - Explanation seems misleading as it does not include state entities contrary to the respective definition on page 3.

Business relationships: in the last sentence, the words “and covered by” should be deleted.

Para 6: RBC Risk & Impacts - Content does not fully fit the headline as the first sentence of the paragraph skips the risks and immediately goes into the impacts.

Page 2:

Box 1, 3. Bullet - Set out the shared **expectations recommendations** for responsible business conduct of the governments adhering to them and provide a common point of reference for enterprises and stakeholders.

Page 3:

Para 1: Adverse Impact – Definition and related understanding still centers around the perspective of impact on someone or something, which might be helpful for example in the area of human rights, but does not really work in the area of corruption and bribery.

Key Terms:

Leverage: add “Leverage may be limited or hindered by legal and practical obstacles such as the prohibition of unlawful interference in the management of a subsidiary”.

Mention explicitly in the definition of “risk based” the importance of companies’ risk prioritisation process, to ensure that efforts are focussed on the most severe risks

Key Terms: An explanation of "RBC impacts" refers only to adverse impacts. There are both positive and negative impacts caused by enterprises and the sentence should be *"RBC Impacts refer to both positive and negative impacts created by enterprises."*

Key Terms: add explanation on the term 'salient' and different/relationship with 'material'. This explanation will help companies to understand better how to make prioritization.

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 **or contributed** to a harm (OECD Guidelines, II, Commentary, 19). It is desired that enterprises work to create leverage to the extent practicable when an enterprise is directly linked by operations, product, or service through a business relationship with an entity that caused or contributed to a harm.*

Spell out "RBC" as it is a key term.

Page 4:

In the "Key Terms" section on "stakeholders" – we think it would be helpful to give some specific examples of the different types of stakeholders. This would help when the text later refers to "stakeholder engagement" because it does not explain who are, in fact, useful stakeholders to engage with, i.e. employers' organizations, CSOs, local government, regulators, trade unions etc.?

Para 1: RBC Risk – What does "other organizations" mean in the context of adverse impacts and why is that included here?

Page 5:

Capturing the "essence" of due diligence:

- "Prioritization is crucial to identify the relative severity and likelihood of occurrence of RBC impacts and focus due diligence efforts **on the most severe risks identified by the enterprise.**"
- **"Efficiency of due diligence can be reached through** collaboration with enterprises at a sector-wide level, workers, home and host governments, and civil society."
- In the last bullet, add a sentence: **"Duly take into account the practical and legal limitations that companies can encounter in their ability to act, in particular towards business relationships".**

"Identifying and managing not only risks association with its own operations...." – It should be explicitly stated that there are limitations with regard to and that companies cannot be expected to address *all* risks in the supply chain.

"Collaboration with enterprises at a sector-wide level, workers ..." – add **recognizing that the situation differs depending on specific circumstances.**

In the last bullet, add a sentence: "Duly take into account the practical and legal limitations that companies can encounter in their ability to act, in particular towards business relationships."

The two-page summary states that *"Enterprises should maximize positive impacts and avoid adverse impacts. For this purpose, they are expected to carry out due diligence"*. The OECD Guidelines aim to *"encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimize the difficulties to which their various operations may give rise"*. While business can make significant and important positive contributions, maximizing these contributions should not undermine long-term sustainability of an enterprise. We therefore recommend including language that is in line with the Guidelines.

Page 6:

Headline should read: “Summary of “Key Actions” **that can facilitate** due diligence” instead of “key actions” **to put a due diligence process in place.**

II-B – 3 – should read: Work to **build leverage** with **existing** business relationships to prompt responses to potential or actual impacts.

II-D. Communicate should read:

1. Consistent with the practical guidance and limitations recommended in Guidelines 30-32, disclose timely and accurate information on all material matters with a view towards improving stakeholders’ understanding of how the enterprise has addressed actual and potential adverse RBC impacts, adapting communication channels as necessary to stakeholders.

2. Without causing undue administrative burden or exposing competitively sensitive information, enterprises are encouraged to further disclose other material matters regarding their activities, structure, financial situation, performance, ownership and governance as set out in the Guidelines. The reference to the “OECD Principles of Corporate Governance” should be deleted.

Core concepts section – this part in particular is still very narrative and could be considerably shortened.

Wording with unclear references (e. g. II-C.1: “... how **it** is responding ...”, II-D.1: “...matters regarding **their** activities”, III.2: “... **they** identify that **they** have caused ...”)

As currently drafted, the due diligence requirements mentioned on page 6 go beyond the provisions of the OECD Guidelines. They are too high and prescriptive and unrealistic for many companies, especially smaller ones. The text should be brought in line with the concrete wording of the OECD Guidelines. It should also be mentioned that the OECD Guidelines give companies sufficient space to develop their tailor-made human rights due diligence.

The Guidance suggests that an enterprise should communicate and account for how it is addressing adverse RBC impacts throughout its operations and with its business relationships by communicating about what it is doing. However, the OECD Guidelines do not require that, nor do the UN GPs. The UN GPs state that “business enterprises **should be prepared** to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders.” Thus, if not specifically requested, a company does not need to communicate or report for how exactly it is addressing adverse RBC impacts.

The guidance document suggests that companies as part of their due diligence should “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”. The OECD Guidelines, however, clearly state that the due diligence provision does not apply to the chapters on Science and Technology, Competition and Taxation.

Page 7:

Para 1:- Wording “The *Guidelines* establish that enterprises have responsibilities to prevent or avoid such harms.” seems inconsistent, as in case of linkages, there is no (direct) responsibility to prevent or mitigate such impacts; instead, a company only linked to such incidents is expected to seek to use its leverage – which is something different.

Box 1: Inconsistent structure of the enumerated examples (e. g. “failure” vs. “failing” vs. “ecosystem degradation through”).

Page 7/8:

The examples of RBC Impacts Covered by the Guidelines should be brought in line with the concrete wording of the OECD Guidelines. It should also be mentioned that the OECD Guidelines give companies sufficient space to develop their tailor-made human rights due diligence.

Not all of the examples of RBC Impacts Covered by the Guidelines on page 7 and 8 are overly helpful, as

for instance “failing to take into consideration the rights of disabled persons, such as through reasonable accommodation”. Moreover, the example “**payment of wages** that do not meet the basic needs of workers and their families” is taken out of the context of provision 4b of the OECD Guidelines, which stresses that “multinational enterprises operate in developing countries, where comparable employers may not exist, provide the best possible wages, benefits and conditions of work, within the framework of government policies. These should be related to the economic position of the enterprise, but should be at least adequate to satisfy the basic needs of the workers and their families”. By dismissing the context of the provision, the Guidance is misleading. It is important to **bear in mind existing government frameworks and the economic position of the enterprise** and be fully in line with the MNE Guidelines.

Page 8:

Last para: RBC due diligence - “...RBC risks and impacts – risk of harm created *by* enterprises and the consequences for society, for workers, and the environment.” The explanation only addresses risks but not actual impacts. It differentiates between harm and its consequences – what does “harm” mean other than adverse impact on somebody or something? It introduces a new enumeration of who/what is protected not in line with the wording e.g. on page 4 (definition of RBC risks) which is not exhaustive. Emphasis on risks created **by** enterprises seems at least misleading; this wording does only cover adverse impacts (potentially) caused by a company, but both the contribution and the linkage related responsibilities relate to risks (and adverse impacts) partly or solely created by another entity.

Pars 3 should read: “RBC due diligence” is a tool for identifying and addressing adverse RBC impacts that can build upon but also differs from commercial or compliance due diligence.

The example “using harmful and hazardous chemicals and restricted chemicals in productions” is too broad and not mentioned in the OECD Guidelines.

The Guidance suggests that “labour rights are human rights”. That is not correct, since not all provisions on the employment chapter of the Guidelines are human rights relevant, as for instance the provisions on skills development and training. Only the ILO core conventions can be seen as “human rights”.

Page 9:

Para 1: Inconsistent wording switching from “risks” to “harm”. RBC risks will often constitute risks to the enterprise at the same time – a strong argument why this theoretical distinction should not be overestimated in its practical consequences.

Para 2: “... steps go beyond just identifying risks as may be the case with some areas of commercial or compliance due diligence.” This is not correct, enterprise risk management (ERM) and also compliance risk management go beyond simply identifying risks; both usually include the definition and implementation of respective mitigation measures (depending on the chosen response strategy). Even voluntary measures to remediate actual adverse RBC impacts could be covered under ERM, e. g. in order to avoid costly law suits etc. Perhaps it should be considered to add this topic in this section (3.).

The scope of responsibilities that is placed upon companies is very broad, e.g. companies carrying out “continuous improvements” to the due diligence system and assessing impacts throughout the “full life cycle of operations”. In particular, smaller companies may not be able to fulfil the full scope. Responsibilities should be allocated based on the highest risk and abilities to carry out due diligence.

It should be explicitly stated that companies cannot be expected to fully address all risks in the supply chain.

We recognize that the Guidelines mention going “beyond what may be required by domestic law in many cases”. The importance of governments putting the right framework in place should be underlined. For any whistleblower and consumer protection mechanisms, governments must for example ensure that appropriate protections are afforded. MNEs cannot implement robust systems within their organizations, without the appropriate support of laws.

4. Change expectations to **recommendations**

Page 10:

Para 4: Prioritization - While prioritization is important, the concept of prioritization according to the severity of potential impacts cannot simply be applied as a general concept to *all* relevant areas of the MNE Guidelines: (1) Compliance with applicable laws must always have top priority across all topic areas. (2) Since e.g. bribery incidents typically do not affect individual victims, the severity criterion would not be helpful for prioritization efforts in this area.

Point 9 mentions that there can be **legal** and practical limitations on the ability of enterprises to effect change in the behaviour of business relationships, but this should be made much clearer.

The business relationship as presented is too extensive. The guidance should more fully recognize that companies focus on a narrower scope of suppliers, based on a severity/ leverage prioritization for the already prioritized risks.

Para 1: "...among its suppliers or other business relationships is most significant **and severe**, based on this risk assessment,..."

Point 7: change expectations with **recommendations**

Page 11:

Para 5: RBC impacts directly linked - Paragraph introduces another (exhaustive) enumeration of business relationships which should be aligned with the wording on pages 1 and 3. Perhaps also refer to definition on page.

"...impacts caused or contributed to by these business relationships ..." – seems incorrect, it is not the relationship which causes or contributes, but another state or non-state actor (as correctly stated in the following paragraph).

Para 8: (RBC due diligence is risk based)... Modify wording: "adverse impact is most significant and prioritizing these for more detailed due diligence". Companies should focus on the most severe risks.

Para 9: when referring to practical limitations, also refer to legal ones. A clear acknowledgement of such limitations is needed, in a manner which is balanced with the explanation of the influence and the requirement to create or exercise leverage: see for instance section 3 p. 21.

Point 10 under i. and ii.: according to the UNGP "causing" and "contributing" is linked to business enterprises' **own activities**. Therefore, the information that "an enterprise can cause harm through [...] *including activities in its supply chain or other business relationships*" seems wrong. Please delete this part, both in paragraph 10i. and 10ii ("*including through activities in its supply chain or with other business partners*").

If the definition of "cause" and "contribute" is understood to include supply chain relationships, then it means that companies' obligations to remedy would go beyond our scope of activities. This is not consistent with the definitions of "cause" and "contribute" provided in Annex (p28), which are limited to the company own activities.

Point 10, ii, line 1: add the words in bold "including through **its own** activities"

PP 11, 17, 18 etc.:

It should be recognized that "practical limitations" are real and will impact the ability to deliver on due diligence and leverage. We need to ensure that where practical limitations are duly evidenced by the company, this should be recognized.

Although the new text mentions in different headings that it recognizes the limitations that companies may have in order to exert their influence in the supply chain (pages 11 and 18), the document should also state

more explicitly that companies cannot assume *all* the risks arising from the activity of their suppliers and contractors, and that they should have a special focus on those ones with manifestly more critical profiles, which companies are capable to influence effectively.

Page 12:

Stakeholder engagement: As currently written, it is a rather generic collection of general remarks mainly focusing on due diligence regarding individual business transactions. Protection of whistle blowers is important, but where is the nexus to stakeholder engagement? Please clarify the difference between consultation with potentially affected stakeholders and wider engagement up front in section 12. It should be underlined that the focus is on stakeholders who have a real stake in the issues at hand, and that the dialogue should be carried out in good faith.

Consultation should also be recommended with industry and professional associations, who may provide insights and information relevant to the entire industry or business sector within which an MNE operates.

On page 12 (and also on page 21), the value of collaboration is emphasized - “*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*”. While collaboration is desirable in principle and especially in some contexts, in practice it can also sometimes be cumbersome, costly and impractical. For example, collaborating with a host government on human rights due diligence where that government represents the greatest risk to human rights is problematic. Therefore we suggest more neutral language on the issue of collaboration.

Page 13:

Change second heading from expectations to **recommendations** under the OECD Guidance.

Page 14:

Point A: Companies’ efforts to meet the Guidelines’ objectives should not be looked at as a “tick in the box” approach. We have thus some concerns about the notion of “performance”. This notion might open / lead to the development of “performance indicators” which are not desirable.

We recommend changing the phrasing of the first sentence: “The *Guidelines* highlight the importance of enterprises taking a systematic approach to meeting the *Guidelines*’ objective that RBC becomes ... “

RBC policy (or combinations of policies): Companies have already many policies in place such as human rights policies. It is not always necessary to create a new overarching policy called “RBC policy”.

Page 15:

3rd bullet: add “embed *appropriate and proportionate* internal controls” and replace “Guidelines’ standards” by “*Guidelines*’ recommendations.”

6th bullet: replace “performance in areas covered by the Guidelines” with “*in meeting the Guidelines*’ objectives and recommendations.”

Point 6: please shorten the sentence to improve readability: Recognizing that there are **practical limitations** 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 through policy or code of conducts expectations to the extent practical and consider **approaches** to doing so, individually and collectively, that can be used (See approach suggested in the OECD’s Due Diligence Companion). These can include steps to integrate RBC expectations from the beginning of the relationship, such as bidding criteria that include requirements to disclose business partners’ RBC approaches or incorporating RBC requirements into contracts.

Last Para: “...disclose **their** RBC approaches ...” – meaning of “their” is unclear.

Page 16:

The draft guidance does not distinguish between overall impact assessments at group or business levels – which should be reviewed or repeated in an appropriate frequency – and due diligence for specific business transactions (where a repetition typically will not be feasible and/or useful – except for transactions going over a longer period of time or in different stages such as pre-sales, sales and execution phase). This makes the page rather confusing.

This section (II-A.) also deals with the prioritization of RBC risks. Such prioritization would only make sense considering those adverse RBC impacts a company could potentially cause, contribute or be linked to.

Section II-A – B -1 should read: Use a variety of tools/approaches to **scope out and identify risks of harm** on all matters covered by the *Guidelines* (with the exception of the chapters on Science and Technology, Competition and Taxation) that may be likely to be in the enterprise's own operations and with its business relationships.

Para 1: "...what harm may result from an enterprise's proposed activities or new business relationships ...": see comment to 11,5.

Para 3: Assess ... - First phrase does not make sense ("Assess whether those RBC risks or actual impacts would have the kind of adverse impacts covered by the Guidelines ...") – an impact cannot have an impact.

Para 4:– Repeat - Suggestion only makes sense for periodic impact assessments at group or unit levels or for specific product lines etc., not for specific transactions, see comment to page 16 above.

Last para – Business Partner - The draft guidance deals with a company's "business partners" and their influence on RBC risks, e.g. resulting from their business models. However in the context it could create the misperception that a business relationship of a company is always based upon a relationship to another enterprise – state entities are not addressed here.

Page 17:

5th bullet under point 1, on risk severity vs. likelihood - It is at least arguable that the reverse is true i.e. that it is more important to consider risks more likely occur than less likely risks. Likelihood of occurrence should be considered a key factor, not just the severity of an unlikely risk. It is important to find a balance.

Last bullet under point 1, add: *"Meaningful stakeholder engagement is characterized by two-way communication that involves input and feedback and that depends on the good faith of the participants on both sides."*

Under point 2 on going deeper into the supply chain, add that it needs to be recognized that companies can face practical challenges.

Point 2, last bullet should read: Where RBC risks are identified **deeper in the supply chain or several layers removed from direct business relationships**, an enterprise is likely to need to build up influence through collaborative approaches as there is no direct leverage. The enterprise can work with others to use fit-for-purpose approaches to encourage suppliers and their activities are being assessed, such as using traceability approaches, or engagement with 'choke points'. (As noted in the Due Diligence Companion, this is an area where **collaborative approaches** to due diligence may add value, depending on the supply chain in question).

Para 2: Shaping of due diligence processes - The draft guidance does not sufficiently distinguish between recommendations for the design of due diligence processes and suggestions for the operation of such processes once they have been designed and implemented. Related recommendations should be grouped or at least put into a (chrono)logical sequence.

Para 10: Impacts on society - First paragraph in section 3 ("... how a proposed activity or associated

business relationships could have impacts on the society, workers or environment ...”): inconsistent enumeration (see comment to page 8); last paragraph, the draft guidance again states that business relationships may have impacts; this wording is inconsistent (see comment to page 11, 5). The meaning of “associated” is unclear.

Point 3 and bullet 1 and 2 should read: Assessing against RBC policies, with the *Guidelines* as a guide. It is not useful to “benchmark” against the Guidelines per se, but rather against company policies that are informed by the Guidelines.

Assessing means projecting how a proposed activity or associated business relationships could have impacts on the society, workers or environment **against an enterprise’s established RBC policies and codes of conduct, which should be informed by legal standards and RBC norms, such as** : (i) *national law*; and (ii) *the Guidelines* and its referenced international standards (these are found throughout the Commentary to the *Guidelines*).

Enterprises are encouraged **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*. **It is recommended that enterprises honour the *Guidelines*’ approach to the fullest extent** which does not place them in violation of domestic law. 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, or which would deprive the enterprise of procedural or other rights otherwise entitled to it in the context of a particular legal system, so long as those rights themselves do not conflict with or undermine the recommendations in the *Guidelines*. 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.

Page 18:

Para 3: Updates - See comment to page 16

Page 19:

See comment to page 16 – the distinction between comprehensive/overall and transaction-specific assessments made in the 1st and 2nd paragraph of section C.1. should be handled consistently across the entire guidance.

Para 2 and page 20: Prioritization - B.2. suggests prioritizing responses “...as necessary, based on severity of the potential or actual impacts.” At the same time prioritization is recommended already in the previous section (regarding the identification of potential risks).

Para 3 from bottom – stakeholders - “... collaboration with workers, governments and stakeholders ...”: according to usual definitions workers are considered stakeholders as well – see also definition on page 4 and e. g. page 24, 1st paragraph of the draft guidance. Also why “workers” and not “employees”?

Last para: Determination of the way of involvement - Content should be moved to section II-A. – see comment to page 16. The way of a company’s involvement (if any!) will of course influence the overall mode of expected response (ranging from direct mitigation to rather broad scale leverage approaches), but will not “... determine what actions an enterprise should take ...” as this will have to be determined individually considering several factors and aspects. Reference 106 is unclear.

Page 20:

Prioritization - Applicable laws which should always have top priority. Some comments could be added on how an enterprise’s proximity to potential or actual adverse impacts (cause / contribute to / being linked to) should influence prioritization; especially in the linkage cases, there are other entities closer to the impact

(having caused / contributed to them), which are primarily responsible for direct and appropriate response. It should also be taken into account that applying the leverage concept will usually require more time than a direct operational action undertaken by an entity having caused or contributed to the impact.

Page 21:

2nd bullet: In the sentence “If an enterprise does not have any leverage, it should try to create it” is too broad and disregards the difficulties in having leverage in certain cases. Add: *“to the extent possible while acknowledging that there are practical limitations”*.

The document encourages creation of leverage without concretely describing how to do this. Industry collaboration does not always work because of anti-trust issues for example. Creating leverage in the beginning of the relationship on a contractual basis as mentioned requires negotiation power and concerns the first layer.

In bullet 3 (collaborating) delete “improve their performance”.

Para 1: “enterprises have responsibility for addressing **their** adverse RBC impacts”: This wording seems inadequate, since impacts enterprises are only linked to should not be named “theirs”.

“...focused due diligence and subsequent steps towards prevention, mitigation and, if appropriate, remedy and building leverage should begin with the most severe impacts.” What does “subsequent steps towards prevention, mitigation” mean with regard to linkages/leverage? What does “due diligence” exactly mean in this step of the process which deals with determining action in response to impacts? Why only “building” and not also or primarily “seek to use existing” leverage? Furthermore, this paragraph lacks the clarification that there must at least be a direct linkage as a prerequisite of an enterprise’s responsibility to respond as per the MNE Guidelines.

Para 4: last sentence - The option to continue a business engagement or relationship in case the use of leverage has not been successful or in case there is no leverage/opportunity to build leverage is very important and should be dealt with more prominently.

Bullet 2 should read: If an enterprise does not have any leverage **it should try to work with others to try and build it to the extent practical**. While leverage is not strictly determined by a mathematical formula that, for example, necessarily equates with the value of 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, there is a strong correlation between those levers and the ultimate existence of leverage between entities. For example, any given buyer, i.e., customer enterprise can often only represent a small amount of each of its own suppliers’ overall business and therefore, more often than not, would from the outset have limited leverage on its own. Building leverage with other customers that use that supplier in a non-competitive way is a means to build leverage.

Bullet 3 should read: An enterprise, be it an investor or a buyer or a client can sometimes take steps to increase its chances of ultimately having more leverage with another enterprise than it would otherwise if, at the start of relationships it is able to negotiate certain conditions with business relationships, such as through contractual arrangements, pre-qualification requirements for potential suppliers, voting trusts, and licence or franchise agreements. There can, at times, be a perceived soft power dimension to leverage that results from the perception of an enterprise in the market or its ability to bring along its peers, although this perception, just like other elements, might not be a realistic indicator of actual leverage either.

Page 22:

Point C: Delete « actual » which is written twice.

Point C, 1 – bullet 3: “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.” - This is not very practical or easily achieved

Page 24:

Add the following sentence at the beginning of point C: *“The Guidelines encourage enterprises to disclose different types of information while respecting their legal obligations (e.g. competition).”*

Point C – 1 – bullet 3: ‘ Information about **foreseeable risk factors** and issues regarding **workers and other stakeholders** are considered **material** information that should be disclosed.’ The language should be in line with the Guidelines.

The Guidance suggests that an enterprise should communicate and account for how it is addressing adverse RBC impacts throughout its operations and with its business relationships by communicating about what it is doing. However, the Guidelines do not require this, nor do the UN GPs. The GPs state that “business enterprises **should be prepared** to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders.”

The guidance suggests that “issues regarding workers and other stakeholders are considered material information that should be disclosed”. However, the OECD Guidelines do not say that issues regarding workers and other stakeholders are per se material. The OECD Guidelines say that if there are material issues with regards to workers and other stakeholders, then they should be reported. In the guidance documents, this is turned around.

Page 25:

There are many reporting standards and companies choose the most appropriate one which meets their objective of reporting. A specific example of one reporting standard, such as GRI, should be avoided in the main guidance document and could be included in the companion as one possible example.

Page 25/26/27:

Whistle blowing/reporting channels: Though reporting of potential adverse impacts may be formally considered “communication”, the main role of whistle blowing and the protection of whistle blowers against retaliation in the context of the following section of the draft guidance are key elements of what companies can do as a prerequisite for any other remediation (effort). Para 8 creates confusion: “Communication and disclosure are about **a one-way provision of relevant information.**” Whose communication does this section of the draft guidance deal with? Whistle blowing is about a potentially affected stakeholder’s communication to the company (see also comment to page 27 below).

Page 26:

Para 2 from the bottom: Business relationships - “...that business relationship should remedy the harm done.” A business relationship cannot do this, as it is only a contractual relationship.

Para 3: use ‘recommendation’ instead of ‘expectation’.

Page 27:

Para 2: Means to raise concerns - Here the topic of whistle blowing as an element of grievance mechanisms is addressed again, but in different wording, which may lead to confusion.

Last para: The Guidance could also mention works councils or other similar types of employee representation bodies at company or site levels.

Bullet 1 – use ‘**recommendation**’ instead of ‘expectation’

Page 28/30:

Para 3 (2nd bullet) – Direct linkages - Contrary to the MNE Guidelines (see IV.3. and comment 43.) the draft states that ...”the enterprise is still expected to seek to prevent or mitigate the adverse impacts arising

in its entire supply chain.” As clarified in the 4th bullet on page 28, see also page 31: In case of linkages, companies should seek to use or increase their leverage to influence the behavior of the entity causing the adverse impact. The wording should be adjusted.

Please also clarify the context of the term “**omissions**”. We understand that “omission” should only be read in conjunction with “causing” and/ or “contributing”, which should be clarified. Henceforth that in the case that due diligence is being performed on the activities of a business relationship, i.e. being “directly linked”, this could never be considered (or lead to) an omission. Please confirm.

The draft Guidance document focuses in several places on the concept of “omissions”, for instance to elaborate and define the “cause” and “contribute to”. However, the OECD Guidelines use the concept of omission only in the consumer chapter and in the commentary of the human rights and the disclosure chapter. Thus, it is not appropriate to give the concept such significance in the guidance.

The draft guidance takes a rather broad stand by interpreting “omission” from the Guidelines, where there are only 2 mentions of the word - both implying known or deliberate omissions. It is a concept that requires further discussion and careful thought as it could have considerable implications for companies and their practices. In this respect, we would like to emphasize the extensiveness and complexity of many supply/value chains. In line with the earlier comment, we need to recognize there could be, and most probably are, practical limitations on companies’ reach.

Page 29:

Add at the beginning of the second bullet which states that “direct linkages are not limited to first-tier or immediate relationships, *“While recognizing that there are practical limits in influencing all layers of the supply chain (e.g. transparency and access to information to enterprises where there is no direct business relationship such as through a contract).”*

A key question for all companies is how far into the supply chain the “directly linked” concept extends. Going deep down the supply chain is extremely challenging, and in particular for SMEs, it might be unfeasible due to limited resources. Therefore, it is important to mention that there are limits of how deep in the supply chain the company can have leverage.

Further details on what leverage would be practical and feasible should be added in the third bullet.

Bullet 1 - ““Direct linkage” refers to the linkage between the harm and the enterprise's products, services and operations through another enterprise (the business relationship); or chains of relationships, and does not refer to some causal relationship between the enterprise and the harm. Suggest revising to more articulately explain a series of one-on-one business relationships connected by a product or service in which they all have some part and in which there is a demonstrated chain of custody link.

Bullet 2: Direct linkages are not limited to first-tier or immediate business relationships **if there is a demonstrated chain of custody link by a product or service**. Hence, even if the adverse impact is caused or contributed to by an entity deeper in the supply chain, the **enterprise that is directly linked by the product or service has a responsibility to do ‘something’** to seek to prevent or mitigate the adverse impacts arising from that entity. For example, despite multiple tiers of **entities** between the enterprise’s end product (e.g. **an automobile**) and the mine of origin where a serious adverse impact may arise (e.g. financing armed groups through mineral production and trade), **if the mineral originated from that location is used by the manufacturer**, there is a direct link between the enterprise product and the adverse impact through its sub-suppliers of products containing those metals.

Page 30:

Last section – Directly linked: only addresses upstream business (supply side), not downstream (sell side) – which could be misunderstood in a way that linkages could only occur in the supply chain.

Page 31:

Expected response - Content seems repetitive

Bullet 3 should read: If the enterprise is **directly linked** to an adverse RBC impact, it is expected to take appropriate action to: **Build up leverage with others to work towards preventing or mitigating to the extent practical, but not having responsibility for addressing the impact or applying remedy** The *Guidelines* encourage collaboration, **particularly in driving others** to address issues in the supply chains and other business relationships.

Additional specific comments for the OECD Due Diligence Companion

As mentioned above, the focus should be on examples, and the actual text should be shortened avoiding repetition with the guidance document. When text is kept, it should be made fully consistent with the guidance, and our comments on the latter should be reflected in the companion as well. The companion repeats part of the guidance in each of its sections either 1:1 or by rephrasing content already included in the guidance. These repetitions should be deleted. Cross referencing the related guidance and companion sections would reduce the number of pages of the companion and would help increase the user friendliness of the documents. In some case, it could also be considered to include references to the relevant sections of the MNE Guidelines in the text of the documents instead of listing them at the end of the documents.

Should the explanatory language be retained, the language should also be reviewed considering the comment above. We miss a statement that the definitions contained in the draft guidance also apply to the companion. The numbering should be checked.

Page 6, 2nd bullet:

Add: “embedding *appropriate and proportionate* internal controls”

Before the sentence beginning by “Many of the issues”, add: “In such circumstances (i.e. eventual closure or end of operations), 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”.

Page 21, point 3, last bullet:

Mention that there can be practical limitations on the ability of enterprises to effect change in the behaviour of business relationships.

Page 22:

Box 129, 5th bullet: The spirit of the sentence should be changed by replacing “refusing to participate in an industry association that advocates an irresponsible approach to a societal problem created by the industry” by “participating in industries associations that advocate responsible approaches to societal issues linked to the industries’ activities.”

Last bullet of the page: add “In such circumstances (i.e. closure or end of operations), 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”.

The above-mentioned specific comments on the Guidance should also be reflected in the related parts in the Companion.

BUSINESS SOCIAL COMPLIANCE INITIATIVE (BSCI)

Monique Gerson, Social System Officer, Foreign Trade Association:

Dear reader,

The Business Social Compliance Initiative (BSCI) is pleased to share its observations on the *OECD Due Diligence Guidance for Responsible Business Conduct*. We would like to express that we very much welcome this approach and consider the Guidance as a means to guide enterprises towards increased due diligence. We have furthermore identified a considerable alignment with our own holistic system aiming to improve working conditions in factories and farms worldwide.

Attached you find the document with our detailed remarks and areas for further consideration on the matter. I hope they are useful to you.

If anything is unclear or you have any questions, please don't hesitate to get back to me or my colleague Veronica Rubio in cc.

Best wishes,
Monique

Public consultation on OECD Due Diligence Guidance on Responsible Business Conduct BSCI Feedback | February 2017

The Foreign Trade Association (FTA) is the leading business association of European and international commerce that promotes the values of free trade and sustainable supply chains. It supports international business of retailers, importers and brand manufacturers by providing information and practical solutions towards sustainability in the international supply chain.

Functioning under the umbrella of FTA, the Business Social Compliance Initiative (BSCI) greatly welcomes the development of the *OECD Due Diligence Guidance on Responsible Business Conduct* to provide practical support to companies on the implementation of the OECD Guidelines for Multinational Enterprises. As a business-driven initiative, we greatly believe in the abilities and responsibilities of businesses to 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. Since 2014, the BSCI Code of Conduct is fully aligned with the UN Guiding Principles on Business and Human Rights and has been fully embedded the need for companies to exercise human rights due diligence.

Please find the following comments on the draft Guidance:

General remarks

As a holistic system providing a platform to share supply chain related information and responsibilities among enterprises, we consider a collaboration approach essential as part of the identification and assessment phase for adverse RBC impacts as well as to create and strengthen leverage and collectively pressure for a change to be effective. As such, we highly appreciate the focus on the need for collaboration among enterprises in this document.

BSCI acknowledges the focus on the inter-connectedness of international business environments as our experience with 1800+ businesses has proven that networks consisting of complex nets such as subsidiaries and other entities (can) be a great contributor to enterprises footprint of any kind.

BSCI greatly acknowledges an approach going beyond compliance by taking all necessary steps to identify, manage and account for RBC risks and impacts which have been identified on an ongoing basis and a proactive and reactive manner. Committed to the concept of a systematic approach to address human rights risks and to a continuous improvement of its due diligence processes, we highly acknowledge the recommendations given in the guidance for enterprises. We do, however, believe that an audit-based approach adds deliberate value to this process as one component of many to identify and assess whether the enterprise has caused or contributed to potential or actual impacts, or adverse impacts are directly linked to its operations products or services and would like to stress the importance of it.

Detailed remarks

- **‘CAPTURING THE “ESSENCE” OF DUE DILIGENCE: Stakeholder engagement is used to involve those potentially directly or indirectly affected by its operations or business relationships’** => While BSCI agrees with the above, we would like to empathize that in our view stakeholder engagement should also be used to build effective partnerships to ultimately collectively address and improve RBC impacts, especially on local level.
- ‘Summary of “Key Actions” to put a due diligence process in place’
 - **‘II-A. Identify and assess adverse RBC impacts’** => BSCI believes that identification and assessment of risks goes hand in hand with mapping of enterprises’ supply chains and recommends to complement it under point II-A.
 - **‘II-B. Prevent and mitigate adverse RBC impacts’** => BSCI agrees that response plans have to be designed that are fit for purpose for the potential or actual RBC impacts and corresponds to the enterprise’s involvement with the impact. This may include to readjust business practices accordingly to prevent further indirect or direct RBC impacts.
- **‘8. RBC due diligence is risk-based and therefore involves prioritisation’** => The sentence seems to end abruptly after the first paragraph.
- **‘II-C. Due Diligence: Track Performance – B. KEY ACTIONS** => The use of relevant technologies and tools enabling a sophisticated and holistic analysis as well as big data play an important role in a) tracking performance efficiently to ultimately respond to RBC risks and impacts as well as to b) identify trends and patterns of recurring problems and issues and are therefore recommended to be added. This especially accounts if data are used in a system shared by many businesses to increase the effect.

Overall the Guidance successfully outlines the core concepts and actions to help enterprises identify and address impacts of their activities and business relationships on matters covered under the OECD Guidelines and provides sufficient practical examples in the second Due Diligence Companion ‘living document’ for enterprises to review. BSCI considers the Guidance as a means to guide enterprises towards increased due diligence and identifies a considerable alignment with its own holistic system aiming to improve working conditions in factories and farms worldwide. While BSCI very much welcomes the overall objective and the content of the guidance, previously mentioned remarks are considered as relevant to strengthen the guidance.

CANADA

*Tracy Diehl, Senior Officer, International Trade Portfolio and Responsible Business Conduct Division,
Global Affairs Canada:*

Thank you for the opportunity to provide input, and we apologize for the delay. Please find below consolidated comments on the OECD DD Guidance for RBC from the Government of Canada reflecting input from Natural Resources Canada, Global Affairs Canada, Export Development Canada, and Innovation, Science and Economic Development Canada. In the attachments, there are some specific comments and minor edits, including incorporating more explicit references to human rights throughout.

We know that you have received input from the Canadian Labour Congress and Global Compact Network Canada. Grateful if you could let us know if there were further comments from Canadian entities.

Warm regards,

Tracy

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), the ILO Declaration on Fundamental Principles and Rights at Work, relevant ILO Conventions and Recommendations, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

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. This Guidance may be relevant for other parties, such as sector-wide and multi-stakeholder initiatives, ~~focusing 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) in all sectors and of all sizes, including small and medium-sized enterprises (SMEs), operating or based in countries adhering to the Guidelines. This includes state-owned enterprises. The Guidelines apply to all the entities within the MNE enterprise group – parent and local entities, including subsidiaries. This Guidance may also be useful for any domestic enterprise seeking to implement the OECD Guidelines since the Guidelines reflect good practice for all enterprises and are not intended to introduce differences in treatment between domestic and multinational enterprises.

BUSINESS RELATIONSHIPS: One of the defining characteristics of the international business environment is inter-connectedness. 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 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](#)] ~~comment: Move to an Annex~~

[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. 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; the OECD Guidelines on Corporate Governance of State-Owned Enterprises (SOEs); Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence; the Policy Framework for Investment; and the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009).] ~~comment: Docs would be easier to reference if listed on page (and hyperlinked) as opposed to embedded within sentences.~~

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

The Guidelines:

- Are recommendations addressed by governments to MNEs concerning responsible business conduct.
- Provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally-recognised standards.
- 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.
- 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.

- 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.
- 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.
- Both complement and reinforce private efforts to define and implement responsible business conduct.
- Are consistent with other authoritative international instruments, such as the UN Guiding Principles on Business and Human Rights and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.
- 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.

[Key Terms] comment: **Move to an Annex**

Adverse impact /Harm	Adverse impacts refer to negative impacts (harm) to individuals, workers, communities and the environment in relation to matters covered by relevant chapters in the <i>OECD Guidelines</i> : 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. (<i>Guidelines</i> , 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. (<i>Guidelines</i> , 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 <i>Guidelines</i> . (<i>Guidelines</i> , 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. (<i>Guidelines</i> , 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 (<i>Guidelines</i> , 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 <i>Guidelines</i> 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 <i>Guidelines</i> . 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 <i>Guidelines</i> . 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 its business relationships. As well as This includes human rights defenders, civil society and other groups representing or advocating for the rights of persons or groups who are or could potentially be directly or indirectly affected by the actions of the enterprise and its business relationships..

[Structure of the Guidance] comment: The structural overview and the 2 page summary should be moved to the front of the document

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 derstand, 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~~ will 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 **inclusive**, 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.

CANADIAN LABOUR CONGRESS

From Hassan Yussuff, President:

Introduction

As Canada's largest labour organization, the Canadian Labour Congress (CLC) not only represents 3.3 million workers in virtually every industry and occupation in Canada, but is also committed to social justice for workers, communities and indigenous groups around the world. Central to this commitment is ensuring that Canadian enterprises are engaging in due diligence to protect human and labour rights throughout their supply chains, no matter where they are operating.

The CLC welcomes the opportunity to comment on the draft text of the *OECD Due Diligence Guidance for Responsible Business Conduct* (Guidance) and the *Due Diligence Companion* (Companion). Alongside the comments made in this submission, the CLC fully endorses the comments submitted by the Trade Union Advisory Committee to the OECD (TUAC), which provides substantive comments on the text of the two documents.

The CLC respectfully offers the following five recommendations, which are explained in further detail below: 1) Increase references to trade unions, labour rights, and the role of trade unions in due diligence; 2) Include greater emphasis on stakeholder engagement; 3) Improve accessibility and readability; 4) Provide clarity to core concepts and terminology; and 5) Fully capture the essence of due diligence.

Recommendations

I. Increase References to Trade Unions, Labour Rights, and the Role of Trade Unions in Due Diligence

There is very limited reference to “trade unions” (p.12, 17, 27), “collective bargaining” (p.12, 27), or “labour rights” (p. 8, 22) in the text of the Guidance. In the few areas where such terms are mentioned, there is not sufficient explanation of labour rights or the role of trade unions and collective bargaining.

The Guidance should be amended to provide details surrounding labour rights and the role of trade unions and collective bargaining. This should specifically explain the role of collective agreements between employers and trade unions, as well as include examples of the role of trade unions and labour federations in the different stages of due diligence at the local, national and international levels.

It would also be useful for the Guidance to highlight the importance of reviewing labour practices, whether the workers are employed directly or not, as part of conducting due diligence. The Guidance should recommend that due diligence be conducted regarding the decision to outsource activities of the organization.

Finally, given that two-thirds of complaints brought by trade unions under the Guidelines concern violations of trade union rights, the section on Workers and Industrial Relations in *Box 1: Examples of RBC Covered by the Guidelines* should include a more detailed explanation of what constitutes violations of trade union rights. This should include the following examples:

1) intimidating, or otherwise discouraging workers from forming or joining a trade union;

- 2) refusing genuine opportunities to bargain collectively; and
- 3) undermining trade union rights in the context of outsourcing work.

II. Include Greater Emphasis on Stakeholder Engagement

There should be greater focus and attention given to stakeholder engagement in the main guidance document. Similar to the approved OECD guidance on the garment and footwear sector, the Guidance should provide a list of likely stakeholders that should be included in the process. This list should include workers, trade unions, global union federations, civil society organizations, and indigenous communities. The Guidance should also include specific examples of stakeholder engagement in due diligence.

Alongside integrating stakeholder engagement more widely throughout the text of the document, there are a number of specific areas where more attention could be given to stakeholder engagement, including:

- The description of stakeholder engagement in the section Key Terms could be strengthened by providing the list of stakeholders mentioned.
- Stakeholder engagement should be embedded in the section titled Summary of “Key Actions” to Put a Due Diligence Process in Place.
- The text on stakeholder engagement in the section Core Concepts should be strengthened to highlight the fact that enterprises should consult with stakeholders as part of conducting their due diligence process. It should be emphasized that industrial relations, including collective bargaining, are an important form of stakeholder engagement.

III. Improve Accessibility and Readability

Efforts should be made to expand the accessibility and enhance the readability of both the Guidance and the Companion.

In the Guidance, specific attention should be given to improving the readability of the section on Core Concepts. Readability could be improved by shortening texts, using bullet points rather than dense text, and focusing on single issues rather than conflating a number of complex points into each paragraph.

In the Companion, efforts should be made to reduce the length of the text, as it is currently repetitive of the Guidance, which leads to confusion. Reducing the length of the Companion and providing better visual references would improve its readability and ensure that it is accessible to a wider audience.

IV. Provide Clarity on Core Concepts and Terminology

Alongside improving the overall readability of the core concepts, as discussed above, attention should be given to clarifying the following core concepts or key terms:

- The section on Core Concepts conflates the recommendations of the OECD Guidelines for Multinational Enterprises (e.g., adopting policies, stakeholder engagement, and communication) with the requirements of due diligence. To avoid confusion and uncertainty of requirements versus recommendations, a clearer distinction needs to be made between the two.
- The Guidance describes the OECD Guidelines for Multinational Enterprises as “voluntary,” which may be misinterpreted as being optional. Instead, the Guidelines should be described as “non-binding.”
- Currently, the Guidance uses the term “partner” interchangeably with “business relationship.” This is problematic because the term “partner” refers to a relationship where gains and losses, as well as risks and rewards, are shared. This is not the case for many business relationships, especially those within global supply chains. As is done in the OECD Guidelines for Multinational Enterprises, “business partners” may be used as one example of a business relationship, but not synonymously.

- Given the different requirements of enterprises based on whether they “cause,” “contribute to,” or are “directly linked” to harm, it is essential that clear distinctions are made between these terms. Enterprises are only required to provide remedy when they have “caused” or “contributed to” harm, but not when they are “directly linked.” The distinction between “contribute” and “directly linked” is unclear, and it is of great importance to bring clarity here given the grave difference in subsequent obligations.
- The essence and key aspects of consultation should be clarified. This should explicitly state that consultation must take place before a decision is made, and that stakeholders should be provided with all of the information needed, in an accessible format, in order to make an informed decision.
- The importance of proactive due diligence should be included as an additional core concept. An enterprise’s responsibility goes beyond “doing no harm.” Instead, they must take a proactive approach.

V. Fully Capture the Essence of Due Diligence

The section Capturing the “Essence” of Due Diligence could be strengthened in the following ways:

- The importance of transparency should be highlighted in this section, as well as being integrated throughout the Guidance.
- There is currently no reference to gender in the Guidance. The importance of including a gender analysis in the due diligence process should be included in this section, as well as throughout the Guidance.
- Due diligence is the means and not the end. Companies cannot meet their responsibilities under the OECD Guidelines for Multinational Enterprises simply by establishing a due diligence process. Due diligence must also be effective in avoiding and addressing adverse impacts. Although this is explained later in the text, given its centrality to the outcomes of due diligence, alongside its likelihood of being misinterpreted, it should also be clearly outlined upfront in this section.

CATALYST SOCIAL MANAGEMENT

Bettina Reyna Ugarriza, Advisor in Social and Environmental Affairs:

Dear Sirs,

We are Catalyst Social Management, an independent and private organization from Peru, conformed by professionals from different technic and academic backgrounds, who are engaged in the promotion of sustainable and legitimate enterprises, in the public or private sectors.

As we support the promotion of public policies in the line of sustainable development, shared value, responsible and respectful relationships between: corporation, public sector and community, we have made recomendations to the Due Diligence Guidance for Responsible Business.

On February 1ST, 2017, the "OCDE Guidelines Conversation" was held, which consisted of a discussion with Peruvian experts on corporate social responsibility to gather comments and suggestions on the topics covered by the proposed OCDE Guidelines. This discussion took place at the GERENS facility and under the CATALYST SOCIAL MANAGEMENT facilitation.

Kind regards,

Following are the comments and suggestions of the participants on the documents: **"Due Diligence Guidance for Responsible Business Conduct"** and **"Due Diligence Companion"**, poured into said Conversation:

A) Responsibility of the companies:

- There is doubt about what will happen to the situation of Peruvian companies, which is adherent as a country but does not have regulations according to the Guidelines and may not be met, then what can companies do to that reality.

The Guide states that *"each company is responsible for carrying out due diligence, which will vary according to the risk of serious human rights impacts and the nature & context of its operations, and the nature of risk responses will vary according to the relationship with an adverse impact. Thus, it is pointed out that, if a company is aware that its products or services are directly linked to an adverse impact through a business relationship, it has a responsibility to use its influence to try to prevent or mitigate that impact, although liability to address and remedy the impact depends on the entity causing the damage."*

Regarding this, the concern of the participants arises that we are in a country with a high rate of informality, and how the companies would end up assuming this responsibility in case of a commercial relationship.

- Although it is pointed out that it is not the responsibility of the companies to report adverse events and that they incur in a commercial relationship, in a context such as the Peruvian one, it is a great concern in what way the formal entrepreneur may or may not take actions to prevent adverse effects of Informal enterprises in its chain. The entry of Peru to the OCDE will not mean that we are suddenly a more formal country, then there are greater risks that have to be assumed from the multinationals, so we need a precision on how the country will gradually move to have companies Formal and sustainable in time. This responsibility, in any case, corresponds to policies that must be implemented by the Peruvian State.

There is concern that in the OCDE, particularly the Guidelines, there is no differentiation between high-income countries and strong institutions and acceding countries like Peru, which is emerging and its legal framework is not necessarily aligned with The OCDE Guidelines.

For example, in the country, Convention 169 was not implemented until more than 15 years later, when a law and its regulations were issued, so there is concern that Peruvian policies and norms are not in line with the Guidelines and whether this will have any responsibility or impact on the adverse impacts and/or risks of multinational companies, due to this weakness of the Peruvian State.

Also, in environmental matters, the State has rules that are rather harmful to the environment and yet companies must comply with them. In any case, governments should be encouraged to issue environmental standards that can be met by companies.

In that sense, many of the aspects contained in the Guidelines are rather a challenge for the government itself than for companies.

- Another risk is that governments, as has happened with other non-binding or non-binding international standards, have made them mandatory national standards as the "only" mechanism to establish "good conduct" determined by international organizations such as the OCDE. Mechanisms such as the generation of incentives or the recognition of good practices that are already being carried out by companies, among others, are ignored.

B) On good practices and positive impacts:

- In many cases, good practices, approach and involvement and training of local communities are carried out by the company and it is the State that is surprised by the progress in involving the communities that carry out the companies, instead of being The State that has initiatives in this regard.
- The rules on participation have been based on the practices of companies but unfortunately also the pressures of anti-system political leaders. For example, it is not enough to have a license to have water, although there are very strong international norms or corporate policies, more powerful than the national legislation and that companies comply, but the great obstacle is that such licenses cannot be executed because Government itself cannot enforce it in favor of a company that, having met all the requirements, groups that oppose mining activity are prevented or rejected by using violence and often enjoy impunity.
- There is no topic in the Guides that develops what is public-private partnership. Often the private ones have the initiative to carry out tasks together with the State and, however, the institutions ignore them. As a result, companies are more focused on the Sustainable Development Objectives, which implies in their Objective 17 the realization of alliances, which can be public-private. The regulation of public-private partnerships is limited, despite recent regulatory changes, due to constitutional or political constraints.
- The Guidelines do not highlight or promote positive impacts, only focuses on adverse impacts, when in practice is very important for the relationship. The Guide gives an approach of not doing "avoid doing this or that thing", highlighting the reputational aspect. It is necessary to incorporate the legitimate stimulus for companies that are concerned with doing and doing things well, in labor, environmental or accounting terms, among other aspects.
- There are 3 ways in which the company could adversely affect but not in ways that it impacts positively.

C) Comments:

- Recommendations are made without applying a sector approach, as if there were uniformity in multinationals.
- Does not indicate how to do the monitoring of impacts.
- It is not mentioned how we determine the stakeholders, which, for example, for mining projects, could be numerous.
- There is concern about what information should be disclosed, for example, should be made known the income tax, the profits that are distributed to workers? Should this information be delivered to local communities?
- It is not clear what the role of stakeholders is in company policies. Should they be developed?
- It raises the question of how one can make sure that it will actually be fulfilling all of this. Will there be a Certifier? Should the due diligence be done by the company or hire a consultant? This is not self-report, but it is not certification either.
- When it is pointed out that the potentially impacted are mentioned to indicate in which situation a company is, in relation to the impacts, it is worrisome, because what implies that opinion.
- If the national standards are below the standards of the Guidelines, then to whom is the company responsible?

D) Suggestions:

- It is suggested that the rule be a little clearer, that someone indicate in what circumstances the Guidelines and the Guide, are above the law and when not.

- No mention is made of good practices such as the EITI, in terms of transparency of the extractive industry, an initiative that began in 2004 in Peru. And so, Peru can demonstrate that the business sector is putting the best practices on the subject of transparency.
- It is necessary for governments to encourage companies to invest in innovation and technology, in order to comply with the guidelines. Already some companies are taking the initiative in this aspect, but would be even more involved if there were incentives from the governments.
- Companies do not have information about National Contact Points, their functions, what it implies. In the case of Peru, it is not perceived that the National Contact Point, which is PROINVERSIÓN, allows a way to guide companies to follow the Guidelines. There should be some aspect of this in the Guides. Due to the political risks, the National Contact Point should also be constituted by the business guilds.
- It is recommended that a review of compliance with the Guidelines for State Enterprises is also carried out.
- It is very important that companies have clear policies about the companies already, which regulates policies and guides that their employees are willing to comply with. This should be recognized by the Guides, the practices that companies already have.
- Doubts arise about what happens if the company delivers money to the local community, due to the possible damages, this would also be a risk, as defined in the Guide? Without more precision, all relationships would be a risk. It should be more thorough with the examples in the Guide.
- The Guidelines could be developed with a sector approach. It would be desirable for the OCDE to contextualize more all the recommendations.

E) Participants:

- **As facilitators:** Bettina Reyna Ugarriza, Miguel Castañeda Loayza & Natalie Amanchantoux Macpherson.

Participants: Carlos Aranda, Peter Orams, Guido Bocchio, Darío Zegarra, Antonio Cornejo, Hugo Aguirre, Eddy Ormeño, Alejandro Camino, Lorena Carrillo, Sandra Carrillo, Ana Rosa Adaniya, Marilú

CENTRAL ORGANISATION OF FINNISH TRADE UNIONS

Pia Björkbacka, Adviser, Industrial Policy:

1. Because of the shortcomings the main comments on Consultation on OECD General Due Diligence Guidance for RBC are the following providing examples of/suggestions on any of the following (or other relevant issues):

- **Accessibility/readability. especially the section on Core Concepts**
- The role of trade unions and collective bargaining in different stages of due diligence;
- Different types of agreements between trade unions and employers;
- Effective collaborative initiatives;
- Good practices by MNEs on transparency;
- MNEs *causing, contributing or directly linked* to supply chain abuses (see below);

- Inadequate due diligence with respect to trade union rights;
- There is no reference to gender in the Guidance
- Involvement of unions in complaints mechanisms.

DESCRIPTION	EXAMPLES OR SUGGESTIONS
<p>DUE DILIGENCE GUIDANCE FOR RBC</p> <p>This is the main Guidance document: <i>Part I</i> sets out the ‘core concepts’/elements of due diligence; <i>Part II</i> describes the ‘key actions’ involved in due diligence: <i>embed; identify and assess; prevent and mitigate; track performance; communicate; remedy.</i></p>	<p>- Role of trade unions and collective bargaining in the different stages of due diligence:</p> <ul style="list-style-type: none"> - <i>identify and assess;</i> - <i>prevent and mitigate;</i> - <i>track performance;</i> - <i>remedy (process and in the outcome).</i>
<p>THE DUE DILIGENCE COMPANION</p> <p>The Companion Document provides additional explanation/examples on ‘key actions’ but repeats much of the content of the main Guidance, which is confusing. It would be strengthened by less text/greater use of visual material (boxes/diagrams).</p>	<p>- Trade union agreements: sector agreements, freedom of association protocols, global framework agreements;</p> <p>- Good practices by MNEs on transparency: disclosure of suppliers; including names of the buyer in contracts;</p> <p>- Failures of due diligence regarding trade union rights;</p> <p>- Involvement of union in complaints mechanisms.</p>
<p>ANNEX TO THE DUE DILIGENCE GUIDANCE</p> <p>The Annex explains the 3 ways in which the responsibility of an enterprise is engaged under the Guidelines: <i>cause, contribute</i> or <i>directly linked</i> to adverse impacts. Under the Guidelines MNEs are required to provide <i>remedy</i> only when they have <i>caused or contributed</i> to the harm – not when they are <i>directly linked</i>. The distinction between <i>contribute</i> and <i>directly linked</i> is therefore very important but still unclear. This is an opportunity to help clarify it.</p>	<p><u>Cause</u></p> <p>i. Is the explanation of <u>cause</u> adequate?</p> <p>ii. Provide an example of an MNE <u>causing</u> abuses in the supply chain.</p> <p><u>Contribute</u></p> <p>i. Is the explanation of <u>contribute</u> adequate?</p> <p>ii. Provide an example of an MNE <u>contributing</u> to abuses in the supply chain.</p> <p><u>Directly Linked</u></p> <p>i. Is the explanation of <u>directly linked</u> adequate?</p> <p>iii. Provide an example of ‘<u>directly linked</u>’ becoming ‘<u>contribute</u>’ e.g. the MNE fails to act when it knew/should have known about abuses.</p>

2. Substantive Points

GENERAL

2.1 Stakeholder Engagement: stakeholder engagement should be given a greater focus in the main Guidance document, including in the Summary of the Key Actions, and by providing examples.

- The approved OECD guidance on the Garment and Footwear Sector lists likely stakeholders including employees, workers and trade unions in the supply chain (Section 1.2, page 8) as well as giving examples of stakeholder engagement in due diligence.

2.2 Role of Trade unions and collective agreements: the Guidance should include examples of the role of independent trade unions at the local and international level in the different stages of due diligence, including the role of collective agreements between employers and trade union. The text omits important labour issues including the terms “trade unions” and “collective bargaining”, both which are in the text of the OECD Guidelines:

- The approved OECD guidance on the Garment and Footwear Sector includes a section on ‘Direct agreements with trade unions’ (Section 2.1 page 10).

2.3 Transparency: transparency should be given more prominence, importance throughout the Guidance, in particular regarding business relationships/supply chains.

2.4 Consultation: The essential nature of “consultation” should be clearly explained. “Consultation” is about informing a decision and it must take place before the decision has been made. The enterprise must also provide the stakeholder(s) with all of the information needed to make an informed decision in a timely manner. The clarification of the difference between “communication” and “consultation” provided in the Guidance misunderstands the nature of consultation.

2.5 Conflation of due diligence recommendations and other provisions of the Guidelines: the section on ‘Core Concepts’ conflates the recommendations of the Guidelines, with respect to adopting policies, stakeholder engagement and communication, with the requirements of due diligence. This is confusing and obscures the requirements of due diligence/the key messages.

2.6 Mitigating actual adverse impacts: Under the OECD Guidelines mitigation only relates to business relationships. Where an enterprise causes or contributes to adverse impacts its responsibility is to **Cease, Prevent and Remedy**. When it is directly linked to adverse impacts its responsibility is to use its leverage to influence the supplier to **Mitigate** remaining impacts. This is represented visually in Figure 1 (page 20) of the Guidance. However, the text (REF) refers to mitigation where the company has caused/contributed. This should be explained further and especially the relationship between mitigation and remedy. (STILL WORKING ON THIS).

2.7 Shifting responsibility: the Guidance explains that the expectations of MNEs with regard to business relationships do not shift the responsibility from the supplier/entity that is causing the abuses. The Guidance should also make clear that enterprises are, however, responsible for the decision to enter into the business relationship.

2.8 Review labour practices: it would be useful for the Guidance to explain that in conducting due diligence enterprises should review their labour practices, whether the labour is directly employed or not. The decision to outsource activities of the organisation requires due diligence.

2.9 Gender: there is no reference to gender in the Guidance:

- The approved OECD Guidance on Textiles emphasises the importance of taking account of the position that women may have in any particular context (Section 1.4. page 12). Recommendations include involving women in the design of monitoring and evaluation, and ensuring accessibility of grievance mechanisms.

INTRODUCTION

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

- Suggest describing the Guidelines as ‘**non-binding**’ instead of ‘voluntary’ to avoid the misinterpretation that the Guidelines are optional;
- Bullet points 1, 3, 4, and 5 make the same or related points, whereas other important issues missing:
 - o MNEs have a responsibility for their adverse impacts including in their supply chains/business relationships;
 - o MNEs should conduct due diligence in order to meet this responsibility;
 - o The Responsibility of MNEs to respect human rights exists independently of States’ abilities and/or willingness to fulfil their own obligations.
 - o Basic information on the cases filed under the Guidelines.

CAPTURING THE “ESSENCE” OF DUE DILIGENCE

2.11 Conduct due diligence against specific adverse impacts: a bullet point should be included stating that due diligence should be conducted with respect to specific adverse impacts – it cannot be performed in an abstract way.

2.12 Salient risks or sector specific risks: a bullet point should be included stating that due diligence should

begin with “salient risks” – these are risks of specific adverse impacts in all activities and all geographical locations that are generally understood/not difficult to identify. In many cases, where labour is involved, the abuse of workers’ human rights will be such a salient risk. ‘Salient risks’ should be included in the section on ‘Key Terms’.

2.13 Due diligence is the means not the end: there is concern within the trade union movement that due diligence will be misunderstood and that companies will consider that they meet their responsibility under the Guidelines by establishing a due diligence process, regardless of whether or not due diligence is effective in avoiding and addressing adverse impacts. While this is explained in the text of Core Concept 3, page 8, it should also be included as a point in *Capturing the “Essence” of Due Diligence*.

2.14 Prioritisation is a matter of sequencing: The main text explains (2. *Prioritising prevention and & the most severe impacts*, Page 24) that prioritising risks on the basis of severity relates to the sequencing of responses where companies are unable to address all adverse impacts at once and does not mean that companies do not need to address other less severe adverse impacts. Bullet point 3 on prioritisation should be amended to reflect this.

2.15 Stakeholder engagement: strengthen bullet point 6 on stakeholder engagement as follows: “involves meaningful consultation with potentially affected groups and other relevant stakeholders directly or indirectly affected by its operations or business relationships”.

SUMMARY OF “KEY ACTIONS” TO PUT A DUE DILIGENCE PROCESS IN PLACE (SUBSTANTIVE POINTS ARE DISCUSSED UNDER PART II BELOW)

2.16 Stakeholder Engagement:

- Map stakeholder engagement on to the one-page schematic of the due diligence process so that it is clear that stakeholder engagement plays a role at different stages of due diligence.

PART 1: CORE CONCEPTS FOR IMPLEMENTING DUE DILIGENCE UNDER THE GUIDELINES

2.17 Core Concepts: This section covers a number of issues, not all of which are “Concepts”. The section could be renamed ‘Key Considerations’. The text could be made more accessible by reducing the complexity/presentation and not repeating descriptions that are covered in Part II:

- Shorter texts the aim should be to present headline messages that users of the Guide really need to grasp before reading more detailed explanations in Part II.
- Bullet points rather than dense text;
- Single issues: some paragraphs are quite complex covering a number of points:
 - E.g.: Core Concept 3: RBC is a means for enterprises to meet their responsibilities to address RBC adverse impacts and differs in several ways from commercial or compliance due diligence. Concept 3 covers three major points: that due diligence is a means not an end; that due diligence should be commensurate with the risks; and that the risks/impacts being addressed are the risks to society not for the enterprise. It would be better to address these separately.

2.18 Box 1: Examples of RBC Covered by the Guidelines: the examples for the section of the table on ‘Workers and Industrial Relations’ should include violations of trade union rights. Two-thirds of complaints brought by trade unions under the Guidelines concern violations of trade union rights (Chapters IV.1a and V1.a and 1b). The examples in Box 1 should include the following:

- intimidating, or otherwise discouraging workers from forming or joining a trade union;
- refusing genuine opportunities to bargain collectively;
- risks to trade union rights in the context of the issues of “contracting out” work.

2.19 RBC due diligence can help enterprises obey domestic law... (Core Concept 4, page 9): This heading should be changed to “*RBC due diligence helps enterprises meet internationally-recognised standards on*

business behaviour, going beyond national law". The paragraph is essentially about the fact that the Guidelines go beyond the law and an explanation of what it means for there to be a conflict with national law.

2.20 RBC due diligence Prioritisation (Concepts 8 and 9): Core Concepts 8 and 9 are quite confusing as they both have 'prioritisation/prioritising' in the header/title but in fact address different issues:

- Core Concept 8 is (partly) about using severity as the basis to prioritise. The explanation of the factors for determining severity, which is on the last line of second paragraph, under Core Concept 8, however could easily be missed. Also Concept 8 does not explain that prioritisation is a matter of sequencing and does not mean that companies do not need to address other less severe adverse impacts;
- Core Concept 9 is about conducting due diligence in relation to supply chains/other business relationships.

2.21 Stakeholder Engagement (Core Concept 12, page 12): the text on stakeholder engagement should be strengthened to make it clear that enterprises should consult with stakeholders in conducting their due diligence. It should also make clear that industrial relations are an important form of stakeholder engagement. The text conflates the recommendation of the Guidelines on stakeholder engagement and disclosure with the requirements of due diligence to hold meaningful consultations with stakeholders. This is confusing and obscures the requirements of due diligence. Finally, the text focuses on the need to engage with **threatened** groups (**whistle-blowers**) as stakeholders whereas this issue probably deserves separate treatment. It should also include examples of marginalised groups.

- The approved OECD guidance on the Garment and Footwear Sector usefully provides an indicative list of stakeholders that includes employees, workers and trade unions in the supply chain (Section 1.2, page 8). It also gives example of stakeholder engagement in the design and implementation of due diligence processes (identification, assessments, development of correction plans, tracking performance and the design of operational grievance mechanisms).

2.22. Collaboration (Core Concept 13, page 12): the text should explain that collaboration on "root causes" should not become a way for enterprises to use philanthropy to offset the adverse impacts that business decisions have cause or contributed to. Stressing "root causes" can easily lead to the substitution of philanthropy for responsibility.

2.23 Due diligence is proactive: an additional 'Concept/Key Consideration' to be included is that due diligence requires companies to "do something" – their responsibility goes beyond "doing no harm" and being proactive in identifying and addressing their adverse impacts.

2.24 Factoring in the costs of due diligence: the Guidance should explain that the cost of due diligence should in itself be a factor taken into account by the enterprise before deciding to undertake an activity or to enter into a business relationship – e.g., the decision to stitch leather footballs in Indonesia.

PART II: PRACTICAL STEPS FOR IMPLEMENTING DUE DILIGENCE UNDER THE GUIDELINES

2.25 II.1 Embed RBC into Policy and Management Systems: there is a conflation with the general responsibility to devise and adopt an RBC policy to support due diligence and recommendations made in the Guidelines to adopt policies on specific issues (human rights, bribery). This is confusing.

2.26 II.A. Identify and Assess Adverse RBC Impacts:

- Key Action 1: add "including stakeholder engagement" in the 1st bullet point;
- C. Explanation of Key Actions, 1. Building RBC risk-identification, last bullet point: stakeholder engagement is not limited to the provisions of Chapter II, paragraph 14 of the Guidelines. It is an operational principle of due diligence (see UNGP 18).

2.27 II.B. Prevent and mitigate adverse RBC impacts: in the Guidelines the steps required are to **Cease**, **Prevent** **or** **Mitigate**.

- This is also the heading in the approved OECD Guidance for the Garment and Footwear Sector.

2.28 II.B. Prevent and mitigate adverse RBC impacts, Working with others through collaboration (page 18): revise the title of the first bullet point as follows: Working with auditing initiatives. Clarify the text to differentiate between private workplace inspections and suppliers' "social audits", conducted or commissioned, by companies themselves and third-party auditing schemes. Companies' social audits and collaborative initiatives both often lack transparency and independent monitoring / verification of impacts, and therefore they are not credible alternatives to third-party certification and auditing schemes. To address shortcomings such as worker and community issues mentioned in the Draft, companies should be encouraged to help strengthen third-party certification and auditing schemes, not replace them. One means to achieving this is to engage global trade union movement in monitoring compliance in particular with trade union rights, including collective bargaining rights.

2.29 II.C Track Performance, Explanation of Key Actions, 1. Developing or adapting tracking systems (page 26): in relation to auditing the guidance should make it clear that private workplace inspection and "social auditing" performed by commercial enterprises, or similar auditing undertaken by collaborative initiatives (whether industry-led or multi-stakeholder) does not change the responsibility of the enterprise for any specific adverse impacts related to its activities. Commercial auditors are agents of the enterprises that engage them and enterprises must assume responsibility for the effectiveness.

2.30 II.D Communicate: the text conflates the requirement of due diligence to "account for how adverse impacts are addressed" and the disclosure responsibilities under Chapter III of the OECD Guidelines. The inclusion of Point II-D 1, a recommendation on the disclosure of 'material' financial information (Chapter III, paragraph 1 of the OECD Guidelines), is confusing. The result is that the responsibility to report on how adverse impacts were addressed, which should be directly stated, is obscured.

3. Layout/Presentation Points

3.1 Accessibility: the readability of the Guidance could be improved, especially the Section on Core Concepts and the Companion Document:

- Core Concepts: suggest re-writing to focus on headline messages, with less detailed explanations and inclusion of visual aids;
- Companion Document: this should be far less text-based and included boxes and diagrams. It but repeats much of the content of the main Guidance, which is confusing. It would be strengthened by less text/greater use of visual material (boxes/diagrams).

4. Terminology

4.1 Adverse impacts: due diligence is required in relation to adverse impacts not positive impacts under the Guidelines, so the term that should be used is "adverse impacts" or "adverse RBC impacts"

4.2 Right-holders/Stakeholder Engagement: the term 'rights-holders' should be used in addition to stakeholders. This is consistent with Chapter IV of the Guidelines on Human Rights.

4.3 Business relationships not business partner: the term 'partner' should not be used as a synonym for business relationships. The term "partner" refers to a relationship where gains and losses as well as risks and rewards, are shared in one way or another. This will not be true for most business relationships, especially those in supply chains. In the Guidelines business partner is used as an example of a business relationship.

CHAMBER OF LABOUR, AUSTRIA

Dear Sirs,

As experts on this issue in the Chamber of Labour, Vienna – the Chamber of Labour represents the interests of 3.4 million employees and consumers in Austria – we take the opportunity to present our comments on the Draft text “OECD Due Diligence Guidance for Responsible Business Conduct”.

From our point of view, there are shortcomings in the following topics:

- Accessibility/readability: especially the section on Core Concepts.
- Need for references to trade unions, trade union rights and the role of trade unions in due diligence.
- Greater visibility about stakeholder engagement.
- There is no reference to gender in the Guidance.
- Trade Unions should be involved in complaints mechanisms.

Complementary we want to make specific remarks, what we have observed specifically:

The **Stakeholder Engagement** should be given a greater focus in the main Guidance document. Reference should be the OECD guidance on the Garment und Footwear Sector: there the stakeholders are listed: employees, workers and trade unions in the supply chain as well as given examples of stakeholder engagement in due diligence.

We criticise, that the text **omits important labour issues** including the terms “**trade unions**” and “**collective bargaining**”, both which are in the text of the OECD Guidelines. The role of trade unions and collective agreements has to be included in the Guidance with examples of the role of independent trade unions at different stages of due diligence.

The **transparency** should be given more importance throughout the Guidance.

There should be a **clear explanation**, what “**consultation**” should be like: informing about a decision before the decision has been made.

It would be useful for the Guidance to mention explicitly that in conducting due diligence enterprises should **review their labour practices**, whether the labour is directly employed or not. The decision to outsource activities requires also due diligence.

The **Companion Document** is a good idea in principle but it is really confusing as it repeats what is in the Main Guidance so there is no way to know what is additional. We also have to consider that people are not going to read another long text-based document.

With best regards

Elisabeth Beer
AK Wien - EU und Internationales

COMMISSION NATIONALE CONSULTATIVE DES DROITS DE L'HOMME

From Céline Branaa – Roche, Counselor for Magali Lafourcade, Secretary General:

La Commission nationale consultative des droits de l'homme (CNC DH) est l'Institution nationale de promotion et de protection des droits de l'homme (INDH), accréditée auprès des Nations unies, de statut A.

Composée pour partie de représentants de la société civile, des principaux syndicats et du patronat, des principales religions de France, et pour une autre partie de personnalités dites « qualifiées » ayant acquis une expertise certaine dans le domaine des droits de l'homme et du droit international humanitaire, la CNC DH exerce en toute indépendance des fonctions de conseil et de contrôle auprès du Gouvernement français.

La CNC DH est par ailleurs rapporteur indépendant sur la lutte contre le racisme sous toutes ses formes depuis bientôt 30 ans et sur la lutte contre la traite des êtres humains depuis 2014.

Convaincue que les entreprises ont une responsabilité certaine, par leurs activités multipartites en matière de droits de l'homme et jouent un rôle majeur dans leur promotion et protection, la CNC DH a publié une large étude en 2008, liant les problématiques de la RSE et du respect des droits de l'homme.

Sur saisine du gouvernement français, elle a rendu en 2013 un avis très étayé, adopté à l'unanimité, « Entreprises et droits de l'homme »²⁰ en vue de la préparation d'un plan national d'application des Principes directeurs des Nations unies relatifs aux entreprises et aux droits de l'homme. Dans ce cadre elle a émis des recommandations concernant très précisément le principe de diligence raisonnable.

Deux ans plus tard, le gouvernement a confié à la Plateforme RSE, dont la CNC DH fait partie, la rédaction d'un projet de Plan national d'action pour la mise en oeuvre des Principes directeurs des Nations unies, sur la base des recommandations émises par la CNC DH en 2013. La Commission a ainsi activement contribué à l'élaboration du projet de PNA adopté en septembre 2016 dont l'adoption officielle par le Gouvernement est attendue très prochainement.

Désireuse de renforcer sa collaboration avec les entreprises, la CNC DH a rejoint le Global Compact France en 2016.

La CNC DH a en outre soutenu la rédaction d'un guide sur les Objectifs de développement durable à l'attention des Petites et moyennes entreprises et les entreprises de taille intermédiaire, avec B&L Evolution, Global Compact France et l'association 4D.

Par ses multiples contacts et projets, la CNC DH est convaincue du rôle clé qu'une INDH peut jouer aux côtés des entreprises pour les accompagner dans leur démarche de diligence raisonnable telle que la propose le Guide OCDE.

La CNC DH note avec satisfaction qu'en cohérence avec l'introduction d'un chapitre entier dédié aux droits de l'homme dans le Guide OCDE, les droits de l'homme soient systématiquement cités comme une catégorie de « risques » spécifiques, et que les risques liés aux personnes et à leurs droits soient considérés comme prioritaires (I.8).

Introduction

Un nombre croissant d'Etats ont adopté ou sont en train d'élaborer des Plans nationaux d'action (PNA) qui visent à mettre en oeuvre les Principes généraux des Nations unies.

Ce guide peut être un outil supplémentaire que les parties-prenantes des PNA peuvent utiliser. Il serait intéressant d'ajouter une référence à ces PNA dans l'introduction.

Les entreprises étant des acteurs majeurs de la réalisation des Objectifs de développement durable, la CNC DH pense qu'il est important qu'un tel document y fasse référence dans l'introduction.

Basis for this Guidance

²⁰ Avis « Entreprises et droits de l'homme : avis sur les enjeux de l'application par la France des Principes directeurs des Nations unies », www.cncdh.fr/fr/actualite/entreprises-et-droits-de-lhomme.

Seuls les Principes directeurs des Nations unies et les conventions de l'OIT sont évoquées, or d'autres textes, dont notamment la Déclaration des Nations unies sur les droits des peuples autochtones sont aussi importants. S'il n'est pas possible d'évoquer tous les textes, il pourrait être ajouté le mot « notamment » avant la liste.

De plus, en tant que commission nationale du Droit international humanitaire, la CNCDH suggère que soit ajoutée une référence au Droit international humanitaire. Il est en effet indispensable que les entreprises connaissent et s'engagent à respecter cette branche spécifique du droit, lorsqu'elles exercent directement ou indirectement, ou soutiennent financièrement des activités commerciales dans des pays connaissant des situations de conflit ou post-conflit.

Business relationships

Si l'objet premier de ce guide porte sur les relations internationales de l'entreprise, le principe de diligence raisonnable doit aussi s'appliquer aux relations commerciales conduites dans le pays d'origine.

La CNCDH suggère que dans cette partie de l'introduction il soit précisé que, notamment en matière de droits de l'homme, les entreprises, quelle que soit leur taille, doivent s'engager à veiller au respect en leur sein et par leurs partenaires commerciaux des droits de l'homme, de l'environnement, etc....

Part I

I.10.iii - RBC impacts directly linked to enterprise operations, products or services by a business relationship 7

Responsabilité de l'entreprise.

Dans ce paragraphe, il est indiqué qu'il ne peut y avoir de transfert de responsabilité vers le donneur d'ordre. La CNCDH, pour sa part, estime que l'obligation de *due diligence* s'étend aux filiales et partenaires commerciaux des entreprises multinationales dans la chaîne de valeur (fournisseurs). A ce titre, elle a soutenu une proposition de loi française relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

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

La CNCDH recommande l'ajout dans la liste des parties-prenantes et interlocuteurs à consulter les Institutions nationales de protection et promotion des droits de l'homme (INDH)

Par leurs missions et leur composition, les INDH peuvent en effet aider les entreprises à identifier les risques liés aux droits de l'homme, les interlocuteurs à contacter, et les priorités à établir, y compris à l'étranger en s'appuyant sur les réseaux européens et onusiens des INDH notamment.

I.13 Collaboration can enhance RBC due diligence

La CNCDH recommande d'ajouter les INDH comme partenaires pour promouvoir la diligence raisonnable dans le domaine des droits de l'homme au sein de l'entreprise et de ses partenaires. Les INDH ont en effet une expertise certaine dans la formation et la sensibilisation aux droits de l'homme. Elles peuvent être des partenaires dans l'élaboration de supports, la conduite de formation, etc.

Les INDH collaborent aussi avec les écoles de commerce et les cursus d'universités, des écoles d'étude supérieures au sein desquelles il est aussi fondamental d'enseigner le principe de *due diligence*. Les entreprises peuvent y organiser des séminaires ou conférences en y associant les INDH.

II – A Due diligence : Identify et assess adverse RBC Impacts

C. Building RBC risk-identification processes

La CNCDH recommande qu'il soit expressément précisé que les risques doivent être identifiés y compris dans le pays d'origine de l'entreprise multinationale et pas seulement à l'étranger. En effet, notamment en matière de droits de l'homme, il est fondamental que les entreprises, publiques et privées, luttent contre

toutes les formes de discrimination en leur sein, soient exemplaires, pour ainsi pouvoir partager leurs bonnes pratiques et montrer les bénéfices d'un management pleinement respectueux des salariés (et indirectement de leurs proches aussi).

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

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

Troisième point : La CNCDH recommande l'ajout de l'Institution nationale de promotion et protection des droits de l'homme comme un interlocuteur pour identifier les préjudices subis et prévenir les préjudices potentiels. La connaissance des lois nationales et des textes juridiques internationaux en font un interlocuteur des plus compétents pour accompagner les entreprises pour ce qui est du domaine des droits de l'homme.

Part III – Provide for or Co-operate in remediation when appropriate

III.C-1 . Enable remediation for harms caused or contributed to

La CNCDH propose que soit ajoutée une référence ou une note à la récente proposition de loi (PPL) sur le devoir de vigilance qui sera adoptée en France d'ici fin février, et qui pour la première fois établit la responsabilité des entreprises donneuses d'ordre.

La CNCDH a soutenu cette PPL en accord avec une de ses recommandations adoptée en 2013.

III.C-2 In the case of human rights grievances

La CNCDH recommande qu'il soit précisé dans ce paragraphe que les procédures de réclamation extra-judiciaires doivent venir en complément (ou ne sauraient remplacer) des procédures judiciaires.

CORA NETWORK FOR CORPORATE ACCOUNTABILITY

From Heike Drillisch, Coordinator:

The CorA Network for Corporate Accountability is a network of over 50 German development, human rights and environmental organizations as well as consumer associations and trade unions including Bread for the World, Greenpeace, Misereor, Oxfam, verdi.

The network welcomes the opportunity to comment on the draft Due Diligence Guidance for Responsible Business Conduct. The Guidance provides a great opportunity to enhance businesses' understanding of what their responsibilities are in the field of human rights, employment, environment, combating bribery among others. This is important in order to create an international level playing field for business - in regards to the MNE Guidelines as well as to what is expected from them under national action plans for the implementation of the UN Guiding Principles on Business and Human Rights.

However, the Guidance will only be able to fulfil its role as an important reference if it sets a high standard and while on the one hand clarifying and elaborating on what is expected of business, at the same time not falling behind relevant external developments and existing standards and guidance in the field of business and human rights. In this context we would like to highlight five aspects of the draft Guidance, where we see weaknesses especially from a human rights perspective and would advise further specifications. Regarding the further process we believe that it is essential and good practice that the OECD publish all submissions it received in regards to the draft Guidance on its website. Additional comments to those made in this document can be found in the submission of OECD Watch which we endorse.

1. Stakeholder engagement

Meaningful stakeholder engagement is a key element of due diligence, being “an ongoing process of interaction and dialogue between a company and its potentially affected stakeholders that enables the company to hear, understand and respond to their interests and concerns, including through collaborative approaches.”²¹ Our experience in a large variety of cases concerning negative human rights impacts of German companies shows that stakeholder consultation, participation and adequate communication were largely missing, even in evident cases of severe human rights risks, and human rights risk analyses, if in place at all, were limited to desk research.

In this light we believe that meaningful stakeholder engagement is not sufficiently highlighted and specified in the draft Guidance and needs significantly more emphasis. We therefore suggest the following amendments:

- **Specific section on stakeholder consultation and communication:** Both the *Guidance* and *Companion* should include a specific section on stakeholder consultation including information on how to identify and engage with the right stakeholders, how to include and not endanger vulnerable groups, at what times stakeholder engagement is crucial, in the process but also prior to decisions being made over a project and what information needs to be disclosed and consulted on with stakeholders to ensure meaningful engagement.
- **Include stakeholder engagement in summary of Key actions:** Stakeholder consultation is crucial in order to identify and address RBC Risks. Therefore this should be part of the key actions to put a due diligence process in place. Under II A and II B the requirement of meaningful stakeholder engagement needs to be added.
- **Strengthen the wording in Part I No. 12:** The language in this passage on stakeholder engagement is too weak. Participation and consultation are not just helpful or advisable but absolutely crucial for effective due diligence. The wording should be amended accordingly. Additionally, the Guidance should stress the requirement that companies respect the right to Free Prior and Informed Consent (FPIC). Companies have to respect if indigenous peoples or other communities reject activities of a company in their territory.

2. Transparency:

The Guidance highlights the importance of communication about due diligence processes. Transparency on human rights risks and what the company is doing to address these is absolutely crucial for stakeholders to measure a company’s performance, for stakeholders to have the necessary information to meaningfully engage with the company but also for other business partners within the supply chain to behave responsibly. Unfortunately provisions on transparency and disclosure remain weak throughout the text referring to additional information in the OECD guidelines which is equally weak.

We therefore recommend:

- Transparency should be added as a Core Concept in Part I of the draft Guidance.
- The wording in Section II D should be strengthened, using shall instead of “can” or “is encouraged to” when speaking of disclosure requirements.
- Consideration for “business confidentiality and other competitive concerns” highlighted in several parts of the text should not be able to override the responsibility to disclose information necessary for the realization of human rights.

²¹ United Nations High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, p. 8

- Section II D should be a lot more specific on what the companies are requested to disclose. Disclosure of “general findings on risks” will not be sufficient for stakeholders to evaluate and engage with a company on due diligence processes. Reporting requirements under the OECD Minerals Supply Chain Due Diligence, the EU Directive on Nonfinancial Reporting and the UN Guiding Principles reporting framework go a lot further. For example, the OECD Minerals Guidance requires communication of risks identified in the supply chain and risk management plans, including risk mitigation, monitoring and involvement of affected stakeholders.²²

Therefore II D. C. 2 bullet point 3 should include:

- a company’s policy on human rights and how it is communicated internally and externally, operationalized throughout the enterprise and in relation to business relationships, monitored and evaluated, and whether and how objectives are met,
- disclosure of specific risks and specific prevention and remediation efforts, (including specific instances of abuse that the enterprise acknowledges and concerns consistently raised by affected people even if contested by the enterprise),
- engagement with and response from affected people and measures to remediate impacts and avoid recurrence,
- all risk assessments and audits conducted,
- investment and other agreements with governments, the terms of all relevant licences and permits,
- detailed supply chain information, including the names, addresses and contact details of supplier facilities and other business partners, subcontracted suppliers and labour agents managing home-working facilities.

3. Risk Identification and Assessment

The Guidance should be careful not to give the impression that companies must only consider severe risks and can ignore other risks. Both the OECD Guidelines and the UN Guiding Principles expect due diligence systems to be capable of identifying all risks to human rights²³ Focusing on severe or known risks can lead to companies ignoring other impacts that have been out of the radar but could also cause serious harms. The text should therefore clarify that, despite the possible need for prioritization, companies remain responsible for all of their risks and harms.

Furthermore the Guidance should stress that the identification and assessment of potential and actual impacts is a clear requirement of RBC. In the introduction to the key action in section II-A, the Guidance should underline that enterprises “shall” instead of “can” take these actions. Furthermore in the actions and explanations part, the Guidance should mention key principles of human rights impact assessments that are generally accepted: a) Human Rights and other RBC aspects should form the normative basis of the assessment; b) the assessment should pay particular attention to vulnerable groups or people in vulnerable situations; c) consultation of these vulnerable groups as well as human rights defenders and other relevant civil society organizations such as trade unions should be a key part of the assessment, d) the process, methods, findings as well as the resulting mitigation plan should be made transparent to affected people and the public.

²² Pages 52 and 53 (third edition)

²³ See also step 1 of the due diligence process under the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas

4. The concept of “linked to” / supply chain due diligence

The Guidance should be careful not to unduly limit the responsibility of companies directly linked to abuses. This is currently especially the case concerning the passages on remediation, which lift any responsibility to remediate from companies linked to human rights abuses. While companies should not be responsible for remediating every harm they are linked to, it should be made clear that a company that continuously fails to act with due diligence to identify and/or take credible measures to prevent or mitigate these harms while profiting from these should then also be responsible to remediate or collaborate in remediation. The Guidance should acknowledge more clearly that while a company can be only “directly linked” to begin with, the failure to react with appropriate due diligence measures can lead to the company contributing to abuses and increase the responsibility to mitigate and remediate.

CSR EUROPE

Lorena Sorrentino, EU Team Senior Project Manager:

I am writing you on behalf of [CSR Europe](#), the leading European business network for Corporate Social Responsibility. Through its network of around [45 corporate members](#) and [41 National CSR organisations](#), it gathers over 10,000 companies, and acts as a platform for those businesses looking to enhance sustainable growth and positively contribute to society.

Given our work and expertise in the field of responsible business conduct, and in particular in relation to sustainable supply chain and business and human rights, we welcome the public consultation that the OECD is conducting in relation to the Due Diligence Guidance for Responsible Business Conduct.

We would like to share with you our comments on the current draft text, which we hope you will find useful when finalizing the Guidance throughout 2017. Please see document attached.

We remain at your disposal for any questions you might have or clarification you might need on our input.

Thank you in advance for the consideration you will give to our email.

Kind regards,
Lorena Sorrentino

- The OECD Due Diligence Guidance on Responsible Business Conduct is a very comprehensive document that offers valuable guidance to companies.
- In order for businesses to have more impact and play a positive role in the economic, environmental and social progress, CSR Europe believes that companies should also be encouraged to work with their suppliers, **to build the sustainability capacity throughout** their value chains.
- It is most often at the local level, up in the supply chain, that issues arise. Suppliers, often removed from the political and legal spheres, are expected to perform and be evaluated on criteria of which they are not aware, do not know how to meet, or are unable to meet due to the socio-economic context they find themselves in.
- Companies have many forms of checks to verify supplier compliance to standards (self-assessments, audits, etc.) which are very good to detect issues (i.e. forced labor, human rights abuses etc.).

However, to solve the issues and achieve real impact on the ground, CSR Europe believes that capacity building of suppliers (or other actors up the supply chain) at local level is the key. Capacity building can range from different forms of training and awareness rising on sustainability topics to practical projects addressing specific local issues e.g. on improving farmer productivity. No matter the format, local capability building should always be tailored to the region, the legal context, the sector, the commodity, the raw material or to any other specific elements that influence sustainability.

- As a next step to capacity building, bringing together suppliers in **local sustainability networks** can bring about long-term impact in increasing supply chain sustainability. Networks at local level where suppliers can engage in continuous peer-to-peer learning to address issues specific to their context have the advantage of increased supplier buy-in and participation. This is a bottom-up approach as suppliers and actors on the upstream value chain should be encouraged to take ownership of such networks, shape it according to own needs and ultimately use it to increase their sustainability performance and their competitive advantage on the global market.
- The formation of these networks and assistance from the top-down (through knowledge sharing and educational sessions) should be facilitated by favorable policy measures that encourage and ease the organization of such initiatives.

DANISH INSTITUTE FOR HUMAN RIGHTS, THE NATIONAL COUNCIL OF HUMAN RIGHTS OF MOROCCO AND THE FRENCH COMMISSION ON HUMAN RIGHTS

From Elin Wrzoncki, Senior Adviser, Human Rights and Business, DIHR:

The Danish Institute for Human Rights (DIHR), the National Council of Human Rights of Morocco (Conseil national des droits de l'Homme – CNDH) and the French National Commission for Human Rights (Commission nationale consultative des droits de l'Homme- CNCDH France) are independent National Institutions for the Promotion and Protection of Human Rights (NHRIs) accredited with an A-status according to the Paris Principles. DIHR, CNDH and CNCDH welcome the opportunity to comment on the draft due diligence guidance for responsible business conduct elaborated by the OECD Investment Division.

General comment

In the introduction, it is stated that “businesses can play a major role in contributing to economic, environmental and social progress, *especially* when they minimize the adverse impacts of their operations...”. We would like to suggest that the word “especially” be deleted. Indeed, in the area of human rights, it is clearly established that a positive contribution to the realisation of human rights cannot compensate an adverse impact. This would be in line with the UN Guiding Principles on Business and Human Rights (UNGPs), as well the OECD Guidelines for Multinational Enterprises and the remainder of the Guidance and Companion.

Cause, contribute, linked to

Moving away from the sphere of influence concept, the UNGPs and the OECD Guidelines introduced a distinction based on the type of involvement of a business in an adverse impact: a business enterprise can cause an adverse impact; contribute to an adverse impact; or be directly linked to an adverse impact through its products, services or operations. The last category includes situations where there is no causality between the actions or omissions of the enterprise and the adverse impact. These categories, which are used throughout the draft Guidance and the Companion document, are indeed useful to assess potential and actual human rights impacts as well as determine what constitutes appropriate action.

However, as quickly underlined in the draft Companion document, “*the distinction between each of the*

three situations may not always be crystal clear”²⁴. Limited concrete, practical and authoritative guidance is available today to determine in which category an adverse impact will fall²⁵. As such, while we welcome OECD’s contribution to the subject, we are concerned that debates over how a business enterprise is connected to an adverse impact might over-shadow the key message that it needs to act in all instances.

In our experience, whether a business enterprise is contributing to an impact or is directly linked to an adverse impact is subject to interpretation, will depend on contextual elements, and can often be disputed. This is particularly the case with regard to adverse impacts occurring in the supply chain where it is often difficult to assess whether the enterprise has contributed through its actions or omissions to the adverse impacts or not. To address this concern we recommend that the Guidance makes clear that:

- There is a responsibility to act regardless of how the enterprise is connected to an impact.
- Analysing whether an enterprise is causing, contributing or directly linked to an adverse impacts should not be used to, or result in, a delay in addressing the situation.
- ‘Hiding’ behind the limitations of the definitions or investing resources in demonstrating that the enterprise is directly linked to an adverse impact, rather than causing or contributing to the impact, is not RBC. Rather, enterprises should think of three categories as a method that can help them design an adequate action plan, not to help them escape requirements.

We would also like to suggest to include examples in the Annex, to make it more user-friendly and usable for a business audience.

Finally, we would like to suggest that the role a business enterprise is expected to play in remediation of a human rights impact in a case it is being “directly linked to” an adverse human rights impact should be more open-ended. We welcome that emerging good practices in that regard are underlined in box 30 on “Options for playing a role in remediation with business relationship”²⁶, which could also include a mention of working towards prevention of further harm through guarantees of non-repetition which is also an important element of a remedy.

Assessing human rights impacts

Both the UNGPs and the OECD Guidelines proscribe that businesses need to conduct human rights due diligence, a process in which the assessment of human rights impacts is critical. None of these do require that specific **human rights impact assessments (HRIA)** be conducted. Emerging practice though seems to indicate that stand-alone HRIAs may be useful in certain contexts of heightened human rights risks²⁷. It is suggested that HRIAs be underlined as good practice of investigative approaches in part II.A: Identifying and assessing adverse RBC impacts. The guidance could also devote a longer section on this specific type of assessment.

We also recommend that the guidance or companion document should indicate **useful sources** for including external human rights expertise in order to both understand contextual factors that contribute to

²⁴ OECD (2016), Due Diligence Companion (Draft), p. 16.

²⁵ ² Examples include OHCHR (2012), The Corporate Responsibility To Respect Human Rights, An interpretative guide; OECD (2014), Scope and application of ‘business relationships’ in the financial sector under the OECD Guidelines for Multinational Enterprises.

²⁶ OECD (2016). Due Diligence Companion (Draft), p. 35.

²⁷ see DIHR (2016). HRIA guidance and toolbox, p. 20. Available at http://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/business/hria_toolbox/hria_guidance_and_toolbox_final_may22016.pdf_223795_1_1.pdf

RBC risks²⁸, identify impacts²⁹, as well as assess the severity of the adverse impacts³⁰. In that regard, National Human Rights Institutions are, amongst other human rights experts including non-governmental organisations, useful sources.

Engagement with stakeholders and more particularly with potentially affected rights-holders is a central element of a human rights based approach to assessing impacts and is a requirement under the Guiding principles. While meaningful stakeholder engagement is recognised on page 12 of the draft Guidance, it is in some parts of the draft Guidance framed as a ‘helpful option’ and not a firm requirement. We suggest to strengthen the importance of this element throughout the section II A and II B. For example, engaging with affected stakeholders is currently missing as a key action in section II-A.

Severity

The guidance and companion currently includes some confusing **messaging around severity**. Some places it is indicated prioritisation is crucial to identify severity³¹ and other places assessing severity is needed to prioritise³². In other instances, severity is used in combination with probability³³ and other places it is made clear that severe impacts should be prioritized even if they are unlikely³⁴. Applying severity to communication³⁵ is missing and materiality is used instead. This adds to the confusion as enterprises are indeed required by the UN Guiding Principles to report formally on their severe impacts, not material impacts. We suggest that the use of severity is reviewed and streamlined throughout both documents, that it is made clear that all impacts need addressing, severity being a prioritisation tool only and that a definition of severity is added to the Key Terms³⁶.

In assessing the **severity of adverse human rights impacts**, the guidance should further underline that vulnerability of those potentially affected by an adverse impact should be taken into consideration. Indeed, the same breach of the guidelines will affect different rights-holders in different ways. For example, children will be more at risk of experiencing an adverse impact on their right to health than adults in the case of air or water pollution. Marginalised members of the communities will be more at risk of experiencing rights abuses than more well-off individuals. This element is currently lacking in the assessment of severity in box 17³⁷.

Moreover, it is unclear whether the severity of adverse impacts on other RBC matters covered by the guidelines should be analysed through a similar lense, focused on the impact on the enjoyment of human

²⁸ OECD (2016). Due Diligence Companion (Draft), p. 11 (Box 9).

²⁹ Ibid, p. 12.

³⁰ Ibid, p. 20.

³¹ OECD (2016). Due Diligence Guidance for Responsible Business Conduct (Draft 2.1), p. 5.

³² Ibid, p. 20.

³³ Ibid, p. 10.

³⁴ Ibid, p. 20.

³⁵ Ibid, section II-D.

³⁶ Ibid, p. 3.

³⁷ OECD (2016). Due Diligence Companion (Draft), p. 20.

rights. It is recommended that further analysis pertaining to other areas of the guidelines, be conducted before publication of the guidance.

Transparency and communication, stakeholder engagement

We welcome that a specific section of the guidance (section V, due diligence: communicate) is devoted to the issue of disclosure. However, there is a need to ensure consistency throughout the draft Guidance and Companion about the need to disclose information relating to RBC, in particular with regard to human rights. We find the current stressing of materiality in connection to communication misleading, as enterprises need to be guided by risks to rights-holders and not the materiality or risks to the company. We recommend that severity is used to guide disclosure requirements, instead.

The right to freedom of expression which includes the right to seek information is enshrined in international human rights law³⁸ and is also a key principle of a human rights based approach. Moreover, participation or meaningful stakeholder engagement cannot happen without appropriate information being communicated. We welcome that this is recognised under the core concept 12 on meaningful stakeholder engagement³⁹. Nonetheless, we would like suggest to strengthen the recommendation on disclosure of human rights information, **clarifying that communicating on human rights impacts and due diligence is not optional**. Communicating and reporting on human rights due diligence including on human rights impacts is expected under the UN Guiding Principles⁴⁰. In its Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, the OECD recommends that companies “publicly report on their supply chain due diligence policies and practices”⁴¹. The Directive on disclosure of non-financial and diversity information (2014/95/EU) entered into force in December 2014 requires around European large companies to disclose relevant environmental and social information including on human rights. Increased transparency in supply chains has also been called for by the G7⁴².

Disclosing information on human rights impacts and due diligence may pose some challenges to businesses in sensitive environments, but those should be addressed on a case-by-case basis while making sure human rights reporting is meaningful. Business enterprises should be particularly mindful of the risks to rights-

holders and should take all necessary steps to avoid any such risks.

Human Rights Grievances – and grievance mechanisms

We welcome that a specific section is dedicated to the case of human rights grievances. It would be very useful for the draft to recall that **operational level grievance mechanisms are a complement to a functioning state-based remedy system**. And remind business enterprises that in all circumstances, they should cooperate with state-based judicial and non-judicial remedy mechanisms. While it is recalled in the box 33 that operational level grievance mechanisms should not be a prejudice to legal recourse, it would be useful to add a point on state-based judicial and non-judicial remedy in the section “complementing but not replacing other avenues”⁴³.

³⁸ ICCPR, Art. 19.

³⁹ OECD (2016). Due Diligence Guidance for Responsible Business Conduct (Draft 2.1), p. 12.

⁴⁰ OHCHR (2011). Guiding Principles on Human Rights and Business, Art. 21.

⁴¹ OECD (2013). OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, p. 19.

⁴² G7 Summit (2015). [Leaders’ Declaration](#), p. 5.

⁴³ OECD (2016). Due Diligence Companion (Draft), p. 38.

We further recommend that establishing or participating in **operational level grievance mechanisms is not framed as an option**⁴⁴, but rather a requirement, in line with the UNGPs⁴⁵ and that it is included as a Key Action⁴⁶.

Accessibility and relevance of the guidance to small and medium size enterprises

The field of RBC and business and human rights is blessed with an increasing amount of guidance and tools. While this can indeed be helpful to companies, it also runs the risk of creating confusion and watering out key messages. To ensure that OECD's forthcoming publications avoid such risks, we recommend that the following is considered:

- There are a lot of repetitions between the guidance and the companion and it is not clear why there are two documents.
- The documents need to create more certainty and clarity around key concepts and terms. Current inconsistencies and mixed messaging should be minimised.
- While it is made clear that the guidance can also be used by SMEs there is little explicit focus on the characteristics of these companies or suggestions of SME practice.
- While we welcome that human rights is given extra focus and is treated separately at different points, the Guidance is sometimes unclear on how human rights relate to the other RBC matters (for example for assessing severity).
- In general, with a large focus on implementation practices and procedural steps the Guidance is somewhat detached from the substance areas including human rights. To address this it is suggested that more substantive examples and cases relating to all RBC matters are given throughout the Guidance.

DEBEVOISE & PLIMPTON AND ENODO RIGHTS

Yousuf Aftab, Principal at enodo rights:

I write on behalf of Debevoise & Plimpton and Enodo Rights to submit our contribution to the OECD's public consultation on the Due Diligence Guidance for Responsible Business Conduct (Draft 2.1). We attach a cover letter from David W. Rivkin and a discussion paper on the practical meaning of cause, contribute, and directly linked under the OECD Guidelines for Multinational Enterprises and the Guiding Principles on Business and Human Rights.

We hope these materials prove helpful and look forward to continued engagement in the coming months.

Kind regards,

Yousuf

⁴⁴ OECD (2016). Due Diligence Guidance for Responsible Business Conduct (Draft 2.1), p.27.

⁴⁵ OHCHR (2011). Guiding Principles on Human Rights and Business, Guiding Principle 21.

⁴⁶ OECD (2016). Due Diligence Guidance for Responsible Business Conduct (Draft 2.1), p. 26.

Dear Mr. Gillard,

We write to contribute to the public consultation on the OECD Due Diligence Guidance for Responsible Business Conduct ("Draft Guidance"). In particular, we hope to assist the OECD in developing practical guidance on the meaning and implications of the terms *cause*, *contribute*, and *directly linked* under the *OECD Guidelines/or Multinational Enterprises* ("Guidelines") and the *Guiding Principles on Business and Human Rights* ("Guiding Principles").

To that end, we enclose a discussion draft of our paper, "Practical Definitions of Cause, Contribute, and Directly Linked to Inform Business Respect for Human Rights." This draft is an updated version of the paper we shared with you and other business and human rights experts in October 2016. We have since refined the paper based on our civil society and business engagement over the past few months—a process which we intend to continue in the coming months.

We were delighted to see that our prior version informed the structure of the Annex to the Draft Guidance and the definitions of *cause* and *contribute*, and we hope that our updated paper proves similarly helpful. Our paper does not comment specifically on the Draft Guidance, save for requesting more detail on the meaning of *omission*, which we believe is a pressing due diligence concern for businesses and stakeholders alike. Nonetheless, we consider in detail several issues that we believe would benefit from more clarity as the Draft Guidance is revised, including:

The difference between the prospective and retrospective definitions of *cause* and *contribute*. As detailed in our paper, the practical due diligence challenge with these terms is determining when, in fact, an act or omission "results in" an adverse impact. Needless to say, we support the risk-focused prospective definitions of *cause* and *contribute* in the Draft Guidance. We have difficulty following, however, why the same definitions do not apply retrospectively.

The meaning of *directly linked*. The Annex does not offer much practical guidance regarding how and when businesses are—and, as importantly, are *not-directly linked* to adverse impacts. While we recognize that the term is complex and expansive, we believe that more precision regarding its scope is needed to help

businesses design and implement properly structured human rights due diligence programs. In particular, we would encourage the OECD to consider two questions regarding *linked* and *directly*, respectively. First, what is the nature of the relevant link? Second, what would make the link direct? The answers to these two questions will be invaluable in promoting voluntary business respect for human rights.

The limits of involvement. The Draft Guidance provides several helpful illustrations of business *causing*, *contributing*, or being *directly linked* to adverse impacts. While such examples are essential, we believe a practical understanding of what these terms mean depends equally on illustrating when businesses are *not* involved with adverse impacts. Building on our definitions, we have thus developed practical tests of involvement, which we demonstrate with case studies showing when businesses are and are not involved specific human rights impacts.

We have addressed these and other issues in some detail with our proposed definitions, practical examples, and broad-based analysis in the enclosed discussion paper. We look forward to engaging with you and other stakeholders from business, government, and civil society in the coming months to help further a shared and practical understanding of business

respect for human rights.

/Sincerely,

David W. Rivkin
Partner, Debevoise & Plimpton
Immediate Past President, International Bar Association

Practical Definitions of Cause, Contribute, and Directly Linked to Inform Business Respect for Human Rights

Discussion Draft prepared by the Debevoise Business Integrity Group in collaboration with Enodo Rights

TABLE OF CONTENTS

EXECUTIVE SUMMARY

- I. Structure
- II. Method
 - A. Note on Omissions
- III. Key Findings
- IV. Cause and Contribute
 - A. Interpretation
 - B. Definitions
 - C. Practical Application
 - D. Case Studies: Cause and Contribute
- V. Directly Linked
 - A. Interpretation
 - B. Definition
 - C. Practical Application
 - D. Case Studies: Directly Linked

ANNEX: DETAILED ANALYSIS 2

- I. Objectives
- II. Interpretive Approach
- III. Cause and Contribute
 - A. Key Cause and Contribute Provisions
 - B. Ordinary Meaning
 - C. Meaning in Light of Guidance's Object and Purpose
 - D. Note on Knowledge and Foreseeability
 - E. Definitions
- IV. Directly Linked
 - A. Key Directly Linked Provisions
 - B. Ordinary Meaning
 - C. Meaning in Light of Guidance's Object and Purpose
 - D. Vicarious Liability
 - E. Definition

EXECUTIVE SUMMARY

This discussion paper advances concrete and practical definitions of the involvement terms—*cause*, *contribute*, and *directly linked*—under the OECD Guidelines for Multinational Enterprises (“Guidelines”) and the UN Guiding Principles on Business and Human Rights (“Guiding

Principles”) (together, “Guidance”). The Guidance sets forth non-binding principles and standards that are not designed to create or define legal liability for businesses.⁴⁷ The Guidance provides an authoritative and comprehensive voluntary framework for businesses to respect human rights.

The involvement terms are critical parameters of this framework: they shape the expected scope of due diligence and remedy under the Guidance. In particular, companies that *cause* an adverse human rights impact are expected to cease, prevent, and remedy the impact. Companies that *contribute* to an adverse human rights impact are expected to cease, prevent, and remedy the impact to the extent of their contribution. In such cases, companies should also use or seek leverage to mitigate any remaining adverse impact. Unlike *cause* and *contribute*, however, *directly linked* involvement does not bring any expectation of remedy; companies *directly linked* to adverse human rights impacts are expected only to use or seek leverage to mitigate the adverse impact. As a result, adherence to these parameters implicates serious reputational risks for companies across sectors. Increasingly, these same parameters indirectly affect significant legal and financial business risk. A precise and shared understanding of the involvement terms is therefore essential to bring certainty to businesses and stakeholders alike regarding the scope of voluntary corporate commitments to respect human rights.

In the past few years, the practical implications of the involvement terms have been explored by authoritative institutions, including the OECD and the UN Office of the High Commissioner for Human Rights (OHCHR). But the focus thus far has been on examples to illustrate how business may be involved in adverse human rights impacts.⁴⁸ The logic uniting and distinguishing those examples remains largely unexplored. And, to the extent definitions have been suggested, the reasoning underlying them has not been disclosed.⁴⁹ The result is uncertainty regarding how businesses should structure human rights due diligence and when they should engage in remediation, increasing the risk to businesses for failing to align their activities with the Guidance. We seek to address that uncertainty.

Building on the Guidance and authoritative commentary, this discussion paper suggests definitions that enable businesses practically to anticipate when they are, or might be, involved with a particular adverse human rights impact. We illustrate the implications of these definitions with case studies to demonstrate how any company can differentiate between *cause*, *contribute*, and *directly linked* involvement. Crucially, the definitions and case studies not only suggest when a business is actually or potentially involved in adverse human rights impacts, but also when businesses are *not* involved with adverse impacts, so they can tailor their due diligence appropriately. We have devised practical definitions with a view to making them precise enough

⁴⁷ GUIDELINES at 3 (“The *OECD Guidelines for Multinational Enterprises* are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. The *Guidelines* are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting.”).

⁴⁸ See, e.g., U.N. Office of the High Comm’r for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* 18 (2012), http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf [hereinafter *Interpretive Guide*]; OECD, *Guidelines for Multinational Enterprises* 32 (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf> [hereinafter *Guidelines*].

⁴⁹ OECD, *Due Diligence Guidance for Responsible Business Conduct (Draft 2.1)* (2016), <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-Responsible-Business-Conduct.pdf> [hereinafter *Draft Due Diligence Guidance*].

to enable constructive stakeholder engagement and program development, while still flexible enough to be used in diverse business contexts.

I. Structure

This Executive Summary provides a high-level overview of our reasoning, results, and practical implications. Our definitions, analysis, and case studies in this draft are for discussion purposes only. We do not here take any definitive positions on the issues raised in this paper. Rather, we aim to participate in a considered discussion of the involvement terms, which we hope will assist in resolving issues of concern to all those interested in the discipline of business and human rights.

The analysis behind our proposed definitions of *cause*, *contribute*, and *directly linked* is largely set forth in the Annex. We welcome questions and encourage all interested stakeholders to assess and critique the reasoning underlying our definitions in the Annex.

II. Method

We began this research in May 2016 to assist in crafting the OECD's Due Diligence Guidance for Responsible Business Conduct ("Draft Due Diligence Guidance"). The process has involved extensive review and analysis of guidance from the OECD Secretariat, National Contact Points, and the OHCHR, as well as from relevant legal and social science sources. Since October 2016, we have also shared drafts and engaged with leading business and human rights experts from civil society and the private sector to refine our reasoning.

We hope to engage with businesses and stakeholders over the next few months on the issues raised in this discussion draft. To that end, the manner of interpreting the involvement terms is as important as their definitions. Our approach is grounded in the interpretive framework of the Guidance itself. Our aspiration is neither to ossify the Guidance, nor to transform it into a mechanical, check-the-box exercise.

Nonetheless, we seek to address our concern that leaving the involvement terms undefined invites arbitrary or quixotic interpretation, which risks compromising the legitimacy and credibility of business and human rights as a discipline. An effective definition should allow objective observers to determine when a company is involved with an adverse impact, and, just as importantly, when it is not. Our analysis proceeds in two stages: *first*, we consider the ordinary meaning of *cause*, *contribute*, and *directly linked*, including in the context of the natural and social sciences, and analogous legal contexts, particularly with respect to civil injuries and human rights abuses; and *second*, we consider the meaning of the involvement terms with reference to the context and object and purpose of the Guidance itself.

This approach leads us to definitions of each of the involvement terms specifically linked to the Guidance, which we have tested for consistency with decisions of OECD National Contact Points and prior interpretive guides released by authoritative institutions. Finally, we demonstrate how our proposed definitions might work in practice, with practical tests of involvement illustrated with representative case studies.

A. Note on Omissions

While it is beyond the scope of this paper, one issue that warrants careful study is the meaning of *omission*. Under the Guidance, businesses may be involved in human rights impacts through actions or *omissions*, but the term is undefined.⁵⁰ The OECD has recently proposed a definition in the Draft Due Diligence Guidance, but it appears to foster uncertainty by leaving material questions unanswered:

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*.⁵¹

The proposed definition raises two practical challenges: overbreadth and circularity. The risk of overbreadth flows from the reference to “action ... necessary to prevent or mitigate” an impact. If *any* failure to act when one has the power to “prevent or mitigate” an adverse impact could constitute involvement in that impact, leverage would determine business responsibility for human rights: a powerful company would by virtue of influence alone be in a position to curb, or attempt to curb, abuses by the state where it operates—no matter their relationship to the business’s products, operations, or services. We do not believe that is the intent of the Guidance. As John Ruggie has noted regarding the limits of business responsibility:

[C]ompanies cannot be held responsible for the human rights impacts of every entity over which they may have some influence, because this would include cases in which they were not a causal agent, direct or indirect, of the harm in question. Nor is it desirable to have companies act whenever they have influence, particularly over governments. ***Asking companies to support human rights voluntarily where they have influence is one thing; but attributing responsibility to them on that basis alone is quite another.***⁵²

The related circularity challenge arises from the fact that if involvement in the proposed definition depends on the scope of due diligence a business conducts, a critical component of due diligence guidance becomes circular: a company is expected to conduct due diligence on adverse human rights impacts with which it is involved; a company is involved with adverse human rights impacts

⁵⁰ Guiding Principles, Commentary to Guiding Principle 13 at 15.

⁵¹ OECD, Due Diligence Guidance for Responsible Business Conduct (Draft 2.1) 28 (2016), <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-Responsible-Business-Conduct.pdf> [hereinafter Draft Due Diligence Guidance].

⁵² Protect, Respect And Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, H.R.C., 8th Session, at ¶ 69, U.N. Doc. [A/HRC/8/5](#) (2008)(emphasis added).

on which it fails to conduct due diligence. Such a definition would preclude a company from ever conducting due diligence of sufficient scope and rigor to align with the Guidance, for an integral component of appropriate due diligence would be to consider impacts on which due diligence had *not* been conducted.

These challenges are serious, practical, and immediate. The proposed definition leaves an essential component of the practical scope of expected due diligence unsettled—without a definition of *omission* that is prior to, and independent of, the scope of due diligence, we are unable to tell exactly what “due diligence ... would have shown” if conducted appropriately. We would thus encourage the OECD to develop more concrete guidance regarding when businesses have a duty to act to prevent or mitigate adverse human rights impacts, so that they may tailor their due diligence accordingly.

III. Key Findings

Our broad-based research and analysis suggests that none of the involvement terms is as clear as many presume. Even *cause*, the term considered most obvious, has been subject to extensive debate in the natural sciences, social sciences, and the law. In each discipline, experts have found that it is often impossible to say definitively that a particular event results from a particular act or omission. The consensus is thus that *impact on the probability* of an event should determine whether an act or omission is the event’s *cause*—both prospectively and retroactively. In practice, *contribution* becomes much harder to separate out from *cause*, as both fundamentally bear on risk. The analytical challenge is even more difficult with *directly linked*, which has no clear antecedents in the disciplines we considered. To understand *directly linked*, we therefore rely on the structure and objectives of the Guidance, drawing on the analogous legal concept of vicarious liability to understand the term’s proper scope.

The following observations animate our definitions:

1. Rather than falling on a continuum, the involvement terms are better understood as founded on two distinct bases: risk and benefit. *Cause* and *contribute* involvement turn on a company’s effect on the risk of an impact. *Directly linked* involvement turns on the benefit a company derives from an adverse human rights impact.
2. From the perspective of the Guidance, knowledge and foreseeability are not implicated in the question of whether a company is involved with an adverse human rights impact. Because the Guidance does not create liability directly, fault in any legal sense does not come into play. A business may be involved with an adverse impact even if no one could have foreseen that impact. Conversely, a business may not be involved with an impact even if it knows of, or ought to have known of, the impact.
3. Remoteness is crucial to delineating the scope of business responsibility to respect human rights. There is a distinction between increasing the probability of legitimate business activity *A* and increasing the risk of adverse human rights impact *x* flowing from *A*. If *A* could reasonably have been performed without *causing* or *contributing* to *x*, a third party that facilitates *A* does not necessarily *cause* or *contribute* to *x*.

IV. Cause and Contribute

A. INTERPRETATION

Cause and *contribute* ordinarily mean, respectively, “to make happen or bring about” and “to help make happen or bring about.” In the context of business impacts on human rights, the difficulty lies in practically making such determinations. Questions of causal complexity are commonplace when considering responsibility for adverse human rights impacts. For instance, when three companies simultaneously pollute a community’s water supply, it may be very difficult—even impossible—to determine as a matter of fact whether any one of them brought about—or even helped to bring about—the adverse impact on any individual’s right to health. Similarly, when a factory fire leads to the death of workers, it is very difficult to parse as a factual matter whether government failures, auditor negligence, factory-owner indifference, or inadequate monitoring by the purchaser brought about the adverse impacts on workers’ rights.

The challenge for a practical definition of *cause* and *contribute* is to enable businesses and stakeholders to determine when a business act or omission can be deemed to bring about a particular impact against a backdrop of factual uncertainty. Such a definition should be consonant with the object and purpose of the Guidance, which is voluntary and remedial rather than binding and punitive. The Guidance does not create or define liability for business enterprises. Rather, it seeks practically and voluntarily to “promote positive contributions by enterprises to economic, environmental and social progress worldwide.”⁵³ The definition of *cause* and *contribute* should advance these ends by encouraging businesses voluntarily to engage in human rights due diligence, which is at the heart of the Guidance.

B. DEFINITIONS

Based on our analysis of the ordinary meaning of the terms in the context of the Guidance, we propose the following definitions of *cause* and *contribute*:

- A business **causes** an adverse human rights impact when its activities (including omissions) materially increase the risk of the specific impact which occurred *and* would be sufficient, in and of themselves, to result in that impact.
- A business **contributes to** an adverse human rights impact when its activities (including omissions) materially increase the risk of the specific impact which occurred *even if* they would not be sufficient, in and of themselves, to result in that impact.

These definitions can also be used on a prospective basis, by replacing “which occurred” with “which may occur.” Thus, for instance, a business **potentially causes** an adverse human rights impact when its activities (including omissions) materially increase the risk of a specific impact which may occur *and* would be sufficient, in and of themselves, to result in that impact.

⁵³ Guidelines at 3.

C. PRACTICAL APPLICATION

The implication of our definitions of *cause* and *contribute* is that, in conducting practical human rights due diligence, a business should consider the effect of its activities on the risk of a particular adverse impact. The business ought not seek scientific precision—in many cases illusory—regarding whether the adverse impact has resulted or will result from its activity.

The three-stage inquiry for impact or risk assessment would be:

1. Is there an actual or potential adverse human rights impact?
2. If so, do the company's activities (including omissions) materially increase the risk of that impact?
3. If so, would the company's activities (including omissions) in and of themselves be sufficient to result in that impact?

If the answer to all three questions is “yes,” then the business causes, or may cause, an adverse human rights impact and is expected to take appropriate measures to cease, prevent, and remedy the impact. If the answer to the first two questions is “yes” and the answer to the third is “no,” the business is contributing, or may contribute, to an adverse impact and should take appropriate measures to cease, prevent, and remedy its contribution; it should also exercise its leverage to mitigate any remaining impact to the greatest extent possible.⁵⁴

D. CASE STUDIES: CAUSE AND CONTRIBUTE

The case studies below serve a narrow end: to illustrate the practical meaning of our preliminary definitions of *cause* and *contribute*—for discussion purposes alone. The rights articulated in the following examples draw on the rights referenced in the Guidance and are not intended to be discussions of the status of such rights under national or international law. In light of the continuing discussion of the definition of *omission*, we also assume no relevant omissions in the examples below.

Example 1: A European apparel manufacturer's wholly owned foreign subsidiary posts notices in the workplace threatening retaliation against workers who join a union.

- i. *Is this an actual or potential adverse human rights impact?*
 - Yes, the threat “removes or reduces”⁵⁵ the ability of individuals to enjoy freedom of association and right to collective bargaining. The threat of retaliation constitutes the adverse impact.
- ii. *Do the manufacturer's activities materially increase the risk of this adverse impact?*
 - Yes, under the Guidelines, the foreign subsidiary is considered part of the

⁵⁴ Guidelines at 24.

⁵⁵ Interpretive Guide at 15.

“multinational enterprise,”⁵⁶ such that its conduct in issuing the threat is attributable to the manufacturer.

iii. *Are the manufacturer’s activities sufficient to result in the adverse impact?*

- Yes, the threat of retaliation constitutes the adverse impact.

Recommendation: The company is causing an adverse impact on human rights and is expected to cease, prevent, and remedy the impact.

Example 2: To ensure prompt delivery of its order, a major European apparel manufacturer encourages a supplier who has been facing labor-relations issues at one of its factories to threaten retaliation against all workers who are members of a union. The supplier follows the suggestion.

i. *Is this an actual or potential adverse human rights impact?*

- Yes, the threat removes or reduces the ability of individuals to enjoy freedom of association and the right to collective bargaining.⁵⁷ The threat of retaliation constitutes the adverse impact.

ii. *Do the manufacturer’s activities materially increase the risk of this adverse impact?*

- Yes, the encouragement coming from a major manufacturer materially increases the risk that the supplier will issue the threat.

iii. *Are the manufacturer’s activities sufficient to result in the adverse impact?*

- No, the encouragement alone would not result in any abridgement of workers’ rights. Ultimately, the supplier would need to act on that encouragement.

Recommendation: The company is contributing to an adverse impact on human rights and is expected to cease, prevent, and remedy the impact(s) to the extent of its contribution; it is also expected to exercise its leverage over the supplier to mitigate any remaining impact.

Example 3: A multinational bank lends to a food and beverage company to build a factory in an emerging economy. The company retains forced labor in building the facility.

i. *Is this an actual or potential adverse human rights impact?*

- Yes, forced labor adversely impacts, among others, the right to liberty, the right to be free from slavery or servitude, and the right to be free from inhuman or degrading treatment.

ii. *Do the bank’s activities materially increase the risk of this adverse impact?*

- No, the loan itself does not increase the risk of this specific impact. The loan may have materially increased the likelihood that the facility would be built. But that does not mean that the loan affected the risk that the facility would be built with forced labor.

Recommendation: The bank is not causing or contributing to an adverse impact. As discussed in the next section, however, it may nonetheless be directly linked to the adverse impact, in

⁵⁶ Guidelines at 12.

⁵⁷ Interpretive Guide at 15.

which case it should exercise its leverage over the company to mitigate the impact.

Example 4: A pharmaceutical company markets an over-the-counter painkiller by making misleading claims about its health benefits.

- i. *Is this an actual or potential adverse human rights impact?*
 - Yes, the misleading claims about the drug's effects adversely affect, among others, the right to health—specifically, an individual's right to make informed choices about his or her health.
- ii. *Do the company's activities materially increase the risk of this adverse impact?*
 - Yes, by making misleading claims, the company materially increases the risk that consumers will make health decisions based on false information.
- iii. *Are the company's activities sufficient to result in the adverse impact?*
 - Yes, the making of misleading claims is sufficient to result in consumers making poorly or falsely informed decisions regarding their health.

Recommendation: The company is causing an adverse impact. It should cease, prevent, and remedy the impact.

Example 5: A pharmaceutical company distributes an over-the-counter painkiller to pharmacies with clear, accurate, and detailed information about the benefits and adverse effects of the product. One of the pharmacies repackages the drug in smaller quantities, without sharing any of the relevant health information, to sell to socioeconomically disadvantaged consumers.

- i. *Is this an actual or potential adverse human rights impact?*
 - Yes, the failure to inform consumers about the drug's effects adversely affects, among others, the right to health—specifically, an individual's right to make informed choices about his or her health.
- ii. *Do the company's activities materially increase the risk of this adverse impact?*
 - No, the pharmaceutical company's activities only materially increased the likelihood that consumers would have access to the drug. There was nothing in the manner of distribution that necessarily increased the risk that consumers would not be properly informed about the drug's effects.

Recommendation: The company is not causing or contributing to this adverse impact. As discussed in the next section, however, it may be directly linked to the adverse impact, in which case it should exercise its leverage over the pharmacy to mitigate the impact.

Example 6: An oil and gas company begins development of a project in a relatively peaceful and well-governed region. The project results in significant in-migration. As the population of the surrounding areas doubles, violent crime skyrockets and public forces are unable to protect the security of the most vulnerable inhabitants, particularly women and children.

- i. *Is this an actual or potential adverse human rights impact?*
 - Yes, the failure to protect individuals from violent crime adversely impacts, among others, the right to security of the person.

ii. *Do the company's activities materially increase the risk of this adverse impact?*

- No, by building the project, the company only materially increased the likelihood of in- migration. But that does not mean that the company materially increased the risk of security failures. Given the operating context, in-migration was not necessarily or strongly correlated⁵⁸ with security failures. The project's development is too remote from the impact to be considered as bearing on the specific risk.

Recommendation: The company is not causing or contributing to this adverse impact. (As discussed below, depending on its arrangement with the government, the company may nonetheless be directly linked to these adverse impacts.)

Example 7: An oil and gas company begins development of a project in a post-conflict region where ethnic tension is high and violence is endemic. The project results in significant in-migration. As the population of the surrounding areas doubles, violent crime skyrockets and public forces are unable to protect the security of the most vulnerable inhabitants, particularly women and children.

i. *Is this an actual or potential adverse human rights impact?*

- Yes, the failure to protect individuals from violent crime adversely impacts, among others, the right to security of the person.

ii. *Do the company's activities materially increase the risk of this adverse impact?*

- Yes, by developing the project, the company materially increased the likelihood of in- migration. Given the operating context, significant in-migration was necessarily and strongly correlated with violent crime and security failures. Thus, in increasing the likelihood of in-migration, the project itself materially increased the risk of these specific adverse human rights impacts.

iii. *Are the company's activities sufficient to result in the adverse impact?*

- No, project development alone is not sufficient to result in violent crime or the failure of security forces to protect individuals.

Recommendation: The company is contributing to an adverse impact on human rights and is expected to cease, prevent, and remedy the impact(s) to the extent of its contribution; it is also expected to exercise its leverage over the government and others to mitigate any remaining impact.

⁵⁸ Correlation is distinct from foreseeability. As a factual matter, an unforeseeable event may still be the inevitable consequence of a particular action. Mesothelioma, for instance, was necessarily and strongly correlated with asbestos exposure arguably before the disease was the foreseeable result of asbestos exposure.

V. *Directly Linked*

A. INTERPRETATION

Directly linked is rather more complex than the other involvement terms. As with *cause* and *contribute*, *directly linked* involvement does not create or define liability for business enterprises. Unlike *cause* and *contribute*, *directly linked* involvement does not bring any expectation of remedy, which suggests attenuated risk creation or a different type of involvement altogether. We have found no identically phrased precedent in the social sciences or law to ground a definition of the term.

Considering the terms *directly* and *linked* separately suggests that the ordinary meaning of *directly linked* is “a connection formed, or a bond created, without intervention.” The challenge under the Guidance has two prongs in this context: (i) to identify what type of connection or bond is relevant; and (ii) to identify what would constitute intervention so as to break the bond.

The challenge is complicated by the definition of *business relationship*, which is both integral to *directly linked* involvement and turns on the same term: “‘Business relationships’ include relationships with business partners, entities in its supply chain, and any other non-State or State entity **directly linked** to its business operations, products or services.”¹³ The recursive structure of *directly linked* under the Guidance raises two questions about *linked* and *directly*, respectively:

1. What kind of non-causal connection could equally explain (i) the relationship between a business and a state or non-state entity and (ii) the relationship between a business and an adverse human rights impact?
2. What kind of non-causal connection could pass through intermediaries while remaining direct?

The Guidance itself and authoritative commentary do not expressly answer either of these questions. But the remedial objectives and overarching structure of the Guidance provide a path to the answer.

B. DEFINITION

Based on our analysis of the ordinary meaning of the term in the context of the Guidance—with specific reference to the analogous concept of vicarious liability—we propose the following definition of *directly linked*:

- A business is **directly linked to** an adverse human rights impact when it has established a relationship for mutual commercial benefit with a state or non-state entity, and, in performing

¹³ Guidelines at 33 (emphasis added).

activities within the scope of that relationship, the state or non-state entity materially increases the risk of the impact which occurred.

The cornerstone of this definition is *for mutual commercial benefit*. The *link* underpinning a business's responsibility to conduct due diligence and seek leverage to avoid or mitigate an adverse human rights impact, even when it has not *contributed* to it, is the benefit the business derives from the adverse impact. *Directly* then conditions the type of benefit provided and received through the value chain rather than the number of intermediaries through which it passes. *For mutual ... benefit* is essential to avoid capturing “extremely loosely connected associations,”¹⁴ such as might extend, for instance, from infrastructure projects to all who rely on them. That is, for a *business relationship* to exist, there must be a mutual, albeit general, intention between the businesses to benefit one another's operations, products, or services. Lastly, *commercial* is essential to avoid capturing the activities of a state acting in a public capacity (as opposed to when it is conferring a private benefit).

C. PRACTICAL APPLICATION

The three-stage inquiry for impact or risk assessment would be:

1. Does the business have a relationship for mutual commercial benefit with the state or non- state entity?
2. Does the benefit provided by the state or non-state entity retain consistent form as it is transmitted to the company's products, operations, or services?
3. When acting to provide the benefit that is the object of the relationship, did the state or non- state entity materially increase the risk of the adverse human rights impact which occurred or may occur?

If (and only if) the answer to all three questions is “yes,” the business is directly linked to the adverse impact and is expected to exercise or seek leverage to prevent or mitigate the impact to the extent possible.

D. CASE STUDIES: DIRECTLY LINKED

The case studies below serve a narrow end: to illustrate the practical meaning of our preliminary definitions of *directly linked*—for discussion purposes alone. The articulation of rights in the following examples draw on the rights referenced in the Guidance and are not intended to be discussions of the status of such rights under national or international law. In light of the continuing discussion of the definition of *omission*, we also assume no relevant omissions in the examples below.

¹⁴ OECD, Due Diligence in the Financial Sector: Adverse Impacts Directly Linked to Financial Sector Operations, Products or Services by a Business Relationship 11 (2014), <https://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-1.pdf> [hereinafter Due Diligence in the Financial Sector].

Example 1: A pension fund invests through an asset manager in a multinational steel producer; the steel producer is involved in a joint venture which causes or contributes to land rights violations. *[NB: This fact-pattern closely tracks the allegations in Lok Shakti Abhiyan et. al. vs POSCO, ABP/APG and NBIM⁵⁹, which was considered by the Norwegian National Contact Point (NCP) and decided in 2013. We assume, for illustrative purposes alone, that there was in fact an adverse human rights impact in the circumstances; no such determination was made by the NCP.]*

- i. *Does the pension fund have a relationship for mutual commercial benefit with the joint venture?*
 - Yes, the pension fund's commercial interest is a return on its investment; in exchange, the joint venture receives the direct and indirect benefits of increased steel producer share price.
- ii. *Does the benefit provided by the joint venture retain consistent form as it is transmitted to the pension fund's products, operations, or services?*
 - Yes, the benefit is monetary, i.e., profit. This benefit is transmitted as financial returns via the steel producer and the asset manager to the pension fund.
- iii. *When acting within the scope of the mutually beneficial relationship, did the joint venture materially increase the risk of an adverse human rights impact?*
 - Yes, the entirety of the joint venture's operations may be considered as directed to the end of profit, the very benefit sought by the pension fund; the joint venture's adverse impact on land rights thus occurred within the scope of the relationship.

Recommendation: The pension fund is directly linked to the joint venture's adverse impacts on land rights. It should use or seek leverage to mitigate the construction company's adverse impact.

Example 2: A pension fund invests through an asset manager in an industrial products company. The industrial products company retains a construction company that relies on forced labor.

- i. *Does the pension fund have a relationship for mutual commercial benefit with the construction company?*
 - Yes, the pension fund's commercial interest is a return on its investment in the industrial products company. The construction company's provision of infrastructure to the industrial products company advances this interest. Similarly, the pension fund's financial benefits to the industrial products company flow to the construction company in the form of ability to pay or possible future demand.
- ii. *Does the benefit provided by the construction company retain consistent form as it is transmitted to the pension fund's products, operations, or services?*

⁵⁹ Lok Shakti Abhiyan et. al. vs POSCO, ABP/APG and NBIM, Final Statement of Norwegian National Contact Point (May 27, 2013), http://www.oecdwatch.org/cases/Case_262.

- No, the benefit provided by the construction company is of goods and services to the industrial products company. To the extent a benefit accrues to the pension fund's products, operations, or services, it is monetary. Such a benefit is, at most, indirectly tied to the original benefit provided by the construction company.

Recommendation: The pension fund is not directly linked to the construction company's use of forced labor. (*Note:* This conclusion would change if the industrial products company's activities had materially increased the risk that the construction company would use forced labor.)

Example 3: A mining company enters into a concession agreement with the Ministry of Mines under which the government agency will lay down railway tracks for minerals to be transported to the nearest port. Under the direction of the Ministry of Mines, when building the railway, public security forces arbitrarily arrest and detain without charge protestors who objected to the railway's path.

- i. *Does the mining company have a relationship for mutual commercial benefit with the government agency?*
 - Yes, the mining company's commercial interest is the development and commercialization of the mine, which the railway facilitates; the Ministry of Mines benefits through the revenues conferred by the mine's development and commercialization.
- ii. *Does the benefit provided by the Ministry of Mines retain consistent form as it is transmitted to the mining company's products, operations, or services?*
 - Yes, the government's development of the railway is a good that benefits the mining company's operations by facilitating transport. This benefit is delivered as-is to the mining company.
- iii. *When acting within the scope of the mutually beneficial relationship, did the Ministry of Mines materially increase the risk of an adverse human rights impact?*
 - Yes, the use of security to forge and protect the railway's path is one of the activities incidental to the development of the railway. The act of the public security forces constitutes a violation of, among others, the right to liberty and security of the person, and the right to be free from arbitrary arrest and detention.

Recommendation: The mining company is directly linked to the public security forces' violations of human rights. It should use or seek leverage to mitigate the security forces' adverse impact.

Example 4: A mining company enters into a concession agreement with the Ministry of Mines to develop a mine in Province Q. Independently of this arrangement, the Ministry of Infrastructure builds a dam in neighboring Province Y. The dam will provide electricity throughout the country, including to the area around the proposed mine. The Ministry of Infrastructure does not consult with affected indigenous groups before rerouting the water sources on which they rely.

- i. *Does the mining company have a relationship for mutual commercial benefit with the Ministry of Infrastructure?*
 - No, the mining company's commercial interest is the development and commercialization of the mine. The Ministry of Infrastructure's project is in its non-commercial capacity, to provide a public benefit, not to provide a commercial benefit to the mine specifically or the mining industry in general.

Recommendation: The mining company is not directly linked to the Ministry of Infrastructure's failure to seek free, prior, and informed consent.

Example 5: A venture capital firm takes a minority stake in a mining company that has entered into a concession agreement with the Ministry of Mines under which the government agency will lay down railway tracks for minerals to be transported to the nearest port. Under the direction of the Ministry of Mines, when the railway is being built, public security forces arbitrarily arrest and detain without charge protestors who objected to the railway's path.

- i. *Does the venture capital firm have a relationship for mutual commercial benefit with the Ministry of Mines?*
 - Yes, the venture capital firm's interest is a return on its investment in the mining company, which the railway construction facilitates; the Ministry of Mines benefits through the infusion of capital into the mining company, to enable the mine's development.
- ii. *Does the benefit provided by the Ministry of Mines retain consistent form as it is transmitted to the venture capital firm's products, operations, or services?*
 - No, the development of the railway is a good that benefits the mining company's operations by facilitating transport; the benefit received by the venture capital firm from the mining company is monetary. The railway construction thus only indirectly benefits the venture capital firm.

Recommendation: The venture capital firm is not directly linked to the public security forces' human rights abuses.

Example 6: A food and beverage company sources its cocoa through a broker who in turn relies on a local cocoa distributor who purchases the cocoa from thousands of small-holder farms. One of those farms relies on child labor for cocoa farming.

- i. *Does the food and beverage company have a relationship for mutual commercial benefit with the farm that relies on child labor?*
 - Yes, the food and beverage company's interest is obtaining cocoa for its products, which the farmer provides; the farmer receives financial remuneration from the food and beverage company, albeit via the distributor.

- ii. *Does the benefit provided by the farmer retain consistent form as it is transmitted to the food and beverage company's products, operations, or services?*
 - Yes, the benefit provided by the farmer is a good, cocoa, which feeds into the food and beverage company's products.
- iii. *When acting within the scope of the mutually beneficial relationship, did the farmer materially increase the risk of an adverse human rights impact?*
 - Yes, the farmer relied on child labor in providing the cocoa, the very purpose of the relationship.

Recommendation: The food and beverage company is directly linked to the farmer's adverse impact on human rights. It should use or seek leverage to mitigate the adverse impact.

Example 7: A food and beverage company sources its cocoa through a broker who, in turn, relies on a local cocoa distributor. The cocoa distributor retains a construction company to build a warehouse to store the cocoa. The construction company relies on trafficked labor to complete the project.

- i. *Does the food and beverage company have a relationship for mutual commercial benefit with the construction company?*
 - Yes, the food and beverage company's interest is obtaining cocoa for its products, which the construction company helps to preserve; the construction company receives financial remuneration from the cocoa distributor, which is made possible by the food and beverage company's demand.
- ii. *Does the benefit provided by the construction company retain consistent form as it is transmitted to the food and beverage company's products, operations, or services?*
 - No, the benefit provided by the construction company is the warehouse; the benefit received by the food and beverage company is cocoa. While the warehouse contributes to the preservation of cocoa, it only indirectly benefits the food and beverage company.

Recommendation: The food and beverage company is not directly linked to the construction company's adverse impact on human rights.

Example 8: An electronics manufacturer sources component parts of its products from various subcontractors. One of those subcontractors makes transistors that require gold. It purchases the gold from a broker who acquires the gold from a mining company operating in a conflict zone. In seeking to protect the mine's resources, the mining company's private security forces violently abuse unarmed protestors.

- i. *Does the electronics manufacturer have a relationship for mutual commercial benefit with the gold mining company?*
 - Yes, the electronic manufacturer's interest is obtaining the constituent parts for its products; gold is one of these parts; the mining company receives financial remuneration for its gold via the broker.
- ii. *Does the benefit provided by the gold mining company retain consistent form as it is transmitted to the electronics manufacturer's products, operations, or services?*
 - Yes, the benefit provided by the mining company is a good, which feeds as gold into the electronics manufacturer's products.
- iii. *When acting within the scope of the mutually beneficial relationship, did the mining company materially increase the risk of an adverse human rights impact?*
 - Yes, the provision of security is incidental to the extraction of gold to feed into the electronics manufacturer's supply chain. The violent abuse of unarmed protestors constitutes, among others, an adverse impact on the right to security of the person.

Recommendation: The electronics manufacturer is directly linked to the mining company's adverse impact on human rights. It should use or seek leverage to mitigate the adverse impact.

Example 9: A technology company with a proprietary, subscription-based surveillance program licenses its technology to a private intelligence company. The intelligence company is retained by a government security agency to identify dissidents, whose rights the government then abuses through arbitrary arrest and indefinite detention without charge.

- i. *Does the technology company have a relationship for mutual commercial benefit with the government security agency?*
 - Yes, the technology company's product was developed and licensed specifically to enhance surveillance for a defined class of customers. The technology company benefits financially from the intelligence company's licensing, which is facilitated by the government's retainer.
- ii. *Does the benefit provided by the government agency retain consistent form as it is transmitted to the technology company's products, operations, or services?*
 - Yes, the benefit provided by the government is financial; this benefit remains financial as it is transmitted to the technology company via the intelligence company.
- iii. *When acting within the scope of the mutually beneficial relationship, did the government agency materially increase the risk of an adverse human rights impact?*
 - Yes, the arrest and detention of the alleged dissidents is incidental to the use of the surveillance software, which is squarely within the scope of the indirect relationship between the government and the technology company.

Recommendation: The technology company is directly linked to the government's violation of human rights. It should use or seek leverage to mitigate the adverse impact.

ANNEX: DETAILED ANALYSIS

We share the analysis below to be transparent about our reasoning and to facilitate constructive stakeholder engagement. The analysis is preliminary and for discussion purposes only. In the pages that follow, we explain in detail our interpretive approach and how we arrived at each of our proposed definitions.

I. Objectives

A common response during our civil society engagement over the last few months was skepticism about the need for, or value of, precise definitions of the involvement terms. That skepticism flowed chiefly from concerns that the nature of the Guidance did not allow for rigorous or precise interpretation and/or that developing precise definitions would transform business and human rights into a mechanical, check-the-box exercise divorced from the spirit of the Guidance. Rather than undermining the spirit of the Guidance, we believe that definitions are essential to advance rigorous and legitimate respect for human rights in a quickly hardening risk environment. In particular, precise definitions serve three ends: (i) to facilitate constructive stakeholder engagement; (ii) to promote accountability and consistent non-financial disclosure; and (iii) to encourage businesses to embrace respect for human rights against a backdrop of mounting legal risk.

First, a chief virtue of the Guidance is the framework it provides for effective engagement between businesses and stakeholders. The Guidance enables companies and stakeholders to discuss the scope of business responsibility using a shared language. The shared language is the foundation of credible human rights due diligence, remedy, and grievance mechanisms. Credibility, in turn, depends on a common interpretation of core terms. If businesses and affected stakeholders do not agree on what human rights mean, they will hardly be able to resolve grievances effectively. Similarly, leaving the meaning of the involvement terms to the eye of the beholder risks eroding the trust of stakeholders and businesses alike.

Second, the Guidance increasingly shapes corporate accountability through voluntary initiatives and legally binding measures. The Corporate Human Rights Benchmark and the Reporting Assurance Framework Initiative, among others, will shape stakeholder and market perception of how well particular businesses respect human rights. And compliance with the EU Non-Financial Reporting Directive will require companies to report in line with standards directly or indirectly derived from the Guidance. Against this backdrop, relatively precise definitions are critical to ensure consistency, which underpins any reasonable accountability. If Company A interprets the involvement terms narrowly and Company B interprets them broadly—and neither is explicit about its interpretation—their non-financial disclosures will not be comparable. The challenge is all the greater where (as is common) different individuals and functions within the company interpret the involvement terms inconsistently.

Third, uncertainty regarding the involvement terms' meaning risks undermining good faith corporate commitment to respect human rights. While the Guidance is formally voluntary, the risks of non-compliance are increasingly serious. Public decisions of OECD National Contact

Points, for instance, can affect legal, financial, and reputational risks. At the same time, courts across the world are hearing more lawsuits related to adverse human rights impacts in far-flung jurisdictions. And investors, financiers, and other stakeholders seek increasing transparency regarding corporate human rights policies, due diligence, and remediation. These manifold pressures are mutually reinforcing: the more public representations businesses make about their respect for human rights, the greater the legal and financial risks they face for failing to implement the Guidance. Without precision regarding what respect for human rights means, companies will be (reasonably) wary of making such commitments in the first place. Against this backdrop, certainty is essential to encourage companies to embrace respect for human rights as an integral business pursuit.

Certainty is elemental in the context of the involvement terms. While the Guidance is notably practical in recognizing that salience and various contextual factors may shape how a company responds to adverse impacts with which it is involved, the scope of involvement itself is not flexible. A company is either involved with an adverse impact—and thus expected to respond accordingly—or not.

Involvement determines which particular adverse human rights impacts any particular company should aim to foresee and address. And involvement determines how the company should address those impacts once identified. Recognizing when a business is involved with an impact, and how, must precede any accommodation for circumstance and resource limitations. In other words, involvement is fundamentally an issue of principle, not context. That principle should inform how companies practically and legitimately structure their human rights policies, due diligence processes, and remediation processes.

II. Interpretive Approach

While the Guidance offers an authoritative framework for businesses to respect human rights, many of its terms are subject to interpretation.

As voluntary instruments, the effectiveness of the Guidance lies in the willing acceptance of businesses, governments, international organizations, civil society, and affected stakeholders. Such consent depends on a shared ability to discern the meaning of the expectations from the text. The Guiding Principles' own interpretive guidelines focus on the text, taken in the context of the whole:

These Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.⁶⁰

⁶⁰ U.N. Office of the High Comm'r for Human Rights, United Nations Guiding Principles on Business and Human Rights at 1 (2011)
http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[hereinafter Guiding Principles]. While the Guidance is non-binding, this approach is reminiscent of the approach under the Vienna Convention on the Law of Treaties, which likewise focuses on the good faith interpretation of the text of a treaty, in accordance with the ordinary meaning given to the terms in context and in light of its object and purpose. Vienna Convention on the Law of Treaties art. 31(1),

Accordingly, in interpreting the involvement terms, we examine the ordinary meaning of the relevant terms in their context, before refining that meaning with reference to the objectives and purpose of the Guidance. We also rely on the following interpretive maxims derived from the Guidance:

- *Treat the Guidelines and the Guiding Principles as synonymous.* The human rights section of the Guidelines is “consistent with the Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework.”⁶¹
- *Endeavor to practical results, with an eye to ensuring voluntary respect for human rights.* We derive this maxim from two aspects of the Guidance: (i) the Guiding Principles provide that they should not “be read as creating new international law obligations”;⁶² and (ii) the Guidelines refer to themselves as “non-binding principles and standards for responsible business conduct in a global context.”⁶³
- *Privilege consistency with international human rights law.* While the Guidance is not law, it repeatedly emphasizes its consistency with national and international law. The Guiding Principles should not be read “as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.”⁶⁴ Similarly, the Guidelines provide that their requirements are “consistent with applicable laws and internationally recognized standards.”⁶⁵

III. Cause and Contribute

The involvement terms *cause* and *contribute* are distinct, but they are interwoven throughout the Guidance. There is a good reason for this close relationship: for practical reasons, the distinction between the two terms is inherently inconstant and permeable. Indeed, in the Guidance itself, “contribution” is derived from “cause.”⁶⁶ We therefore consider the meaning of both involvement terms together before deriving their independent definitions.

A. Key Cause and Contribute Provisions

1. GUIDELINES

States have the duty to protect human rights. Enterprises should, within the framework of internationally recognized human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

May 23, 1969, 1155 U.N.T.S. 331.

⁶¹ Guidelines at 3.

⁶² Guiding Principles at 1.

⁶³ Guidelines at 3.

⁶⁴ Guiding Principles at 1.

⁶⁵ Guidelines at 3.

⁶⁶ See, e.g., Guidelines at 23 (in the context of due diligence aimed at identifying adverse impacts, “contribution” means “an activity that causes, facilitates, or incentivises another entity to cause an adverse impact.”).

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.
4. .
5. .
6. Provide for or cooperate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.⁶⁷

“[C]ontributing to” an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivizes another entity to cause an adverse impact and does not include minor or trivial contributions (emphasis added).⁶⁸

2. GUIDING PRINCIPLES

Guiding Principle 13: The responsibility to respect human rights requires that business enterprises:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;⁶⁹

Guiding Principle 22: Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.⁷⁰

B. ORDINARY MEANING

1. Dictionary Meaning

Our interpretation begins with the ordinary meaning of the terms. The Oxford English Dictionary

⁶⁷ Guidelines at 31.

⁶⁸ Guidelines at 23.

⁶⁹ Guiding Principles at 14.

⁷⁰ Guiding Principles at 24.

defines the verb *cause* as to “make (something, typically something bad) happen;” *contribute* is defined as to “help to cause or bring about.”⁷¹ The meaning of *contribute* thus is a derivative of *cause*. In sum, the dictionary meaning of *cause* is “to make happen or bring about”; *contribute* is, accordingly, “to help to make happen or bring about.”

The practical challenge in operationalizing this definition is how to identify when an action has, in fact, brought about a particular impact.

2. SOCIAL SCIENCE MEANING

The definition of cause as productive agent—*i.e.* that which makes or brings about an effect—has been adopted and explored in some detail in sociology. Cause in this sense has four characteristics:

1. *Adequacy*: If *x* causes *y*, “occurrence of *x* is adequate for occurrence of *y*.”
2. *Invariability*: If *x* causes *y*, “upon occurrence of *x*, *y* will occur without exception.”
3. *Uniqueness of bond*: If *x* causes *y*, “the existence of *y* follows (not necessarily in time) in a unique and unambiguous way from the existence of *x*.”
4. *Continuity of action between cause and effect*: If *x* causes *y*, there is an “absence of gaps in causal lines.”⁷²

In other words, at the level of pure theory, *x* can be said to cause *y* if, and only if, (i) *x* is *sufficient* to result in *y*, (ii) *x* *always* results in *y*, (iii) *only x* results in *y*, and (iv) *x* *directly* results in *y*, without any intervening causes. If these four conditions are met, we may safely say that *x* causes *y*, or that “*x* produces *y*.”⁷³

This definition may be too rigid in practice. Social impacts are frequently the result of myriad factors. Identifying with precision which factor brought about a particular human rights impact—and to what degree—is a herculean task. Indeed, the complexity of causal uncertainty is well-recognized in the social sciences: “Despite a growing interest in causal mechanisms in the social sciences . . . there is little consensus in the literature about what causal mechanisms are.”⁷⁴ The challenge has also been recognized in the physical sciences: “Causation may be important, both in science and in everyday life, and yet not the sort of thing we should expect to find in physics.”⁷⁵

The issue is the difficulty of separating causation from correlation. It may be straightforward to note that one event happened before another; it is more difficult to determine whether the earlier event brought the later event into being. In social contexts—where cultural, institutional, and individual factors may bear on any particular impact—separating causal signal from noise is a challenge no matter the number of data points. “Problems involving causal inference have dogged at the heels of statistics since its earliest days. Correlation does not imply causation, yet

⁷¹ OXFORD ENGLISH DICTIONARY (2d ed. 1989).

⁷² WSEVOLOD W. ISAJIW, CAUSATION AND FUNCTIONALISM IN SOCIOLOGY 32-33 (reprint. 2010).

⁷³ *Id.* at 32.

⁷⁴ Tulia G. Falleti & Julia F. Lynch, *Context and Causal Mechanisms in Political Analysis*, 42 Comp. Pol. Stud. 1143, 1148 (2009).

⁷⁵ CAUSATION, PHYSICS, AND THE CONSTITUTION OF REALITY 2 (Huw Price & Richard Corry eds., 2007).

causal conclusions drawn from a carefully designed experiment are often valid.”⁷⁶

Sociologists thus generally deploy *cause* in terms of likelihood: “The concept of causality is most often used in a probabilistic way in sociology.”⁷⁷ The question is not whether presumed cause *x* meets the four formal criteria of productive causation. Rather, the question is whether presumed cause *x* increases the likelihood of effect *y*: “the core idea of such approaches ... is that a cause [*x*] must raise the probability of its effect [*y*] with respect to some suitably specified set of background conditions *B_i*.”⁷⁸

In other words, the ordinary meaning of *cause* in sociology is increasing the likelihood of a particular effect. *Contribute* accordingly means helping to increase the likelihood of a particular effect.

3. MEANING IN ANALOGOUS LEGAL CONTEXTS

The legal context is another candidate to illustrate the ordinary meaning of *cause* and *contribute*, particularly when speaking of social impacts. Across legal systems, *cause* and *contribute* are used to establish fault and determine liability for private and public wrongs. Notwithstanding the voluntariness of the Guidance, the legal definitions of these terms are therefore instructive when understanding their ordinary meaning in the context of business responsibility for human rights.

a. Conditio sine qua non

The dominant test of causation in most legal systems is the *conditio sine qua non* test.⁷⁹ This formulation literally means “condition without which the damages would not have occurred.” That is, causation is established by considering a hypothetical alternative reality in which the allegedly wrongful act did not occur. If the injury would nonetheless have occurred, the wrongful act is not the cause of the injury. If the injury would not have occurred, the allegedly wrongful act is considered a *conditio sine qua non*, or the cause in fact. In common law jurisdictions this test is usually called the *but for* test. The test applies beyond private wrongs and appears to be the default approach to causation applied by the European Court of Human Rights:

⁷⁶ Paul W. Holland, *Statistics and Causal Interference*, 81 J. Am. Stat. Ass’n 945, 945 (1986).

⁷⁷ RAYMOND BOUDON & FRANCOIS BOURRICAUD, *A CRITICAL DICTIONARY OF SOCIOLOGY* 62 (Peter Hamilton trans., Univ. of Chicago Press 1989) (1982). *See also* JUDEA PEARL, *CAUSALITY: MODELS, REASONING, AND INFERENCE* 1 (2nd ed. 2009) (“[P]robability theory is currently the official mathematical language of most disciplines that use causal modeling, including ... sociology ... In these disciplines, investigators are concerned not merely with the presence or absence of causal connections but also with the relative strengths of those connections and with ways of inferring those connections from noisy observations.”); Isajiw at 41 (“ascertaining causation is a matter of degree of possibility (probability included) that all the characteristics of the causal bond are present. The more the variables within a system are limited and the more their correlative relation to each other is defined, the more probability there is that a variable will be a productive cause of a state of the system in which it appears.”).

⁷⁸ James Woodward, *Causal Models in the Social Sciences*, in *PHILOSOPHY OF ANTHROPOLOGY AND SOCIOLOGY* 157, 175 (Stephen P. Turner & Mark W. Risjord eds., 2007).

⁷⁹ Cees van Dam, *European Tort Law* 310 (2d ed. 2013).

When ruling on the ‘causal connection’ under art 41 of the [European Convention on Human Rights], the Court seems to employ ‘the *conditio sine qua non*’ test without, however, mentioning the test by name.

The ‘*conditio sine qua non*’ test entails the question of whether the harmful result would also have occurred but for the damaging event (ie the violation of the Convention). Should the answer be negative (‘No, the harmful result would not have occurred in the absence of the damaging event.’), then causation between harm and event is established. Should the answer be positive (‘Yes, the harmful result would also have occurred in the absence of the damaging event.’), causation is missing.⁸⁰

b. Limitations of *conditio sine qua non*: causal complexity

In theory, the *but for* test has an appealing simplicity. It has limitations, however, in contexts of causal complexity.⁸¹ Such contexts are common in the realm of business and human rights. Take the example of several unrelated businesses who each release pollutants into a municipal water supply. The pollutants released by any one of the businesses would be sufficient to render the water undrinkable and dangerous to health. In such a scenario, each business would be able to argue that it is not the *condition sine qua non* of any adverse human rights impact—but *for* its actions or omissions, the pollutants would still have been released by others, any one of which would have been sufficient to result in the harm.

Courts have addressed this type of evidentiary complexity by unshackling the formality of the *but for* test. In such scenarios, several European jurisdictions would hold each business that could have caused the adverse human rights impact responsible for the entire injury.⁸² In other words, if a company’s wrongful actions would have been sufficient to result in the injury—even if it cannot be determined whether the injury would have occurred *but for* those actions—courts are willing to deem the company the cause in fact of the injury. For example, in French law, each business would be considered liable unless it could prove that the actions of a third party caused the adverse impact in question.⁸³

A second type of causal complexity is where a series of actions, omissions, or events result in an adverse impact. In a famous English case, *Bonnington Castings v. Wardlaw*, an employee sued his employer after contracting pneumoconiosis.⁸⁴ The disease was shown to be the cumulative result of two sources, even one of which would place fault on the employer.⁸⁵ The House of Lords held that the employee did not have to prove which source had been the more probable cause of his disease. Instead, it was sufficient if he proved that the action for which the employer might be at

⁸⁰ Markus Kellner & Isabelle C. Durant, *Causation*, in *TORT LAW IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS* 449, 457 (Attila Fenyves et al. eds., 2011) (citation omitted).

⁸¹ Van Dam at 289-290.

⁸² *Id.* at 329-332.

⁸³ *Id.* at 331 (“If a collective *faute* is established, the defendants may prove that the conduct of a third party (including the victim) yields an external cause (*cause étrangère*) which was unforeseeable and unavoidable (*imprévisible et irrésistible*). If they cannot prove this, they are bound *in solidum*, which means that they are each fully liable towards the victim but each has a right of recourse towards the other tortfeasor(s).”) (citation omitted).

⁸⁴ *Bonnington Castings v. Wardlaw*, [1956] 613 (HL) 614 (appeal taken from Scot.).

⁸⁵ *Id.* at 622.

fault had “materially contributed” to the development of the disease.⁸⁶ Any more than minimal contribution would be material.⁸⁷ That is: an action or omission that makes a non-negligible contribution to an injury may be deemed the *cause* of that injury.

The principle of causation as contribution was taken further in *McGhee v. National Coal Board*.⁸⁸ As with *Bonnington Castings*, the case concerned industrial disease. Unlike *Bonnington Castings*, in *McGhee* one of the potential causes, for which the company could not be faulted, might have been sufficient by itself to result in the injury; the other potential cause, for which the company could be faulted, might not in fact have made a difference to the plaintiff’s injury.⁸⁹ The court nonetheless found that the company caused the injury because it had made the risk of injury more probable.⁹⁰ In other words, a material increase in risk can be considered a “substantial contribution,” which may be treated as the cause in fact of the resulting injury.⁹¹

The European Court of Human Rights has relied on an analogous concept of *cause* to delineate a government’s responsibility to protect human rights. *Tatar v. Roumanie* concerned a mining company whose operations produced cyanide-contaminated tailings water. Plaintiffs brought suit after a dam had breached, releasing the tailings water into the local environment. The court found that, even though plaintiffs could not prove *sine qua non* causation, the “existence of a serious and substantial risk” was sufficient to impose on the Romanian government an obligation to adopt measures to protect human rights:

[T]he existence of a serious and substantial risk to the health and well-being of the applicants, even if scientific certainty was lacking, is enough to impose on the state the positive obligation to adopt reasonable and adequate measures capable of protecting the rights of those individuals to respect for their private and home life, and, more generally, to enjoy a healthy and protected environment.⁹²

c. Limitations of *conditio sine qua non*: overreach

In addition to its potential to be too restrictive, the *conditio sine qua non* approach inherently risks being unfairly expansive. In a series of contingent events leading to an injury, each is arguably a *conditio sine qua non* of the injury. A car accident at 12:02 pm arguably would not have occurred *but for* the misplaced keys, which led to a ten-minute delay, which forced an alternate route,

⁸⁶ *Id.* at 620.

⁸⁷ *Id.* at 621 (“I do not see how there can be something too large to come within the *de minimis* principal but yet too small to be material.”). See also J.F. CLERK & W.H.B. LINDSELL, CLERK & LINDSELL ON TORTS § 2-30 (21st ed. 2014) (noting that, in *Bonnington*, “[a]nything which did not fall within the principle *de minimis non curat lex* would constitute a material contribution.”).

⁸⁸ *McGhee v. Nat. Coal Board*, [1972] 3 All E.R. 1008 (HL) (appeal taken from Scot.).

⁸⁹ See generally *Id.*

⁹⁰ *Id.* at 1016 (finding liability because plaintiff “has, after all, only to satisfy the court of a probability, not to determine an irrefragable chain of causation . . .”). See also Clerk & Lindsell § 2-31 (noting that *McGhee* stands for the proposition that a claimant need only “show that the defendants’ breach of duty made the risk of injury more probable even though it was uncertain whether it was the actual cause.”).

⁹¹ Clerk & Lindsell § 2-41 (citation omitted).

⁹² Dinah L. Shelton, *International Decision: Tatar c. Roumanie*, App. No. 67021/01...European Court of Human Rights, Jan. 27, 2009, 104 Am. J. Int’l L. 247, 252 (2010), citing *Tatar v. Romania*, App. No. 67021/01 ¶ 107, Eur. Ct. H.R. (2009) (discussing ECHR finding of state responsibility even where inconclusive scientific data makes causation somewhat uncertain).

which led to a distracted left turn, which led to the injury. That is: misplacing keys could be considered a *conditio sine qua non* of the accident in the same way as the distracted left turn.

Courts have addressed this limitation by introducing the concept of remoteness, which carves out a zone of risk created by any action. In *Carslogie S.S. Co Ltd v. Royal Norwegian Government*, one ship caused substantial damage to another. En route to the repair dock, the damaged ship sustained further damage from a storm that it would not have encountered *but for* the original accident. The House of Lords held that, as a legal matter, the accident did not cause the storm damage, as it “was not in any sense a consequence of the collision, and must be treated as a supervening event occurring in the course of a normal voyage.”⁹³ In other words, the storm damage was not within the zone of risk created by the defendants’ negligence.⁹⁴ (This legal requirement that the result be within the zone of risk created by the presumed cause echoes the “continuity of action” element of sociology’s definition of *cause*.)

4. SUMMARY OF ORDINARY MEANING

The ordinary meaning of *cause*—particularly as it applies in contexts relevant to business and human rights—is to increase the likelihood of a particular effect. That is: *x* causes *y* if *x* materially (*i.e.*, non-negligibly) increases the risk that *y* will occur. Accordingly, *x* contributes to *y* if *x* helps to materially increase the risk that *y* will occur. Implicit in both concepts is a limited zone of risk that can be attributed to *x* and into which *y* can fall.

C. MEANING IN LIGHT OF GUIDANCE’S OBJECT AND PURPOSE

The ordinary meaning of *cause* and *contribute* must be considered against the object and purpose of the Guidance. The Guidance is remedial, not punitive; it does not create or define liability for business enterprises. Rather, it seeks to “promote positive contributions by enterprises to economic, environmental and social progress worldwide.”⁹⁵ In the human rights context, the objectives are best understood through the lens of remedy rather than fault: “These Guiding Principles are grounded in recognition of . . . [t]he need for rights and obligations to be matched to appropriate and effective remedies when breached.”⁹⁶ This end is consonant with the ends of international human rights law more generally, *i.e.*, to restore the individual to a situation as close as possible to the position he or she would have enjoyed had the violation not occurred.⁹⁷

⁹³ *Carslogie S.S. Co Ltd v. Royal Norwegian Government* [1952] AC 292 (HL).

⁹⁴ Clerk & Lindsell § 2-99 (noting that, in *Carslogie*, “[t]he storm damage was not within the risk created by the defendants’ negligence.”).

⁹⁵ Guidelines at 3.

⁹⁶ Guiding Principles at 1.

⁹⁷ DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 315 (2d ed. 2005). *See also* *Factory at Chórzow (Ger. v. Pol.)*, Judgment, 1928 P.C.I.J. (ser. A) No. 13, at 47 (Sept. 13) (“reparation must, as far as possible, wipe out all the consequences of the illegal act and *reestablish the situation which would, in all probability have existed if that act had not been committed*”) (emphasis added); Octavio Amezcua-Noriega, *Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections*, ¶¶ 6, 15 (2011) UNIV. OF ESSEX TRANSITIONAL JUSTICE NETWORK, http://www.essex.ac.uk/tjn/documents/paper_1_general_principles_large.pdf (“An important consequence of the principle of proportionality is that reparations are not punitive in nature. This is so regardless of the gravity of the breach. Reparations should exclusively be aimed at remedying the damage committed through the wrongful act, and not conceived as an exemplary measure. . . . [R]eparation measures should *neither enrich nor impoverish the victim of a human rights violation*, as they are intended to eliminate the effects of the violations that were committed.”) (emphasis added) (citations omitted).

The remedial purpose illuminates the meaning of *cause* and *contribute*. As the *Interpretive Guide* notes, where a business may *cause* or *contribute to* an adverse human rights impact, “it should cease or change the activity that is responsible, in order to prevent or mitigate the chance of the impact occurring or recurring.”⁹⁸ That is, a business’s ability to shape the “chance of the impact occurring” informs whether it has caused or contributed to an impact. A business that cannot shape the “chance of the impact occurring” cannot be said to *cause* or *contribute* to that impact.

The difference between *cause* and *contribute* lies in the degree of prospective influence over the risk. “[W]here a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact.”⁹⁹ If a business causes an adverse impact, it is presumed to exercise such control over the “chance of the impact occurring” that it has the ability to “cease or prevent the impact.”¹⁰⁰ No such presumption exists with “contribution,” in which case a business is expected to “take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible.”¹⁰¹

The Guidelines specify that, notwithstanding this difference, contribution must pass a threshold level of importance to warrant a response:

‘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. An enterprise can also contribute to an adverse impact if the combination of its activities and that of another entity result in an adverse impact.¹⁰²

This qualification parallels the threshold of “material” contribution or increase in risk in multi-cause legal contexts. In other words, a business may contribute to an adverse impact even if the business itself does not have the ability to “cease or prevent the impact” as long as its activities have a material bearing on “the chance of the impact occurring.”¹⁰³

D. NOTE ON KNOWLEDGE AND FORESEEABILITY

The discussion above has not touched on knowledge or foreseeability. Rather, we have focused only on cause in fact. This is not the sole determinant of liability in law. Courts in both civil and common law jurisdictions further condition liability on the concept of foreseeability. The European Court of Human Rights, for instance, has held that an actor will not be liable for harm “that even a particularly prudent, knowledgeable and experienced person at the height of the current state of scientific knowledge would not have had to foresee because of its complete

⁹⁸ Interpretive Guide at 18.

⁹⁹ Guiding Principles, Commentary to Guiding Principle 19 at 21.

¹⁰⁰ Interpretive Guide at 18; Guiding Principles, Commentary to Guiding Principle 19 at 21.

¹⁰¹ Guiding Principles, Commentary to Guiding Principle 19 at 21.

¹⁰² Org. for Econ. Co-Operation & Dev., OECD-FAO Guidance for Responsible Agricultural Supply Chains 20 (2016), <https://mneguidelines.oecd.org/OECD-FAO-Guidance.pdf>.

¹⁰³ Interpretive Guide at 18.

improbability.”¹⁰⁴ Neither knowledge nor foreseeability fall within the ordinary meaning of *cause*; the role of these related concepts is largely to negate fault rather than to identify the action or omission that brought about an event.

As the Guidance is not liability creating, fault in a moral sense is not relevant. Indeed, foreseeability is expressly discounted as an element of causation in the Guidance: “even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent.”¹⁰⁵ *Cause* and *contribute* under the Guidance are therefore independent of knowledge or foreseeability. This is also consonant with the purpose of the Guidance, which is to encourage companies to engage in human rights due diligence across their value chains. Were knowledge or foreseeability material to determining a company’s involvement with—and thus responsibility to address—an adverse human rights impact, the effect would be a disincentive for companies to conduct rigorous due diligence in the first place.

E. DEFINITIONS

The practical meaning of *cause* and *contribute* based on ordinary usage in analogous contexts and the object of the Guidance turns on increasing the risk of a particular effect. In both cases, that increase in risk must be “substantial” or “material,” *i.e.*, not negligible. The best way to understand the difference between *cause* and *contribute* thus lies not in the impact on risk but in the sufficiency of the underlying activity to bring about the adverse impact. Based on these principles, we propose the following definitions:

- A business **causes** an adverse human rights impact when its activities (including omissions) materially increase the risk of the specific impact which occurred *and* would be sufficient, in and of themselves, to result in the impact.
- A business **contributes to** an adverse human rights impact when its activities (including omissions) materially increase the risk of the specific impact which occurred *even if* they would not be sufficient, in and of themselves, to result in the impact.

IV. Directly Linked

Directly linked is rather more complex than the other involvement links. Unlike *cause* and *contribute*, we have found no identically phrased precedent in the social sciences or law to ground a definition of the term. Nonetheless, the context and objectives of the Guidance provide a structural foundation to identify the contours of *directly linked* involvement. Indeed, while it has unique features, *directly linked* bears a familial resemblance to the established legal concept of vicarious liability. Considering the two concepts in tandem in the specific context of the Guidance illuminates the underlying objectives and proper scope of the term.

A. Key Directly Linked Provisions

¹⁰⁴ Franz Bydlinki, *Methodological Approaches to the Tort Law of the ECHR*, in *TORT LAW IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS* 29, 75 (Attila Fenyves et al. eds., 2011).

¹⁰⁵ Guiding Principles, Commentary to Guiding Principle 22 at 24.

1. GUIDELINES

States have the duty to protect human rights. Enterprises should, within the framework of internationally recognized human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

...

3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.¹⁰⁶

2. GUIDING PRINCIPLES

Guiding Principle 13: The responsibility to respect human rights requires that business enterprises:

...

- (a) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.¹⁰⁷

B. ORDINARY MEANING

The Oxford English Dictionary defines “directly” as “straightforwardly” or “without changing direction or stopping” or “with nothing or no one in between.”¹⁰⁸ It defines the verb “link,” of which “linked” is the past participle, as “make, form, or suggest a connection with or between.”¹⁰⁹ These definitions suggest that the ordinary meaning of “directly linked” is “a connection formed, or a bond created, without intervention.”

The challenge under the Guidance has two prongs in this context: (i) to identify what type of connection or bond is relevant; and (ii) to identify what would constitute intervention so as to break the bond.

C. MEANING IN LIGHT OF GUIDANCE’S OBJECT AND PURPOSE

Under the Guidance, Company A’s *directly linked* involvement with an adverse human rights impact turns on a three-stage test. *First*, there must exist a *business relationship* between Company A and Entity

B. “‘Business relationships’ include relationships with business partners, entities in its supply

¹⁰⁶ *Id.* at 31.

¹⁰⁷ Guiding Principles at 14.

¹⁰⁸ OXFORD ENGLISH DICTIONARY 705 (2d ed. 1989).

¹⁰⁹ OXFORD ENGLISH DICTIONARY (2d ed. 1989).

chain, and any other non-State or State entity directly linked to its business operations, products or services.”¹¹⁰ *Second*, Entity B must *cause or contribute to* an adverse human rights impact.¹¹¹ *Third*, Entity B must *cause or contribute to* that adverse impact while acting within the scope of its *business relationship* with Company A: “When looking at business relationships, the focus is not on the risks the related party poses to human rights *in general*, but on the risks that it may harm human rights *in connection with the enterprise’s own operations, products or services*.”¹¹²

This structure is difficult. The definition of *business relationship* makes the concept *directly linked* integral to the definition of *directly linked*. The complication, however, is also the source of insight. *Directly linked* plays two distinct roles in the Guidance: (i) it establishes the scope of the relevant business relationship between Company A and Entity B; and (ii) it establishes the relationship between Company A and the adverse human rights impact. That the same term is used for both types of relationships suggests that the two are of the same kind: the relationship between Company A and Entity B is of the same type as the relationship between Company A and the adverse human rights impact. That type of relationship is independent of cause: Company A may be *directly linked to* adverse impacts even if it has “not contributed to those impacts.”¹¹³ Thus, actors who *cause or contribute to* an impact do not break the link between the business and the adverse impact.

A subsidiary challenge raised by the Guidance concerns the scope of *directly* under the above constraints. The *Interpretive Guide* specifies that *business relationships* include “indirect business relationships ... beyond the first tier.”¹¹⁴ In other words, a business may be *directly linked* to an adverse human rights impact through an *indirect business relationship* in its value chain. As the OECD has explained:

“Although the due diligence provisions of the Guidelines do not extend to extremely loosely connected associations, direct linkages are not limited to first-tier or immediate business relationships.”¹¹⁵

These elements of the Guidance raise two questions about *linked* and *directly*, respectively:

1. What kind of non-causal connection could equally explain (i) the relationship between a business and a state or non-state entity and (ii) the relationship between a business and an adverse human rights impact?
2. What kind of non-causal connection could pass through intermediaries while remaining direct?

The Guidance itself and authoritative commentary do not expressly answer either of these questions. But the remedial objectives and overarching structure of the Guidance provide a path

¹¹⁰ Guidelines at 33.

¹¹¹ Due Diligence in the Financial Sector at 6 (“However let’s imagine that Company B’s operations, products and services are **directly linked** to Company C, an entity that *is causing or contributing* to an adverse impact within the scope of Company A’s supply chain. In that case Company A is still considered to be **directly linked** to the adverse impact.”) (bold emphasis added).

¹¹² Interpretive Guide at 32 (emphasis in original).

¹¹³ Guiding Principles at 14.

¹¹⁴ Interpretive Guide at 5.

¹¹⁵ Due Diligence in the Financial Sector at 11.

to the answer.

As discussed above, the Guidance seeks to “promote positive contributions by enterprises to economic, environmental and social progress worldwide.”¹¹⁶ In the human rights context, the objectives are best understood through the lens of remedy rather than fault: “These Guiding Principles are grounded in recognition of ... [t]he need for rights and obligations to be matched to appropriate and effective remedies when breached.”¹¹⁷ *Directly linked* involvement should be understood against these ends. In service of global social progress and remedy, the Guidance imposes on business a responsibility to address adverse human rights impacts, even when that business has not *caused* or *contributed* to the adverse impact. The responsibility is independent of fault. This structure is analogous to the legal concept of vicarious liability, to which we now turn.

D. VICARIOUS LIABILITY

Vicarious liability is a form of no-fault legal liability in which an entity can be held accountable for the acts of an employee or business partner irrespective of whether the entity itself caused the injury.¹¹⁸ While the precise parameters of vicarious liability vary by context, and have evolved since their initial emergence in Roman law, one “root-idea” underpins its various formulations: “that A is doing work in concert with B, whether on equal terms or on terms of subordination. In each case the persons concerned are carrying on an undertaking in common and in concert.”¹¹⁹ That is, while A and B may be independent entities, they share an enterprise; when that enterprise results in injury, they share liability irrespective of fault.

Vicarious liability thus conceived turns on two elements—business relationship and wrongdoing in the scope of that relationship.

Business relationship. In the most common form of vicarious liability regime, an employer or partner typically is held liable for the wrongful acts of an employee or partner.¹²⁰

Wrongdoing in the scope of the relationship. Vicarious liability applies only to those harms that occur within the scope of the business relationship. In other words, no vicarious liability exists where the harm is unrelated to the relationship in question.¹²¹

The contours of vicarious liability are readily discerned in the structure of *directly linked* involvement. The differences between the concepts lie in the breadth of relevant relationships and depth of resulting responsibility. *First*, vicarious liability traditionally applies to a narrow class of undertakings in concert, particularly employment and partnership arrangements. *Business relationships* under the Guidance, by contrast, are much broader in scope: “direct linkages are

¹¹⁶ Guidelines at 3.

¹¹⁷ Guiding Principles at 1.

¹¹⁸ Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* 22 (2010).

¹¹⁹ T. BATY, *VICARIOUS LIABILITY* 7-8 (1916).

¹²⁰ See JENNY STEELE, *TORT LAW: TEXT, CASES, AND MATERIALS* 564 (2007).

¹²¹ See, e.g., CODE CIVIL [CIVIL CODE] art. 1384(5) (Fr.) (« Les maîtres et les commettants [sont responsables] du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés. »).

not limited to first-tier or immediate business relationships.”¹²² *Second*, and related, vicarious liability imposes legally enforceable penalties on those found so liable. Under the Guidance, however, while a business is expected to address adverse human rights impacts to which it is directly linked, it is not expected to provide a remedy.¹²³

1. JUSTIFICATION FOR VICARIOUS LIABILITY

There is arguably no single definitive or comprehensive justification for vicarious liability.¹²⁴ Three main principles have been advanced by courts and commentators: deterrence, compensation, and fairness.

Deterrence. The deterrence rationale for vicarious liability turns on moral and economic justifications. The moral case presupposes control, as in the employment context.¹²⁵ That is, vicarious liability helps ensure that businesses are held accountable for and “internalize” the costs of the risks that they create, thereby most efficiently minimizing risk of injury to others.¹²⁶ The economic justification turns on incentivizing the party best positioned to mitigate risks to others: “the employer has the *opportunity* to increase standards of safety, for example through better procedures for selecting employees and for their supervision. Therefore, it is best if there is an *incentive* for him or her to do so, through liability for the employee’s tort.”¹²⁷

Compensation. As with deterrence, the compensation principle is built on moral and economic justifications. The former is focused on justice for the victim: when someone is injured due to the fault of a person who has insufficient resources to pay, the injured person should be able to seek compensation from another person who, although not at fault, has a relevant connection to the cause of the injury.¹²⁸ Thus, the “pragmatic” basis for employer liability for employee wrongs “is that employers . . . can best afford to bear the cost of

¹²² Due Diligence in the Financial Sector at 11.

¹²³ Guiding Principles, Commentary to Guiding Principle 22 at 24-25 (“Where adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so.”).

¹²⁴ SIMON DEAKIN, ANGUS JOHNSTON, AND BASIL MARKENESINIS, *MARKENESINIS AND DEAKIN’S TORT LAW* 665-66 (6th ed. 2008) (“Though the theoretical justifications of vicarious liability vary, this is not a problem that has often worried the English courts. Lord Pearce’s remark that the doctrine of vicarious liability has not grown from any clear logical or legal principle but from social convenience and rough justice is typical of their pragmatic approach to the question. Perhaps it should also be taken to suggest that, although no single theory can explain the rule, its basis cannot be dismissed entirely.”).

¹²⁵ NEIL HAWKE, *CORPORATE LIABILITY* § 3-04 at 69 (2000) (“[liability] is founded on an assumption of control by the employing individual or company”). See also *Reedie v. The London & Nw. Ry. Co.* [1849] 4 Exch. 244, 154 ER 1201 (“[t]he party employing has the selection of the party employed, and it is reasonable that he who has made the choice of an unskilled or careless employee . . . should be responsible for any injury resulting [from activities undertaken in the course of employment]”).

¹²⁶ Steele at 565. See also *Bazley v. Curry*, [1999] 2 S.C.R. 534, ¶ 32 (“[e]mployers are often in a position to reduce accidents and intentional wrongs by efficient organization and supervision”).

¹²⁷ Steele at 566.

¹²⁸ QUEENSLAND LAW REFORM COMMISSION, *VICARIOUS LIABILITY*, Report No. 56 at 11 (Dec. 2001) [hereinafter Report No. 56].

compensating injured third parties.”¹²⁹ The economic justification, by contrast, highlights the societal efficiency of distributing such losses widely, as corporations are able to do through insurance and pricing.¹³⁰

Fairness. Fairness requires that the party to a joint enterprise that benefits from the actions of a wrongdoer should bear the cost of any injury sustained by a third party arising from a wrong committed in the course of that labor.¹³¹ Courts have long relied on principles of fairness to impose vicarious liability, noting that, for example, “those who set in motion and profit from the activities of their employees should compensate those who are injured by such activities even when performed negligently.”¹³² In other words, businesses should assume the risks that they create, and from which they benefit, in the course of their activities.¹³³

While they cannot be applied directly and as-is, these underlying principles can help illuminate the Guidance’s objectives in imposing responsibility on businesses for *directly linked* involvement. *First*, deterrence is consonant with the Guidance’s express objective of “enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.”¹³⁴ That is: no-fault responsibility for *directly linked* involvement encourages businesses to adopt measures—including policies and due diligence processes—to minimize the risk of adverse human rights impacts by third parties.

Second, fairness aligns with the structure of the three involvement links. There are two types of fairness rationale underpinning vicarious liability: (i) a business should bear the risks it creates; and (ii) a business should not benefit from wrongs to others.¹³⁵ Under the Guidance, *cause* and *contribute* involvement address risk creation. The gap remaining is benefit. Drawing on the fairness justification for vicarious liability to animate the purpose of *directly linked* ensures that the Guidance comprehensively “promote[s] positive contributions by enterprises to economic, environmental and social progress worldwide.”¹³⁶

2. Understanding *Directly Linked* through Vicarious Liability

The principle of fairness addresses the two ambiguities raised by the structure of *directly linked* in the Guidance.

¹²⁹ Vivienne Harpwood, *Modern Tort Law* 353 (7th ed. 2009).

¹³⁰ Report No. 56 at 10 (citation omitted).

¹³¹ P.S. ATIYAH, *VICARIOUS LIABILITY IN THE LAW OF TORTS* (1967).

¹³² *Viasystems (Tyneside) Ltd. v. Thermal Transfer (N.) Ltd.*, [2006] QB 510, para. 55. *See also* *Bazley v. Curry*, [1999] 2

S.C.R. 534, para. 30 (under vicarious liability theory, “a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise”) (citation omitted).

¹³³ Hawke § 3-04 at 69 (“The responsibility of the individual (or company) for acts or omissions of an employee from which a benefit accrues forms the basis of vicarious liability where the plaintiff has suffered loss . . .”).

¹³⁴ Guiding Principles at 1.

¹³⁵ Steele at 565.

¹³⁶ Guidelines at 3.

Link. *What kind of non-causal connection could equally explain (i) the relationship between a business and a state or non-state entity and (ii) the relationship between a business and an adverse human rights impact?*

Fairness is the logic best suited to both types of link: a company may be expected to address adverse human rights impacts that it does not *cause* or *contribute to* when it benefits, or is deemed to benefit, from them. Benefit establishes the link between Company A and Entity B to constitute the business relationship. Benefit similarly establishes the link between Company A and adverse impact *x*. The *Interpretive Guide* adds support for this interpretation by noting that a business’s “value chain”—the fulcrum of *directly linked* responsibility—“encompasses the activities that convert input into output by *adding value*.”¹³⁷ That is, Company A is *directly linked* to an adverse impact that it did not cause or contribute to when (i) its products, services, or operations benefit, or are deemed to benefit, from a relationship with Entity B, and (ii) its products, services, or operations benefit, or are deemed to benefit, from adverse impact *x* *caused* or *contributed to* by Entity B in the course of that relationship.

Direct. *What kind of non-causal connection could pass through intermediaries while remaining direct?*

Fairness is also best placed to explain what kind of connection could pass through intermediaries while remaining direct. The Guidance makes clear that the link between Company A and Entity B/adverse impact *x* can be direct even if it comes from “indirect business relationships in [Company A’s] value chain.”¹³⁸ To be meaningfully *direct*, however, the link must nonetheless remain connected to Company A’s products, services, or operations “straightforwardly ... without changing direction or stopping.”¹³⁹ Any proposed link based on influence or proximity of relationship would necessarily come at the expense of *directly*, because it could not explain the possible directness of indirect relationships.

By contrast, considering *link* through the lens of fairness enables us to endow *directly* with practical meaning. Given the structure of the Guidance, the qualifier must act to condition the type of benefit, not the manner of its travel. That is, even as it passes through intermediaries, a benefit may be *direct* if it remains of the same type from origin to destination. Or, to adopt the terms of the *Interpretive Guide*: for it to be direct, the *kind* of value added must remain consistent as it traverses the value chain. If the original benefit provided by Entity B is a good, such as agricultural produce, it should remain a good when ultimately adding value to Company A’s products, services, or operations. Similarly, if the original benefit is financial, such as profits for shareholders, the ultimate benefit enjoyed by Company A should similarly be financial. Otherwise, the benefit to Company A’s products, operations, or services would not be “straightforward” and “without stopping”; it would be indirect.

3. Vicarious Liability and the Scope of a *Business Relationship*

Deploying fairness to understand direct linkage suggests that a *business relationship* depends on three elements: (i) a benefit to a company’s products, operations, or services (ii) of a specific and

¹³⁷ Interpretive Guide at 8 (emphasis added).

¹³⁸ Interpretive Guide at 5.

¹³⁹ OXFORD ENGLISH DICTIONARY 705 (2d ed. 1989).

constant type (iii) transmitted with or without intermediaries from a state or non-state entity to a business. But these criteria remain incomplete; benefit without qualification would cast the net far too wide. Businesses benefit from an array of technology, infrastructure, and laws that enter and shape the public domain. Benefit alone would capture the activities of all state and non-state entities who provide these, as well as the adverse human rights impacts they *cause* or *contribute* to in so doing. But the Guidance does not expect businesses to address all adverse human rights impacts from which they might benefit: “the due diligence provisions of the Guidelines do not extend to extremely loosely connected associations.”¹⁴⁰

While benefit animates the meaning of *directly linked*, deterrence animates the term’s natural limits. The Guidance specifies that, where a business is *directly linked to* an adverse impact through a business relationship, it should “use its leverage to influence the entity causing the adverse human rights impact to prevent or mitigate that impact.”¹⁴¹ In other words, when a business is *directly linked to* an adverse impact via a business relationship, it is expected to be in a position where it has, or is reasonably able to attain, leverage. This tracks the deterrence rationale underpinning vicarious liability; the difference is that, in the Guidance context, the existence of a *business relationship* does not depend on control. Still, a precondition for being *directly linked to* an adverse impact is the reasonable prospect of leverage over the entity causing or contributing to the impact. Otherwise, deterrence would be a chimera.

This qualification imposes mutuality on relevant *business relationships*. The Guidance defines leverage as “an advantage that gives power to influence.”¹⁴² For leverage to exist in a *business relationship*, the party over which influence is to be exercised must benefit in some way from the party that is asked to exercise its influence. In other words, just as the business must benefit from the state or non-state entity, so must the state or non-state entity benefit from the business. For the purposes of the Guidance, therefore, a *business relationship* between Company A and Entity B only exists if they are engaged in an enterprise *for mutual* commercial benefit.

E. DEFINITION

Considering the meaning of *directly linked* in the context of the Guidance’s object and purpose suggests that the concept serves a distinct purpose from *cause* or *contribute*. The latter involvement terms underpin business responsibility based on increase in the risk of an impact. By contrast, *directly linked* responsibility is independent of the business’s effect on the risk of a particular impact. That is: rather than lying on the same continuum as *cause* and *contribute*, *directly linked* lies on a distinct pillar—benefit rather than risk. The scope of a business’s *directly linked* involvement with an adverse impact turns fundamentally on the nature of its relationship with the state or non-state entity causing or contributing to the adverse impact. We endeavor to capture the parameters of that relationship in our proposed definition:

- A business is ***directly linked to*** an adverse human rights impact when it has established a relationship for mutual commercial benefit with a state or non-state entity, and, in performing activities within the scope of that relationship, the state or non-state entity

¹⁴⁰ Due Diligence in the Financial Sector at 11.

¹⁴¹ *Id.* at 33.

¹⁴² Interpretive Guide at 7.

materially increases the risk of the impact which occurred.

The cornerstone of this definition is *for mutual commercial benefit*. The *link* underpinning a business's responsibility to conduct due diligence and seek leverage to avoid or mitigate an adverse human rights impact, even when it has not *contributed* to it, is the benefit the business derives from the adverse impact. *Directly* then conditions the type of benefit provided and received through the value chain rather than the number of intermediaries through which it passes. *For mutual ... benefit* is essential to avoid capturing “extremely loosely connected associations,”¹⁴³ such as might extend, for instance, from infrastructure projects to all who rely on them. That is, for a *business relationship* to exist, there must be a mutual, albeit general, intention between the businesses to benefit one another's operations, products, or services. Lastly, *commercial* is essential to avoid capturing the activities of a state acting in a public capacity (as opposed to when it is conferring a private benefit).

ELECTRONIC INDUSTRY CITIZENSHIP COALITION AND THE CONFLICT-FREE SOURCING INITIATIVE

This submission is made on behalf of the Electronic Industry Citizenship Coalition (EICC) and the Conflict-Free Sourcing Initiative (CFSI). EICC is a nonprofit coalition of electronics companies committed to supporting the rights and wellbeing of workers and communities worldwide affected by the global electronics supply chain. The EICC is comprised of more than 110 electronics companies with combined annual revenue of over \$4.75 trillion, directly employing more than 6 million people. In addition to EICC members, thousands of companies that are Tier 1 suppliers to those members are required to implement the [EICC Code of Conduct](#). More than 3.5 million people from over 120 countries contribute to the manufacture of EICC members' products.

Founded in 2008 by members of the Electronic Industry Citizenship Coalition and the Global e-Sustainability Initiative, the CFSI has grown into one of the most utilized and respected resources for companies from a range of industries addressing conflict minerals issues in their supply chains. Over 350 companies and associations from seven different industries participate in the CFSI today.

General Comments

1. Overall EICC/CFSI has no major concerns with the Guidance, it seems well aligned with the United Nations Guiding Principles on Business and Human Rights (UNGPR).
2. As the Guidance is meant to provide practical support to companies on the implementation of the OECD Guidelines for Multinational Enterprises that aim to provide “*voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally-recognized standards*”, the tone on some of the disclosure related language should not have a compliance focus but rather focus on best efforts, i.e. including terms such as “encourage”, “may” versus “should”, “require” and “requirements”.
3. There is some of repetition in the document between the core concepts and the detailed sections. You could probably remove all of Part 1 core concepts.

¹⁴³ OECD, Due Diligence in the Financial Sector: Adverse Impacts Directly Linked to Financial Sector Operations, Products or Services by a Business Relationship 11 (2014), <https://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-1.pdf> [hereinafter Due Diligence in the Financial Sector].

4. There is a lack of appreciation of how supply chains work. Most companies have hundreds of customers and the expectation that each customer can contractually require its own expectations of its suppliers is unreasonable and impractical. Suppliers typically provide services to more than one industry sector—so that the opportunity to build leverage within an industry sector can also be limited.
5. The Guidance seems to re-interpret the Guidelines even though it explicitly states that doing so is not its purpose:
 - a. In Section II-D Due Diligence (Section C), the bullet on disclosure of impacts regarding business relationships seems far-reaching, as does some of the other language.
 - b. The reference to the Guidelines in footnote 115 seems disconnected, as there is not a direct reference to issues regarding workers and other stakeholders in that part of the Guidance.
6. The nature of the guidance should be intended to suggest what is possible or desired, but to recognize that in the real world circumstances, not everything suggested is practical or reasonable.
7. The Draft Guidance on page 26 acknowledges that the Guidelines Human Rights Chapter sets out explicit expectations on remedy for human rights harms, but other Guidelines Chapters do not set those same expectations on remedies for other potential harms (environmental, consumer, etc.). The Companion draft goes beyond the Guidelines because it appears to set expectations for remedies for these other potential harms. See Companion, starting on p. 34. The Draft Guidance and Companion appear to assign companies responsibility for addressing risks through fairly loosely defined “linkages,” for example, “causing,” “contributing to” and “directly linked.” These definitions are not clear; however they appear to suggest that even very loose or indirect links might be sufficient to support a remedy. These sections should be revised to be consistent with the OECD Guidelines.
8. The draft Guidance and Companion (section II-C) appear to extend expectations on tracking performance beyond that in the Guidelines. Because the definitions of “linkages” are not clear (described above), it is difficult to understand the scope of these expectations.
9. The Due Diligence Companion (Draft) should avoid including sections of the Guidelines. For the guidance to be applied by companies it should be less descriptive. Should focus on examples rather than “best or good” practices.
10. The Companion draft should include case studies/examples on how many of the elements of the Guidelines have been included in practices, such as the EICC Code of Conduct or the CFSI Smelter Audit Program.
11. Minimize refereeing and cross-referencing across the Guidelines, Guidance and Companion draft.

Page 3 - Key Terms

- Change Leverage Definition to - “Leverage is desired to be created to the extent practicable when an enterprise is directly linked by operations, product, or service through a business relationship with an entity that caused or contributed to harm”.
- RBC Impacts – spell out “Responsible Business Conduct”.

Specific textual edits

Page 6 – suggested edits in tracked mode

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. **Work to build up** ~~Use~~ leverage with **entities where** business relationships **exist** to prompt responses to potential or actual impacts.

II-C. Track performance

1. Develop or adapt systems to track responses 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.

Page 14 I.C.1. (4th bullet) – suggested edits in tracked mode

Set out the enterprise's expectations of ~~relevant organizations~~ **all the entities within the enterprise**,⁸⁸ of **workers** who perform work on behalf of the enterprise and of its ~~business relationships~~ **entities it has a business relationship with** and making the policy publicly available and communicated to all workers, business relationships and other stakeholders.⁸⁹

Page 15 I.C.4 (1st bullet) – suggested edits in tracked mode

Recognising that there ~~will at times be~~ are practical limitations⁹⁹ 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 **through policy or code of conduct expectations to the extent practical, , and there are a number of** consider approaches **suggested in to doing so, individually and collectively, that can be used** (See the OECD's Due Diligence Companion).

Page 17 II-A.C.2. (3rd bullet) – suggested edits in tracked mode

Where RBC risks are identified **deeper in the supply chain or several layers removed** ~~among~~ from business relationships, an enterprise is likely to need ~~to~~ **to build up influence through collaborative approaches as there is no direct leverage. The enterprise can work with others to use fit-for-purpose approaches to** ~~ensure encourage 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.~~

Page 17 II-A.C.3 (1st ~~-(2nd~~ bullet) – suggested edits in tracked mode

Assessment ~~ing~~ means **evaluating a function or organization or supplier's adherence to the enterprises RBC related policies and code of conduct, which could include 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*).

Page 17-18 II-A.C.3 (2nd bullet) – delete the entire bullet

Page 21 II-B.C.3

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 **working towards** 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 work with others to try and build it to the extent practical. 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. Most customers only represent a small amount of their suppliers overall business and therefore would have limited leverage on its own. Building leverage with other customers that use the supplier in a non-competitive way is a means to build leverage

- **Collaborating** with others to create leverage and collectively pressure for a change can be effective ~~if done in a non-competitive manner~~. 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, ~~geopolitical issues, etc.~~, 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~~ are **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.

Page 29 Annex: Understanding “Cause”, “Contribute” and “Directly Linked”

- "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 ~~if there is a demonstrated chain of custody link by a product or service~~. Hence, even if the adverse impact is caused or contributed to by an entity deeper in the supply chain, the enterprise ~~that is directly linked by the product or service has a responsibility to do “something” is still expected~~ to seek to prevent or mitigate the adverse impacts arising from that entity. ~~in its entire supply chain~~. For example, despite multiple tiers of ~~business relationships~~ entities between the enterprise's end product (e.g. ~~an automobile computer~~) and the mine of origin where a serious adverse impact may arise (e.g. financing armed groups through mineral production and trade), ~~if the mineral originated from that location is used by the manufacturer~~ there is ~~nonetheless~~ a direct link between the enterprise product (~~computer-automobile~~) 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 ~~conducting due diligence responsible mineral supply chain management~~ in accordance with the OECD Due Diligence Guidance.¹⁴³

Page 30 Questions to help Guide the Analysis of Cause – Contribute – Directly Linked (4th bullet and sub-bullets)

- 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:
 - o 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.
 - o 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.

Page 31 Expected Responses under the Guidelines (3rd bullet and sub-bullet)

- If the enterprise is directly linked, to an adverse RBC impact, it is expected to take ~~appropriate some~~ action to:
 - o ~~Build up leverage with others to work towards~~ ~~Seek to~~ preventing or mitigating the adverse impact to the extent practical, but not having responsibility for addressing the impact or applying remedy ~~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 ~~driving others to~~ addressing issues in the ~~if~~ supply chains and other business relationships.

ERASMUS UNIVERSITY ROTTERDAM, ERASMUS SCHOOL OF LAW

From Prof. Martijn W. Scheltema:

Dear Madam/Sir,

I have read the insightful and elaborated (draft 2.1 of the) OECD Due Diligence for Responsible Business Conduct (hereinafter 'guidance') and (the draft) Companion to the Due Diligence Guidance (hereinafter 'companion'). These are helpful documents which do assist in better understanding the due diligence requirement in the OECD Guidelines for Multinational Enterprises.

That being said, I would propose the following suggestions.

Guidance

Contractual mechanisms

In the guidance the use of contractual mechanisms is mentioned a few times. I feel these contractual mechanisms might be used more broadly than suggested in the guidance. For example, on page 6 II-A the means for identification and assessment of adverse RBC impacts is mentioned. Contractual mechanisms are not mentioned there, but might play a role. They might implement an obligation of suppliers to provide aggregated information on the number and nature of complaints from their grievance mechanisms, to report on the impacts and to assess their own risks as well as those of their suppliers, an obligation to engage in training and dialogue on RBC and an obligation to map their supply chain. These contractual

instruments might also help to support leverage as mentioned on p. 6 under II-B and II-C.

On page 10 (paragraph 9) the contractual mechanisms are mentioned without further guidance. It might be helpful to elaborate a little on the kind of contractual mechanisms needed, for example including the just mentioned issues. Furthermore, the necessity of clear contractual obligations, means to incentivize or enforce human rights compliance and dispute resolution clauses might be mentioned.

On page 21 (paragraph 3) the usefulness of contractual mechanisms seems to be questioned because the (current) top-down cascading of RBC requirements may do little to stimulate the needed changes. It might be helpful to explain here that this does not imply contractual mechanisms are useless, but might need to be deployed in more effective ways than is currently achieved. Therefore, business should enhance their contractual mechanisms to support their due diligence efforts.

Beside the contractual obligation of a supplier to monitor its own RBC performance (mentioned on page 22 (Paragraph C.1)), it might be helpful to implement a contractual reporting mechanism on this issue to buyers in supply chains.

I feel effective contractual mechanisms should also be part of the on-going RBC due diligence process as mentioned on page 31 (under the heading *As Situations Change, So May Expected Results*).

Risk management and assessment

On page 9 (paragraph 3) it is suggested to incorporate RBC risks in broader enterprise risk management systems. This might be helpful but current practice shows that more broad risk assessments often misses human rights related risks because more specific assessments are necessary to identify those risks (including engagement with human rights experts). Thus specific attention for human rights risks is necessary. In that regard more specific (human rights related risk) assessments as mentioned on page 15 (paragraph 4) might be indicated.

Dispute resolution, stakeholder engagement, involvement and feedback

On page 12 (paragraph 12) consultations with affected stakeholders are rightly seen as part of RBC due diligence. It might be emphasized these consultation might require experienced local third parties in order to build a meaningful dialogue and trust from these stakeholders. This process of building a meaningful dialogue might be time consuming and especially challenging in complex situations where for example affected stakeholders have pre-existing disputes amongst themselves. The same might be true for soliciting for meaningful stakeholder feedback as mentioned on page 23 (paragraph 3). As long as stakeholders do not trust the feedback mechanism and do not know what the company does with their feedback (as well as whether they might fear retaliation) they might be reluctant to provide useful feedback. Third party facilitation might also be helpful in connection with involving external stakeholders as mentioned on page 27 (paragraph 2).

On page 27 (paragraph 2) operational level grievance mechanisms are mentioned in case of human rights grievances. To date these mechanisms do not prove to be very effective especially in terms of providing remedy. It might be good to strengthen these mechanisms need to be designed for the intended users (and therefore developing a global system which is deployed in all the companies operations might not be effective) and need to be adapted to the local issues and challenges. Furthermore, only if intended users trust these mechanisms (especially in terms of transparent procedure, accessibility and other UNGP 31 requirements) they might make use of it.

Beyond that, reference is made to transparency (UNGP 31). This is useful indeed in human rights grievances. However, it might be highlighted this does not mean the source of the grievance has to be transparent too. Especially in terms of fear for retaliation this transparency might not always be useful.

Furthermore, should other dispute resolution options be mentioned too? For example, next to the NCPs arbitration might be an effective escalation mechanism. Should that be entailed in contractual instruments?

Multi-stakeholder collaboration

On page 12 (paragraph 13) multi-stakeholder collaboration is proposed, which might indeed be helpful.

That said, business should assess and monitor the effectiveness of these MSIs in order to conduct meaningful due diligence through multi-stakeholder collaboration.

Benchmarking against relevant laws and regulations

On page 16 (paragraph 16) the necessity to benchmark against relevant laws and regulations is mentioned. Does this entail an obligation to benchmark throughout a supply chain (including laws and regulations governing all suppliers)?

Typographical remarks

The note numbers on page 27 are not consecutive numbers.

Companion

On page 3 (paragraph B) a key action to be mentioned might be the enhancement of the current contractual mechanisms building on my earlier suggestion on the guidance. This is also emphasized on page 7 (paragraph 6).

On page 7 Supplier Codes of Conduct are mentioned. Many of them do not perform that well to date, entail unclear obligations on one or more RBC topics or are not enforced. Thus these might be helpful but might benefit from review and better enforcement or other incentives to comply.

On page 6 it might be mentioned more specific risk assessments might be necessary to identify human rights risks properly. On the same page feedback loops are mentioned. It might be emphasized these mechanisms should effectively incentivise employees to provide such feedback (e.g. if RBC issues are not perceived as material to company such feedback might be scarce). Furthermore, the feedback should be solicited from the whole supply chain if applicable. Beyond that IT solutions are rightly mentioned as means to enhance due diligence. New IT-techniques such as blockchain technology might enhance due diligence especially in supply chains.

On page 15 (paragraph 3) the (rare) issue of the OECD guidelines violating national laws is addressed. In these rare cases leverage might still entail engaging with the national government (e.g. in collaboration with business partners, home governments or industry associations) in order to bring about changes to these laws.

Typographical remarks

The box numbering on page 11, 13, 14, 15, 19, 21, 22, 26 and 27 is not consistent.

I hope these suggestion are helpful.

Kind regards,
Martijn Scheltema

ESTELLE LEVIN LTD.

Public consultation: OECD Guidance and Companion

General

- It could be confusing to have three different documents: Guidelines, Guidance and Companion, that have to be switched between. Might be too much for companies which are looking for easy to use tools.
- Duplications between Guidance and Companion. The important parts of the Companion could simply form an Annex to the Guidance, which would make the document more concise.
- Check for typos.
- Often, only human rights impacts are mentioned when environmental or health-related or other impacts are also relevant. Be careful that omission of one or more impacts in a section of the document does not lead to omission of carrying out due diligence on that aspect.
- Domestically and within their own corporate bodies, companies see the ethical arguments but costs and pricing are not insignificant and this risks an unequal playing field with competitors. For example, what is the likelihood of the Russian metal industry, the major (non-replaceable) supplier of nickel, aluminium and other materials to the West, plus oil and gas, to jump into line anytime soon on all of these targets of ethical behaviour? Western competitors of the Russians compelled to follow the guidelines will complain about the cost impact if they are obligated in some way to introduce all aspects of the Guidelines. Auditing to the expected levels in Russia and its satellites simply will not happen. Only by Western import taxes could there be an offset of costs but it would not achieve any ethical targets in Russia if the supply source is not replaceable.
- Health and Safety, the Environment, Quality Control are all covered by ISO Standards and each participant in the supply chain that actually comes into contact with the materials in terms of handling and processing them should be certified. The drawback is that, notwithstanding certification compliance, the Standards required have to be in compliance with individual national laws. To level the playing field of such laws across nations is a monumental task in itself. To propose that OECD levels of attention to these matters should supersede national laws is going to be very difficult to implement, again if acquisition of the materials is crucial.
- One of the fundamental commercial facts of life is that the supply chain is not transparent to all participants in the chain. Each link knows its supplier and its customer and whilst it is the intention that each participant should be following the guidance it is likely to be impossible for the pre- and post-links of each centre link to conduct any form of audit or control of that link the further downstream you go. Materials change origin through each process of conversion from source to finished product. The various side links to materials subject to transactions and manipulation, finance, storage and shipping, will also not usually know the complete chain. These ‘unknowns’ are built for commercial contract considerations where lack of public transparency is fundamental to retention of business. Opening up the entire chain of any product to any third-party scrutiny would damage that commercial process.
- Possible way forward: to design an audit process in the MEIs at the first smelter that creates the basis for decision making along the whole supply chain for subsequent links to evaluate RMC actions.

Due Diligence Guidance on Responsible Business Conduct (Draft 2.1)

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

Page 3, Key Terms

A definition of what “policy” means should be included. Many small companies do not understand what a policy is and what it means. Examples should also be referred to.

The definition of Due Diligence is not written clearly enough. The idea of “background investigation” on a third party or a potential supplier/business partner should be included to help businesses understand in practice something which sounds very theoretical.

The definition of remediation is only applicable to incidents occurring in the most immediate supply chain link. How can a downstream or mid upstream company do remediation when one or more suppliers sit between them and the incident? More details or an example would provide greater clarity.

Page 7, Box 1: Examples of RBC Impacts Covered by the Guidelines

Workers and Industrial Relations: add ‘working time regulations that do not respect the workers’, ‘need to rest.’

Bribery, Bribe Solicitation and Extortion: add ‘receiving gifts from business partners or public officials without adequate controls or record.’

Consumer Interests: change ‘using deceptive marketing practices about the environmental and social impact of products to mislead consumers’

Page 9f., 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

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. Large enterprises can consider providing support to their smaller business partners, e.g. through training on due diligence systems.

The chapter should be split in two: Policy & Management System. Many SMEs struggle with seeing the difference between the two and how they can be linked. Greater clarity and examples will help.

Page 11, 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

In relation to business partners, the Guidance could suggest that enterprises provide support to their business partners in terms of capacity building, helping them define strategies for mitigation and remediation etc.

Chapter 10 would hugely benefit from clear examples. These are in the Annex but they should be directly linked to explanations to ensure the reader clearly appreciate the full meaning of concepts explained.

Page 11, 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. 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~~ are encouraged to do so and may collaborate with other enterprises in doing so.

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, mitigate or remediate harm.

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. For the case that business operations take place on indigenous peoples' territories, the concept of free, prior and informed consent as elaborated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the ILO Indigenous and Tribal Peoples Convention (No. 169) should be respected.

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

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

C. EXPLANATION OF KEY ACTIONS

Page 17, 1. Building RBC risk-identification processes

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. This should include developing an exit strategy for when the company's operations will end, assessing risks of negative effects of the company's departure (e.g. unemployment, land unusable for other purposes, etc.).

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

C. EXPLANATION OF KEY ACTIONS

Page 20, 2. Prioritising prevention & the most severe impacts

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. If possible they should seek coherence between the different risk mitigation strategies.

II-D. Due Diligence: Communicate

C. EXPLANATION OF KEY ACTIONS

Page 24f., 2. Disclose additional information

Enterprises are encouraged to make information available in plain language and in a format that is appealing to consumers where this is relevant 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). Information could in that case be transmitted through radio or in-person communication. If in writing, the information should be available in the local languages.

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~~ is encouraged to do so and may collaborate with other enterprises in doing so.

B. KEY ACTIONS

2. Provide for or co-operate through legitimate processes in the remediation of adverse human rights or environmental impacts where they identify that they have caused or contributed to these impacts.

Due Diligence Companion (Draft)

I. Embedding Responsible Business Conduct into Policy and Management Systems

A. PURPOSE

Box 1: Good Practices Box

Why Adopt a Public Commitment to Responsible Business Conduct

- Demonstrates that RBC is a priority for enterprise management – it sends a signal “from the top” that the enterprise considers this important
- Lays the foundations for an RBC business culture
- Sets clear expectations for the entities in the enterprise, staff and business partners
- Provides the basis to apply an RBC framework across the enterprise’s business activities
- Shows the wider world (governments, investors, customers, other stakeholders) that the company has considered the issues covered by the Guidelines and understands that they represent a minimum standard for conducting business with legitimacy
- Provides a starting point to better leverage RBC in its business relationships
- **Improves the reputation of the company and potentially widens the customer base**

C. FURTHER EXPLANATIONS OF KEY ACTIONS

Setting out the enterprise's expectations

- As it is meant to provide guidance on the enterprise’s approach to matters covered under the Guidelines, the RBC policy or policies can usefully provide more specific guidance on the specific RBC risks and how it will handle some or all of them. It can also provide policy direction on areas that are likely to be of interest to stakeholders such as how the enterprise will implement its responsibilities – how it will approach due diligence, stakeholder engagement, **mitigation**, remediation.

[2. Embedding an RBC Culture in the Enterprise] **comment:** There is no point 1

3. Assigning Accountability

Accountability can also be reinforced by including RBC issues in the **[management/staff incentive structures.]** **comment:** Could be elaborated a bit more to clarify why is meant by this

4. Developing a Management System(s)

iv. the RBC risks inherent to an enterprise’s business model and those with which it may actually be involved. RBC risk is the driving factor in designing appropriate systems, thus even smaller enterprises involved in **[higher risk (for example, hazardous activities)]** will need more in-depth controls. **Comment:** **Examples of high risk business activities would be useful**

Box 2: Guidelines Box Guidelines Recommendations for Developing a Management System to Address Corruption, Bribery and Extortion

- Develop and adopt adequate internal controls, ethics and compliance programmes or measures for preventing and detecting bribery, developed on the basis of a risk assessment addressing the individual circumstances of an enterprise, in particular the bribery risks facing the enterprise (such as its geographical and industrial sector of operation).
- These internal controls, ethics and compliance programmes or measures should include a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of bribing or hiding bribery.
 - Such individual circumstances and bribery risks should be regularly monitored and re-assessed as necessary to ensure the enterprise’s internal controls, ethics and compliance programme or

measures are adapted and continue to be effective, and to mitigate the risk of enterprises becoming complicit in bribery, bribe solicitation and extortion.

- **Develop a mechanism for whistleblowers and their protection.**

II.A. Due Diligence: Identifying and assessing adverse RBC impacts

C. FURTHER EXPLANATION OF KEY ACTIONS

Box 3: Good Practices Box Examples of Incorporating RBC Risk Identification Processes into Other Business Processes

- Legal reviews of upcoming transactions can be scoped so that they review not only risks to the enterprise, but also RBC risks
- Country context reviews can assess human rights, **conflict** and **corruption** [white-collar crime] risks in the relevant country/region comment: **Beyond corruption**
- Hiring decisions involving migrant workers can particularly probe the potential increased risk for labour exploitation
- Expanding know-your-customer/counterparty (KYC) processes to consider the human rights records of persons and firms reviewed
- Expanding ex ante environmental impact assessments can be revised to do “double-duty”, incorporating consideration of potential environmental, social, health and human rights impacts
- Screening of potential suppliers can include a review of their RBC system
- Using customer surveys to cover concerns about privacy

Box 9: Explanation Box:

Understanding Contextual Factors that Contribute to RBC Risks

Country / Operating Context, Governance context: Existence and effectiveness of government policies in the countries and local area will increase or decrease the risk of adverse impacts. Levels of corruption play a significant role. In well-regulated locations, compliance with the national regulatory framework will often assist an enterprise in addressing many RBC risks whereas in less well-regulated locations a more proactive approach to identifying and managing risks and impacts is necessary. For example, there are likely to be significant differences in operating in countries with strong labour inspectorates and active trade unions compared to countries with weak or corrupt labour inspectorates or trade unions. **The government's record of protecting and promoting human rights can give an indication about the human rights regulatory environment in the country and the risks of human rights violations to occur.**

VI. Providing for or cooperating in remediation

- *This section should outline that community members, workers or other stakeholders filing complaints should be adequately protected, i.e. through guarantee of anonymity.*

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 the harm done. A core purpose of conducting due diligence is to prevent, ~~or~~ avoid **or mitigate** actual adverse RBC impacts. But where adverse RBC impacts do occur and an enterprise has actually caused or contributed to them, remediation will be expected. When enterprises are directly linked to adverse RBC impacts, they are not expected to provide for or cooperate in remediation, but **may choose are encouraged** to do so and may collaborate with other enterprises in doing so. **It is recommended that the remediation action is linked to the harm done, in order to provide for sustainable solutions instead of mere compensation.**

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] and **environmental** impacts where they identify that they have caused or contributed to these impacts.
- Comment: Do not understand why the focus here is on human rights**

C. EXPLANATION OF KEY ACTIONS

Understanding the enterprise's relationship to remediation

- Where an enterprise has caused or contributed to an actual adverse RBC impact, it should be prepared to address the harm and provide for or cooperate in remedying the harm. This can involve working with business relationships (See Box 28).
- 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~~ **is encouraged** to do so, alone or in collaboration with other parties. (See Box 28).

ETHICAL TRADING INITIATIVE - NORWAY (IEH)

From Stine Foss, Acting Managing Director and Karoline Bakka Hjertø, Senior Advisor:

Thank you for the possibility to comment on the drafted guidance. We hope you find the comments useful, please get in touch if you have any questions.

Ethical Trading Initiative - Norway (IEH) is a resource centre and an advocate for ethical trade practices. Our objective is cooperation on trade which promotes human rights, workers' rights, development and environmental standards.

IEH is a multi-stakeholder initiative, represented by NGOs, trade unions, businesses and the Enterprise Federations, as well as the public sector.

IEH's aim is to strengthen its members' efforts to promote decent working, environmental conditions and anti-corruption in their supply chains, and to strengthen support for ethical trade in general. We have approximately 160 members ranging from some of Norway's largest companies to sole proprietorships, public bodies and organisations. The majority of our members are small and medium-sized enterprises. See the [register of members](#).

Our feedback is therefore based on our experience of working with small, medium-sized and large enterprises for more than 16 years, and what we have learned about their needs from the perspective of enabling and driving Responsible Business Conduct (RBC).

General feedbacks

- The guidance (the two documents) gives a good and broad overview of the topic, including the process of due diligence for responsible business conduct. As far as we can see, key issues concerning the principles around the process, and the process itself, are covered.
- While it is a good attempt to provide comprehensive guidance, there is a danger that the reader will lose sight of what is critical to their business. We recommend an emphasis on core and advanced/additional elements of building your RBC.
- There is a lot of text. Our experience is that businesses do not always have the time, interest or ability to get through a lot of text. We fear this guidance will not engage small and medium-sized enterprises. We therefore suggest you cut text where possible, especially repeated text.

- It is not clear how you want the guidance(s) to be used. If you want it to be read from beginning to end or as a reference tool, like an encyclopedia, for specific issues or parts of the process. If the first, repetitions should be limited. If the latter, this intention for use should be communicated more explicitly.
- Regarding the subdivision of the guidance into two documents:
 - o It is challenging to understand the difference between the two documents, and to understand how you intend these two documents; combined or by choosing one or the other?
 - o The Guidance is more of an overview of crucial concepts, and how the process proceeds, theoretically. The Companion is, from our point of view, a more useful *guidance*. In this you find explanations, examples and good practice that you will need if you want to conduct a due diligence. We often get feedback from businesses in our network that they need practical guidance with little, if any, theoretical perspectives. We think a more pragmatic approach would add value to this guide.
 - o If you must have two documents, you should call the Companion a *Guidance for Implementing Due Diligence*, and the Implementing Guide *Explaining the Principles Behind a Due Diligence Process for RBC*.
 - o The text under the same headline is different in the two document without us understanding why. This creates some confusion. For example when you get to Part II in the Guidance, which is part I in the Companion, which in addition have slightly different headings. In addition, some of the text is identical in the two documents, while some differs.
 - o With two documents, there is a lot more text to get through.
 - o *We therefore suggest you combine the two documents into one.*
- The whole guidance must be analysed in a light of user-friendliness: What do you, as a reader, need to get through the text? Charts? Figures? Illustrations? Drawings? Boxes? We suggest the use of several tools to improve user-friendliness and understanding.
- The language is not too complicated, which is good, but the whole guide should nevertheless be scrutinized to avoid complicated language – the easiest way to say things, is often the best.

The Introduction, Key terms and Summary (in the Guidance)

- These sections are overall useful and good.
- The fact that you have included a two-page summary is good, and useful. Maybe this can be used on its own, with the Companion.

Part I – Core Concepts (in the Guidance)

- This section is useful, but might be tightened up, both considering words used and topics included.
- Principle 3, page 8: We consider the distinction between “risk of harm created by the enterprise” and “risk to the enterprise” as a much-debated topic in this field. You explain this in a good way, and we would like to see this elaborated even more.
- If cutting text, do not cut the text under principle 4, page 9, which we find important.
- Principle 5, page 9: Our experience is that RBC policies and strong management systems not only *help*, but are *crucial* in driving an effective RBC due diligence.
- Principle 7: A very good and important point.
- Principle 8, page 10: the point you are making, that “severe impacts should be prioritised over less severe risks, even if the more severe risk are less likely to happen” is important.
- Every explanation of the actual due diligence process can be cut from these principles, as the process itself is explained later. The explanations offered here are anyhow not complete and often leaves more questions (about “how”) than answers. This goes for example for the process explained in principle 9, page 10.
- Naturally, we particularly like the emphasis on a meaningful stakeholder engagement, explained as “a core part of implementing the guidelines”, and the role a “multi-stakeholder collaboration” can play, explained in principle 12 and 13, page 12. But the text could be shortened a bit, specially under point 12.

Principle 8, page 10: the point you are making, that “severe impacts should be prioritised over less severe risks, even if the more severe risk are less likely to happen” is important.

Part II Practical Steps for Implementing Due Diligence under the Guidelines (Guidance) and The Companion

- When it comes to explaining the actual due diligence process, we prefer the Companion over the Guidance. It is difficult to understand the process without the examples and good practice boxes (which we appreciate in the Companion). This is once again based in our experience that enterprises need *practical* guides. The Companion is a much more practical guide than the Guidance.

- As earlier mentioned it is difficult to grasp why the text differ in the two documents. In example, why does the explanation of *the purpose* differ?

I. Embed/Embedding Responsible Business Conduct into Policy and Management:

- From our experience, ensuring commitment and embedding the work into policy and management is absolutely *crucial* for getting anywhere. We want the recommendations to be stronger on this part. The Companion is better.

- Key action 4, page 15 (in the Guidance) can be shortened substantially.

- Key action 6, page 15. A very good and important aspect, but do not start with the *practical limitations*. The Companion is more assertive, which is good.

II-A Due diligence (in the Guidance)

- In general, the boxes under this section are really helpful (in the Companion).

- Our experience is that the initial *prioritization process* is challenging for businesses, and we find the text in the Guidance too theoretical. The Box 9 in the Companion, page 11 addresses some of the need for concrete advice about *how to*.

- In Box 10, page 13 (in the Companion) – We want to see included 1. worker’s voice/representation (trade unions), 2. stakeholder dialogue and 3. purchasing practice as examples of investigative approaches. We also want the limitation to audits to be mentioned.

II-C Due Diligence

- We would also like you to elaborate more under section c: *Explanation of key actions*, on the limitations to audits, maybe referring to research. This is because social audits are, by many companies, often used as the only tool, both for investigation and for addressing (remediate) adverse impacts.

We would also like see more emphasis on the dialogue with workers and the important of democratically-elected workers representation in this part, page 21.

There is a lot more we could have commented on, working with these issues every day. But we hope this nevertheless was useful. You are more than welcome to contact us if you would like to discuss any of the above in more detail.

FACILITECH INTERNATIONAL

From Jan Boon:

Dear Madam/Sir,

I have read the above documents with great interest and I have inserted a number of minor editorial comments in the attached copies, especially in the main document. I would like to make the following additional comments:

The documents are very thorough and touch on all important points.

It took me quite a while to read them, and for me that was not an issue.

However, you may find that the management of a smallish mineral exploration company may find it challenging to wrap its mind around all this. Therefore, it may be good to accompany the roll-out of these documents with a series of workshops and to identify a contact person in each OECD country that can help SMEs overcome some barriers. Another possibility would be to design a self-guiding website. I found the approach taken by the Prospectors and Developers Association of Canada in its community engagement guide very helpful (<http://www.pdac.ca/programs/e3-plus/community-engagement-guide/introduction>).

I wish you success with this important work.

Yours sincerely,

Jan Boon
FaciliTech International
Ottawa, Canada

Key Terms

'RBC impacts' - Do the impacts necessarily have to be adverse to be mentioned here? Responsible Business Conduct should benefit the actors involved and I believe it is worth mentioning this.

'RBC Risks' - Throughout the document, RBC is linked to risks, mitigation, adverse impacts etcetera, whereas I would argue that Responsible Business Conduct leads to the absence of risk, no need for mitigation or remediation, no adverse impacts. I don't see the logic of linking something good (RBC) rather than its opposite to adversity

'Remediation' - I would not put punitive sanctions in the same group as remediation. Even if punitive sanctions may provide those affected with some satisfaction of justice being done, they do not even partially undo the harm caused, not do they provide any compensation
--Prevention of additional harm?—

'Risk-based' – "...which should be proportionate to the severity of the anticipated harm"

'Stakeholder' - Write either "actions of the enterprises and their relationships", or "actions of the enterprise and its business relationships" to be grammatically correct

Two-page summary: Due diligence for responsible business conduct

- **positive impacts** on society and contribute to sustainable development, for example through job creation, human capital development, raising investment and fostering innovation
 - For the extractive industries, their activities can be linked to the UN Sustainable Development Goals: Mapping Mining to the Sustainable Development Goals: An Atlas, UNDP, 2016
- **adverse impacts** related to human rights, workers conditions, the environment, bribery, disclosure and consumers through their own activities or their business relationships.

- Could you describe what and adverse impact on disclosure would look like, why it would be adverse and to whom? I don't quite understand the comment
- social fabric of communities

WHAT IS DUE DILIGENCE?

- Why shouldn't they be required to identify and maximize possible positive impacts from the get-go?
- It may be time to start including management of positive impacts on other actors involved. After all, we are living in a world in which sharing of resources is becoming de rigueur for the survival of our species.
- Focusing on positive impacts AND risk may be a more productive frame of reference. After all "responsible business conduct" should focus on the positive and recognize conduct that is not responsible

CAPTURING THE “ESSENCE” OF DUE DILIGENCE:

- In all of the above list it may be productive and provide a vastly improved reference frame if "risk" were replaced with "risk and opportunities". It would also better match the positive connotation of the term "responsible business conduct"

“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.”

- It may be useful to remind the reader what "integrated" means in this respect

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

I. Embed responsible business conduct into policy and management systems

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

- This may be the most challenging task of all. Companies like Enron and SNC Lavalin had good paper policies that did not help because the culture of important sections of the organization was not there. The approach proposed is necessary, but it is incomplete. Much attention also needs to be paid to the "soft" side of organizations, and to developing attitudes that can successfully deal with uncertainty, ambiguity. Capacity for dialogue is also important

II-A. Identify and assess adverse RBC impacts

- This should be done as a joint exercise with other actors involved
- As I noted before, by its definition, Responsible Business Conduct is designed to **prevent** adverse impacts, so the expression "adverse RBC impacts" is a contradiction in terms

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).

- You are really talking about risks posed by business conduct that is **not responsible**

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.

- "fit for purpose": it seems a word is missing?

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.

- I presume "it" refers to the organization?

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.

- who does "their" refer to?

III. Provide for or cooperate in remediation when appropriate

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.

- Who identifies?

Part I: Core Concepts for Implementing Due Diligence under the Guidelines (page 7)

1. Enterprise actions create responsibility to address adverse RBC impacts

- "...developing innovative solutions to sustainable development challenges" does not read well. The grammar is somewhat cumbersome and the word "innovative" does not add much - it matters less that it is innovative than that it makes and is seen to make a real contribution to development

"The *Guidelines* establish that enterprises have responsibilities to prevent or avoid such harms."

- and to mitigate or compensate for any damages caused

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

- As mentioned earlier "adverse Responsible Business Conduct impact" is a contradiction in terms

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.

- Systems alone cannot do the job. The values implicit and explicit in the system need to be lived by the people in the organization

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.

- This can be very difficult - or example, while Shell's head office in The Netherlands took the correct approach, its subsidiary in Nigeria did not follow suit, at least not initially.

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.

- Would being aware of local social conflicts into which the enterprise may become unwittingly entangled also be part of due diligence?

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.

- Would “true dialogue” be a better term to describe this?

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.

- as early as possible

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.

- At this point it may be useful to make some explicit comments about relationship building and provide some references where the reader can find more detailed advice and information

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.

- The enterprise is only one actor in a complex ecosystem of actors and their relationships.

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

- However, this is only a side benefit. An integrated approach involving the major actor groups has intrinsic benefits not measurable in dollars and cents

Part II.

Practical Steps for Implementing Due Diligence under the *Guidelines*

I. Embed Responsible Business Conduct into Policy and Management Systems

C. EXPLANATION OF KEY ACTIONS

2. Embedding an RBC Culture (page 15)

- 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.
- In addition to setting the tone, which is very important, socialization of RBC expectations is a key actor for success. The ways in which successful safety cultures have been built in many organizations could serve as a model

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

C. EXPLANATION OF KEY ACTIONS

3. Understanding & exercising leverage with business relationships (page 21)

- **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.
- Bottom-up initiatives also may lead to more sustainable solutions

FELLOW NYENRODE BUSINESS UIVERSITEIT

From Herman Mulder, Chairman of the Nyenrode Corporate Governance Institute (NCGI) and Former member NCP-NL (2007- 2016):

INTRODUCTION

First of all, my compliments to the WPRBC staff for this extremely important Paper. It is very comprehensive, practical and although it is not intended to reinterpret or alter the MNE Guidelines, it does offer a number of clarifications on the Guidelines' text which are important for MNE's as well as for NCPs when offering their good services.

There is "no free law zone", so I hope that this Guidance will set the benchmark for good practice in any new law under consideration on due diligence, or in courts.

As the OECD MNE Guidelines offer a normative baseline with respect to adverse impacts by business in their value chains, the recognition in your Introduction that "business can play a major role in contributing to economic, environmental and social progress" may justify to make reference to the UN 2030 Sustainable Development Goals, which I consider a compass for business to make such positive contribution and impacts. Such explicit reference is also made in the concluded Sector Covenants in the Netherlands for the textiles & Garment and Banking sectors.

SPECIFIC COMMENTS ON THE TEXT

1. Target Audience: (page 1):

Reference is made to the usefulness for domestic companies (including SMEs); this is an important statement, which may be amplified by stating that such companies are often operating in the value chain of MNE's; you may in this "usefulness"-context refer to the government in its role as market actor (ref also the NUON Case by the NCP-NL)

2. Business Relationships(page 1)

Am pleased that explicit reference is made to minority investments, which is a recognition of the final statement in the APG case by the NCP-NL;

3. RBC Risks & Impacts(page 1):

The scope is entirely based on the 2011 MNE Guidelines, but reference to specific themes such as GHG emissions, Biodiversity loss, Animal Welfare, Consumer product origin may be referred to as well;

4. Other OECD Instruments(page 2):

Your reference to the G20/OECD Principles of Corporate Governance is unfortunate as these Principles are in my view a major deviation from the MNE Guidelines; this is particular relevant as Corporate Governance is relatively weakly addressed in the MNE Guidelines; the FPIC issue is also weak in the Guidelines, but the text of the OECD Common Approaches and FAO VGGT in this context much stronger: you may emphasize this;

5. Remediation(page 4):

Reference is made to "punitive actions", which is strange in the context of the voluntary MNE Guidelines;

6. "Contributing to"(page 11):

"Contributing to" should explicitly include "benefitting from": this is particularly relevant in the case where an MNE is benefitting from undue expropriation or eviction of local communities by a government (agency) to the benefit of the project of the MNE; adhering countries should set standards in such case for MNE which are compliant with the MNE Guidelines (ref the ADSB/SUAPE case in Brazil)

7. Meaningful Stakeholder engagement (page 12):

Recognition should be given to the "balancing act" by MNE with respect to the various issued addressed in the MNE Guidelines (nb: this also applies to the SDGs: my new SDG!#18 is: "leave no SDG behind"); MNE must take informed decisions for which they are accountable, but there are no perfect solutions, outcomes;

8. Assigning Accountability (page 14,15):

Important that Board level responsibility is mentioned; may be emphasized more upfront in the Paper;

9. Direct linkage (page 29):

There is no "Indirect linkage": finally clarity on this issue.

FINN WATCH

From Anu Kultalahti, Researcher:

Finnwatch welcomes the development by the OECD of specific guidance on the implementation of the due diligence recommendations in the OECD Guidelines for Multinational Enterprises. The draft OECD Due Diligence Guidance and the OECD Due Diligence Companion documents provide many practical tips and

good practice examples which can assist companies significantly in their efforts to implement due diligence.

In its response to the public consultation, Finnwatch has chosen to focus narrowly on Working with others through collaboration section under II.B Due Diligence: Preventing and mitigating adverse impacts, C. Explanation of key actions, 1. Developing response plans that are fit for purpose (page 18 in the Companion document. In the Guidance document, these issues are discussed in brief under II-C. Due Diligence: Track performance on page 22).

Finnwatch is concerned that although this section rightly urges companies to address strategic challenges and root causes of adverse human rights impacts, the messaging in this section could be misinterpreted to endorse companies' own collaborative initiatives as alternatives to third-party auditing and certifications schemes.

Companies' own collaborative initiatives can help to shorten and increase transparency in often long and complex supply chains and thereby, foster long-term business relationships and help build leverage. However, many existing company collaborative initiatives lack transparency and independent monitoring / verification of impact and results. Without transparency and a robust monitoring mechanisms in place, these programmes cannot form a basis for credible consumer communications or company due diligence.

Already with the proliferation of auditing and certification schemes over the last couple of decades, it has become extremely difficult for the consumer to compare different schemes, tell trustworthy schemes apart from the rest and make informed purchasing decisions. An increase in the use of companies' own collaborative initiatives as the basis for responsibility claims over consumer products would make this practically impossible.

A multi-stakeholder structure can sometimes help to overcome transparency and credibility challenges, but is not a panacea. For example, NGOs are often considered desirable partners in multi-stakeholder initiatives as they are seen lending these initiatives more credibility, and some NGOs also themselves actively seek a role in such initiatives. NGOs, however, do not necessarily represent workers' interests nor are they democratically governed. NGOs have their own agendas which might mean that some important perspectives are ignored in the process. For example, other aspects of sustainability – environmental or economic – might be emphasised over social sustainability.

As pointed out in the draft OECD Due Diligence Companion document, many of the existing auditing and certification schemes indeed tend to favour technical criteria (e.g. OHS, working hours, minimum wage) over process rights (e.g. freedom of association, living wage as a result of collective bargaining). Advancing process rights is key to achieving long-term, sustained improvements to terms of employment and working conditions.

However, to say that the auditing approach is in itself to blame for this is to simplify the matter. The auditing and certification schemes have partly been unsuccessful in advancing process rights because the criteria they have set in this regard, and the methods for verification of compliance, have been inadequate. Several schemes for example, accept the mere existence of a workers' committee in a work place as compliance with freedom of association and collective bargaining related criteria. In addition, often the schemes do not even seek to confirm whether the workers' committees have democratically elected leadership, whether the workers feel that they truly represent the needs of the workers, or whether they have been able to negotiate for improvements in terms of employment on the workers' initiative. According to some academic studies¹⁴⁴, these shortcomings in some schemes are attributable to their ownership structure which places the power in the hands of companies and business interests. Companies' own collaborative initiatives are unlikely to change this power-balance.

¹⁴⁴ See for example, Barrientos S. and Smith S., 2007, Do workers benefit from ethical trade? Assessing Codes of Labour Practice in Global Production Systems. *Third World Quarterly*, Vol. 28, No. 4, Beyond Corporate Social Responsibility? Business, Poverty and Social Justice, pp. 713-729

Auditing and certification schemes need to also be further developed and strengthened. Finnwatch has for example recommended that concerted effort be made to involve trade unions in the development of auditing and certification schemes and in particular, to verify compliance with freedom of association and collective bargaining related criteria.¹⁴⁵

In addition, auditing and certification schemes must be supported by ongoing capacity building efforts. This work can benefit from the leverage and improved access created through companies' own collaborative initiatives. However, collaborative systems can be credible forms of due diligence and form basis for consumer communications only when they too incorporate robust monitoring of impact and results. Key characteristics of a robust monitoring mechanism include independence and transparency. Certification and auditing are therefore tools through which the impact and results of collaborative systems can be verified.

Below, we suggest some specific changes to the section on Working with others through collaboration in the draft OECD Due Diligence Companion document, page 18. Original text is in bold, suggested new wording and additions are highlighted in yellow, and comments in italics. We also suggest changes to ordering of paragraphs in this section for clarity.

Working with others through collaboration: The corollary of the deepening ties among enterprises of all sizes within the global economy, is the collaboration that may be required to address some of the strategic challenges for enterprises and their stakeholders. The *Guidelines* encourage enterprise to consider such collaboration.

~~• Moving from auditing to collaborating~~ Working with auditing initiatives:

Finnwatch recommends that the title of the first bullet point is changed to Working with auditing initiatives. This formulation would also be consistent with the title of the second bullet point, Working with certification initiatives.

Many larger enterprises and increasing range of industries have developed their own 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. These are also a form of due diligence.

Finnwatch recommends that additions are made to the text to clarify that what is referred to here, are workplace inspections and suppliers' social audits, conducted or commissioned by the companies' themselves – as opposed to third-party auditing initiatives (see below).

While these systems can work well to track compliance - hard data about supplier performance on issues such as emissions, both the tracking systems and the underlying data they report have in many instances will be less effective in actually addressing impacts – what is achieved [sic].

This sentence should be revised as it appears to contain errors.

This is particularly true around worker and community issues in supply chains. In addition, these systems have led to duplication of audits and so-called “auditing fatigue” as each buyer audits the same supplier separately. From the stakeholders' perspective, companies own workplace inspections and social audits also lack credibility that is offered through independent, systematic, standardised and transparent third-party monitoring.

¹⁴⁵ Finnwatch, 2016, Perspectives on the quality of social responsibility monitoring schemes, available at http://finnwatch.org/images/pdf/PerspectivesOnVSS_forweb.pdf

(Suggest moving this paragraph) Some industries have moved to sharing ethical supply chain data, within the limits of competition constraints, or through industry associations, special-purpose non-profits and multi-stakeholder initiatives as a way of reducing the burden of multiple audits on suppliers, and increasing their leverage to push improved performance. **This is preferable good practice over developing companies own workplace inspections and social auditing systems.**

Working with certification initiatives: Some enterprises choose to work with certification initiatives that have aligned requirements around RBC issues, as these initiatives have their own systems of not only assessment but also (usually) corrective action planning and follow through. **Third- party certification and auditing schemes remain the only readily- available, structured, standardised and transparent means for credible supply chain monitoring and therefore, the preferred option. Differences exists between the initiatives though.** As with auditing approaches, it is useful for enterprises to understand the advantages but also the limits of **various** certification systems and to inform themselves about the latest evaluations of certification systems and how they are evolving. As with auditing, they may be more effective in addressing certain issues than in others, particularly around workers and broader human rights issues and there will be differences in the approach and effectiveness of different types of certification programmes. **Therefore, enterprises are encouraged to put active effort into further developing and strengthening the existing certification initiatives.** Enterprises may **also** need to consider supplementary measures or combinations of approaches when operating in more complex countries and issues.

(Suggest moving this paragraph) ~~Consequently,~~ **For example,** some enterprises and some sectors are working towards more collaborative and partnership based initiatives that seek to address the root causes of adverse impacts that usually involves building supplier capacity and at times, government capacity as well. 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.

FRENCH RSE PLATFORM - PRIME MINISTERS OFFICE

From Gilles Bon-Maury, Secrétaire permanent de la Plateforme RSE - France Stratégie , Services du Premier ministre :

Madame, Monsieur,

La Plateforme RSE, plateforme nationale d'actions globales pour la Responsabilité Sociétale des Entreprises, a été installée en 2013 par le Premier ministre afin de réunir l'ensemble des acteurs de la RSE – entreprises, partenaires sociaux, ONG, chercheurs et institutions publiques – et de leur offrir un lieu d'échange et de concertation pour construire des propositions et promouvoir la RSE.

En réponse à la consultation de l'OCDE relative au Guide sur la conduite responsable et la diligence raisonnable des entreprises (*Public Consultation: Due Diligence Guidance for Responsible Business Conduct*), la Plateforme RSE a élaboré la note que vous trouverez en pièce jointe.

Je me tiens à votre disposition.

Bien à vous,

Gilles Bon-Maury

Monsieur le Secrétaire Général,

La plateforme RSE, plateforme nationale d'actions globales pour la Responsabilité Sociétale des Entreprises, a été installée en 2013 par le Premier ministre afin de réunir l'ensemble des acteurs de la RSE – entreprises, partenaires sociaux, ONG, chercheurs et institutions publiques – et de leur offrir un lieu d'échange et de concertation pour construire des propositions et promouvoir la RSE.

En décembre 2015, le Premier ministre a invité les membres de la plateforme RSE à travailler à la définition et à l'élaboration du contenu des mesures de vigilance que mettent en oeuvre les entreprises. La plateforme a décidé, au vu de l'important cadre méthodologique et conceptuel développé par l'OCDE dans ses guides sectoriels, de se saisir de ces travaux afin d'élaborer une approche commune. La plateforme a donc travaillé à partir de quatre étapes clés de la diligence raisonnable, en cohérence avec les recommandations de l'OCDE, que sont : l'identification et l'évaluation des risques (1), la prévention et l'atténuation des incidences négatives potentielles (2), la remédiation aux incidences négatives (3) et la communication (4).

Chacune de ces étapes a fait l'objet d'un exercice de dialogue et de concertation entre les parties prenantes de la Plateforme RSE afin de faire émerger les éléments essentiels à mettre en œuvre dans le cadre d'une démarche de diligence raisonnable.

La Plateforme RSE tient à souligner, comme le rappelle également l'OCDE, que les entreprises jouent un rôle majeur dans le développement socio-économique de notre société. Celles-ci reconnaissent toutefois que leurs activités peuvent générer des incidences négatives.

La présente note s'attache donc à décrire la façon dont la Plateforme conçoit l'exercice de diligence raisonnable destiné à prévenir, atténuer et remédier à de telles incidences négatives. Ce processus d'analyse et de gestion des risques doit être itératif et continu en s'appliquant tout au long des activités de l'entreprise. Il doit également s'appuyer sur une collaboration efficace avec l'ensemble des parties prenantes et des relations d'affaires.

Le niveau de détail requis peut cependant différer en fonction de la taille de l'entreprise. La Plateforme RSE recommande donc d'appliquer les mesures de diligence raisonnable selon le principe de proportionnalité.

Par ailleurs, cette démarche s'inscrit pour la Plateforme RSE dans le prolongement d'une conception de la responsabilité d'entreprise (RSE) comme étant notamment relative à la « maîtrise de ses impacts », en se référant à la définition retenue dans son texte de référence¹⁴⁶. Elle implique de préciser les moyens pour l'entreprise d'assurer une diligence raisonnable non seulement à court terme mais aussi à long terme.

1. Identification et évaluation des risques (point II.A du projet de guide)

Pour la Plateforme RSE, il incombe aux entreprises d'établir une cartographie des risques, d'impacts négatifs potentiels à l'égard des populations et parties prenantes concernées et de l'environnement, liés aux activités de l'entreprise et à ses relations d'affaires.

¹⁴⁶ « Annexe 3. Texte de référence », Contribution pour le Plan national d'actions prioritaires pour le développement de la RSE, Plateforme RSE, septembre 2016.

Cette cartographie des risques devrait inclure les risques « internes », générés par l'entreprise elle-même et ses filiales, et les risques « externes », induits par les fournisseurs et les sous-traitants de l'entreprise. L'entreprise doit également identifier et évaluer les pratiques contractuelles et commerciales qui pourraient être à l'origine d'incidences négatives.

Une telle cartographie peut se fonder sur une approche par domaines, par secteurs, par zones géographiques et par fournisseurs. L'entreprise peut également recourir à une forme de matrice de matérialité afin de définir les priorités. La classification des risques peut s'établir en fonction de trois critères : sévérité, probabilité et capacité à les maîtriser.

La Plateforme RSE réaffirme l'importance de la méthodologie mise en œuvre, qui doit s'appuyer sur des outils adéquats comme des analyses de risque extrêmes ou des études d'impact, impliquant l'ensemble des parties prenantes pertinentes.

Il faut enfin favoriser et s'appuyer sur un processus continu de mise à jour et d'analyse, nourri par les résultats des quatre étapes du processus de diligence raisonnable, permettant de compléter et d'actualiser l'analyse des risques.

2. Prévention et atténuation des incidences négatives (point II.B du projet de guide)

Pour la Plateforme RSE, il est essentiel d'engager l'entreprise au plus haut niveau sur la politique de RSE, y compris de diligence raisonnable, afin de favoriser la bonne mise en œuvre de ces politiques dans la société-mère comme dans ses filiales et auprès de ses relations d'affaires.

Il est nécessaire de former l'ensemble des métiers de l'entreprise et de favoriser la diffusion des bonnes pratiques et l'émergence des synergies au sein de l'entreprise. Il est notamment nécessaire de former les acheteurs en veillant à bien intégrer des critères sociaux et environnementaux dans les processus d'achat, mais aussi, en fonction des risques identifiés.

Le développement d'une approche de gestion du cycle de vie des produits et des services doit permettre de prévenir et d'atténuer les risques en matière sociale et environnementale.

Il est également primordial de mettre en œuvre des processus dynamiques et itératifs sur les pratiques de l'entreprise et celles de ses fournisseurs et sous-traitants, dont les engagements en matière de diligence raisonnable doivent être inclus dans des clauses du contrat les liant à la société mère et donneuse d'ordre. Un accompagnement des fournisseurs pour l'amélioration de leurs pratiques doit également être prévu.

Des évaluations, des audits, des plans d'action correctifs doivent être mis en œuvre en fonction des risques identifiés.

La mise en place de processus d'alerte accessibles et efficaces doit permettre de garantir le traitement effectif et la protection du lanceur d'alerte.

Il est enfin important d'identifier qui valide et suit le plan de vigilance, sous la responsabilité de la direction générale.

3. Remédiation aux incidences négatives (point III. Du projet de guide)

Pour la Plateforme RSE, l'entreprise doit agir sur les causes d'incidences négatives, en respectant les textes et les standards internationaux, pour opérer une action de remédiation efficace. Elle doit impliquer les parties prenantes, lorsque c'est pertinent et adapté, dans le

processus menant à la médiation I remédiation, notamment les experts et les populations locales, en s'assurant de leur consentement

L'entreprise peut établir et participer à des mécanismes de réclamation et de médiation, en se référant notamment aux travaux de l'OCDE. Des exemples de médiation / remédiation satisfaisants peuvent être cherchés dans le cadre des mécanismes de la Société financière internationale.

L'entreprise doit examiner l'ensemble des outils de remédiation à sa disposition afin de mettre en œuvre les plus adaptées à la situation constatée. Ces actions peuvent être de différentes natures telles que : reconnaissance des faits, excuses publiques, restitution, réhabilitation, compensation financière ou non financière, engagement d'améliorations ou encore financement de programmes éducatifs.

La Plateforme RSE rappelle que, au-delà des actions mises en œuvre par l'entreprise et notamment les mécanismes assurantiels et d'indemnisation, la réparation peut également passer par l'accès des victimes à la justice, y compris pénale.

S'il n'est pas du ressort de l'entreprise d'assurer cet accès à la justice, la Plateforme RSE estime que l'indemnisation n'est pas toujours un outil pertinent, adapté ou suffisant, puisqu'il comporte notamment le risque de dilution de la responsabilité et d'un manque de transparence dans sa mise en œuvre. La possibilité d'accéder à la vérité et d'identifier les responsables est donc importante pour les victimes et afin de prévenir les futures incidences négatives.

Au regard des principes directeurs de l'OCDE à l'intention des entreprises multinationales, lorsque les incidences négatives sont causées par une relation d'affaires, la Plateforme RSE considère que les entreprises devraient user de leur influence pour que la relation d'affaires évolue, pour faire cesser l'incidence négative. Faute de résultat, il peut être en effet nécessaire de suspendre ou de modifier la relation d'affaires, voire de la rompre ou de désinvestir afin de faire cesser le dommage.

Il faut enfin préserver la possibilité de sanctions dans l'éventail des mesures de remédiation, mais également soulever l'importance relative de la sanction selon le mécanisme de réparation mis en place.

4. Communication (point 11.D du projet de guide)

Il est impératif de favoriser un lien direct avec les populations et les parties prenantes potentiellement affectées par les activités identifiées à risque de l'entreprise, notamment par des procédures de consultation des populations. Il convient de communiquer, dans la mesure du possible, non seulement sur les risques identifiés par l'entreprise, mais aussi sur la méthode d'évaluation, les mesures mises en œuvre pour prévenir et atténuer les risques et les résultats obtenus.

La communication pourra s'effectuer, au minimum, annuellement dans le cadre du reporting de l'entreprise. La Plateforme encourage à publier des communications exceptionnelles, en cas de situation spécifique. Elles devront le plus souvent possible être rendues publiques via un site internet accessible à tous. Les questions de la langue et, plus, globalement de l'accessibilité effective des informations devront également être prises en compte, en fonction des parties prenantes concernées.

La Plateforme insiste sur l'importance de diffuser ces informations aussi à tous les salariés de l'entreprise.

La Plateforme RSE se tient à la disposition de vos équipes pour présenter et détailler ces propositions, que nous continuons par ailleurs à affiner dans le cadre du programme de travail 2017.

Je vous prie d'agréer, Monsieur le Secrétaire général, l'expression de ma très haute considération.

Hélène Valade,
Présideute de la Plateforme RSE

GLOBAL WITNESS

Dear all,

Please find attached a formal letter of endorsement of the OECD Watch joint NGO submission to OECD Due Diligence Guidance for Responsible Business Conduct and the Due Diligence Companion. With apologies that we are a couple of days after the deadline.

Global Witness welcomes the OECD's initiative to develop overarching Due Diligence Guidance for Responsible Business Conduct. We underline in our attached letter that in order for this Guidance to be the most effective possible, it must contain clear and robust public disclosure requirements for companies.

With best wishes,
Sophia Pickles

Global Witness has submitted comment for this consultation via the OECD Watch joint NGO submission.

Since 2009 Global Witness has been closely engaged in developing and then monitoring the implementation of the OECD five step supply chain due diligence framework for mineral supply chains.

Our research and investigations over the last twenty years have revealed repeated failures by companies worldwide to conduct business responsibly and without causing harm. We advocate respect for the United Nations Guiding Principles by all companies throughout our work. We consider that firms have an equal responsibility to conduct due diligence, including supply chain due diligence, as part of their responsible business conduct, whatever their sector, size or location.

Global Witness welcomes the OECD's initiative to develop overarching Due Diligence Guidance for Responsible Business Conduct. We underline that in order for this Guidance to be the most effective possible, it must contain clear and robust public disclosure requirements for companies.

Global Witness' research and publications have consistently demonstrated how regular and detailed public reporting is central to the effectiveness and evaluation of company due diligence efforts. Full and periodic reporting that includes detailed information about specific risks identified and mitigated is critical to effective due diligence and the necessary flow of information throughout supply networks. This in turn helps third, fourth and further tier suppliers evaluate and mitigate risks beyond their immediate impacts and demonstrate responsible response to them. At present, the impact of company due diligence efforts is routinely limited by inadequate public reporting. Detailed public reporting also allows companies to showcase their efforts and assess whether genuine progress is being made over time. Investors and shareholders are also increasingly drawing upon public reporting to make decisions about their investments and to evaluate a company's health and performance.

Global Witness restates our endorsement for the Comments submitted by OECD Watch. We trust that the OECD will take them into consideration.

Sincerely,
Sophia Pickles

GRI

Teresa Fogelberg , Deputy Chief Executive:

Dear Sir/Madame

It is my pleasure to send you the GRI's input to the public consultation on the on the OECD Due Diligence Guidance for Responsible Business Conduct.

My colleagues and I are at your disposal for any further questions and we look forward to collaborating with OECD on this important topic.

Best regards
Teresa

Dear Mr. Angel Gurría,

On behalf of GRI, I would like to congratulate the OECD for the development of the Due Diligence Guidance for Responsible Business Conduct and commend your organization on holding a public consultation on the draft document. GRI itself is built upon a multi-stakeholder principle which ensures the participation and expertise of diverse stakeholders in the development of its Sustainability Reporting Standards, and we therefore understand the value of such an approach. Moreover, GRI recognizes the importance of implementing due diligence processes in business activities, as shown by the emphasis placed on this concept within [GRI 103: Management Approach](#), one of the three universal GRI Standards.

GRI welcomes the OECD's recommendation for companies to employ our Standards as part of the implementation of due diligence steps. It is our view that the various synergies listed below enable the two instruments to work well together: the GRI Standards can be used as a practical tool for companies to operationalize the principles and steps outlined in the Due Diligence Guidance for Responsible Business Conduct:

GRI – according to the KPMG Survey of Corporate Responsibility Reporting 2015 is the most widely used sustainability reporting framework in the world – enables all companies to report on their material economic, environmental and social topics, their related impacts, and how they manage these impacts. In this regard, the Standards function not only as an external communication tool, but also as a guide for companies to identify, assess and manage their significant impacts.

The starting point for reporting with the GRI Standards is the universal Standard [GRI 101: Foundation](#), which acts a guide with essential information on how to use the Standards, enabling new reporters to easily build a sustainability report. There are two additional universal Standards; [GRI 102: General Disclosures](#), which is used to report contextual information about an organization, and [GRI 103: Management Approach](#), which directly links to due diligence by communicating the management approach put in place for each material topic. The GRI Standards also include a set of 33 topic-specific Standards, which reflect the OECDs Guidelines' topic-specific impacts, divided into three series of Economic, Environmental, and Social topics. Companies can select from the set of topic-specific Standards according to their material topics.

Consequently, a report in accordance with the GRI Standards can (1) explain how RBC is embedded into policy and management systems (2) Identify and assess adverse impacts (3) Communicate how these are prevented/mitigated/remediated (4) Help companies track their performance through reporting and (5) Communicate to stakeholders-in this way fulfilling the expectations and practical steps set out in the OECD's Due Diligence Guide on Responsible Business Conduct.

In this regard, the following linkages between the Guidance and the GRI Standards should be noted:

1. Focus on Impacts

The Guidance refers to the responsibility of enterprises to address and manage adverse RBC impacts created through their actions and business relationships. Sustainability reporting, as promoted by the GRI Standards, is an organization's practice of reporting publicly on its economic, environmental, and/or social impacts, and hence its contributions – positive or negative – towards the goal of sustainable development. Through this process, an organization identifies its significant impacts on the economy, the environment, and/or society and discloses them in accordance with a globally-accepted standard.

The GRI Standards require organizations to report not only on significant impacts that they cause directly, but also those they contribute to or are linked to through their business relationships – for example, suppliers or customers. The full set of GRI Standards covers a variety of impacts included in the OECD Guidelines chapters, including but not limited to Human Rights, Labor/Management relations, Anti-corruption, Consumer Interests, and various environmental impacts, making it a tool that is aligned with the OECD Due Diligence Guidance on RBC as well as with the general OECD Guidelines for MNEs in order to support companies in the assessment, prevention and mitigation of impacts

2. Due Diligence and emphasis on Management Approach

The Guidance defines due diligence as the processes through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential impacts. Similarly, GRI believes that information on how an organization identifies and manages its significant economic, environmental, and social impacts is an essential component of effective sustainability reporting. The GRI Standards therefore require that organizations report comprehensively on their management approach for every material topic, using GRI 103: Management Approach.

GRI's management approach disclosures support an overall approach to due diligence by helping organizations to identify, analyze, and respond to their significant impacts. [GRI 103: Management Approach](#) requires organizations to first explain the purpose of their management approach – for example, whether to avoid, mitigate, or remediate negative impacts, or to enhance positive impacts. The Standard also requires an explanation of why each topic is material and where the impacts occur (e.g. within the organization itself, or in the value chain), as well as a description of the organization's involvement with the impacts – for example, whether it has caused, contributed to, or is linked to the impacts through a business relationship. The organization is also expected to report the relevant components of its management approach for each material topic, including policies, commitments, grievance mechanisms, and goals and targets, along with an evaluation of the management approach. GRI's management approach disclosures are closely aligned with key instruments such as the OECD Guidelines for MNEs and the UN Guiding Principles for Business and Human Rights.

3. Disclosure of information on all material matters and prioritizing impacts (Materiality)

The OECD signals the disclosure of information on all material matters as one of the key actions for companies to follow as part of the Due Diligence Guidance on RBC, placing importance on the necessity to prioritize which impacts to focus on. GRI shares this standpoint in its materiality concept, as it believes that while it is not realistic for companies to report their impacts on every economic, environmental, and social topic, neither should they pick and choose or disregard some topics in their practices and reporting. The GRI standards define materiality as the threshold at which topics become sufficiently important that they should be reported. A report in accordance with the GRI report is required to cover all material topics for that organization. This ensures that the report provides a full and balanced picture of the organization's impacts, and therefore its contributions – both positive and negative – towards the goal of sustainable development. Within the GRI Standards, material topics are defined as those which reflect the organization's significant economic, environmental and social impacts, or substantively influence the assessments and decisions of stakeholders. Going beyond the disclosure of information, this addresses the internal process of identifying impacts as outlined in the Guidance as well as the prioritizing of impacts as outlined in the Policies and Management Systems chapter.

4. Communication with Stakeholders

Meaningful stakeholder engagement is a core element of the Due Diligence Guidance, highlighting the need to communicate with stakeholders in order to account for how the enterprise has addressed impacts as well as taking into consideration their input and feedback. GRI believes that transparency of information empowers sustainable decision making and is essential for stakeholders to be able to influence activities that may in turn affect them. Stakeholder Inclusiveness is one of GRI's ten fundamental Reporting Principles, and all organizations preparing a report in accordance with the GRI Standards are required to apply this principle. In addition, GRI 102: General Disclosures requires a detailed explanation of how an organization has prioritized and engaged with various stakeholder groups, and has responded to the issues raised. In addition to communicating to stakeholders through formal sustainability reporting, GRI 413: Local Communities addresses participatory processes, consultations, the establishment of committees and other forms of engagement and communication tailored to local stakeholders. Therefore, using the GRI Standards to communicate with stakeholders supports sustainable decision making while at the same time aligning companies' communication with the OECD Due Diligence Guidance on RBC.

Taking into account the alignment and synergies between the GRI Standards and OECD's Due Diligence Guidance, GRI is interested in exploring the possibility of collaborating with the OECD on a joint communication on how these two instruments are harmonized and can be used together. My team and I remain available to further discuss the synergies presented in this letter, either with a follow up call or by e-mail.

Yours Sincerely,
Teresa Fogelberg

HUMAN RIGHTS WATCH

Submitted by Helen Griffiths, Coordinator, Children's Rights Division:

Human Rights Watch welcomes the opportunity to comment on the Draft OECD Due Diligence Guidance for Responsible Business Conduct ("Guidance"). Human Rights Watch is an international nongovernmental human rights organization that is working in over 90 countries globally. For more than two decades we have documented human rights abuses in the context of global supply chains in agriculture, the garment and footwear industry, mining, construction, and other sectors. We have interviewed thousands of workers, employers, and government officials, and engage regularly with businesses and governments regarding their responsibilities to protect human rights.

The need for a binding international standard on business and human rights

Governments have the primary responsibility to protect human rights, including in the context of global supply chains. To meet this responsibility, they should regulate the business sector both domestically and abroad. We have seen that where states have imposed mandatory due diligence, company transparency and accountability has been improved, but often, States do not sufficiently regulate businesses to meet their human rights obligations.

Many key human rights responsibilities of businesses are already spelled out in a number of non-binding voluntary standards, including the United Nations Guiding Principles on Business and Human Rights. The Guiding Principles and other voluntary standards provide a clear and widely-accepted model of responsible business practice. But while some companies take their human rights responsibilities seriously, other companies have taken little or no action to implement due diligence measures. As a result, human rights abuses related to the economic activities of businesses remain common, affecting millions of workers around the globe.

The creation of the proposed voluntary guidance would therefore be of limited effectiveness. Human Rights Watch believes that the best way to strengthen human rights due diligence in the context of business operations is to create a new, legally binding international standard to oblige governments to require businesses to conduct human rights due diligence in global supply chains.¹⁴⁷ We understand that the OECD's goal here is to create a non-binding instrument that spells out recommendations laid down in the (non-binding) Guidelines for Multinational Enterprises. However, it does have the capacity to adopt legally binding standards as it did with the Anti-Bribery Convention.

➔ ***Recommendation:*** *The OECD Due Diligence Guidance for Responsible Business Conduct and OECD Guidelines for Multinational Enterprises should become a binding standard.*

Comments on the content of the draft Guidance

Alignment with existing human rights standards

It is vital that the Guidance recognizes and explicitly names international human rights standards as a foundation and core concept in Part I. While the Guidance mentions several important standards such as the International Labour Organization (ILO) Conventions, it should also specifically name core human rights instruments, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, the UN Convention on the Rights of the Child, and several other treaties, listed in full by the Office of the High Commissioner for Human Rights.¹⁴⁸

¹⁴⁷ Human Rights Watch, Human Rights in Supply Chains : A Call for Binding Global Standard on Due Diligence, May 2016, <https://www.hrw.org/report/2016/05/30/human-rights-supply-chains/call-binding-global-standard-due-diligence>

¹⁴⁸ Office of the United Nations High Commissioner for Human Rights, 'The Core International Human Rights Instruments and their monitoring bodies', undated, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (accessed February 1, 2017).

The Guidance includes discussion of proportionality of response to risks and harm, with priority given to severe harm or human rights abuses. However, great care needs to be taken that less severe human rights problems are not simply ignored next to an exclusive focus on the most severe potential harms. In cases where an enterprise is unable or unwilling to take effective steps to prevent, mitigate, or remediate human rights abuses, the Guidance should encourage enterprises to consider halting activities linked to those abuses, or disengaging with suppliers that are linked to the human rights abuse until or unless a viable mitigation strategy is found.¹⁴⁹

In relation to children's rights, the Guidance should specifically recognize and build upon the General Comment issued by the UN Committee on the Rights of the Child on State obligations regarding the impact of the business sector on children's rights.¹⁵⁰

➔ ***Recommendation:*** *The OECD Due Diligence Guidance for Responsible Business Conduct should explicitly mention ILO and core human rights standards as its foundation. In its introduction and in Part II-A, the Guidance should explain that any violation or abuse of the rights enshrined in these human rights standards is considered an adverse impact. It should also explicitly recognize the content of the General Comment on child rights in the context of business operations.*

Transparency and disclosure

Transparency and disclosure are central to ensuring robust due diligence and effective outcomes. Transparency should be included and emphasized throughout the Guidance, in particular that relevant, accurate, timely, current, and accessible disclosure is necessary at every step of the iterative due diligence process. In addition, transparency around due diligence policies, methodologies, and remediation methods will provide a greater predictability in the process, particularly for affected stakeholders.

Transparency is particularly important with regard to supply chains. Enterprises should disclose the names and locations of the entities along its supply chain, from subsidiaries to subcontracted suppliers or service providers. Business relationships with financial institutions should also be disclosed.

¹⁴⁹ Organisation for Economic Co-operation and Development (OECD), 'OECD Guidelines for Multinational Enterprises, II :Commentary on General Policies', 2011, <http://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf> (accessed February 6, 2017) pp.21-22.

See also 'OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-affected and High-risk Areas', 2016, <http://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf> (accessed February 6, 2017).

¹⁵⁰ UN Committee on the Rights of the Child, 'General Comments No.16 (2013) on State obligations regarding the impact of the business sector on children's rights', CRC/C/GC/16 (2013), <http://www.refworld.org/docid/51ef9cd24.html> (accessed February 1, 2017).

- **Recommendation:** *The OECD Due Diligence Guidance for Responsible Business Conduct should make the transparency recommendations more robust by including disclosure throughout the due diligence process and of supply chain business relationships.*

Monitoring implementation

The goal of the Guidance is to improve business conduct by implementing the due diligence recommendations of the OECD Guidelines for Multinational Enterprises. While the Guidance encourages companies to track their own due diligence processes, it contains very little information on how States will monitor and measure implementation. This is a major oversight.

Human Rights Watch believes that a formal assessment is needed to measure how States are implementing the OECD Due Diligence Guidance for Responsible Business Conduct. Adhering States should report regularly and publicly on (i) what activities they have undertaken to promote and monitor implementation of the Guidance; (ii) the number and overall proportion of companies who are reporting on their due diligence policies and practices in accordance with Part II-D of the Guidance; and (iii) the number of reporting companies that are, in the state's assessment, undertaking due diligence in accordance with the Guidance. The OECD should set up a monitoring mechanism that assesses progress on the implementation of the Guidance in each State.

- **Recommendation:** *The OECD Due Diligence Guidance for Responsible Business Conduct should include a mechanism to monitor implementation.*

Accountability and remedy

The Guidance does not go far enough to ensure effective remediation processes where harm was not prevented or only partly mitigated. Enterprises should make an effort to assess the possibility of remediating potential abuses as part of the due diligence process. As part of the “specific response plans” described in Part II-B, enterprises should identify and disclose the methods by which affected parties can raise concerns about future impacts, whether through judicial or non-judicial mechanisms.¹⁵¹

¹⁵¹ Non-judicial grievance mechanisms should also be designed in consultation with stakeholder groups for whom the mechanism is intended. Office of the UN High Commissioner for Human Rights, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework’, 2011, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed February 6, 2017).

The Guidance should also strongly encourage enterprises that are directly linked to human rights abuses, but that are not causing or contributing to that harm, to ensure that just, fair, and effective remedial processes are in place. This is particularly important in the context of supply chains, particularly where enterprises rely on goods and services from companies with risky business practices.

➔ **Recommendation:** *The OECD Due Diligence Guidance for Responsible Business Conduct should include remediation planning and disclosure as part of its due diligence process. Remediation should be strongly encouraged throughout a supply chain, even when an enterprise is only directly linked to harm.*

ICAR

Submitted by Sarah McGrath, Legal and Policy Director:

Please find attached ICAR's submission on the draft OECD Due Diligence Guidance for Responsible Business Conduct. We appreciate the opportunity to provide feedback on this document, and we look forward to engaging with the OECD further in its efforts to ensure and promote responsible business conduct.

Warm regards,
Sarah

The International Corporate Accountability Roundtable (ICAR), a project of the Tides Center, is a civil society organization working to ensure that governments create, implement, and enforce laws and policies to protect against business-related human rights abuse.

ICAR appreciates the opportunity to provide feedback on the draft OECD Due Diligence Guidance for Responsible Business Conduct. Guidance such as this is key to ensuring that companies take adequate steps to address, prevent, mitigate, and remediate adverse human rights impacts throughout their global operations.

As the first OECD guidance to discuss the issue of due diligence more generally, this document provides an important opportunity to clarify and strengthen existing due diligence concepts and standards. ICAR therefore recommends that the Draft Guidance:

1. Clarifies and emphasizes that enterprises are responsible for all adverse impacts, not just those that are considered to be severe;
2. Place greater emphasis on the importance of meaningful, ongoing, and inclusive consultation with stakeholders and rights-holders throughout all stages of the due diligence process;
3. Strengthen the focus on disclosure and transparency throughout the text, highlight the importance of supply chain mapping and disclosure, and include transparency as a stand-alone “Core Concept for Implementing Due Diligence under the Guidelines;”
4. Provide greater clarity around the due diligence steps enterprises should take in relation to their

subsidiaries and members of their corporate group;

5. Acknowledge that the line between an enterprise causing, contributing, or being directly linked to an adverse impact is fluid. The text should also highlight that if an enterprise knew (or should have known) about abuses taking place, and took no action to prevent or mitigate it, the enterprise will be contributing to the abuse and should provide remediation; and

6. Confirm that if an enterprise has caused or contributed to an adverse impact, it cannot diminish its responsibility to provide remediation by disengaging from the business relationship.

The Draft Guidance should affirm corporate responsibility for all adverse impacts

ICAR recognizes that due diligence is a risk-based process and therefore a method of prioritization will take place. However, as currently drafted, there is the potential for the Draft Guidance to be interpreted in a manner whereby enterprises are only responsible for severe risks and impacts. Furthermore, relying solely on a risk-based process, with a particular focus on severe risks, may lead to other adverse impacts being ignored. This is also problematic as the term “severe” can be narrowly interpreted. We therefore encourage the Draft Guidance to explicitly emphasize that enterprises have a responsibility to address all adverse impacts.

In addition, we note that “severe impacts” is not fully defined in the Draft Guidance, as the definition is included in the companion. Given the focus on severe risks and impacts within the Draft Guidance, ICAR believes that the definition should be moved to the main document.

Recommendation 1: *The Draft Guidance should clarify and emphasize that enterprises are responsible for all adverse impacts, not just those that are considered to be severe.*

The Draft Guidance should place greater emphasis on meaningful and inclusive consultation with stakeholders and rights-holders

The Draft Guidance correctly notes that meaningful stakeholder engagement is a core part of implementing the *OECD Guidelines for Multinational Enterprises*, including responsible business conduct due diligence. However, ICAR believes that the Draft Guidance does not adequately address the centrality and importance of meaningful and inclusive consultation with stakeholders and rights-holders throughout the due diligence process. For example, within the “Summary of ‘Key Actions’ to put a due diligence process in place” on page 6,1 the only mention of stakeholders is listed under section II-D on communication. ICAR recommends that the Draft Guidance emphasize and clarify within the “Key Actions” section and throughout the document the steps enterprises should take to effectively engage with stakeholders and rights holders.

Recommendation 2: *The Draft Guidance should place greater emphasis on the importance of meaningful, ongoing, and inclusive consultation with stakeholders and rights-holders throughout all stages of the due diligence process.*

The Draft Guidance should confirm the importance of transparency and disclosure

The Draft Guidance correctly acknowledges that due diligence involves a process of “knowing and showing.” However, there is not enough focus on the importance of “showing” within the document. Given that information transparency is essential to the due diligence process, transparency should be recognized as a stand-alone “Core Concept for Implementing Due Diligence under the Guidelines.”

The *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High Risk Areas* outlines a number of steps enterprises should take to effectively disclose due diligence activities and outcomes. ICAR believes that the Draft Guidance would benefit from a similar level of detail and that the standard established in the Draft Guidance should not fall below other such standards. In particular, section II-D on “Communicate” should be strengthened to bring the Draft Guidance in line with the conflict minerals guidance and provide additional detail on what effective disclosure entails.

Given that mapping an enterprise's supply chain is a critical part of due diligence, this issue should receive more attention in this guidance. If an enterprise is not mapping and disclosing its own supply chain, any human rights due diligence it conducts will be inadequate. In order to conduct adequate risk assessments, enterprises must first know the locations of entities within their supply chain. While a company may be able to identify some risks, such as risks linked to the enterprise's sourcing model, without knowledge of its supply chain, other risks, such as risks associated with the country of production, cannot be identified without knowing the supply chain. Additionally, if the company itself does not know who its subcontractors are, it cannot communicate to potential or actual affected individuals about any grievance mechanism or human rights abuse reporting mechanism the company may have in place.

Recommendation 3: *The Draft Guidance should strengthen the focus on disclosure and transparency throughout the text, highlight the importance of supply chain mapping and disclosure, and include transparency as a stand-alone "Core Concept for Implementing Due Diligence under the Guidelines."*

The Draft Guidance should provide further direction in relation to subsidiaries and members of the corporate group

The Draft Guidance appropriately captures that business enterprises often operate through a distinct network of subsidiaries and other entities located in different jurisdictions. As a result, 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."² Yet, following section I on "Core Concepts for Implementing Due Diligence under the Guidelines," there is only one mention of subsidiaries in the text and no reference to them within the "Two-page summary."³ While subsidiaries and other members of the corporate group are included within the definition of the MNE enterprise group,⁴ the Draft Guidance could be strengthened by including specific references to subsidiaries and members of the corporate group throughout the text. By not doing so, the OECD opens the door for potential misinterpretation and may significantly narrow the scope and application of the due diligence process. Furthermore, the OECD should capitalize upon the important opportunity which this guidance presents to provide enterprises with specific guidance on how due diligence should be undertaken in relation to their subsidiaries and members of the corporate group.

Recommendation 4: *The Draft Guidance should provide greater clarity around the due diligence steps enterprises should take in relation to subsidiaries and members of their corporate group.*

The Draft Guidance should ensure access to remedy, including in the context of supply chains

ICAR is concerned by the way in which the Draft Guidance approaches the role and responsibility of enterprises in providing remediation when they are directly linked to a harm. The Draft Guidance establishes limits to when impacted individuals or communities might seek access to remedy, stating that enterprises "directly linked" to adverse impacts through business relationships are not responsible for remediation, but should seek to prevent or mitigate the adverse impact by using or building leverage. This approach fails to respond to those situations, particularly in the context of supply chains, where an enterprise may not directly cause or contribute to an abuse, but may benefit or profit from it.

The Draft Guidance should acknowledge that the line between the various categories of involvement is fluid, and an enterprise may move between categories depending on its own acts or omissions. For example, on face value, an enterprise may appear to be directly linked to human rights abuses within the factory of one of its suppliers. However, if the enterprise knew (or should have known) about the abuses taking place, and took no action to prevent or mitigate them, the enterprise will be contributing to these abuses and should provide remediation.

ICAR recommends that the Draft Guidance take into account these dynamics and recognize that there may be situations when an enterprise fails to adequately identify, prevent, and mitigate risks of human rights harms and benefits financially or otherwise from such harms. The Draft Guidance should encourage enterprises to objectively examine their role in the harm and provide remediation accordingly.

The Draft Guidance should also confirm that if an enterprise has caused or contributed to an adverse impact, it cannot diminish its responsibility to provide remediation by disengaging from the business relationship. While disengagement may be an appropriate option, this should be coupled with the provision of effective remediation. Although the Draft Guidance touches on the notion of disengagement, additional information on how an enterprise can responsibly disengage to prevent, mitigate, and remediate adverse human rights impacts should be provided.

***Recommendation 5:** The Draft Guidance should acknowledge that the line between an enterprise causing, contributing to, or being directly linked to adverse impacts is fluid. It should also highlight that if the enterprise knew (or should have known) about the abuses taking place, and took no action to prevent or mitigate the abuse, the enterprise will be contributing to the abuse and should provide remediation.*

***Recommendation 6:** The Draft Guidance should confirm that if an enterprise has caused or contributed to an adverse impact, it cannot diminish its responsibility to provide remediation by disengaging from the business relationship.*

We appreciate the opportunity to provide feedback on this document and look forward to engaging with the OECD further in its efforts to ensure and promote responsible business conduct.

Sincerely,
Amol Mehra, Esq.
Executive Director
International Corporate Accountability Roundtable

ISO 20400

Prepared by Jacques Schramm ISO 20400 “sustainable procurement” workgroup (PC 277) Chairman:

Main recommendation: this guidance should mention ISO 20400 “sustainable procurement”, and explain in general terms why it could be useful in deploying the OECD guidance

The OECD Due Diligence Guidance “*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 guide is clearly focused on the due diligence concept and risk category and, by not mentioning **ISO 20400**, which **covers** as we will see **a wider scope as regards supply chain risks and opportunities**, is missing an opportunity to strengthen its efficiency in deploying such policies and strategies along international supply chains.

As ISO 20400 states (4.4 Drivers for sustainable procurement) **multinational companies might want to deploy sustainable procurement on a wider scope for strategic reasons** such as innovation, competitive advantage, customer expectations, broader risk management, and even cost optimization which is obviously strategic in the procurement activity.

By better connecting this guidance to ISO 20400, in other words to the broad business interests of large multinational companies, **the guidance increases its possibility to be part of a broader process** and effort shared along procurement activities and supply chains, and also benefit from more important resources resulting from bigger business expectations. It would also help allocate resources and organize activities more efficiently in the procurement process, due to the strong operational and practical focus that ISO 20400 is providing in its 7th clause, which will be easy to understand by procurement professionals.

By not mentioning it, and not explaining how both guidelines connect and can “help each other”:

- the OECD Due diligence guideline runs the risk to lead to “defensive approaches”, driven by the worry “not to get caught by the sheriff”, basically aiming at achieving the minimum due diligence level of performance (respecting national laws, minimal norms of behavior) all this for the necessary and minimal cost effort. OECD due diligence might result at the end in a lack of ambition and deprive stakeholders such as governments, populations, SME’s... from societal added value
- multinational companies might face increased complexity, duplication of procedures and deployment cost if both approaches are not better organized and monitored from the beginning in very complex organizations, whereas this is totally possible, due to the joint and successful efforts from the ISO PC 277 and OECD team to align concepts regarding due diligence
- it might also increase unnecessary confusion in deploying good practices in supply chains. Multinational companies understand better the need to do things, and allow more adequate resources to such project when international organizations and governments provide stronger political support through joint communication. UNEP already explains that ISO 20400 supports their policy. The European Commission and other UN branches will probably do the same in 2017. It would be an added value for decision-makers and stakeholders if OECD adopts the same communication. ISO 20400 also mentions its connection with these organizations.

How could the OECD guidance be improved?

The connection with ISO 20400 should be made in the Due Diligence Guidance and at the beginning of it because it is a priority for decision makers to understand from the beginning that both approaches can be or should be connected and design their deployment strategy and policy accordingly.

The mention could be added in the introduction, clause “links to other OECD processes”. Through a new paragraph such as:

OTHER OECD LIAISONS

The guideline concepts have been introduced through OECD liaison commitment in the new ISO 20400 “sustainable procurement” standard, published in march 2017. This standard might help multinational companies deploy due diligence based on their broader strategy and business interest, possibly addressing a wider range of counties around the world. It covers a wider scope of social responsibility issues, and will help address risks and opportunities relating to stakeholders that might not be relevant, nor focused upon at the same degree in the due diligence guidance. It provides additional help to integrate due diligence into the procurement process and adds accessibility of due diligence concepts for procurement professionals use. The OECD guidance will in that case provide the necessary expertise in due diligence deployment, so that broader sustainable procurement approaches increase their consistency with OECD due diligence guidelines.

Some additional help could also be provided in the companion through a “one page” description of the ISO 20400 standard, such as the one provided in the attached document.

Beside documentation, it would also be a good idea to establish a **communication plan between OECD and the ISO PC members**.

Why does ISO 20400 deal with a wider scope and how could it benefit to the OECD due diligence guidance?

It is important to recognize first that due to important efforts conducted in the workgroup in the last ISO meetings (especially during Sydney meeting may 2016, enhanced by Rio meeting December 2016 through UN/OHCHR inputs) a full alignment with due diligence concepts and scope, as defined by OECD and the UN, has been achieved:

- guidance relevant for multinational enterprises, of all sizes
- due diligence impacts belong to core subjects and main areas as described in ISO 26000
- same due diligence definition
- same definition of leverage
- practical steps for implementing due diligence are included
- inclusion of grievance (remediation) mechanisms

The OECD guidance and its companion includes more detailed provisions, and for that reason remains very useful on top of ISO 20400, but the general logic is the same, so that that correct application of ISO 20400 in itself should lead to a global correct deployment of due diligence guidelines in supply chains.

We also need to consider that **ISO 20400 scope is wider**, which also means that such a wide application of social responsibility in supply chains, and also in some regards more specific in its recommendations, **should also mean additional benefits to due diligence in supply chains**, as we will see in the following items:

- ISO 20400 provides the same guidelines to public organizations. Public procurement policies might add support to due diligence guidelines by influencing their private suppliers
- ISO 20400 provides the same guidelines to domestic enterprises and the guidance focuses more (through also more detailed sector guidances) on “long” international industrial supply chains such as minerals, textile...However, in developed countries economies, more than 70% of GNP is made in the service business, where supply chains are a lot shorter and more nationally driven. ISO 20400 can help deploy due diligence at national level, including in the service business
- ISO 20400 international scope might be wider, since ISO has 161 member countries around the world, including developed, BRIC and developing countries. Even the PC 277 international scope, co-chaired by France and Brazil, was quite wide in itself, with 50 countries participating in the 6 continents, and liaisons with major international organizations besides OECD: 3 branches of UN, European Commission, IATA...Given the very high score (92%) accepting the publication of the standard on the final vote, close to unanimity, it is liable that this standard will be legitimate internationally and will deploy strongly around the world: this could help OECD deploy the due diligence guidance key concepts into countries which are not members of OECD, and involve better their national purchasing organizations
- ISO 20400 provides a definition of risk that is wider than due diligence risks:

	<i>Negative (or adverse) impacts</i>	<i>Positive (opportunities) impacts</i>
<i>Impacts on society</i>	Due diligence	Short mention at top of the two-page summary
<i>Impacts of the procuring organization</i>	Out of scope of OECD guidance	Out of scope of OECD guidance

By addressing opportunities as well as impacts on the organizations, ISO 20400 will increase the motivation of multinationals to promote good practices in their supply chains because it is their strategic interest to do so. Benefits will be for due diligence guidance:

- Being ambitious and innovative in opportunities regarding societal impacts will improve the reputation of the enterprise and of its products and services and facilitate market development as well as investors interest for the company
- Addressing positive and negative impacts of procurement practices and supply chains, as it is done in ISO 20400, leads to get multinational enterprises more interested to economic impacts, resulting from due diligence, on the organization, and therefore put more attention

to it. For example adverse impacts could generate additional costs of risks for the organization

- ISO 20400 provides the concept of “life cycle costing” (LCC) which is an attempt to encompass in procurement decisions the broad definition of risk, as seen before, into one single economic impact for the procuring organization. The general idea is to help procurement professionals consider more the broader economic impact of their decisions, rather than the cost of products and services bought, or even the total cost of ownership, which would only consider economic impacts on the procuring organization. LCC includes economic (monetized or non monetizable) societal impacts and will therefore add motivation to consider all sorts of economic impacts resulting from due diligence good or bad practices
- ISO 20400 brings (see annex A) a full transposition of ISO 26000 core subjects and main areas in the procurement function. Each main area may include a few basic recommendations. When examining this list and comparing it to the RBC risks and impacts, the guideline outlines core concepts and actions, but apparently the detail of it is developed in another document: *guidelines*. So it is not possible at this stage to check the completeness of detailed items through the guidance only. It appears given the list of core items that some important issues covered in ISO 20400 might be not really covered, or might be covered more globally in the *guidance/guidelines*, for example
 - SME access to market and fair business practices with bigger procuring organizations
 - Protection of Intellectual property
 - Impact of procurement on the economic development of territories

If some of such issues are covered in ISO 20400 and not at all or less in the *guidance/guidelines* recommendations, then it means that ISO 20400 can help cover specific risks regarding specific stakeholders which, at the end, can have an **indirect impact** on due diligence adverse impacts. As an example, if a faulty supplier introduces counterfeit products for half the usual price in a country where national suppliers respect well IP rights, it might cause adverse impacts for these suppliers, workers, families, local populations: they will stop recruiting, cut existing jobs and could even get bankrupt.

- ISO 20400 goes deeper in each step of the procurement process than the guidance does. The guidance describes the due diligence process plus remediation, both being described and included in clause 6 of the standard. Then the standard develops a full 7th clause explaining what are the operational recommendations made to people being part of the procurement process, and making day-to-day decisions. This applies globally to sustainable procurement objectives and priorities, which includes due diligence issues. For that reason using the standard could be a valuable operational help for implementing due diligence within the procurement process

Annex proposed in the due diligence companion



20400 SUSTAINABLE PROCUREMENT

Sustainable Procurement definition



"Procurement that has the most positive environmental, social and economic impacts on a whole life basis"

Scope and usage



- Recommendations standard (versus requirements). It may therefore result in a performance assessment, but not certification (just like ISO 26000). ISO 20400 is a guide that intends to help organizations improve their sustainable procurement performance
- It applies to all organizations, be it public or private, regardless of size or activity
- It is meant to all stakeholders that are involved or affected by the procurement processes [not only procurement professionals, but also internal stakeholders (such as

Content



FUNDAMENTALS



All stakeholders

Based on ISO 26000 and UN/OECD work

→ Accountability, transparency, ethical behaviour, respect for stakeholder interests, respect for rule of law and international norms of behavior, due diligence, grievance mechanisms

POLICY & STRATEGY



Top management

Applies fundamentals to the procurement function

→ Setting priorities; managing risks; life-cycle costing; promoting transformative and innovative solutions; exercising influence, but avoiding complicity; integrating SP in procurement processes; ...

ENABLERS



Procurement management

6 levers for transforming the procurement function

Governing procurement Setting priorities Enabling people Grievance mechanism
Measuring and improving performance Identification and involvement of stakeholders

PROCUREMENT PROCESS



Individuals involved in the procurement process

Individual guidance in all steps of the procurement process

Planning → selection criteria definition → supplier selection
contract review ← contract management

LEARN2IMPROVE YOUR PLANET

From Hans Kröder, International Expert CSR:

Dear OECD contact persons,

Here you receive my comments on the public consultation.
It concerns:

1. Profit from the Dutch National Standard (Code of Practice) NPR 9036, NEN, March 2015.
“CSR, Guidance for the integration of due diligence in existing risk management systems”
2. Make use of ISO 26000 & OECD MNE 26000 Linkage document. 6 February 2017.
“Practical overview of the linkages between ISO 26000:2010, Guidance on social responsibility and OECD Guidelines for Multinational Enterprises (2011)”

I look forward to contribute in the next step.

Kind regards,
Hans Kröder

Comment 1.

Profit from the Dutch National Standard (Code of Practice) NPR 9036, NEN, March 2015.
“CSR, Guidance for the integration of due diligence in existing risk management systems”
See Attachment 1.

Comment 2.

Make use of ISO 26000 & OECD MNE 26000 Linkage document. 6 February 2017.
“Practical overview of the linkages between ISO 26000:2010, Guidance on social responsibility and OECD Guidelines for Multinational Enterprises (2011)”
See Attachment 2.

Attachment 1. Corporate social responsibility, Guidance for the integration of due diligence in existing risk management systems, NPR 9036

NEN, March 2015

This National Code of Practice standard is 79 pages

Contact for more information:

- NEN, Dick Hortensius, Project leader, Dick.Hortensius@nen.nl
- NEN, Thamar Zijlstra, contact person CSR standards, Thamar.Zijlstra@nen.nl

Here is a short introduction:

The development of this code of practice

In the perspective of the growing interest for and importance of due diligence, the committee on international CSR of the **Social and Economic Council of the Netherlands (SER)** focused on due diligence as the theme for its work program in 2013-2014. The goal of the committee is to contribute to the further operationalization of due diligence by Dutch companies. In that context, it was decided to develop this Dutch code of practice (Nederlandse Praktijkrichtlijn or NPR) to assist companies in applying their existing (risk) management system for implementing due diligence and in adapting their existing practices to ensure they comply with the OECD Guidelines and the UNGP.

This code of practice has been developed by a special working group under responsibility of the Standards Committees 400 178 ‘Social responsibility’ and 400 179 ‘Risk Management’. This working group included stakeholders and expertise in the field of human rights, due diligence, risk management and management systems.

Scope (first text paragraph)

This code of practice provides companies with guidance for the integration of the due diligence process as

specified in the OECD Guidelines for Multinational Enterprises (OECD Guidelines) and the United Nations Guiding Principles on Business and Human Rights (UNGP) in their existing (risk) management systems. The aim of this code of practice is to assist companies in preventing and mitigating violations of human rights (including labour rights) as well as other adverse environmental, social, and economic impacts to meet the expectations for Corporate Social Responsibility (CSR) of companies as laid down in the OECD Guidelines and the UNGP.

References

The following referenced documents are indispensable for the application of this document. For dated references, only the edition cited applies. For undated references, the latest edition of the referenced document (including any amendments) applies.

- NEN-ISO 26000:2010 *Guidance on social responsibility*
- NEN-ISO 31000:2009 Risk management principles and guidance
- ISO/IEC Directives Part 1 Annex SL:2014 *ISO/IEC Directives Part 1, Consolidated ISO Supplement – Proposals for management system standards*
- UNGP (2011) *Guiding principles on business and human rights – Implementing the United Nations “Protect, Respect and Remedy” framework*
- OECD Guidelines (2011) *OECD guidelines for multinational enterprises*

Content of the standard (Reader’s guide)

This code of practice provides a comprehensive introduction to due diligence as well as guidance for its integration in a company’s (risk) management system.

Top management of both companies and other organizations should fully understand the intent and purpose of this code of practice and should at least read the Clauses 1, 2, 4 and 5. Specialist staff involved in support of corporate decision-making and the operation of existing (risk) management systems (e.g. the QHSE and risk managers), supplier and contractor management (e.g. the purchasing and procurement managers) and CSR departments should be intimate with this code of practice for implementation and day-to-day use thereof and should also read Clause 6 and the Annexes.

Clause 1 Scope

provides a concise description of the objectives and the main target groups of the code of practice.

Clause 2 References

Clause 3 Terms and definitions and abbreviations

Clause 4 Context of international corporate social responsibility (CSR) and due diligence

Provides an introduction into CSR and related due diligence processes and their relevance to companies operating in an international supply and value chain. The process for due diligence for human rights as given in the UNGP is described in more detail as it is taken as the reference for integrating due diligence in existing (risk) management systems.

Clause 5 Due diligence and its linkage to the generic (risk) management framework

Provides the basic framework for the integration of due diligence in (risk) management systems. The requirements for due diligence as described in the UNGP and for (risk) management in the new ISO High Level Structure for management systems are compared and this analysis results in a mapping of differences and alignments that a company should consider when integrating due diligence in its existing (risk) management system. Typical actions a company could take when integrating due diligence, are identified.

Clause 6 Integration of due diligence in existing generic (risk) management systems

provides for each element of the due diligence process implementation guidance on how to address the issues and differences identified in Clause 5. Typical examples are included.

Annex A Explanation of existing ISO Standards

Provides an explanation of existing ISO Standards and guidelines. A growing number of companies use these mechanisms to implement a systematic approach for addressing sustainability and their social responsibility in the value chain. In this respect ISO Standards (such as ISO 9001 and ISO 14001, ISO

31000 and ISO 26000) can provide important guidance.

Annex B Explanation of the concept of risk

Provides a brief explanation of the different concepts of risk as applied in ISO Standards and how these relate to due diligence as described in the OECD Guidelines and the UNGP. This is important to take into account when integrating due diligence in existing management frameworks as the concepts of risk underlying the OECD Guidelines and the UNGP on one hand and most existing (risk) management frameworks on the other hand, differ.

Annex C The generic management system

Provides a more elaborate explanation of the characteristics of the generic (risk) management system provided by the ISO High Level Structure.

Attachment 2. Practical overview of the linkages between ISO 26000:2010, Guidance on social responsibility and OECD Guidelines for Multinational Enterprises (2011)

ISO 26000 Post Publication Organization, 6 February 2017

This linkage document contains 32 pages

Contact for more information:

- Staffan Söderberg, vice chair
- Hans Kröder, main drafter

Here is a short introduction:

This linkage document explains:

- that both instruments encourage a similar responsibility approach;
- any similarities and differences in content and specific characteristics;
- that ISO 26000 provides detailed guidance for organizations that are willing to implement the OECD MNE Guidelines.

This document is described mainly from the ISO 26000 point of view.

Content structure

1. **ISO 26000 and OECD MNE Guidelines**
 - 1.1. **Introduction: Why a practical overview of the linkage document?**
 - 1.2. **OECD and ISO working together**
2. **Comparison, key similarities**
 - 2.1. **In general**
 - 2.2. **Definitions**
 - 2.3. **Principles**
 - 2.4. **Subjects**
 - 2.5. **Integration into the organization**
 - 2.6. **Practice of due diligence**
3. **Comparison, key differences**
 - 3.1. **In general**
 - 3.2. **Terminology**
 - 3.3. **Principles**
 - 3.4. **Subjects**
 - 3.5. **Practice of exercising influence and leverage**
 - 3.6. **Practice of setting priorities**
 - 3.7. **Other characteristics**

Annex I. Comparison table on principles for social responsibility

Annex II. Comparison table on responsibility issues

Annex III. Comparison table on practices and policies

Annex IV. Schematic overview of ISO 26000

LIBERTY ASIA

Submitted by Brooke Estridge, Head of Responsible Investing, US:

Hello,

Liberty Asia is a Hong-Kong-registered charity seeking to end human trafficking and modern slavery.

Attached please find our feedback on areas of priority for OECD General Due Diligence Guidelines for Responsible Business Conduct. We thank you for reading them and incorporating them into your discussions and updates.

By way of background, we are comprised mainly of ex-corporate professionals across the globe bringing corporate skills - alongside professionals from the NGO sector - to disrupt human trafficking through legal advocacy, technological interventions, and strategic collaborations with NGOs, corporations, and financial institutions in Southeast Asia & beyond.

We thank you for taking our feedback into consideration.

Best regards,

Brooke Estridge

Key Priorities for Responsible Business Conduct:

- **Transparency** - keystone for effective RBC
 - Specifically:
 - Supply Chain -- clarity within MNEs, to ground-level workers, and to public
 - Recruitment Practices - workers for businesses are often subjected to issues of debt bondage and exploitation in the supply chain arising from extortionate debts created by the recruitment fees they are required to pay
 - Feedback Channel - Whistleblowing - info must be able to flow safely from ground-level upward; enable “whistleblowing” through systemized access (e.g. anonymous hotline) and protection (non-retaliation policy)
 - Feedback Channel - Local Supplementary Support - given that worker representation through labour unions is illegal in many SE Asian jurisdictions, engagement with worker communities beyond whistleblowing is important. Offer opportunities for support by local NGOs and access to a fair, transparent dispute resolution mechanism in line with the United Nations Guiding Principles.
 - Engagement With Stakeholders - strengthened engagement with local communities on potential risks and rewards of their business operating there (e.g. factories’ influence on local environment)
- **Prioritization** - seek impact by stepping back and first assessing big picture
 - Structural Shortcomings Before Tactical, e.g. rather than making reactive small changes, e.g. changing from one local factory to another, businesses should first assess whether their current supply chain has serious structural “leaks” such as recruitment processes whereby their workers are being enslaved, or have been told they’d be doing other jobs in completely different industry.
 - Severest Risks First, even when less frequent -- focus first on any life-threatening areas of vulnerability
- **Prevention** - shift corporate mindset from reactive to proactive
 - MNE’s should adopt an approach like the **precautionary principle**:
“if an action or policy has a suspected risk of causing harm to the *public*, or to the *environment*, in the absence of *scientific consensus* (that the action or policy is not harmful), the *burden of proof* that it is not harmful falls on those taking that action.”¹⁵²
 - This also shifts the burden of responsibility from the ground-level employee upward to the MNE executives. By shifting some power downstream and responsibility upstream, a business will have a more balanced ecosystem, which is not only more just but also more profitable long-term as increasingly enlightened consumers reward fair businesses
- **Incentives** (for external consequences) - leverage consumer power to reward ethical practices with profit and reputational consequences
 - Benchmarks / labels to rate OETC compliance
 - Rating generate financial motivation -- in parallel example, Harvard Business Review’s study of “empathetic” companies shows financial consequences of public perception: “*The top 10 companies in the Global Empathy Index 2015 increased in value more than twice as much as the bottom 10, and generated 50% more earnings (defined by market capitalization)...ethical failure can prove costly. This is evidenced by the drop in Deutsche Bank from 40th in 2015 to 110th this year and by Wells Fargo plummeting from 20th to 130th. Both falls came in light of the two companies’ recent scandals and poor brand perception*”.¹⁵³
- **Defined Ethics** - MNEs benefit from writing out clear, specific corporate standards and principles
 - Internally

¹⁵² https://en.wikipedia.org/wiki/Precautionary_principle

¹⁵³ <https://hbr.org/2016/12/the-most-and-least-empathetic-companies-2016>

- Clearly defined Business Principles influence company conduct
 - Measurability allows for reward and reprimand
- Externally
 - The business conduct principles must be reflected and clearly communicated to external stakeholders as well. Externally contractual terms and the conduct of business relationships must reflect values enshrined in the code of conduct. This can then be a driver of change across a series of relationships that form supply chains.
- **Responsible Disengagement - a key piece of the puzzle that really gives “teeth” to the entire Guidelines**
 - There need to be consequences for knowing a business relationship is bad and not taking action to remedy. The critically important role of responsible disengagement must be further strengthened in the document, especially the strong domino effect it can have, both up and down the supply chain but also across industry, because of how it increases a business’s leverage.
 - Important side note - Again, the world is becoming more transparent -- consumers are increasingly enlightened, and increasingly voting with their dollars as they learn of corporate practices. Businesses that proactively embrace this reality and invest energy in tackling their vulnerable areas will come out ahead in the long run. They can also benefit in the meanwhile, by using their socially-aware approach as a selling point for their brand, which:
 - a) could be good for their reputation vs. their competitors
 - b) could therefore prove profitable
 - c) could effect change along their supply chain, rewarding ethical suppliers and starving unethical ones
 - d) could inspire competitors to adopt similar practices (see the rise of Fair Trade and Organic labeling)

And finally, we’d emphasize the importance of the Banking Industry in the Guidelines. All of the priorities above, which are critically important for corporations producing products and goods, are equally if not more important in the banking industry. Banks have many different levers to pull that materially influence the success -- or failure -- of corrupt infrastructures. Highlighting some of the Responsible Practices these different areas can adopt would be very beneficial. Among them:

- **Investment** capabilities - e.g. as part of due diligence when a big bank is vetting an equity manager to be offered on the bank’s investment platform, incorporating a standard check for human rights violations by the public companies chosen
- **Clearinghouse** capabilities -- most of the money generated from trafficking and slavery does, at some point, go through one of the large US banks (beholden to US law)
- **AML (anti-money-laundering) / KYC (know-your-client) / Compliance** -- Building upon these existing processes helps make incorporating human rights measures/benchmarks practical
- **Client interest** -- banks benefit reputationally and financially from continuing to build out their ESG and Impact Investing Platform, an area of increased interest by consumers

LINKLATERS

Dear Sir/Madam,

Thank you for the opportunity to provide feedback on the OECD Due Diligence Guidance for Responsible Business Conduct (Draft 2.1) (the "**Guidance**") and the OECD Due Diligence Companion (Draft) (the "**Companion**"). We have reviewed the Guidance and Companion in light of our experience advising clients on the application of such principles to their business.

Our clients and work undertaken

Linklaters is a global law firm, with 29 offices in 20 countries across the globe. The firm consists of over 2,000 qualified lawyers who are involved in a range of challenging assignments for the world's leading companies, financial institutions and governments, helping them to achieve their objectives by solving their most complex and important legal issues.

Our clients include large multinationals, financial institutions and corporates more generally. Our work includes advice on the creation and implementation of governance and corporate social responsibility policies and procedures. This can be on both a proactive basis in light of the general increase in regulations and soft law norms mandating transparency, as well as on a reactive basis when clients find themselves subject to regulatory or stakeholder scrutiny and/or investigations. We also frequently advise our clients on risk-based due diligence into proposed transactions and joint ventures, identifying jurisdictional risks and structuring stakeholder engagement.

General feedback

We support the majority of the suggestions and recommendations made in both the Guidance and the Companion. We believe the use of the "*Key Actions*" sections and "*Good Practices*" and "*Guidelines*" boxes is helpful, highlighting the steps required for compliance effectively and in a way that will enable general counsel and compliance officers to inform themselves and their boards. However, both the Guidance and the Companion are lengthy for their current purpose and sometimes duplicative.

We would suggest according more emphasis to arguments that illustrate the overall benefits of compliance to companies, despite the cost involved, as this may allow the message to resonate more clearly with businesses. Important points include the possible positive impact that compliance may have on a company's public image and market position, given the increased importance currently placed on corporate social responsibility.

Specific Comments

Our main observation is that if the Guidance and the Companion could be made more concise we anticipate uptake and usage would increase. The concern is that both documents are currently too lengthy, at 90 pages, to be easily used by their target audience given time constraints. To increase the likelihood that large corporates will engage with the material, we recommend the creation of a shorter document.

This would allow a combined Guidance and Companion to focus on the "*Purpose*" and "*Key Actions*" sections, including the "*Good Practices*" and "*Guidelines*" boxes for further detail. It would also be helpful to include, at the front, the current "*Two-page summary: Due diligence for responsible business conduct*" from the Guidance. This would result in a single document. Closer to 25 pages, which would be more focused on the practical and which could serve as an easy reference guide for actions required.

It would be useful to outline the reasons why corporates *should* implement the suggestions made. Managers respond better where there are compelling reasons to comply with an additional, voluntary initiative as they face ever-increasing numbers of regulations and obligations. Moreover, they will need a compelling

reason to implement guidance that may well require significant investment of financial and other resources. An example of this could be, in the area of project finance, that failure to implement some or all of the suggestions may impact on the ability of a corporate to secure financing from export credit agencies.

Finally, given that there is a certain amount of content in both the Guidance and the Companion that is of more academic interest, or more suited to the advisers of corporates than the entities themselves, it could also be useful to provide a separate, more detailed piece that is more aimed at advisers and other non- corporate readers.

Further questions

Should you wish to discuss this further, we would welcome the opportunity to be involved and welcome any comments you have. Please feel free to contact me.

Yours faithfully,

Vanessa Havard-Williams
Partner, Head of Environment and Climate
Change For and on behalf of Linklaters LLP

MINISTRY OF ECONOMIC AFFAIRS AND EMPLOYMENT, FINLAND

Thank you for the opportunity to comment the OECD Due Diligence Guidance. We would like to represent the following comments:

- Meaningful stakeholder engagement is a core part of implementing the Guidelines (page 12): it's good that meaningful stakeholder engagement is presented as a core action. We would however rewrite the part concerning vulnerable groups (2nd paragraph, last sentence). The current form can make the reader think of only whistle blowers and other people, who voice out their concerns – while ignoring the fact that other vulnerable groups, such as women, migrants, young workers, people with disabilities, etc., might have trouble voicing out their concerns or even getting recognized as a rights holder/stakeholder. Maybe the last sentence could be taken into two parts, the first one starting with the need for special efforts to get vulnerable groups involved and potentially protected, and the second sentence to recognize the need to protect whistle-blowers and others. This separation could help the reader to recognize vulnerable groups better and hopefully understand that different vulnerable groups might need different efforts.
- Section I. Embed Responsible Business Conduct into Policy and Management Systems (page 14), B. Actions, 2. Section (Embed the RBC policy into...): Could the following sentence be added after the first sentence: "Make sure there are not any counteractive processes, which would hinder the embedding"? Some might take this as a self-evident part of the process, but some might not, so clarifying this could help.
- Section II-D. Due Diligence: Communicate, 3. section "Communicating with stakeholders", last paragraph "Consultation and communication should not be confused" (page 25): this is a good clarification, but the section could also acknowledge more clearly that companies need to do both. Now the paragraph describes the separation between the concepts, but then jumps on to social dialogue.

- General comment on terminology: even though “business relation-ship” is very well described on page 3, later on the text refers repeatedly only to “business partners”. This latter term can be misleading to some and it could be better to change it to business relation-ship, where ever possible or appropriate.

Linda Piirto
Senior Adviser, Responsible Business Conduct
Ministry of Economic Affairs and Employment, Finland

MINISTRY OF FOREIGN AFFAIRS OF THE UNITED STATES OF AMERICA

Submitted by Alan Krill, Special Advisor for Corporate Responsibility , Office of the U.S. National Contact Point for the OECD Guidelines:

Dear Colleagues,

Attached are a few comments from the U.S. government on the draft due diligence guidance and its companion document—the comments are included in the PDFs as notes. We will likely have a few more edits coming from our legal advisers, and will get you those as soon as possible, but wanted to go ahead and send along what we did have right now in light of your requested timeline. On a related note, thanks for providing governments and stakeholders ample review time on this text.

Overall we thought the “2.0” version of this draft guidance does a good job of distilling the Guidelines into practical and useful information, likely making it implementable for companies and also keeping in line with the text of the Guidelines.

Thanks,

Alan

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

Part II.

Practical Steps for Implementing Due Diligence under the *Guidelines*

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

B. KEY ACTIONS

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).

Comment :

- *This sentence is confusing. It is not clear what the baseline is and what the benchmark is. More straightforward would be: "Benchmark RBC risks or actual impacts against relevant laws and regulations, as well as the Guidelines." We recommend a separate step on assessing the enterprise's relationship to the risk or adverse impact, and not including that step within the step on benchmarking.*

Due Diligence Companion (Draft)

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

Comment :

- *DOL encourages the OECD to consider providing information on concrete strategies to identify, prevent, mitigate, and remedy adverse impacts. The U.S. government publishes informational resources on adverse labor impacts and risks. The ILO also has information on these issues, such as indicators of adverse impacts and strategies to prevent, mitigate, and remedy them.*

I. Embedding Responsible Business Conduct into Policy and Management Systems

C. FURTHER EXPLANATIONS OF KEY ACTIONS

6. Incorporating RBC expectations and policies into supplier or other business relationships

- Setting out specific RBC expectations of its business relationships **in its policies or other high level documents** (such as a code of conduct) can include:
 - Expectations that business relationships meet the *Guidelines*
 - Expectations about interactions, monitoring and reporting by the business relationships
 - Specifying whether the business relationships are expected to cascade requirements to their own business relationships, and so on out through the supply chain or value chain

Incorporating **business relationship considerations into management systems and approaches** can be achieved in a number of ways. Some enterprises have departments managing purchasing or supplier relations, joint ventures, franchisees, etc. The policies, processes and practices for these departments should usefully be aligned with its RBC commitments as part of its approach to coherence.

Comments:

- *Enterprises should be aware of the implications of their buying practices for workers in their supply chains. To the extent it aligns with the text of the Guidelines, we recommend the following sentence in an additional bullet in #6.*

Enterprises should take measures to ensure that their purchasing practices do not generate adverse labor impacts in their supply chains that could impose unreasonable demands on workers.

MINISTRY OF FOREIGN AFFAIRS, NORWAY

Submitted by Janis Bjørn Kanavin, Special Envoy for Responsible Business:

From the Norwegian side, we are continuously impressed with the effort and perseverance of the RBC-team of the OECD. The sector-based guidances constitute a very valuable resource for business and other actors. Due diligence is a common factor to these guidances – with natural adjustments according to the specific character of each sector and their different relationships.

We are therefore glad to note that there is already work ongoing with the two Guidances in the Financial Sectors in addition to the Institutional Investors Guidance, and take this opportunity to point to the need to develop accessible **guidance for the remedy side of the process as well** (as discussed at the WPRBC meeting with the NCPs last fall). Such guidance is needed internally for the benefit of the NCPs (i.a. for the purpose of making the complaints processes more predictable and balanced and not least to ensure a

“functional equivalence” in support of the overall OECD ambition of “level playing field”). It is also needed externally for the benefit of companies and other stakeholders who might be entering this process.

A general due diligence guideline is therefore as welcome as it is challenging, especially as it seeks to be more thorough than the sector-specific guidance can be on this particular issue.

This raises the issue of **communication and target audience** for the Guideline. The 70-page draft seems designed to assist legal council or other specialized personnel. There is a need also to emphasize the need for due diligence for managers and leadership who do not require the extensive considerations provided in the Guideline. The two-page summary can be made even tighter for this purpose (and begin with last para. on page 1.).

We recommend that OECD develops appropriate communications material to accompany the general Due Diligence Guidance. This will contribute to broader accessibility and use of the Guidance and thereby promote the Guidelines for Multinational Enterprises.

The communications material should make use of: graphics to illustrate concepts like the risk-based approach, prioritisation, coordinating different departments within business, and other illustrations that may be useful in explaining due diligence in the Guidance. Layout design and formatting for the general Due Diligence Guidance should be reader friendly, with colours, illustrations, images and appropriate OECD branding.

The NCP in Norway has developed the enclosed figure to illustrate the process with due diligence as the core, which we find more accessible than the listing on page II of the two-pager.

Due to the over-arching nature of the due diligence guidance, it is more than ever necessary to tailor the product to **SMEs as well as to MNEs**. A version that can be digested and used as guidance for action by leadership of an SME will often also make sense to the general management and/or Board of an MNE.

Another communications benefit would be to **develop short versions for different cases**. These can i.a. be tailored to 1) project initiation and management (which seems to be the predominant focus of the present draft), 2) partnership selection (which often requires much speedier diligence) or 3) assessment of current state of affairs of a business which has previously not conducted due diligence or needs to document social sustainability.

It is, in our opinion, very good for the guidance to use **clear and direct language** illustrated by examples. The Guidance on Institutional Investors is probably not the best source for such examples (eg. the second section on page 21 mixes the example of a minority shareholder and the examples given for how to create leverage). In our opinion, the Guidance for the Textile Sector provides far better illustrations for the purpose required in the general guidance.

It is also important to be very thorough with regard to ensuring that there are **no discrepancies** between the processes described in sector guidances and in the general due diligence guidance. Here are two examples describing the purpose of the guidance, where we find the first to be more nuanced:

- i. Institutional investors section 10: *“This paper is not intended to create new standards of conduct but outlines practical considerations for institutional investors seeking to carry out the due diligence recommendations of the Guidelines, taking into account the complexities of various business relationships, as well as the legal, policy and market contexts in which investors operate. The scope and application of the term business relationships in the financial sector under the Guidelines has previously been examined by the OECD Working Party on Responsible Business Conduct (See Box 3 for more information).”*
- ii. General DD under 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.”

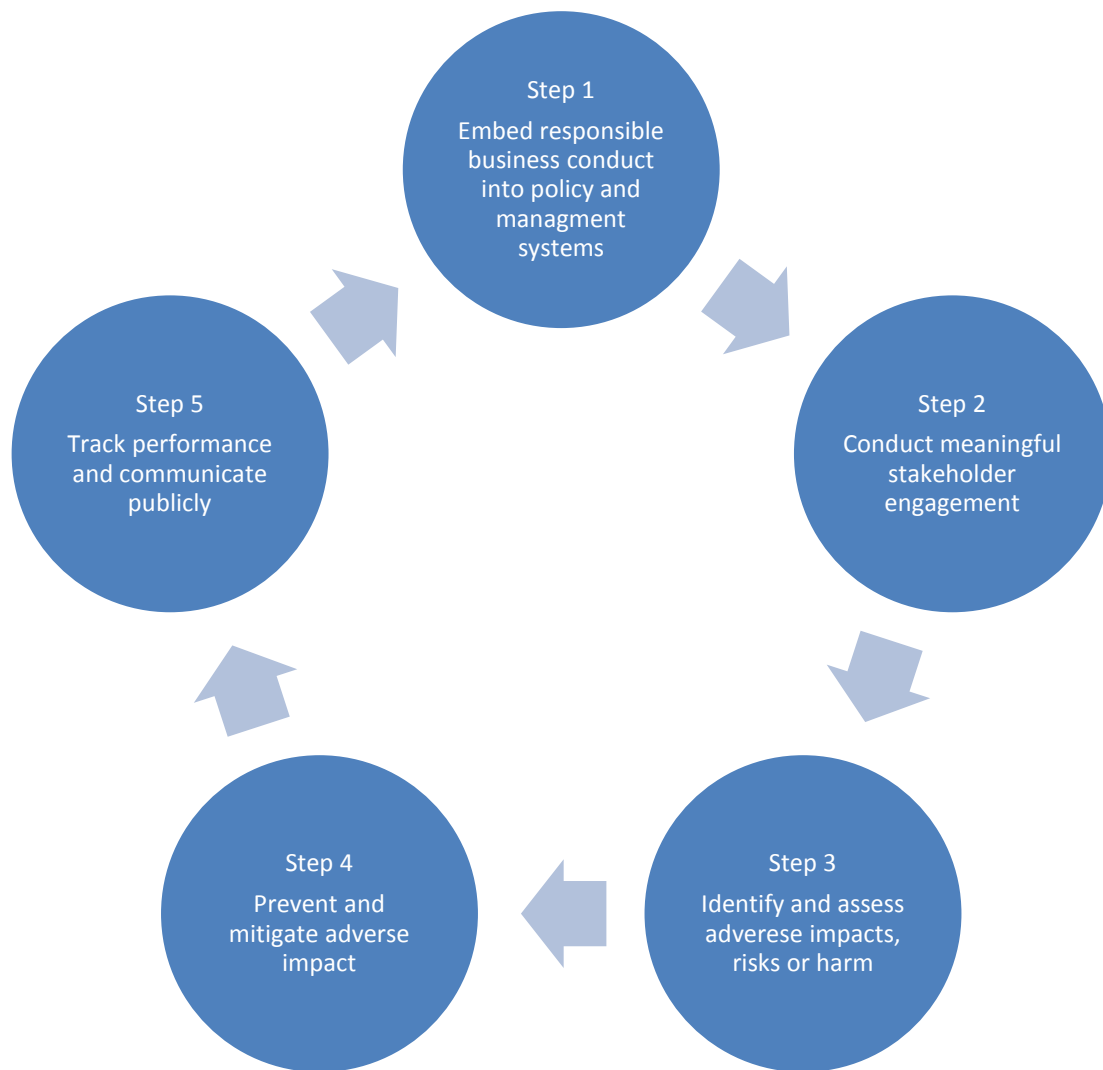
In summing up “**Key Actions**” to put a due diligence process in place it is important to clarify what are “best practices” and what are required steps. The aforementioned enclosed illustration achieves the same purpose with less overwhelming impression.

This having been said, we nonetheless point to the importance of **stakeholder engagement and dialogue**, which is currently referred to as “a variety of tools/approaches to scope....” (II-A). Such dialogue is so central to the whole concept that it should be explicitly mentioned in the two-pager.

In the definition of Business Relationship, the discussion of “**directly linked**” is important and challenging and is yet to be concluded upon. The complexity is illustrated by the previous discussion in the WPRBC (where no conclusion on the issue was reached), and the determination to pass on the deliberations of the terminology to the finance project, cf. DAF/INV/RBC(2014)1/REV1 and DAF/INV(2014)16. No further clarifications of substance has been made in this project. OECD might consider evaluating this topic more carefully. The guidance on due diligence is probably not the right place to discuss and evaluate such important questions of terminology and interpretations of the guidelines. We therefore suggest that the annex be taken out of the guidance. Key terms should be substantiated in separate processes. This will also help simplify the document.

From the Norwegian side we look forward to completing the drafting process – where we hopefully will be presented with a version/versions which can communicate at different levels and in differing circumstances in order to promote a solid understanding of this crucial aspect of the OECD Guidelines.

Key actions to put a due diligence process in place



The OECD guidelines expect that enterprises carry out risk-based due diligence to identify, prevent and mitigate actual and potential adverse impacts, both in their own operations and in the supply chain. Furthermore, enterprises should account for how these impacts are addressed.

Risks refers to the risk of harm on individuals, other organisations and communities in relation to human rights, labour rights and the environment.

Enterprises should track progress on due diligence and should communicate publicly on the processes, including on how the enterprise has addressed negative impacts.

The five steps illustrates that this entails a dynamic, and ongoing process.

MONKEY FOREST CONSULTING

Dear Sir or Madam,

Please find attached comments from Monkey Forest Consulting on the OECD Due Diligence Guidance document for Responsible Business Conduct.

Overall, we find the document to be a strong and useful guide for an enterprise wishing to set up a systemic approach to identifying and mitigating RBC risks and have provided a few overarching and specific comments on the content.

If you require any clarification, please do not hesitate to contact us.

Warm regards

Carol Odell

This document comprises Monkey Forest Consulting's comments on the OECD Guidelines document on due diligence for responsible business conduct, which is open for comment until February 9th, 2017.

Overarching comments: In general the DD guidance for responsible business conduct is well written and provides sensible concepts, an organized approach, clear definitions and practical actions for companies seeking to achieve responsible business conduct. It is possible that, the document makes the process of implementing responsibility seem to be a simple technical process, when in fact, implementation is likely to incorporate a complex organizational change process for many organizations and will involve many of the political challenges common to organizational change processes. **It might be worthwhile to address this directly in the framework, in one or two appropriate places. Similarly, emphasis on the importance of training within the implementation process, and the fact that this training may run counter to 'accepted business practices' in a particular jurisdiction and require discussion, and repeated workshops etc. could be stronger.**

Specific comments: The following paragraphs address specific statements in the draft document. They are labeled according to location and topic and are sequential rather than in priority order.

1. Part 1 #3. Para 3 (Page 8) Enterprise risks vs RBC risks

The framework appears to suggest that, although there are potential enterprise risks associated with RBC risks (reputational damage, exposure to legal liability, operational or market risk), RBC risk management would go over and above a comprehensive enterprise risk assessment. Yet the document also suggests that, incorporating the RBC focus on risks created by the company into the enterprise risk assessment, may be more effective than two separate assessments.

It is not clear to us that this combination would be helpful rather than confusing to the enterprise risk assessment process. We've seen enterprise risk assessments where 'more responsible' companies assigned eg. an equally high value to preventing offsite road accidents, as to preventing loss of life among ex-pat employees (an approach where RBC risk management and ERM is well aligned. We've also seen companies that don't document off-site deaths, despite having quite robust ERM processes, where the RBC risks would be likely to be 'overwhelmed' in the ERM process. For many RBC risks we think it is probably more appropriate to use separate processes, although we understand the desire to incorporate RBC risks into the decision-making processes, rather than being a siloed process that doesn't impact business decision-making.

Perhaps the language could be adjusted to recognize the advantages and disadvantages of combined and separate processes.

2. Part 1 – Core Concepts #8 Para 2 (Page 10) and Part IIB #2 bullet 2 (p. 20) Prioritization of RBC risks.

In both of these references the document advocates prioritization by severity of potential impact rather than by probability. It is unclear to us, why the recommendation isn't for consideration of the risk (ie severity of impact multiplied by probability). While we believe that it is important to note some weaknesses in risk calculation processes. For example it is relatively easy to underestimate both the potential severity of consequences for external actors, who's situation may be vulnerable and inadequately understood, as well as it being a recognized human tendency to underestimate the likelihood of future negative events. **We recommend changing to wording so that it advocates prioritizing through a realistic understanding of risk, than potentially spending significant resources on mitigating a severe impact of very low**

probability. Caveats could point to the need to care in both estimating severity and probability. The link to the UNGP ideas of scale, scope and irremediable nature are helpful.

3. Part I – Core Concepts #13 Para 1 (Page 12) Collaboration in DD

While agreeing with the assertion that the responsibility for undertaking DD rests with the enterprise, the subsequent statement about outsourcing, could be misconstrued as implying that enterprises must carry out all RBC DD functions using internal resources. Clearly, the technical nature of RBC due diligence, means that many companies will need to rely on outsourced capacity to implement and/or train on the processes. We agree that there should be oversight from the enterprise, so that appropriate systems are developed. In this way RBC risk DD is similar to ERM, which is sometimes outsourced, though clearly, responsibility for, decision making based on the ERM, as well as the values and expert opinions used in the ERM rest with the enterprise. **Perhaps this could be clarified**

4. Part II – IIC – tracking performance. (PP 22-23)

It may be worth mentioning within this section that, setting realistic, yet challenging, targets and reporting progress against the targets, is considered a best practice in tracking and reporting.

5. Part II – VB Remedy C 1. Bullet 4 (Page. 27)

It is unclear why the language in the second sentence is only that an “Enterprise *may* set up one of more formalized process...” for remedy (our emphasis). **We recommend stating:** “In cases where there are significant non-human rights RBC risks (footnoting that these are covered in the requirement for an HR Grievance mechanism). Enterprises *should* set up one or more **formalized means** ...” From our perspective non-human rights issues such as corruption and bribery risks should be managed through mechanisms like confidential and independent ethics hotlines.

NBIM

Response to the public consultation on the OECD Due Diligence Guidance for Responsible Business Conduct and the Due Diligence Companion

Thank you for the opportunity to provide comments to the OECD's consultation on the Due Diligence Guidance for Responsible Business Conduct (**the Guidance**) and the Due Diligence Companion (**the Companion**).

Norges Bank Investment Management is the investment management division of the Norwegian Central Bank and is responsible for investing the Norwegian Government Pension Fund Global. As of 30 September 2016, the fund was invested in USD 892 billion of assets globally.

As a financial investor and minority share holder in more than 9,000 companies globally, we support the development of sustainability and corporate governance standards and practices at international and market levels, and seek to promote adherence to recognised international principles. The UN Global Compact, the UN Guiding Principles on Business and Human Rights (UNGP), the G20/OECD Principles of Corporate Governance and the OECD Guidelines for Multinational Enterprises are important foundational principles and points of reference for good practice. We aim to base our practices on such principles and expect the companies we invest in to strive to apply them.

We wish to take this opportunity to express our support of how the OECD, in order to promote the effective observance of the Guidelines for Multinational Enterprises (**the Guidelines**), has developed practical sectoral guidance concerning responsible business conduct to help companies apply the Guidelines, and how it has now undertaken to provide such practical guidance at a general level. We believe the Guidance, written in plain language and including examples of good practices, can provide valuable practical support to companies in their application of the Guidelines.

We would nevertheless emphasise that such guidance should be explanatory in style, and careful to draw distinctions between expectations and examples of best practice. The Guidance would be additional to existing sector guidance and the commentaries of the Guidelines. Notwithstanding the breadth and complexity of issues a general guidance should cover, we believe that the present draft may be made more impactful if it were more concise.

Ensure alignment of text with other guidance documents

The OECD confirms that the sectoral guidance, and the Guidance drawn from the due diligence approaches contained in these, should not create any new responsibilities or recommendations in addition to those in the Guidelines. Further, the Guidance is not intended to reinterpret the Guidelines. It is important that the Guidance therefore does not use language that is unnecessarily loose when discussing central concepts in the Guidelines and those examples are carefully chosen to best exemplify issues of general interest.

Norges Bank Investment Management has been part of the Advisory Group supporting the OECD in its work on developing guidance for the financial sector. The Advisory Group has given input to the drafting of the OECD paper on responsible business conduct for institutional investors. In this instance, we would like to highlight two mentions in the draft Guidance:

- The OECD Working Party on Responsible Business Conduct has previously opined that "[...] A minority shareholding can therefore in principle be seen as a business relationship under the Guidelines, even if this is not spelled out in the text of the Guidelines itself." The associated question of 'directly linked' in the context of financial investors, for instance diversified investment managers which hold minority shareholdings in listed companies, has nevertheless not been authoritatively clarified by the OECD. During the work in the Advisory Group, we have held that such further clarification would be helpful. We believe this is particularly important as neither the OECD Guidelines nor the UN Guiding Principles on Business and Human Rights were developed with such relationships in mind. On this background, we would suggest that the specific mention of "minority investments" under "scope of this Guidance" is either removed, somehow qualified or generalised to "investments".
- The relationship between an investor, through ownership of shares bought in a secondary market, and an investee company, is different from supply or other value chain relationships. There is for one, no direct tie, operationally or contractually, between investor and investee company. During the work of the Advisory Group, we emphasised the importance of giving an accurate representation of the agents responsible for corporate decision making and change – and how these are held accountable by shareholders. On this basis, we think that the mention of minority investors as one of two examples under leverage on page 21 of the draft Guidance should be removed. Investments in listed companies do not typically involve the elements mentioned in this section about the potential for creating leverage, such as "contractual arrangements, pre-qualification requirements, voting trusts, licence or franchise agreements" and we therefore believe relevant context to be missing in the paragraph. In a

general guidance document such as this one, we believe more straightforward examples of the concept of leverage and its potential dynamics would be more purposeful.

Effective corporate governance anchored at board level is a prerequisite for responsible business conduct

The G20/OECD Principles of Corporate Governance are the governance basis the Guidelines are premised on. The Guidance makes a general reference to the governance principles and the interlinks between the two sets of guidelines, as well as specific reference to the disclosure recommendations of the governance principles.

When referring to the assignment of board level responsibilities as a key action for embedding responsible business conduct into policy and management systems, we recommend the Guidance include text from the governance principles directly and not only as a footnote reference.

Additionally, we also believe the importance of an efficient corporate governance system for responsible business conduct should be further emphasised in the Guidance including relevant text from the governance principles directly may be one means of achieving this.

The relevance of materiality to responsible business conduct

As stated in the Guidance, 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. The risk of adverse impacts is a starting point for understanding responsible business conduct as this is laid out in the Guidelines.

When it comes to how companies could communicate how it has addressed adverse impacts, the Guidance suggests that companies could 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 and in the OECD Principles of Corporate Governance.

We believe the Guidance would benefit from being clearer on what is meant by material matters. At least, the Guidance should remind the reader that materiality in this instance may not be limited to what are material risks to the business in a strict financial sense. This may be of particular relevance when talking about human rights, even if disclosure practices on such matters is an emerging field, and may involve real dilemmas or at times be sensitive.

Salient issues and the UN Guiding Principles on Business and Human Rights

When the Guidelines were updated in 2011, a new chapter on human rights was added. This was aligned with the UN Guiding Principles on Business and Human Rights (UNGPs) and reinforced

procedures for addressing human rights violations. In relation to human rights impacts, therefore, the Guidance seeks to align with the UNGPs, as well as the ILO Declaration on Fundamental Principles and Rights at Work, relevant ILO Conventions and Recommendations, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

The Guidelines recommend enterprises to prioritise potentially severe adverse impacts. Further guidance for identifying what severity means have been developed under the UNGPs and centre around the concept of salient issues, i.e. human rights at risk of the most severe negative impacts through an enterprise's activities. The Guidance recommends that enterprises should seek to prioritise the most severe impacts for action first, but makes mention of salient issues only once in the document (page 20) and then with no direct reference to the UNGPs. We think that the Guidance may benefit from introducing the concept of salient issues earlier in the document and that this could include a mention of how the severity of impacts may be assessed by their scale, scope and irremediable nature.

Finally, we would like to take this opportunity to mention that at present, there is significant heterogeneity in the organisation and functioning of the national contact points (NCPs). Norges Bank Investment Management, as a global investor, supports the OECD's ambition to achieve a uniform application of the Guidelines across all national NCPs in instances where enterprises may be responsible for or contribute to adverse impacts and where mediation is needed. Particularly instances in supply or other value chains may have challenging cross-border dimensions. The basic principle, as we understand it, is that specific complaints concerning a company's responsibility for or contribution to an adverse impact must first be addressed by that company's "home NCP". We believe that practical guidance on such issues would enhance the NCP mediation process, and further promote widespread and consistent application of the Guidelines by relevant parties.

Yours sincerely,

Petter Johnsen, CIO Equity Strategies and Runa Urheim, CIO Equity Strategies

Norges Bank Investment Management

NEI INVESTMENTS

We are writing in response to the request for comments on the draft OECD Due Diligence Guidance for Responsible Business Conduct.

By way of context, NEI Investments is an investment management company with approximately C\$6 billion in assets under management, and is Canada's oldest and largest provider of retail mutual funds

managed under responsible investment mandates. Our approach to investing incorporates the thesis that companies integrating best environmental, social and governance (ESG) practices into their strategy and operations will build long-term sustainable value for all stakeholders and provide higher risk-adjusted returns over the long term.

As the corporate responsibility framework endorsed by the Government of Canada, we regard the OECD Guidelines as an important source for determining the priorities of our ESG investment program. We have a strong commitment to engage with companies in our holdings on ESG issues, and frequently draw attention to the OECD Guidelines in this context. From this practice it is clear to us that, beyond certain sectors such as extractive industries, few Canadian companies are familiar with the details of the OECD Guidelines and the concept of Responsible Business Conduct (RBC) due diligence. We have also participated in the consultations on Responsible Business Conduct due diligence for the financial sector, and we are currently exploring how to set up a framework of Responsible Business Conduct due diligence across our investment holdings. We believe these circumstances may give us some insight into the situation of emerging and potential practitioners of Responsible Business Conduct due diligence.

We see considerable value in issuing general due diligence guidance, as well as guidance for specific sectors. However, we note that each of the two documents released for comment (the Guidance and the Companion) exceeds 35 pages in length, and that there is significant repetition in content between the two – especially the "Practical Steps" part of the Guidance, and the matching sections of the Companion. We believe companies like ourselves and many of the investees we engage with, which are just setting out on the path to establishing Responsible Business Conduct due diligence, would find value in a much shorter introductory document.

We would suggest adopting a similar style and presentation to the existing publication "RBC Matters" http://mneguidelines.oecd.org/MNEguidelines_RBCmatters.pdf, which provides a good plain-language overview of the OECD Guidelines context, content and associated mechanisms.

As well as acting as a start-up guide for companies that have already taken the decision to establish an OECD due diligence framework, the introductory document could also be used by corporate responsibility practitioners needing to provide board or executive briefing at companies new to the OECD Guidelines. We note that there is increasing focus in responsible investment circles on the importance of ensuring that corporate boards have adequate knowledge to supervise on ESG matters, which will create further demand for brief executive-level educational materials on key corporate responsibility issues. We also envisage that shareholders and other financial sectors stakeholders seeking to engage on Responsible Business Conduct risks or adverse impacts as part of their own due diligence approach could share "RBC Matters" and the short introductory document on due diligence with investee companies that are unfamiliar with the OECD Guidelines.

Guidance draft - comments

In light of our comments above, we would recommend extracting the two page summary in the Guidance draft (pp5-6) to form the core for a short introductory document. This could be prefaced with brief context for the concept of Responsible Business Conduct due diligence drawn from the relevant section of "RBC Matters" (pp7-9). Indeed, anyone new to the topic of the OECD Guidelines should be advised to read "RBC Matters" first, before continuing to read the introductory document on OECD due diligence.

We recognise that it may be useful to have both a formal Guidance document and a Companion that can be that updated frequently with new tips and examples, but in that case efforts should be made to ensure that, while the structure of the Companion should exactly match and refer back to the Practical Steps section in the Guidance, there should be minimal repetition of content between the two documents.

Some of the definitions in the Key Terms section of the Guidance (pp3-4) could prove confusing to those new to the OECD Guidelines context.

- Adverse (RBC) Impacts/RBC Impacts: if these mean the same thing, it would be simpler to use only one term consistently throughout the documents.

- RBC Risks/Potential Adverse RBC Impacts: again, if these mean the same thing, it would be simpler to use only term consistently throughout the documents.
- Remediation/Remedy: if these mean the same thing, it would be simpler to simply define remediation as "providing remedy".
- ☐ Prevention and Mitigation: there seem to be three separate ideas covered by these two terms, namely "RBC risk mitigation" (reducing the likelihood of adverse impacts); "adverse impact prevention" (preventing a specific adverse impact from happening); and "adverse impact mitigation" (reducing the impact of an adverse impact that has already happened). If this interpretation is correct, it would be helpful to distinguish between these cases more clearly.
- Due Diligence, Leverage, Risk-based etc: where terms are used with a significantly different meaning in other business contexts, this should be clearly specified in the definition, and ideally in the context of the Guidance the term should always be prefixed with "RBC" to avoid confusion with usage in these other contexts.
- Stakeholders: it should be clarified if in this context this term is synonymous with people who suffer, or could suffer, an adverse impact, or if it also encompasses others (e.g. an NGO that brings a specific instance to a National Contact Point (NCP)).

Regarding the two-page summary (pp5-6), which as we have already noted could form the basis for a short introductory document, we offer the following suggestions:

- It is suggested that enterprises should maximize positive impacts as well as avoiding adverse impacts, and "for this purpose, they are expected to carry out due diligence." It has been our understanding that the key focus of Responsible Business Conduct due diligence is to avoid adverse impacts. Obviously positive impact is highly desirable, but we have tended to view the Sustainable Development Goals as more relevant as a framework for considering positive impact. We note that the next paragraph ("What is Due Diligence?") clearly positions due diligence in terms of avoidance and remediation of adverse impacts.
- It may be helpful to point out that demonstrated efforts to conduct Responsible Business Conduct due diligence may be a positive consideration in the event that a company finds itself involved in a specific instance complaint to a National Contact Point (NCP).
- It may be helpful to draw particular attention to aspects of Responsible Business Conduct due diligence that differ from standard corporate due diligence processes, namely:
 - Focus on harm to others, not harm to the company.
 - Unlike some other "risk-based" approaches, focus on severity of impact to others, with less focus on probability of impact.

The Summary of Key Actions is particularly useful. At some points it would be helpful to clarify where there should be different action in relation to Responsible Business Conduct Risks and to Adverse Impacts – clearly Adverse Impacts that have actually occurred should be addressed as a greater priority, but that is not always clear from the text. For example, we assume that action with a supplier that has actually allowed workers to come to harm should be a priority over discussions with a supplier in high-risk country that has never had a recorded incident of adverse impact.

We hope these comments are useful. Please do not hesitate to contact me if you have questions or would like further details on any of the points above.

Sincerely,
 Michelle de Cordova
 Director, Corporate Engagement & Public Policy, ESG Services, NEI Investments

cc: Bob Walker, Vice President, ESG Services, NEI Investments
Rob Gross, Director, Research, Evaluations and ESG Integration, NEI Investments
Jamie Bonham, Manager, Corporate Engagement, NEI Investments

NETHERLANDS NCP SECRETARIAT

*From Lisette Neuerburg, NCP Secretariat, National Contact Point OECD-guidelines for MNE's
Ministry of Foreign Affairs, The Netherlands:*

Dear Colleagues,

The Dutch NCP thanks the OECD staff for the work on the Due Diligence Guidance for RBC. It will be a useful tool for NCP's to promote the Guidelines and to handle specific instances. With reference to the email below, the NCP thanks the OECD for taking into account some of the comments on an earlier draft. Nevertheless with this email we would like to refer to the comments which were not taken into account but are in the opinion of the NCP still important. Furthermore a reference to the SDG's in the final text would be welcomed.

Best regards,
Lisette Neuerburg

From: Neuerburg, Lisette

Subject: Comments Dutch NCP on draft Guidance Note on Risk-Based Due Diligence for RBC

Dear Colleagues,

On behalf of Herman Mulder and the other members of the Dutch NCP I send you the following comments on the Draft Guidance Note:

The Netherlands' NCP has reviewed the Concept Guidance Note (dated 8-9 December 2015) on Risk-Based Due Diligence for Responsible Business Conduct. Because of the importance of this Guidance Note, it has also been discussed at our recent NCP+ meeting, which not only includes the Independent Members and the governmental Advisory Members, but also representatives from FNV (trade unions), VNO-NCW (employers association), OECD Watch and the SER (Social Economic Council). Although this commentary is the joint opinion of the Independent Members of the Dutch NCP, we have considered all, and included some of the views of the participants involved. We also agreed that further public consultation with stakeholders in the Netherlands would serve a dual purpose to raise the awareness of this important Note and also to obtain further opinions, but such process is, of course, dependent time-availability and on your support for this.

Although the Guidance Note should not change the text of, or the concepts underlying the OECD Guidelines for Multinational Enterprises, we feel that on certain issues clarification thereof may be opportune:

1. although reference is made to the "supply-chains", we should more explicitly recognise that the broader "value-chain" concept is part of the concept expressed on the responsibility with respect to "adverse impacts directly linked to their operations, products and services by a business relationship" (Chapter II, Article 12). As NCP-NL we have dealt with a number of cases in the financial and the pharmaceutical sectors where the distribution of such services, products form such linkage.
2. clarification of "contribute to adverse impacts" to include "benefitting from" (with consequential remedy aspects); this is in particular important in the case of expropriation of land by governments for the benefit

of a MNE (such as to open a mine, build a factory, create port facilities) from local communities and/or indigenous peoples without proper consultation, consent, compensation.

3. clarification of the scope of "directly linked": as this is an important issue for corporations to consider their responsibility, we would encourage this issue to be further defined by a WPRBC working group, building also on the practices of other NCPs; we would be happy to lead such exercise, if so desired. Similarly the issue of "responsible disengagement" (paragraph 25) warrants further guidance (and possibly a working group).

On the content of the Guidance Note we have following commentary:

4. more specific language may be considered as guidance for corporations in their due diligence on the basis of the Guidance Note, next to the UNGPs already referred to. An example of such reference may be the "Voluntary Guidelines for Land Tenure, Fisheries and Forests" (VGGT): as the issue of ICP/FPIC is becoming increasingly relevant in our NCP practice and policy coherence within the OECD and in other leading international agreements and fora is important for corporations to consider.

5. we would suggest that paragraph 17 on "Principles of Due Diligence" to have stronger language: "good faith efforts" is in our view too weak in comparison with language already in the Guidelines themselves and in other international agreements: also, the principle of "comply or explain why not" should be mentioned in this respect;

6. we would recommend in general an as early as possible engagement by corporations with relevant (interested and potentially adversely impacted) stakeholders; this should already be considered in Component I (paragraph 23); also the suggestion to use from the beginning "operational level grievance mechanisms" may be considered (paragraph 31)

7. in your paragraph 25, Figure 3: have you considered the views by NCP-NL in the APG/POSCO case in which we considered that the

(prominent) size/standing/stature of a corporation (or a pension fund) has effects on the possible leverage and may be even more relevant

than the size of a (minority-) shareholding-interest;

8. with reference to your paragraph 27, we consider public accountability and external reporting on (initial & ongoing) due diligence extremely important; also here the principle of "report or explain why not" should be adhered to.

Next to these clarifications, there may be specific issues which are not referred to in the current Guidelines and Guidance Note, but may nevertheless be referred to as part of the due diligence, such as animal welfare.

Best regards,
Lisette Neuerburg

OECD NCP – GERMANY

Dear Sir or Madam,

Thank you for your e-mail concerning the Public consultation on the draft documents "OECD Due Diligence Guidance on Responsible Business Conduct" (hereinafter: "Guidance") and "Due Diligence Companion" (hereinafter: "Companion"). At this stage of the process, we would like to submit the following comments:

As already pointed out in our (attached) e-mail sent to you on 8 July 2016, we very much welcome the idea of developing a "Due Diligence Guidance for RBC" that puts the due diligence recommendations contained in the OECD-Guidelines into more concrete terms in order to support enterprises in their implementing efforts.

We see that this intention is now underlined in the draft Guidance at an even more prominent position. For it says on the page immediately following the cover sheet that the Guidance is intended “to provide practical support to companies on the implementation of the OECD Guidelines for Multinational Enterprises”. We continue to regard this as the target mark for the Guidance as well as the Companion which both need to be manageable and practicable for enterprises.

It is against this backdrop that we would like to make the following suggestions:

1. Draft Document “Guidance”

Part I of the draft document “Guidance” provides an overview on “Core Concepts for Implementing Due Diligence under the Guidelines”. In this context, it explains on page 12 under headline no. 13 how collaboration can enhance RBC due diligence. Here, we suggest to insert one sentence before the last sentence on page 12: *“The Guidelines therefore 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.”* This would align the summary given on page 12 with the wording used both on pages 22 and 21. With regard to the pertaining footnotes 109 and 111, we suggest that reference should also be made to Chapter II, Commentary paragraph 24.

As for the “Expectations under the OECD Guidelines” on page 13 of the Guidance, we think that it would be useful for readers if – in addition to the text of the Guidelines as such (Chapter II, paragraphs 10 to 12) – the pertaining Commentaries in paragraphs 14 et seq. could likewise be quoted verbatim.

2. Draft Document “Companion”

From the explanation given on page 4 of the Guidance, we understand that the Companion is a “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”. Hence the Guidance serves as a basis for the Companion.

It therefore stands to reason that the Companion is intended to provide companies with even greater clarity as to how they could best implement the Guidelines as agreed in 2011 and – just like the Guidance – it is not a means to add new recommendations. However, it is our impression that in its current state the Companion does not yet make this sufficiently clear. At the same time, we would regard it as highly desirable if the Companion’s readability and user-friendliness could be increased by generally streamlining the document with regard to content, structure and layout.

Best regards,

Detlev Brauns

National Contact Point for the OECD Guidelines
Federal Ministry for Economic Affairs and Energy

OECD WATCH

Submitted by Dr. Joseph Wilde-Ramsing, Ph.D., Coordinator, OECD Watch & Senior Researcher, SOMO:

Dear Sir/Madam,

Please find attached comments on behalf of the entire OECD Watch network on draft 2.1 of the OECD due diligence guidance for RBC. OECD Watch welcomes the OECD’s initiative to develop this important

guidance and the decision to hold a public consultation on a draft.

If you have any questions about our submission, please don't hesitate to contact me.

With kind regards,
Joseph

OECD Watch comments on the OECD Due Diligence Guidance for Responsible Business Conduct and the Due Diligence Companion February 2017

OECD Watch¹⁵⁴ commends the OECD for holding a public consultation on draft 2.1 of the *Due Diligence Guidance for Responsible Business Conduct* (DD guidance) and its accompanying draft *Due Diligence Companion* (DD companion). We believe public engagement will help foster the development of a more effective and useful DD guidance document.

OECD Watch appreciates that many improvements to the DD guidance have been over previous drafts. Nevertheless, additional improvements in several important areas are still required if the document is to become an authoritative source of guidance for companies to identify, prevent, mitigate and remediate adverse impacts through RBC due diligence. We appreciate the opportunity to provide comments and suggestions to that end. Aside from a brief initial comment on the status of the DD companion, this submission focuses solely on the core DD guidance and is divided into three major sections:

- I. General comments on process, structure, style and status
- II. General comments on substance
- III. Suggestions for improvement in specific paragraphs of the draft

I. General comments on process, structure, style and status

1. Process for developing the DD guidance

In order to ensure a credible process and stakeholder confidence in the course of developing the guidance and the eventual outcome, we encourage the OECD to be transparent about the feedback it receives through this consultation by publishing all of the comments it receives on its website.

2. Status of the DD companion

While we appreciate the idea of a companion document to provide additional examples, best practices and references that could be consulted and used by experts, we believe it is unnecessary to develop this piece in parallel with the core DD guidance and may in fact only deter potential users due to its length, repetitiveness, lack of clarity of its status vis-à-vis the core text, and discrepancies with the core text. OECD Watch recommends postponing further development of the DD companion until a later date. All important concepts, clarifications, and guidance should be included the core DD guidance document. Some examples of important clarifications that are currently in the DD companion that should be included in the core DD guidance include:

- Improved definition of severity: the first paragraph on “How severe are the impacts of concern” of the DD companion (Page 23, Box 20) should be incorporated into the DD guidance, as the guidance neglects to explain severity with regard to the seriousness of the offence.
- The need to cease activities causing impact: Within the DD companion (Page 16), the expectation that businesses have the responsibility to *cease activities causing the impact and prevent recurrence is not currently included in the DD guidance, but an important RBC step in prevention and mitigation of impacts.*
- *While tools such as Know Your Customer/counterparty (KYC) processes are mentioned in the DD*

¹⁵⁴ This submission made on behalf of the entire OECD Watch network, which includes over 100 member organizations. For a full list of OECD Watch members, please see <http://www.oecdwatch.org/members>

companion (Box 3), more information as to the importance of screening and avoiding potential risks and issues before engaging with new clients and governance contexts should be added into the GG guidance Section II-A.

If a decision is made to further develop the DD companion at a later date – and OECD Watch would support this – we recommend that it be focussed only on providing illustrative examples, best practices, and references. OECD Watch will be happy to provide such examples and references at that time.

3. A general comment on “Part I: Core concepts”

The messages in this part will set the tone and determine the quality and value of the entire document. As currently drafted, most of the 13 points, and most of the messages in the text under these points, are not concepts. They are better characterized as “Important considerations that should be taken into account”. We have made detailed comments on “Part I: Core concepts” in section III of this submission, below.

4. The need for mandatory RBC due diligence

OECD Watch understands that the OECD’s goal with developing this general DD guidance is to enhance the implementation of the recommendations contained within the OECD Guidelines, which are non-binding on enterprises. Recent research has revealed that corporate uptake of non-binding standards for RBC such as the OECD Guidelines remains extremely weak, even in front-running countries.¹⁵⁵ Governments have a duty protect human rights and the environment, including in the context of global supply chains. To meet this obligation, States should regulate the business sector both domestically and abroad. OECD Watch has observed that where States have imposed mandatory due diligence requirements, company transparency and accountability has improved. Thus, while OECD Watch recognizes the importance of developing non-binding guidance, we are convinced that the best way to strengthen due diligence in the context of business operations is through a legally binding instrument that will oblige governments to require businesses to conduct due diligence throughout their operations and business relationships. The OECD could work toward the development of such an instrument as it did with the Anti-Bribery Convention.

5. Style: terminology on “adverse impacts” and “business relationships”

The terms “adverse impacts,” “RBC impacts,” and “adverse RBC impacts” are used interchangeably throughout the DD guidance. For consistency and clarity, the documents should exclusively use either “adverse impacts” or “adverse RBC impacts.” The use of “RBC impacts” is potentially confusing as it could, without referring back to the Key Terms section, connote both positive and negative impacts. Also, the draft DD guidance introduces and uses the term “commercial relationships” on several occasions, but this is actually more limiting than “business relationships” since a company may not define certain business relationships as commercial relationships.

6. Style: more examples to make the guidance more concrete and lively

In order to help underline the various types of sectoral risks an enterprise can be exposed to, we would recommend using more examples. The DD guidance could rely on successful OECD Guidelines specific instances that have dealt with specific due diligence aspects to illustrate certain points.¹⁵⁶

II. General substantive comments

7. Upholding the highest RBC and international human rights standards

¹⁵⁵ VBDO, “Commitment to OECD Guidelines by Dutch stock-listed companies”, October 2016, <http://www.vbdo.nl/files/news/VBDOReportOECDGuidelinesresearch.pdf>.

¹⁵⁶ Cases such as [WWF vs SOCO](#), [ADHRB vs Formula 1](#), and [Fivas vs Norconsult](#) would be appropriate and useful in this regard.

The DD guidance should draw from and reflect the highest existing standards in other OECD sector or issue-specific guidance as well as relevant non-OECD standards such as core international human rights instruments and the UNGPs. While it is important to ensure consistency with other existing standards (in the sense of not providing contradictory advice), consistency does not equate to paralysis. New guidance such as the DD guidance should seek to further elaborate, clarify, strengthen or advance concepts and standards wherever needed in order to remain relevant and effective at dealing with present-day challenges.

8. Confusion of general expectations in the OECD Guidelines with actions involved in due diligence

On a number of occasions, the DD guidance confuses expectations of companies under the Guidelines on issues such as disclosure and stakeholder engagement with actions involved in conducting due diligence that is effective in identifying and preventing potential impacts. For example, on p.12, point 12 in the “Core Concepts” section confuses the requirements of the disclosure chapter (Chapter III) of the Guidelines with the kind of disclosure that is involved in conducting due diligence. The OECD Guidelines’ provisions on disclosure and stakeholder engagement were not written with the intention to provide thorough guidance for companies’ due diligence. In a supplemental guidance document such as this, what could and should be suggested to companies in the form of disclosure and meaningful stakeholder engagement during due diligence should go much further than simply reverting to basic provisions in the Guidelines. The OECD has developed an entire separate document with Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector that is only referenced once in the current draft of the DD guidance. The general DD guidance should rely more heavily on the stakeholder engagement guidance in formulating specific and concrete recommendations for due diligence in other sectors, rather than simply relying on the very general expectation expressed in Chapter II, para 14 of the Guidelines.

9. Consultation vs communication throughout the draft

Consultation with potentially affected stakeholders is a core tenant of the Guidelines, yet both remain underemphasized and often conflated with “communication” in the draft. “Consultation” should be better explained in the DD guidance. The purpose of consultation is to inform the enterprise before it makes a decision therefore consultation must be done before the decision is made. Consultation requires communication in that a proper consultation requires the enterprise to provide all of the information needed for the stakeholders to understand how the enterprise’s decision would affect their interests and then make an informed decision about how they feel the enterprise should respond to their concerns in its decision making process. It should also be specifically stated that, although surveys/polls can be useful in certain situations these techniques cannot be considered consultation.

Greater emphasis should be made in part I.12 and D3 to highlight that consultation, *in addition to communication*, with potentially affected stakeholders should be fully integrated into due diligence processes. This means ensuring that consultation happens at the earliest stage of the due diligence process, and that it is not a one-time action, but rather an on-going process.

The DD guidance should also draw more on the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector to provide recommendations as how to tailor stakeholder communication and consultation to different contexts and the vital role that information disclosure plays in ensuring meaningful engagement and trust-building in the process. This should include information detailing how to identify and engage with the right stakeholders, as well as the importance of its timing, and the special attention and consideration that should be made to rightsholders and vulnerable groups, including women, indigenous people and children, in the due diligence process. The DD guidance should provide some specific guidance to companies whose operations impact indigenous peoples. At times, especially when free, prior and informed consent (FPIC) should be respected, stakeholder consultation and communication will need to also include consent, prior to decisions being made over how to avoid causing adverse impacts.

Given its importance, a full section in the DD guidance should be devoted to this topic and consultation with stakeholders should be included as a “Key Action” in Sections II-A and II-C, as well as in the “Key Actions” section of the two-page summary. The lack of a mention of consultation in the key action sections

fails to reflect the importance of this element of the due diligence process. Furthermore, stakeholder consultation should be encouraged not only for severe risks, but for all possible adverse risks.

10. Transparency & disclosure of information

Guidance on transparency and disclosure are insufficiently robust in the draft DD guidance and should be given more prevalence. The DD guidance deals with disclosure in a specific section (Section II-D, “Due Diligence: Communicate”) and otherwise in scattered sections throughout the text. As an example of the issue we raise in point 8 above, generally in this section – and especially the first two points under “B. Key Actions” on p.24 – the disclosure chapter (Chapter III) in the Guidelines is being conflated with the aspect of due diligence that is about accounting for how adverse impacts are addressed as part of the due diligence process, highlighted in Chapter II, paragraph 10 of the Guidelines.

The draft does not articulate or expand on the definition of “material” (Section II-D.B). The term “material” seems to be used as it is used in financial reporting. “Material” is a term also used in nonfinancial reporting but the test of what is considered material is different. In Section II-D, Part C2, the DD guidance makes a generic reference to the disclosure of “additional information” required in the OECD Guidelines’ disclosure chapter, but doing so does not actually provide any real guidance to companies. This DD guidance should seek to expand on what is already stated in the Guidelines and provide companies with additional recommendations and guidance. There is one specific recommendation in relation to what companies should report which is on “general findings of adverse RBC impacts”. This is highly inadequate and falls short of reporting requirements under the OECD Minerals Supply Chain DD, the EU Directive on NFR and even the UNGPs reporting framework.

Within Section II-D, enterprises should be encouraged to have robust disclosure, which is also increasingly critical because robust disclosures serve as important material for investors who are increasingly looking at company due diligence reports, including beyond their own enterprise and along their entire supply chain, to evaluate company performance, attitude towards and ability to responsibly respond to risk. It is important to note that disclosure of risk should define the degree of disclosure; for example, disclosure of risk to communities should be to the same degree as risk disclosure to investors and insurers. Bankable feasibility studies serve as a potentially useful example in this regard. When disclosures are done well, enterprises are able to demonstrate that its due diligence is working (e.g. risks are being identified and properly addressed and remediated), while also helping enterprises demonstrate progress over time.

Showing that an enterprise is respecting human rights requires communicating, at a minimum, the following information:

- A enterprise’s policy on human rights and how it is communicated internally and externally, operationalized throughout the enterprise and in relation to business relationships, monitored and evaluated, and whether and how objectives are met;
- Human rights due diligence procedures to identify and address risks to and impacts on human rights, including those in the value/supply chain, risks to human rights identified and measures to prevent/mitigate them;
- Actual impacts on human rights (including specific instances of abuse that the enterprise acknowledges and concerns consistently raised by affected people even if contested by the enterprise), engagement with and response from affected people and measures to remediate impacts and avoid recurrence;
- The methodology to identify/assess risks and impacts, including grounds for determining severity, and any consultations held to this end.
- Detailed supply chain information, including the names, addresses and contact details of supplier facilities and other business partners, subcontracted suppliers and labour agents managing homeworking facilities. The objective of this transparency is to allow community and worker (labour rights) organisations to organise, to bargain, etc. to defend human and labour rights.

Finally, concerning disclosure of information to stakeholders and local communities, the DD guidance should recommend that the relevant information be translated into local languages and presented in alternative formats for those who lack literacy.

11. Tools understand and evaluate environment & social risk

Consideration of the various tools and processes undertaken to understand, evaluate, and then manage environmental and social risks should be acknowledged in Section II-A of the DD guidance. At the moment, these tools are not detailed and instead are only briefly highlighted in the document. We would like to see greater elaboration given to the specific standards that help ensure adequate due diligence occurs, and which are in fact required for many projects. These include:

- Assessments of knowledge gaps in baseline data. Limited environmental and social baseline data can impede an enterprise's ability to understand the full extent of possible risks, especially risks to livelihoods, culture, food security, biodiversity, climate change and the environment in least developed and developing countries. While the limitations in scientific certainty require a precautionary approach to be applied, an enterprise can go further in terms of commissioning additional research to fill the gaps.
- Elaboration on what is expected in the various impact assessments (environmental, social, health and human rights), including the type, scale and various elements it should entail would be beneficial. The IFC's Performance Standard 1 and Guidance Note 1 (30 April 2006) provides further elaboration on some of these issues that may be of use.
- At times, trans-boundary, cumulative and strategic impact assessments may be necessary for some projects in terms of preventing and mitigating risks that pose cross-border risk or in which numerous projects in an area may further exacerbate the scale of risks.
- It is also important to emphasize the importance of incorporating public consultations into the impact assessment process. Furthermore, such assessments should be publicly disclosed to allow for public scrutiny.

12. Risk-based prioritisation

The DD guidance continues to carry the risk that it could be read as advising enterprises to concentrate on severe risks only. While appropriately prioritizing impacts is important by addressing the severest risks first and should be a starting point for companies, it is equally important that structural shortcomings are also considered simultaneously in order to make a larger impact. For instance, risks of corruption need to be considered to properly evaluate human rights or environmental risks. Furthermore, it is worth mentioning that a strong focus on severe risks distracting attention away from other impacts that potentially could cause serious harms. It is important to recognize that it can at times be difficult to fully assess the full scale and likelihood of an impact, including those considered moderate risks, if necessary baseline studies or consultations are not done before impact assessments or if the cumulative impacts of other projects are also not considered in advance. Rather than solely focusing on known impacts, the text should emphasise that enterprises have the responsibility to take a proactive approach to learn about all possible adverse impacts that may have been outside their radar.

13. Prevention vs. mitigation of RBC impacts

A core objective of carrying out due diligence processes should be to avoid harm through a precautionary approach. In Section II.B., more focus should be given on what is needed to prevent and minimize risks before they become actual impacts that will require mitigation, as the DD guidance does not adequately demonstrate the difference between prevention and mitigation of existing impacts. Furthermore, it is important to emphasize in the DD guidance that moving between prevention and mitigation requires more than just a hierarchical approach of prioritized stages. The DD guidance should provide additional guidance to companies in terms of how an enterprise must first pursue one stage before moving to the next. For example, if harm to human rights or the environment is unavoidable under current plans and projects, enterprises should not automatically move to a consideration of whether harm can be "mitigated," "restored/rehabilitated," and/or "remediated". They should first re-assess and if necessary re-design their plans so as to avoid the harms. If avoiding human rights or environmental harm appears impossible, the plans or projects should be reconsidered and not go ahead at all.

OECD Watch believes that prevention vs mitigation is not an either/or consideration. The priority should be to avoid social and environmental harm and as such that may include having a policy to prevent risks as much as possible by stating “no go” policies and commitments, including a commitment to not carry out operations that may adversely impact protected areas and their buffer zones or areas of high cultural and environmental significance (such as UNESCO World Heritage sites¹⁵⁷, IUCN Protected areas, or, locations where human rights defenders are threatened and at risk, etc.) and when not in a “no go” area to make a commitment to consider implementing a comprehensive options assessment, including alternative designs, sizes, and location changes, etc. or a commitment to use only proven technologies that work.

14. Business relationships vs. supply chains

The draft DD guidance sometimes conflates due diligence on business relationships with due diligence on physical flows of material e.g. along supply chains. Both are important and the document should consistently make that point throughout.

15. Embedding DD into business relationships and contractual obligations

While we appreciate mention that RBC expectations and policies should be incorporated into supplier and other business relationships, carrying out due diligence is not a linear process and should feed into all aspects of business operations. As such, it is essential that due diligence is not only at the transaction level, but that new clients and business relationships are first adequately screened, as well as the governance context in which they operate. For example, business relationships in countries with high levels of corruption, limited civil society space or tax avoidance havens, etc., should first be identified and if necessary excluded. Civil society monitoring reports can serve as a tool to help understand the wider context.

Once business relationships are developed, the responsibility to identify and avoid risks through ongoing due diligence should be integrated into all contractual obligations. In this regard, the DD guidance could provide additional recommendations to business, including that it is important to have clauses that detail what carrying out due diligence means and that it must be incorporated into all other contractual obligations. This could include clauses that outline penalties for failure to mitigate or remediate on a timely basis and to allow for possible modifications without significant financial penalties that may need to occur to a project’s construction and/or operations to allow for improvements to be made in terms of the project’s management and handling of risks.¹⁵⁸

16. Remediation of impacts by enterprises that are directly linked

The way in which the draft DD guidance deals with remediation in cases where enterprises are “directly linked” (but have not caused or contributed) to abuses is problematic. The text suggests that in these cases there is no responsibility to remediate and that this would be optional. In at least one place in the text (section III-A), the draft DD guidance actively discourages directly linked companies from making efforts to facilitate remediation by noting that they are “not expected to provide for or cooperate in remediation”. This is unacceptable, and in providing this unsound advice to enterprises, the draft DD guidance fails to reflect a number of important nuances. Firstly, enterprises that are directly linked to an impact are expected to use their leverage to seek to prevent/avoid recurrence.

These actions in themselves are important aspects of remediation (cessation of the abuse; guarantees of non-repetition). Secondly, while the primary responsibility to remedy harm rests with the enterprise that caused or contributed to the harm, the DD guidance should recognize that, often, the directly linked enterprises may be the only real avenue for those harmed to seek remedy. Accordingly, in all areas where the DD guidance addresses remediation, the recommendation should be, “When adverse impacts are

¹⁵⁷ For example, UNESCO has stated that mineral, oil and gas exploration or exploitation is incompatible and should not be undertaken in World Heritage sites, see: <http://whc.unesco.org/en/extractive-industries/>

¹⁵⁸ As an example: Should the project developer decide to integrate a sediment flushing system into the operations of a large-scale hydropower dam in a later stage of development, in order to allow for better management of sedimentation and reduced downstream impacts, the project may need to stop producing electricity during the given flushing period. The ability to carry out these modifications in a project should be included in all contractual agreements, including in the project’s power purchase agreement, etc.

directly linked to an enterprise's operations, products or services, the enterprise is expected to use its leverage to convince the entity that caused or contributed to the impact to remedy the impact. The directly linked enterprise is furthermore encouraged to collaborate with other enterprises or entities in remediation efforts."

Finally, as is elaborated further under point 19 below, the current draft should indicate that an enterprise's relationship of "contributing" or "directly linked" to an adverse impact is dynamic rather than static, and that this has implications for remediation responsibilities. The DD guidance should clarify that if an enterprise remains in a business relationship that directly links it to an on-going adverse impact that is not remediated, after a reasonable period of time the enterprise will be considered to be contributing to the on-going adverse impact and will be responsible for providing for or collaborating in remediation of the impact.

17. Due diligence as an outcome-oriented process aimed at identifying and avoiding specific RBC risks

The DD guidance should make it clear at the outset that due diligence for RBC is not a stand-alone, tick-the-box exercise, but rather an outcome-oriented process that should result in the concrete and measurable identification of specific risks and impacts and the prevention and remediation of harm. This means that a due diligence process – even if it is genuine and well-designed – that fails to identify an impact, or that identifies an impact but fails to result in the impact being prevented or remedied is not the end of the line for enterprises. Enterprises are expected to take additional (indeed, on-going) action until the risk of adverse impact is definitively prevented (e.g. by deciding that the plan or projects should not go ahead) or, if harm has occurred, it has been fully remediated. This is also true for adverse impacts to which an enterprise is directly linked through a business relationship. If actions to address impacts to which an enterprise is directly linked do not result in the prevention or remediation of an adverse impact, then the "outcome" of the due diligence process should be the responsible disengagement of the enterprise from the relationship linking it to an adverse impact.

18. Responsible disengagement

The draft DD guidance recognizes that if an enterprise's efforts to use (and increase) its leverage to convince its business partner to prevent, or cease and remediate the harm fail, it should consider disengaging from the business relationship. However, the issue of responsible disengagement should receive more attention and nuance in the DD guidance than it currently does. The credible prospect of responsible disengagement is fundamental to the responsibility of the enterprise itself to avoid causing, contributing to and being directly linked to adverse impacts, but the draft DD guidance discourages companies from considering this option. Responsible disengagement should not only be considered if the (potential) impacts are "severe" as is suggested on p.21, but in all cases where there is no prospect of harm, whether it be severe harm or less-severe harm. The DD guidance should also provide clearer guidance to companies that decide to remain in a business relationship despite the failure to address impacts. The DD guidance should be clear that "If the adverse impacts continue and the investor remains in the relationship, the investor should be able to demonstrate its own on-going efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection."¹⁵⁹ The DD guidance should also note that by making the decision to remain in a business relationship where there is little or no prospect for addressing the impact, the enterprises actions can change its relationship to the adverse impact from directly linked to contributing (see point 19 below).

At the same time, the DD guidance should make clearer that an enterprise that has caused or contributed to an adverse impact cannot alleviate itself of its responsibility to remedy the impact by disengaging. The DD guidance can and should provide additional recommendations to enterprises on how to disengage responsibly and thus avoid engaging in the "cut and run" tactic of irresponsibly abandoning suppliers, which can have significant adverse impacts on local employees, communities, and economies.

19. "Contributing" and "directly linked" relationships as dynamic, not static

The DD guidance should clarify that an enterprises' relationship to a (potential) adverse impact is not

¹⁵⁹ This is text directly from the UNGPs (Pillar II, Section B, Human Rights Due Diligence, Commentary paragraph 19).

static but dynamic and can change over time based on a company's own actions or omissions. For example, an enterprise's refusal to seek to convince a business partner it knows is causing/risking an adverse impact to stop the harm and remediate the impact can be considered an omission that substantially contributes to (the risk of) an impact and thus shift the enterprise's relationship with the impact from directly linked to contributing. Similarly, an enterprise's decision to remain in (i.e. not disengage responsibly from) a business relationship linking it to an on-going adverse impact despite no prospect of having the harm stopped or remediated can be considered a substantial contribution to the continuance of the impact.

20. Due diligence in conflict-affected areas

The DD guidance could do more to provide recommendations to enterprises on how to avoid the risk of contributing to (including financing of) conflict and related adverse RBC impacts.

21. Due diligence guidance for responsible tax planning

While we recognize that issues covered in the Guidelines' chapter on taxation (Chapter XI) are technically exempt from the due diligence provisions laid out in Chapter II, para. 14 of the Guidelines, OECD Watch nonetheless believes that the OECD could and should provide additional guidance to companies on how to conduct due diligence with regard to responsible tax planning. The OECD Guidelines themselves clearly acknowledge that responsible tax planning is a part of responsible business conduct, so it would make sense for the OECD's due diligence guidance for responsible business conduct to also address the issue of taxation. If certain important RBC issues are to be excluded from this guidance, it is misleading to call it DD guidance "for RBC".

III. Suggestions for improvement in specific paragraphs of the draft

22. Two-page summary, under the heading "Capturing the "essence of due diligence"

- Rewrite the **second point** as follows: "A risk-based approach means that efforts should be proportional to the likelihood and severity of adverse impacts. The nature and extent of due diligence must be commensurate with this risk."
- Rewrite the **third point** as follows: "Due diligence should give priority to actual and potential adverse impacts on the basis of their relative severity."
- **Point 5** is misleading. The nature and extent of due diligence is mainly determined by the nature and extent of the risk. The other factors cited (sector, environment, size of the enterprise, etc.) are important when they add or decrease risk. As written, the sentence could be used to say that due diligence for smaller companies will not be the same as due diligence for larger companies regardless of the risk. At the least the following phrase should be added at the end of the sentence: "... but always must be commensurate with the likelihood and severity of actual and potential impacts."
- Delete the **7th point**. This is an unqualified endorsement which will not always be true. Moreover the use of the word "enhanced" next to the word "due" changes the meaning of "due".
- Replace the **8th point** with "Remediation is one way that an enterprise should address adverse impacts."
- Add a **new point**: "The cost of due diligence should be taken into account when the enterprise makes a decision to undertake any activity".

23. Part 1 Core concepts for implementing due diligence under the guidelines

The points made in the heading sentences are not always the right points and do not always capture what the following text is about. Moreover, the text following these heading sentences is often difficult to follow. Some heading sentences need to be changed and more points need to be added. The text that follows the heading sentence should be shortened and made easier to read.

- One text concerns a complex subject that should be treated differently and elsewhere in the document: **Point No. 10** is about the relationship of the impact to the enterprise and is so important and somewhat complex that it deserves to be treated separately and not as the 10th item on this list. The basic point in the relationship of the impact to the enterprise (cause, contribute, linked to) can easily and succinctly be noted under **Point No. 1** where it is explained that it is the enterprise's own actions that create its responsibility. The explanatory discussion of "cause, contribute, linked to" and a fuller elaboration of the implications of these relationships, should be put in first section of "Part II A identify

and assess adverse RBC Impacts”. This section should begin with an explanation of the kind of adverse impacts on others that create responsibilities for the enterprise – these are the impacts that are the reason that an enterprise has a responsibility to conduct due diligence.

- Some points that should be included in a list of considerations are absent. There should be an early point about “salient risks” - perhaps as a new Point No. 2. Salient risks are risks that are readily understood to be inherent in specific activities. These are the risks of adverse impacts against which due diligence can begin. (Of course the nature and extent of due diligence and the adverse impacts against which it is conducted can change as more is learned.) All businesses should be aware of the salient risks involved in their regular on-going activities and in the locations in which they do business. Indeed, one of the most important disclosures any enterprise can make about its responsibility is what the salient risks in its activities are and the due diligence that it has taken against these risks.

- **Point No. 2** which recommends “managing in an integrated way” will not always be true and is unlikely to be especially important - at least as it is presented here. A more basic point, and one that should be made early, is that due diligence cannot be conducted in an abstract way – it must be conducted against specific adverse impacts. Due diligence against bribery will not be the same as due diligence against building fires. One test for whether something constitutes due diligence is whether it was directed against the right adverse impact. The activities that would constitute due diligence will vary with the nature of the impact that the due diligence is being conducted against. The value, meaning or purpose of taking an “integrated approach” to such diverse activities is not clear. The really important integration is that of potential adverse impacts on others in the decision by the enterprise to undertake a specific activity. This does not seem to be the subject of this point however. Another absent point is that the cost of due diligence should be a factor in the decision to undertake an activity. The nature and extent of due diligence should not be redefined because the cost of due diligence is later found to be “unreasonable”. The planned cost of an activity should include a realistic estimate of the cost of due diligence.

- Some points are really about more than one issue. **Point No. 3** deals with more than contrasting the due diligence in the Guidelines with more traditional forms of due diligence sometimes referred to as transactional due diligence. This contrast is an important consideration that should be made here. However, what is not quite right is that the first paragraph seems to be suggesting that due diligence is a process that can be independent of its outcome. This is not consistent with the idea in the first sentence of the second paragraph which is that due diligence must be commensurate with the risks. Outcome cannot be avoided. A process that fails to identify actual adverse impacts or to address them should not be considered due diligence. Furthermore, the phrase “a process intended to help enterprises meet their responsibilities” is tautological as due diligence is in itself a responsibility.

- Not all of the text under each of the 13 heading statements is what the heading sentence is about. **Point No. 4** is not really about how due diligence can help enterprises obey domestic law as the heading sentence suggests – the text below this heading sentence is about the conflict that may exist between domestic law and the internationally agreed expectations of responsible behaviour in the Guidelines.

- **Point No. 6** on “continuous improvement” needs this caution: with respect to human rights, continuous improvement can only be about process and not outcome. Process issues that can be measured such as the number of inspections, the number of qualified personnel, amount of training etc. could be the subject of continuous improvement but the number of human rights abuses that an enterprise causes or contributes to cannot be treated in this way.

- Some points seem to go in the wrong direction. The heading sentence for **Point No. 7** seems to be contradicting the idea that due diligence is a function of risk. The text however is better than the heading sentence.

- **Point No. 8** involves an issue that should be resolved in a consistent way throughout the document: how to describe the nature and extent of due diligence needed for a specific situation as contrasted to other situations. How is due diligence to be described when the level, detail, robustness must be increased if it is to remain “due” - that is commensurate with the risk. Here the expression “more detailed” is used. The problem is to avoid the evolution of the term “due diligence” away from a meaning defined by something commensurate with the risk.

- Some points do not provide any helpful guidance. Consider the wish expressed at the end of the first paragraph under **Point No.9**: “The complexity of the business relationship....means that due diligence should be adaptive, with dynamic approaches tailored to these complexities.” There is no useful guidance in this. More useful would be the reminder that a sourcing company’s responsibility for adverse impacts is not limited to the first or second tiers in its supply chain but is determined instead by the adverse impacts that it causes, contributes to or that are linked to it.

- One paragraph in the text under **Point No. 9** concerns “leverage”. This important idea deserves its own point. The point should be that the amount of leverage and its ability to change behaviour does not create or remove responsibility which is determined by other things. Moreover, the failure of leverage to change things should invoke consideration to disengage. This should be considered for a possible point.

- The first sentence in the text under **Point No. 11** is making a better point than the heading sentence. The second paragraph about the Guidelines procedures should link the resolution of disputes brought to the procedure to remedy. After all, the procedures are used by parties seeking remedy. Moreover, it is not fair to say that the issues arise from the implementation of the Guidelines – more often it is the failure of enterprises to observe (respect) the Guidelines.

- **Point No. 12:** Add a new sentence immediately following the first sentence in the text (the one ending with “on both sides”): “Because they are not two-way, surveys or polls are not this kind of engagement.” With respect to the second paragraph of text, one sentence should be amended to read as ‘follows: Hence the engagement must take place *before* the decision is made and *all* of the information needed to make an informed opinion by the stakeholder should be provided to the stakeholder in a timely manner.’ The final paragraph of text should be deleted because it is confusing the requirements of the Disclosure Chapter of the Guidelines with the kind of disclosure that is involved in conducting due diligence.

- There are concerns with **Point No. 13**. One is the use of the word “enhance” in the heading sentence. It seems to be changing the meaning of “due”. Another is the uncritical endorsement for any collaboration. The experience with many CSR initiative is that they were industry PR schemes that did not constitute due diligence. Although some of the activities mentioned – training and capacity building for instance- could be considered a part of due diligence to the extent that they mitigated the risk of specific adverse impacts, the danger is that these activities become a way for enterprises to avoid responsibility. The concept of prior existing “root causes” must not become a way of redefining an enterprises responsibility. Similarly, addressing “root cause” through philanthropy cannot substitute for an enterprise addressing adverse impacts that it has caused or contributed to or is linked to on specific rights holders.

24. Part II – Practical steps for implementing due diligence under the Guidelines

- On **p.16**, the section on the identification and assess of adverse impacts should use the idea of “salient risks” and explain that for most activities and there will be salient risks that are well known and do not require the enterprise to “discover” through some activity. The human rights of workers in labour intensive agriculture or manufacturing involve salient risks that must be taken into account in these activities. Similarly, the rights of indigenous peoples are salient risks where extractive industries operate in or near their land. They must be taken into account at the beginning.

- On **p.16** “B. Key Actions”. Numbering points and describing them as “key actions” is not the best way to explain how an enterprise should decide what adverse impacts to conduct due diligence against and how the focus of due diligence can change.

- On **p.21** the fourth and final bullet point makes too many qualifications with respect to disengagement from business relationships. In situations where the enterprise has no leverage and there are severe impacts caused by the supplier the guidance is that the enterprise “should consider” disengagement but only as a “last resort” and only after “an assessment” of how crucial the supplier is to the enterprise itself and only after taking into account the impacts of any decision it may take to disengage. Moreover it should be made clear that where the adverse impact is irremediable then the enterprise should immediately consider responsibly disengaging.

- On **p.21** under “Collaborating,” it is important to note that while collaborative multi-stakeholder initiatives can play a helpful role, the DD guidance should also make it clear that engagement in such an initiative or scheme does not absolve a company of its own responsibility to act responsibly and in full accordance with the Guidelines. Bluntly put, an enterprise cannot outsource its responsibility to a scheme or initiative.

- On **p.22**, the fourth bullet point under “C. Explanation of key actions 1. Developing or adopting tracking systems...”. This bullet point seems like a strange way to consider the many collaborative initiatives (both multi-stakeholder and industry-led) established over the past 20 years that address supply chain responsibility. It is strange because the treatment of these initiatives in this DD guidance is placed in a section on tracking performance. (The only other place where collaborative initiatives are treated is in point 13 on page 12.) It’s also strange because of the importance attached to a difference between tracking “compliance with standards” on one hand and “tracking actual impacts” on the other. There are two other problematic notions under this bullet point. One is the problem of collaborative initiatives that “address root causes” (a point also considered in page 12). The problem is that these initiatives can become a way for enterprises to use philanthropy to avoid their own responsibility. The other problematic point is the uncritical attitude toward private or multi-stakeholder initiatives. What needs to be said about these in guidance on due diligence is not said: Where an enterprise uses private or multi-stakeholder initiatives as part of its due diligence (such as conducting compliance audits), the responsibility of the enterprise for adverse impacts is not diminished. As with commercial “third party” auditors, enterprises must assume responsibility for the effectiveness of collaborative initiatives to the extent that these initiatives are a part of its due diligence process. In other words, the enterprise cannot pretend that the failure of an auditor or an initiative to discover or prevent an adverse impact means that it was not the enterprise’s fault. This was how the enterprise chose to do its due diligence.

- On **p.24** “Due diligence: communicate”. The requirements of the OECD Guidelines chapter on disclosure are being conflated with the requirement in the definition of due diligence to “account for how adverse impacts are addressed”. In order to meet the due diligence requirement of accounting for how it addresses its adverse impacts, the enterprise must first disclose what these impacts are or at least what it considers to be the risks against which it conducts due diligence. (It would be a major advance if we can use this aspect of due diligence to press companies to report on what they consider to be the risks in their activities and relationships.

- On **p.26** change title of section III to “Provide for Remediation”. The qualifier “or co-operate in” can be brought in at a lower place in the text where the forms of cooperation that are acceptable can be explained. The qualifier “when appropriate” should be removed altogether. In line with point 16 above, these qualifiers should be removed throughout the document and replaced with more robust guidance throughout the entire document. (such as point 11 on p.11).

- On **p.26**, reorganise the text under “A. Purpose” by putting the second paragraph first followed by the 3rd sentence and 4th sentences of the first paragraph. Under “B. key actions”, delete the “(where appropriate)” and replace “enable remediation” in point 1 with “remediate or ensure that remediation takes place” for harms. “Enable remediation” should in fact be deleted throughout the document and replaced with “Remediate or ensure that remediation takes place”.

- On **p.27**, the DD guidance highlights the option of an enterprise to establish an operational level grievance mechanism (OGM), which underscores an existing gap between the Guidelines and the UN Guiding Principle 29, which states that enterprises should establish or participate in effective OGMs. As such, the DD guidance should follow the higher standard and emphasize that OGMs are not optional. Furthermore, the language around “an operational level grievance mechanism should not preclude access to judicial or non-judicial proceeding” is too vague to be of use to enterprises. We recommend that it should be rewritten as “...an operational level grievance mechanism should not require a legal waiver in return for remedy or otherwise preclude access to judicial or non-judicial proceedings.” Finally, the guidance should include a requirement for the monitoring and review of the compatibility of the enterprise’s OGM with the UNGP’s effectiveness criteria.

25. Annex on understanding cause, contribute, directly linked

- On **p.28** under the section on “Contribute to”, the definition of contribution given refers to situations where an enterprise's activities "*significantly* increase the risk of an adverse impact". This language is picked up again in the flow chart. It's unclear what the definitional value of “significant” is as compared to the word "substantial", which is used in the Guidelines. Given that the DD guidance seeks to align with the UNGPs, the DD guidance should perhaps note that this is an important area of difference between the OECD Guidelines and the UNGPs, which use neither “substantial” nor “significant” in their definition of contribution.

- Also on **p.28** under the section on “Contribute to”, we recommend clarifying that there are two subscenarios to this relationship: 1) Contribute via a third party and 2) contribute by combination of own actions and those of a third party or third parties.

- On **p.28** under “Omissions”, we recommend introducing the notion of the dynamic character of a company's relationship to the adverse impact. For example, a failure or refusal to act can be considered an omission that significantly contributes to the risk of an impact and that can thus move an enterprise from the directly linked to the contribute relationship.

- On **p.29**, the last bullet in the “directly linked” section already acknowledges that enterprises are “responsible for their own actions”. This should be followed by a clarification that an enterprise's own actions and omissions partly determine its relationship to the impact. This bullet should also clarify that, even if it has no leverage over a business relationship, the enterprise is responsible for its own decision to stay engaged in or disengage from the relationship. .

- On **p.31**, responsible disengagement should be included as an “expected response” if efforts to prevent/mitigate/remediate fail in both the contributing and directly linked bullets.

- On **p.32**. In the same vein as the point on p.28 above, the Simplified Flow Chart of Questions on Cause-Contribute-Directly Linked should really be a straight evaluation from "did I cause?" to, if not, "then did I contribute (substantially)?" and so on. Also, the possible scenario that an enterprise may contribute via a third party is missing and should be added to the chart. Finally, at the bottom right of the flow chart, a box should be added under the directly linked box to indicate that directly linked enterprises should “use leverage to convince the entity that caused or contributed to the impact to remedy the impact and collaborate in remediation efforts”.

Ms. Ame Trandem, Network Coordinator,
Dr. Joseph Wilde-Ramsing, Ph.D., Senior Researcher and Coordinator,
Ms. Virginia Sandjojo, Researcher and Coordinator

OECD Watch Secretariat
(c/o SOMO)
Amsterdam, The Netherlands

PUBLIC EYE

Dear Sir/ Madam

We welcome the opportunity to submit comments in the public consultation of the Due Diligence Guidance for Responsible Business Conduct. Please find our comments on the Guidance directly in track-change in the attached document. In addition we fully endorse comments made by OECD Watch in its submission.

Yours faithfully,

Lyssandra Sears, Lawyer: and Urs Rybi, Policy Analyst, Corporate Accountability & Commodity Trading
Public Eye (formerly: Berne Declaration)

Introduction (page 1)

[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.

Comment: 1. Say something here about relationships being both up and downstream. 2. Includes States and non-State partners.

Box 1: Characteristics of the OECD *Guidelines* for Multinational Enterprises (MNEs) page 2

The *Guidelines*:

Last bullet:

- 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.]

Comment: In line with the Guidelines, Preface, para 1, it should be added: «matters covered by the Guidelines may also be the subject of national law and international commitments.»

Key Terms (page 3)

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)

Comment: Say something here about relationships being both up and downstream.

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 – particularly to rights holders – related to matters covered by the *Guidelines*. (*Guidelines*, Chapter II – General Policies, Commentary para. 14)

Comment: Important to include here an element about the change of traditional perspective.

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 [but have](#) 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]

Comment: good and important to state here

Two-page summary: Due diligence for responsible business conduct (page5)

Enterprises can create or be involved with:

- x **positive impacts** on society and contribute to sustainable development, for example through job creation, human capital development, raising investment and fostering innovation.
- x **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 the latter] they are expected to carry out due diligence.

Comment: This document should not create any ambiguity: DD is directed at negative impact, as explained in the next sentence. (and the Guidelines p. 23 as well as UNGP 17). At maximum it could be noted that as a side-effect, better knowing your business through DD also helps to better understand positive impacts. In no way this document should allow for a focus on positive contributions as in the old days of CSR.

CAPTURING THE “ESSENCE” OF DUE DILIGENCE (page 5)

Last bullet:

- 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

Comment: we propose to "encourage" that companies directly linked take a role in remediation where appropriate. Companies directly linked "may take a role" in remediation, according to the UNGPs. Taking such a role, while not a strict responsibility under the UNGP, should be considered good practice. And as set out above, this Guidance should help to implement the Guidelines and the "Guidelines reflect good practice".

Summary of “Key Actions” to put a due diligence process in place(page 6)

I. Embed responsible business conduct into policy and management systems

1. Devise and adopt an RBC policy (or combinations of policies), [drawing both on internal and external expertise](#), that provides guidance to staff and business partners and a clear signal to stakeholders and

publish the RBC policy (or policies) to support transparency.

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

8. RBC due diligence is risk-based and therefore involves prioritization (page 10)

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.

*Comment: It is important to ingenerate or at least reference the following clarification formulated on p. 20: «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.»*

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].

Comment: While it is relevant to mention scale, scope and irremediable nature here, there is not enough text to make it clear to a reader unfamiliar with the UNGPs what is meant here.

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 (page 11)

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

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~~ **has its own responsibility also and is** expected to take action as well – to seek to prevent or mitigate the situation by using its leverage.

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 [required] **expected** to provide or cooperate in remediation, but may choose to do so and may collaborate with other enterprises in doing so.

Comment 1: better use past tense here. This would prevent a potential misunderstanding that it might be a legitimate choice to go for remediation instead of prevention once a risk is identified. It should be made clear: remediation is for harm that already occurred.

*Comment 2: IMPORTANT! Replace "expected" by "required". UNGP: « the responsibility to respect human rights does not **require** that the enterprise itself provide for remediation, though it may take a role in doing so.» In fact we suggested above to "encourage" companies to take a role, representing good practice.*

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 and should be an ongoing process (i.e. not only engaging when there is a need, such as after an accident).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.

Part II.

Practical Steps for Implementing Due Diligence under the *Guidelines*

B. KEY ACTIONS (page 14)

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

1. Devise and adopt a **RBC policy** (or combinations of policies) , drawing on both internal and/or external expertise, that provides guidance to staff and business partners and a clear signal to stakeholders. Publish and disseminate the RBC policy (or policies) to support transparency.

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

C. EXPLANATION OF KEY ACTIONS

1. Building RBC risk-identification processes (page 16)

Second bullet:

Enterprises should be prepared to **prioritise and work towards addressing all of 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

Last bullet:

- x Consulting with **potentially affected stakeholders**, and particularly with rights-holders or their legal representatives, 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 [Consultations should be held early in the life of a project and in good faith. Any agreement entered into should be documented and implemented.](#)

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

Second bullet:

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. [Assessments of individual business relationships should include an assessment of their RBC policies and their alignment with international standards.](#)

Comment: Which factors? Not clear.

3. Assessing against the *Guidelines* as a benchmark

Second bullet:

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 prioritized, [nor from the need thereafter to address less severe impacts.](#)

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

C. EXPLANATION OF KEY ACTIONS

[\(page 22\)](#)

3. Understanding & exercising leverage with business relationships

- x [Leverage exists where an enterprise has the ability to effect change in the wrongful practices of an entity causing harm.](#) **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.
- x 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. 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. [Long-term relationships with business partners can also increase leverage.](#)
- x 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** from the business relationship as a last resort. [The more severe the abuse, the quicker an enterprise must see change before taking a decision on whether or not to terminate a relationship.](#) [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 (page 23)

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. [It also enables internal accountability and drives improvement.](#)

B. KEY ACTIONS

Enterprises can take the following actions to track performance:

1. Develop or adapt **systems to track** [the effectiveness of](#) how it is responding to RBC risks and impacts and monitor implementation of any management plan against established objectives, goals and timelines

C. EXPLANATION OF KEY ACTIONS

3. Feedback to earlier due diligence steps

- x 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 and ensure effectiveness](#). 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.

II-D. Due Diligence: Communicate (page 25)

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 action it has taken in consequence of having identified an actual or potential impact.](#) 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, [as well as to enable evaluations of the adequacy of the enterprise's response](#). 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, [as well as about providing transparency and accountability](#). Communication is the “show” part of “knowing and showing” how the enterprise is managing impacts.

C. EXPLANATION OF KEY ACTIONS

2. Disclose additional information

- x Enterprises ~~are encouraged to~~ [should](#) **disclose additional information** as set out in the *Guidelines* Disclosure Chapter on a broader set of issues than financial performance, to improve [accountability and](#) 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).
- x 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 relevant¹¹⁹ 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 [Communications should of a form and frequency that reflect the enterprise's human rights impacts](#). Enterprises should not make representations or omissions, nor engage in any other practices, that are deceptive, misleading, fraudulent or unfair.
- x 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 [\[and actual or potential risks identified, the steps taken to manage risks, the involvement of affected stakeholders, the efforts made by the company to monitor and track performance for risk mitigation and all the instances and results of follow-up to evaluate significant and measurable improvement. It should disclose the number of instances where the company has decided to disengage \]](#) and general findings of adverse RBC impacts and information about the enterprise's RBC risk prevention and mitigation strategy.

*Comment : Source: Minerals Guidance, Gold Supplement (Step 5. A1. 2+3; p. 112). Similar Agricultural Guidance p. 35: «They should provide affected stakeholders and business partners with clear, accurate and timely information on **actual and potential adverse impacts identified** through ongoing impact assessments and on the **steps and measures taken to mitigate or prevent them**. Reports may also include information on the enterprise management systems and the verification reports of due diligence practices. Once released, they should be accessible to all relevant stakeholders.»*

- x [Disclosures should provide sufficient information to enable an evaluation of the adequacy of the enterprise's response, and should convey all the facts necessary for those affected to make informed decisions regarding their own interests.](#)
- x 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 disclose¹²⁶ 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.
- x 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
- x [It is also important to observe that the objectives of traditional public relationship departments are different](#)

[from the objectives of communicating how the enterprise handles human rights risks, where the latter is about accountability rather than promotion.](#)

III. Provide for or Co-operate in Remediation when appropriate (page 28)

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 [and use leverage to encourage remediation on the part of others who have caused or contributed to harm.](#)
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 [or otherwise use leverage to encourage others that have caused or contributed to impacts with which the enterprise is directly linked to do so.](#)

C. EXPLANATION OF KEY ACTIONS

1. Enable remediation for harms caused or contributed to

Second bullet:

- x 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 [required] to participate in the remediation but may choose to do so, alone or in collaboration with other parties.

Comment: see above, core concept 11.

Fourth bullet

- x The *Guidelines* set out **specific expectations for providing remedy** that may not be required by law but which are expected under the *Guidelines* – ~~to~~ [such as remedy to](#) consumers,¹²⁹ for human rights impacts,¹³⁰ [or by 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.

2. In the case of human rights grievances

- x 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).

- x 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.
- X [Furthermore, grievance mechanisms can also help embed respect by promoting internal discussion about impacts. Enterprises should publicise the existence of these mechanisms, guarantee users of anonymity, keep a public registry of complaints and incorporate lessons learned. Enterprises may also encourage contractors as well as local and more remote suppliers to set up grievance mechanisms.](#)
- x **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, [and it is important to understand what those affected would view as remedy, as this may differ from the enterprise's own view.](#) 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.
- x **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. [Enterprises should always take steps to prevent retaliation against complainants.](#)

Annex: Understanding “Cause”, “Contribute” and “Directly Linked”

Questions: (page 33)

- x 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?
- x If so:
 - o ~~What role could the enterprise's activities play in increasing the risk of those potential RBC risks materializing/ maturing into actual adverse RBC impacts~~[Did the role played by the enterprise's activities increase the risk of potential impacts materializing into actual ones?](#) 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?

RAOUL WALLENBERG INSTITUTE OF HUMAN RIGHTS AND HUMANITARIAN LAW

Dear Sir/Madam

Thank you for the opportunity to comment.

In my opinion these two documents offer further clarification to the GPs that many audiences will find useful. The alignment of concepts and terminology with the GPs is indispensable for ensuring coherence. However the GPs have some imperfections in formulating the HRDD notion.¹ Therefore, supplementary formulations could be considered to genuinely enhance clarity while preserving the GPs formulations for the sake of consistency.

In addition to the observations below, I attach for your kind consideration an article where I develop these aspects in more detail.

1. Remediation

Problem: The Guidance follows the GPs' bright line distinction that remediation is expected for 'cause' and 'contribute' settings, but not for 'direct linkages' where remediation is optional. The bright line is explained better in the OECD Guidelines than in the GPs: RtR is not meant to shift responsibility in the linkages setting. However, this bright line (GP 22) also indicates that a business could concern itself with remediation by the business partner, but this is merely optional and desirable. In my analysis, this is incorrect and does not follow from the bright line distinction. The GPs refer to leverage as appropriate action to prevent and mitigate adverse impact. Exercising leverage only to prevent harm or its reoccurrence does not make sense; leverage could and should be exercised to compel the business partner to itself offer remediation. Indeed the Guidance recognizes more clearly than the GPs that in the linkages setting a company should exercise leverage over the business partner to itself remedy the harm (p. 26). *The Guidance might therefore emphasize that the bright line is therefor a purpose (no shifting) but that exercising leverage for remediation is imperative not optional.* As it is now, the Guidance is displaying some inconsistency as the narrow interpretation along GP lines is visible at pp. 5, 6, 11 and the broader interpretation is visible at p. 26.

An additional reason for this interpretation is that the distinction between cause-contribute- linkages 'may not always be crystal clear'. The Guidance indicates that (p. 31), which is in line with a similar acknowledgement from the works of John Ruggie. **If** the distinction is not that clear it is not helpful to draw a bright line on an issue as important as remediation.

Furthermore, saying a business should use its leverage ('should raise the issue with the business partner concerned, request them to address it directly and confirm the outcome' (p. 26)) seems almost indistinguishable from cooperating in remediation ('co-operate through legitimate processes in the remediation of adverse human rights impacts' (p. 6)). Using the leverage is a form of cooperation to provide justice to the victim.

Current relevant formulations in the Guidance:

- 'Providing for or co-operating in remedy for adverse impacts the enterprise "caused or contributed to" ...' (p. 5)
- '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' (p. 6)
- '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.' (p. 11)
- '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.' (p. 26)

Suggestion: In the linkages setting, in relation to remediation, emphasize non-shifting (no shifting of responsibility) and leverage (leverage covers not only prevention and reoccurrence, but also remediation for victims). Concept 11 in Part 1 should read: 'When enterprises are directly linked to

adverse RBC impacts caused by others, they are not expected to provide remediation, but should exercise their leverage over others to offer remediate adverse impacts.'

2. Mitigation

Problem: following the GPs, the Guidance explains HRDD as 'Prevent and mitigate adverse RBC impacts' (p. 6). This explanation is problematic and it has to do with redundancy and ambiguity.

The definitions of prevention and mitigation are useful and clearly separated in the Guidance (p. 3), but overall remain counterintuitive as they both refer to potential impacts (risks). They would be better replaced by one concept to deal with potential impacts. In common language, prevention would do the job. Prevention should be understood as measures to *minimize risks (potential impact) with a view to their elimination*. Actually the 2008 PRR Framework explained HRDD as a process whereby companies 'manage the risk of human rights harm with a view to avoiding it.' (para 25)

Beyond redundancy, HRDD as prevention and mitigation also works to problematize rather than emphasize the key message that HRDD is about measures to eliminate impacts, to prevent occurrence of harm. Somehow the Guidance has to impress very clearly that elimination of impact ('avoidance' and non-occurrence) is imperative because of the human rights impacts, which have specific characteristics compared with other types of impacts (environmental, economic) where just reduction could be good enough. The Guidance should explain *what is specific about the human rights context that requires elimination as an aim*. Why in the HR context only minimization and reduction is not good enough, is not diligent enough? The GPs and the Guidance have succeeded in explaining why 'offsetting' is inappropriate in the human rights context. A similar attempt could be undertaken to help businesses on which it might be lost that human rights impacts are different from other ESG impacts. The notion of mitigation used by the GPs does not assist in these effort. In my analysis the concept of mitigation is too multidimensional (pp. 17-24) and redundant while alternative formulations should also be noted:

1. The HRDD formulation from the 2008 PRR Framework was simpler and clearer than the one in the 2011 GPs.¹⁶⁰
2. International law formulations (e.g. ILO Convention) have a different and clearer way of impressing the aim of elimination of harm.³
3. The 'mitigation hierarchy' approach of the IFC points to the importance of ordering RBC measures but in the same time contains formulations giving too much discretion and little warning to companies not to move to liberally between levels of the hierarchy.⁴

The Guidance has to emphasize that in the specific context of human rights harm, prevention should aim at elimination, non-occurrence, and that this *reduces choice among risk treatment options*. The chosen measure has to *aim* at elimination (not settle for something less demanding) and also have the *capacity* to achieve this (not be inherently unable to achieve that aim). That capacity could be explained in relation to 'root causes' of harm. Indeed, HRDD should involve risk treatment measures that where possible have the inherent capacity to treat root causes and underlying causes as opposed to symptoms and superficial causes. The Guidance already refers to root causes (pp. 12, 19, 22) but this aspect could be highlighted more forcefully and analytically in the very explanation of HRDD, in connection with the elimination aim.⁵ That would Clarify that the minimization effort with a view to elimination is not only a function of effort (zero tolerance) but a function of orientation (root causes). The Guidance would thus ensure that companies do

¹⁶⁰ The 2008 PRR Framework explained HRDD as 'a process whereby companies ... manage the risk of human rights harm with a view to avoiding it.' (para 25) Also HRDD is a 'concept [that] describes the steps a company must take to become aware of, prevent and address adverse human rights impacts.' (para 56)

not understand HRDD as simply taking measures to address impacts, which might be good enough in the real world and offer evidence that progress is made and HRDD is observed.

Current formulations in the Guidance: These valuable formulations could be brought earlier to impress the nature of HRDD

- 'A core purpose of conducting due diligence is to avoid actual adverse RBC impacts ...' (p. 11)
- '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.' (p. 20)
- 'eliminating adverse RBC impacts' (p. 27)
- 'avoid adverse impacts to the greatest extent possible' (p. 28)
- 'ensure that potential adverse impacts do not occur or actual impacts do not reoccur' (p. 17 in Companion)

Suggestion: This elimination aspect should be one among the 13 core aspects of HRDD in Part 1. Currently this insight is hidden in concept 11 covering remediation. It could be introduced in concept 6 which could read: 'RBC due diligence is aimed at elimination of adverse impacts and entails proactive, dynamic efforts with a focus on continuous improvement'. To deal with the problematic aspects of 'mitigation' the Guidance could introduce an alternative formulation: potential impacts are addressed through measures of prevention and mitigation to minimize risk of harm with a view to avoiding/eliminating it. Thus the two concepts would be replaced by one concept to deal with potential impacts in line with the 2008 PRR Framework; referring to that early definition which is still authoritative would facilitate coherence between the Guidance and the GPs. Finally, an explanation of HRDD as measures towards elimination of potential impacts should emphasize several factors such as root cause orientation (prevent misdirection of efforts towards symptoms) in addition to effort (prevent misunderstandings that HRDD harbors unrealistic expectations regarding non-occurrence of risks).

Overall it would be genuinely valuable if the Guidance and Companion did not follow so closely and so exclusively the GPs terminology and risked reproducing formulations of the GPs which are imperfect or ambiguous. The Guidance is in my opinion sending the correct message but alternative terminology and abovementioned clarifications could be brought earlier in the Guidance and be pursued consistently throughout. That would enhance the value added and help businesses adopt preventive and remedial measures that are suitable to the human rights context and consistent with the GPs.

Sincerely yours,

Dr. Rado Mares

Senior Researcher, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund, Sweden;
Associate Professor, Faculty of Law, Lund University, Sweden

SANOFI

Submitted by Laurent Lhopitallier, Corporate Social Responsibility:

Sanofi welcomes the opportunity to respond to the public consultation on OECD Due Diligence Guidance for Responsible Business Conduct (hereafter “the Guidance”) and the Draft Due Diligence Companion (hereafter “the Companion”).

General comments

- Sanofi is already committed to Due Diligence for RBC

Due Diligence for RBC has been on Sanofi’s agenda for the past several years and will continue to be a great challenge due to the difficulties it presents. **Collaboration is key** here - by opposition to constraint or, worse, legal sanction - to successfully prevent and mitigate adverse RBC impacts. Also, Sanofi believes that RBC is not only about preventing negative impacts but also about increasing positive ones. We would like this message to be reinforced throughout the document.

- OECD cross-sector Due Diligence Guidance is urgently needed

Sanofi is in favour of well-balanced OECD Guidance, rather than national guidance which could lead to potentially diverging national sets of recommendations. In addition, soft and hard law tend to gradually converge, requiring all multinational companies to set up Due Diligence processes. We urgently need cross-sector due diligence guidance to tackle difficulties linked to risk identification and assessment, prevention and mitigation of adverse RBC impacts, remediation and communication.

- The proposed Guidance is a valuable explanation of what is expected of companies

The proposed Guidance provides **welcome support to enterprises on how they should implement due diligence recommendations contained in the OECD Guidelines for Multinational Enterprises** (MNE Guidelines). The proposed Guidance is the first publicly available detailed cross-sector guidance specifically designed to help companies implement due diligence processes. As such it is highly useful and meets a growing demand for guidance in this field. Yet, it is essential that the Guidance also clarifies and repeatedly states:

- the **importance for companies to prioritise their most severe risks**, acknowledging the fact that it is **practically impossible to address all other possible risks**; this is especially important for SMEs who would otherwise face inefficient processes and administrative burdens;
- the **practical limitations of due diligence**, specifically with complex supply chains. Cautious and balanced wording is essential, especially when hard law initiatives that explicitly refer to OECD guidelines are emerging, such as in France.
-

- OECD Guidance should be fully in line with MNE Guidelines

The Guidance should be fully in line with the MNE Guidelines and should **not impose additional requirements on companies**. There are some changes Sanofi specifically proposes here-after to avoid any misinterpretation or lack of clarity, especially in the two-page summary which should be as solid and unequivocal as possible, because it will serve as a reference for those who do not have time to read the full Guidance, or for law-makers who wish to introduce legal requirements to establish due diligence.

- OECD Guidance and the Due Diligence Companion should be user friendly and easy to read

The Guidance should ideally make things easier and simplify complex concepts. Sanofi welcomes the fact that the Guidance offers **different levels of granularity** of a due diligence process, from the “Two-page summary” to the “Core Concepts” and finally the “Practical Steps”. This is essential to allow users with different levels of expertise (and time) to grasp what is useful for them.

However, **further rewriting is needed** to ensure consistency between the 3 sections. The reader should find added value as he digs deeper into the document and should not be faced with repetition.

- The Due Diligence Companion is not useful in its current version

We are **dissatisfied with the repetitive and lengthy nature of the Companion**. Indeed, the Companion entirely reiterates the “key actions” as well as parts of the further “explanations of key actions”. This

causes **considerable confusion for the reader** who doesn't distinguish the difference between the initial guidance and the purpose of the companion.¹⁶¹

1 The Guidance and the Companion have a seemingly identical structure, but then there are significant differences at the same time. For example, titles changes slightly (I.C.6.) or are completely missing (II-A.C.4 "Regularly updating"... doesn't appear in the Companion). This incoherence in structure, combined with large repetitions, makes the reading very confusing.

We therefore suggest leaving out the repetitive portions and **concentrating on the good practices, toolboxes, graphs, charts, tables and examples**. Another option would be to postpone the publication of the Companion to a later stage when more examples of good practices and illustrations will be available.

It is also essential that the companion be **based on tested practices**. It should not promote practices unless they have been clearly identified as successful to avoid wasted resources, frustration and a possible backlash against the guidance.

- The role of National Contact Points (NCPs) is of key importance

NCPs are key to promote the implementation of the MNE guidelines. The Guidance could recap how they are organized and work and how they implement the specific instances in accordance with the procedural guidance for NCPs.

We believe that **NCPs should become the recognized bodies handling and resolving stakeholder's grievances relating to OECD, UN and ILO standards for corporate responsibility**, consistent with the objective of functional equivalence highlighted by the OECD. In that context, national regulators would not need to invent or create new grievance mechanisms if they adhere to OECD guidelines and have NCPs in place.

The Guidance could also set out a standard for practical implementation capitalizing on the good practices of the most active NCPs such as the French one.

Specific comments on the Guidance

KEY TERMS (p. 3):

- **Leverage**: add "*Leverage may be limited or hindered by legal and practical obstacles such as the prohibition of unlawful interference in the management of a subsidiary, of a sub-contractor or a supplier, or anti-trust issues (anti-competitive collusion against a common business relationship)*".

- **RBC impacts**: the term « adverse RBC impacts » - which is used throughout the document - is confusing because RBC stands for responsible business conduct which aims precisely at avoiding adverse impacts. The expression "adverse RBC impacts" suggests that responsible business conduct may cause adverse impacts which is generally not the case. Use the term "adverse impact" instead.

- **Risk based**: add "... *and based on the prioritisation of the most severe risks that have been identified*".

TWO-PAGE SUMMARY (p. 5 and 6):

Capturing the "essence" of due diligence:

- "**Prioritisation** is crucial to identify the relative severity of RBC impacts and focus due diligence efforts *on the most severe risks identified by the enterprise.*"

- "*Stakeholder engagement is key in the due diligence process, both to identify potential or actual adverse impacts and to communicate on the due diligence conducted and how the enterprise has*

¹⁶¹ The Guidance and the Companion have a seemingly identical structure, but then there are significant differences at the same time. For example, titles changes slightly (I.C.6.) or are completely missing (II-A.C.4 "Regularly updating"... doesn't appear in the Companion). This incoherence in structure, combined with large repetitions, makes the reading very confusing.

addressed actual and potential adverse RBC impacts” rather than “Stakeholder engagement is used to involve those potentially directly or indirectly affected by its operations or business relationships “.

- *“The strongest efficiency of due diligence will be reached through* collaboration with enterprises at a sector-wide level, workers, home and host governments, and civil society enhances due diligence.”

- Add: *“Practical and legal limitations that companies can encounter in their ability to act, in particular towards business relationships should be duly taken into consideration.”*

Summary of key actions:

This part of the draft guidance should be clarified and simplified for greater efficiency; it should be made more operational and add references to each corresponding section for an easy and quick use.

When speaking about the identification and assessment of adverse RBC impacts, it is necessary to clearly present – in the simplest possible way – the different questions that guide the analysis of “cause” versus “contribute” and “directly linked”, which is fundamental at this stage. It is proposed to add a concise version of the questions that are outlined on page 30 and which should be clear from the beginning to understand the underlying concepts.

- II-A.3.: *“Ask 3 questions to guide the analysis of cause – contribute – directly linked:*

o *CAUSE: Would the enterprise’s activities be sufficient in themselves to result in an adverse RBC impact?*

o *CONTRIBUTE: Do the enterprise’s actions combined with those of another entity result in an adverse RBC impact?*

o *DIRECTLY LINKED: Does the enterprise have a commercial relationship (or a cascade of commercial relationships) with an entity causing a negative RBC impact while providing products or services for the enterprise’s operations, products or services?”*

When it comes to prevention and mitigation of adverse RBC impacts, it should be clearly stated at this stage that **legal and practical** limitations to the use of leverage exist. The Guidance describes these limitations in the Core Concepts (p. 10) and in the Practical Steps (p. 21). The Two-page summary needs to also address this issue.

- II.B.3.: *“Use leverage with business relationships to prompt responses to potential or actual impacts. Collaborating with others may be the most effective means in cases of little or no leverage due to practical or legal limitations.”*

With regards to remediation, **it should be clearly stated that there is no shift of responsibility from the entities that are the source of harm** to the enterprise that is only directly linked to it. This is explained in the Practical Steps (p. 26) but needs to be said in the summary as well.

- III.: 1. Enable remediation for harms caused or contributed to, using a variety of avenues. *In case of harms caused by a business relationship directly linked to the enterprise, the latter is not expected to participate in the remediation but may choose to do so, alone or in collaboration with other parties.* “

PART I: CORE CONCEPTS

- **Title 1.** (p. 7)

The first heading “Enterprise actions create responsibility to address adverse RBC impacts” should be reworded to a softer formulation, considering the different degrees of responsibility of enterprises (depending on whether the adverse impact is caused, contributed to or only directly linked). A possible suggestion is: *“Enterprises’ role to address adverse impacts”*.

- **Box 1** (p. 7)

The box with a list of examples of RBC impacts covered by the Guidelines **is especially useful** for the reader and will allow efficient internal communication within the company to illustrate negative impacts associated with an enterprise's operations. It is greatly appreciated.

- Paragraph 8 (p. 10)

Modify the following sentence: *“This is relevant in: (I) identifying general areas where the risk of adverse impact is most significant and prioritizing these for **appropriate level of ~~more detailed~~ due diligence**”.*

- Paragraph 9 (p. 10)

When referring to practical limitations, it should also be referred to **legal** ones. A clear acknowledgement of such limitations is needed, in a manner which is balanced with the explanation of the influence and the requirement to create or exercise leverage: see for instance section 3 p. 21. In the same section, it should be explicitly mentioned that **“collaborating with others is the most effective way forward”** (by contrast to the current wording which is just “can be effective”).

- Page 11 Paragraph 10 i (p. 11)

Sanofi proposes to delete the end of the following sentence as it includes supply chain relationships: *“An enterprise can cause harm through its own activities, ~~including activities in its supply chain or other business relationships...~~”*. The same comment applies for **paragraph 10 ii** “Contributing to adverse RBC impacts through their own activities”.

If the definitions of “cause” and “contribute” included supply chain relationships, this would mean that companies are obliged to remedy the harm caused by these supply chain relationships. This is neither consistent with the MNE Guidelines nor with the explanations of the terms “cause” and “contribute” provided for in the Annex of the Guidance (p. 28).

The only location where a mention of “supply chain or other business relationship activities” should be acceptable is in **paragraph 10 iii** “RBC impacts directly linked to enterprise operations...”

PART II: PRACTICAL STEPS

- II-B.C.2.: Prioritising prevention & the most severe impacts (p. 20): We would like it to be made clear in this paragraph that the process of prioritisation means that **not all risks that have been identified can be addressed**. The impression when reading page 20 is that **all risks need to be addressed, if not simultaneously, then at least one after the other**. This would go beyond the capacity of enterprises who may have hundreds of thousands of suppliers across the world. **Prioritisation means making a choice and honing in on the most severe impacts that have been identified**. Some sentences need to be rephrased to make this clear, according to the spirit of due diligence outlined in the two-page summary:

- o “The potentially most severe impacts should be prioritised for action **first**.”
- o “Risk prioritisation is about sequencing responses in the event that not all **of the most severe** impacts can be addressed at once.”

ANNEX: UNDERSTANDING “CAUSE”, “CONTRIBUTE” AND “DIRECTLY LINKED”

These concepts still need to be reformulated or further simplified to effectively help the analysis of the terms “cause” – “contribute” – “directly linked” (p. 30 to 32).

The explanation of these terms is fundamental and would gain in clarity if it were illustrated by concrete examples or case studies. The questions supposed to help guide the analysis are not always perfectly clear and need to be simplified. Especially the explanations of the concept of “causing” adverse RBC impacts are not always clear. What does “incentivise another enterprise” or “facilitate another enterprise in taking action that cause adverse impacts” mean? An example for each situation should be given to be sure the reader understands the meaning.

The simplified flow chart on page 32 needs some reformulations to make it clearer. For example, what does the question “If so, would the enterprise's activities **in and of themselves** be sufficient to result in that impact” mean? The difference between “in themselves” and “of themselves” is not evident.

Also, the following questions contained in the flow chart need to be reformulated to be clear:

- "Does the enterprise have a commercial relationship (or a cascade of commercial relationships) **with the entity causing the negative impact while providing** products or services for the enterprise's operations, products or services?"

- "Does the enterprise's actions (**cause, facilitate or incentivise, parallel**) **combined with those of** another entity **to** result in an adverse impact?"

At last, it should be noted that the **concept of "Omission"** is not dealt with in the Guidance, but "surprisingly" introduced in the Annex as being another form of responsibility of the company

SAVE THE CHILDREN SWEDEN

Submitted by Malin Dahlberg Markstedt, Manager, Child Rights & Business Department:

Save the Children's Centre for Child Rights and Business has noted the invitation by the OECD to submit input on the OECD Due Diligence Guidance for responsible Business Conduct and on the Due Diligence Companion and would hereby like to contribute with the following reflections and input.

We welcome the public consultation and regard it as an important possibility to add and further the awareness of children's needs and rights as central aspects of conducting socially responsible business operations. From our point of view, children's rights is the ultimate definition of sustainability, as it inherently requires a long-term perspective of business impact on the planet and mankind.

Save the Children - a founding partner of the Children's Rights and Business Principles/CRBP Save the Children is, together with the UN Global Compact and UNICEF, a founding partner of the Children's

Rights and Business Principles (CRBP), a part of the UNGC's global standards on responsible business conduct. The CRBP were jointly launched globally by the founding partners in 2012. Save the Children responded to queries from business to receive tailor-made support on assessing impact and design actions to implement the CRBP, and set out to develop a due diligence-like model for business actors seeking support to implement the CRBP hands-on, into all business operations. This Due Diligence was produced with financial support from the Swedish International Development Agency/Sida and with development support from Accenture and businesses during the pilot stage.

Save the Children has since the launch built relevant experience of working with individual businesses in many different sectors, and shared experiences and materials on practical ways of implementing CRBP. See our website for more information and witnesses, including films and interviews from companies having been supported by Save the Children in individualized practical ways: <http://crb.savethechildren.se/business-practice>. This information is to illustrate the need to share good practical experience, and to inspire business actors to take action on the CRBP. The CRBP constitutes a call for action for all businesses; privately or publicly owned, to assess its impact on children through its business operations, and to take relevant actions to meet the needs and rights of children accordingly.

Save the Children Sweden/Radda Barnen has within the Save the Children International (SCI) been given the role to actively promote the dissemination of the CRBP and support as many actors as possible to work with concrete actions to promote the CRBP through cooperation with our colleagues worldwide in the 120 countries we are active in, and through direct support to businesses seeking our advice and support. For this reason we have established a Centre of Excellence at Save the Children Sweden's head office in Stockholm staffed with adequate expertise and established a social enterprise

to support individual companies globally.

Our experience from having supported businesses in assessing its impact on children through the process of support by Save the Children is illustrated in the attached brochure.

Apart from the global hub in Sweden providing services to corporate Head Offices worldwide, Save the Children also initiated and owns a Social Enterprise in Asia, having since 2009 supported companies in their supply chains throughout China, Myanmar, Malaysia, Vietnam, Bangladesh and elsewhere. These experiences provide guiding and relevant examples for businesses how to tackle issues relating to children, young workers and parent workers globally. See www.ccrcsr.com for more information. Similar activities have also been initiated in Africa and Latin America.

The UN Committee on the Rights of the Child in Geneva and its General Comment no 16

In this context we would like to draw OECD's attention to the strategic initiative taken by the UN Committee on the Rights of the Child in Geneva, and its General Comment no 16 to the UN Convention on the Rights of the Child, elaborating the responsibility of the state to ensure that business behavior respects and supports children's rights. It can be accessed at: <https://resourcecentre.savethechildren.net/library/general-comment-no-16-2013-state-obligations-regarding-impact-business-childrens-rights>

General Comment 16 underlines the governmental responsibility to make sure that the business sector meets its responsibility to respect children's rights as they are set forth in the UN Convention on the Rights of the Child/UNCRC and in the CRBP. This is a strong message to nation states to do its utmost to secure the implementation of the CRBP through eg. the nation state's publicly owned business operations and/or public procurement. Hence it is important for each nation state to review how its business ownership can be used as a mechanism for better implementation of the CRBP, and to look into different possibilities as business owners, to drive and further the socially responsible business agenda, through systematic implementation of the CRBP.

National Action Plans on Business and Human Rights

As several nation states are committing to National Action Plans, or the equivalent, on Human Rights and Business, where Human Rights are underlined as important values to secure in responsible business operations, Save the Children has on different occasions stressed the importance of including a clear reference to the CRBP and the UN CRC in these types of plans, as this adds strength to different agenda settings on business and children's rights, successfully so e.g. in Sweden.

We have found this as a strategic way forward, urging more businesses to review its business operations with reference to children's needs and rights, as they are set forth in the UN CRC and the CRBP. The Swedish Government has included explicit references to both the UN CRC and the CRBP in its national action plan on business and human rights:

<http://www.government.se/4a84f5/contentassets/822dc47952124734b60daf1865e39343/action-plan-for-business-and-human-rights.pdf>

Save the Children hence strongly propose to the OECD to link and make explicit references to the CRBP, the UNCRC and also to the UN Committee on the Rights of the Child's General Comment no 16 whenever applicable.

Further suggestions

Apart from the above, it is critical that any guidance urges and supports companies to go beyond their realm of ownership or early-tier supply chain, and stress the responsibility to include the entire value chain. In our very practical experience, a lack of this approach does not in any way support solving or addressing challenges, but rather push them further down the supply chain where risks of violations are even higher. It should also be stressed that the due diligence process is by no means a risk minimizing exercise, and that businesses should not expect conducting such a process can serve a PR value. Unfortunately, such an approach is still far too common leading to pushing risks further into the periphery and e.g. children into even higher risks.

As with any due diligence process, a materiality analysis is crucial for any actor including businesses to assess their risks, impact and potential scale of support thru preventive and reactive measures. It must be stressed that businesses need to work with suitable partners from civil society who have deep knowledge of the issues at hand, in order to stand a chance to make such an analysis. In our experience, even the largest corporations thus far lack adequate internal capacity to assess how mankind 01-the planet is effected in all variety of ways, hence we fully support the meaning and importance of SDG 17.

SECRÉTARIAT GÉNÉRAL DES AFFAIRES EUROPÉENNES - FRENCH PRIME MINISTER'S OFFICE

*Submitted by Anne Gevertz, Secrétariat général des affaires européennes, Secteurs OCDE / MICA
Adjointe aux chefs de secteur, Suivi des comités économiques de l'OCDE :*

Objet : Réponse à la consultation publique sur le projet de guide général sur la diligence raisonnable.

PJ : Note des autorités françaises de juillet 2016 relative au projet de guide général sur la diligence raisonnable.

La délégation française remercie le secrétariat de l'OCDE pour avoir élaboré cette nouvelle version 2.1 du projet de guide général sur la diligence raisonnable et avoir lancé une consultation publique.

Le Secrétariat du Point de contact national (PCN) français a veillé à donner une large visibilité à cette consultation publique tout en répondant à de nombreuses sollicitations émanant du secteur privé, du secteur académique et de certaines organisations de la société civile pour expliquer le contenu et la portée de la diligence raisonnable.

Ces actions de promotion ont également permis au PCN de diffuser les standards sectoriels pour la conduite responsable des entreprises adoptés et préparés en 2016 et début 2017 pour les secteurs agricole, extractif, textile habillement chaussures et financier.

Plusieurs parties prenantes du PCN vont ou ont déjà apporté des contributions à cette consultation comme la plateforme nationale d'action pour la responsabilité sociale des entreprises, l'AFNOR au sujet du lien entre ce guide et la future norme ISO sur les achats responsable, ou l'Afep que l'OCDE avait rencontrée pour expliquer le guide.

Ainsi afin de disposer d'un guide général simple qui s'appuiera sur ces différents guides et recommandations, nous apprécions que la partie 1 ait été simplifiée et présente l'approche de la diligence raisonnable. Cependant, il nous semble que le « *companion* » apporte plus de confusion que de clarté et ne donne pas d'exemple concret ni d'outil opérationnel. Nous pensons que ce compendium devrait être supprimé ou revu par exemple en intégrant des extraits de décisions de PCN sur la diligence raisonnable ou des bonnes pratiques (ex : charte fournisseurs, code de bonne conduite, grille d'audit, etc.).

Pour mémoire, vous trouverez ci joint copie de la note adressée par la délégation française en juillet.

Objet : Projet de guide de l'OCDE sur la conduite responsable des entreprises – Commentaires de la délégation française du groupe de travail sur la conduite responsable des entreprises – DAF/INV/RBC(2016)6.

Réf. : OCDE/2017/n° Online-consultation-compilation-contributions FINAL.docx

La France remercie l'OCDE pour l'élaboration de ce guide qui permettra d'aider les entreprises à établir des plans de diligence raisonnable, concept clé de la responsabilité sociétale et environnementale des

entreprises recommandée par les Principes directeurs à l'intention des entreprises multinationales. La structure du guide est cohérente : présentation des principes et des concepts en introduction, présentation des trois composantes de la diligence raisonnable (identifier, prévenir et atténuer les risques de dommages et rendre compte) et enfin la remédiation.

Commentaires généraux

Le texte devrait néanmoins être amélioré afin de veiller à son alignement avec les concepts des Principes directeurs, d'éviter de créer une surcharge administrative pour les entreprises, de conserver de la flexibilité aux outils à disposition des entreprises et d'avoir une approche mesurée sur la responsabilité, le principe général restant une démarche volontaire.

La délégation française fait les propositions suivantes :

L'explication du « lien direct » est fondamentale. Il semble préférable de définir le concept de manière approfondie dès l'introduction pour alléger et simplifier la lecture des composantes de la diligence raisonnable qui peut ensuite être centrée sur les mesures à prendre plutôt que sur l'explication (redondante) des concepts. Il est donc proposé de faire remonter en introduction une partie du texte et des tableaux des pages 29-30.

Veiller à se limiter aux concepts des Principes directeurs et à leurs commentaires afin éviter de créer de la confusion. 1) La partie II de la diligence raisonnable dissocie l'identification et l'évaluation des risques. Ce n'est pas prévu par les Principes directeurs qui se limitent à l'identification des risques. Cette distinction crée de la confusion et de la complexité (notamment pour les PME). Le titre 3 pourrait être supprimé ; les paragraphes ABC qui s'y rattachent pourraient être légèrement modifiés. 2) La définition de « *new risk-spotting processess* » (p.18) et de « *specific trigger points* » (p. 18) n'est-elle pas trop complexe ?

Parmi les mesures **d'identification des risques**, le guide devrait faire référence aux **audits** notamment des fournisseurs et de certaines relations d'affaires (tout en soulignant que l'audit n'est qu'un des outils d'identification et de gestion des risques – cf. recommandations du PCN français en la matière) et aux **études d'impact** environnementale et sur les droits de l'homme.

Le guide devrait mieux prendre en compte le **dialogue social** et le dialogue social international, à la fois comme outil pour identifier les risques, mettre en place des mesures de prévention (comme la formation et le suivi des plans d'actions) et participer le cas échéant à la remédiation.

Le guide devrait prendre en compte les **pratiques d'achat** (p. 14, 15, encadré 8 p.15, p.16A, p.21) et la formation des acheteurs aux enjeux de RSE, et introduire la possibilité de lier les primes aux performances RSE des achats.

L'objectif essentiel de la diligence raisonnable est la **prévention**. Cette composante mérite d'être étoffée. Elle pourrait inclure des mesures comme le suivi des audits des relations d'affaires (c'est-à-dire la mise en œuvre des plans d'actions correctives), l'élaboration et la mise en œuvre d'un plan d'actions sociétales et environnementales après un audit d'impact environnemental (ou une saisine d'un PCN) et / ou d'un audit sur les droits de l'Homme ou encore l'encadrement de la sous-traitance.

La distinction entre parties prenantes « internes » et « externes » n'apparaît pas toujours pertinente. Elle ne figure pas dans les commentaires des principes directeurs.

Commentaires détaillés (par page)

p 1 - Ajouter une référence au plan d'action du G7, au Rapport sur le travail décent dans les chaînes d'approvisionnement mondiales de la CIT de juin 2016 et aux conclusions du conseil de l'UE sur les droits de l'Homme et les entreprises du 20 juin 2016.

p. 6-7 - Développer le concept de « **lien direct** » en insérant notamment les développements et tableaux des pages 29-30.

p. 8/9 - Encadré n°4 sur les **principes de diligences raisonnables** : le mettre **au début** du guide. Ajouter que les entreprises peuvent également coopérer à des initiatives collectives incluant des organisations de représentants des travailleurs (et non pas uniquement les « travailleurs ») et des organisations internationales comme l'OIT (ex : coton en Ouzbékistan, sécurité des usines textiles au Bangladesh), l'OCDE (plateformes de dialogue et projets sectoriels de l'agenda proactif) et l'UE (initiative textile, projets divers).

p. 12 - *C Adoption and Dissemination* : le guide propose que l'entreprise consulte des experts pour établir sa politique de CRE. Il ne semble pas utile de dissocier les experts *internes* et les experts *externes*. L'on pourrait mentionner les organisations syndicales, les ONG et les organisations internationales.

p. 12 - *A Embedding an RBC Cluture in the Enterprise* : insérer l'encadré n°7 à la page 14.

p. 12 - *"3 Key approaches and tools : Embed the policy commitment in company governance, culture and management systems"*. Il est proposé d'ajouter un tiret au point "C" pour citer le besoin de prendre en compte les relations d'affaires dans la politique d'entreprises et le système de gestion des risques (tout en renvoyant au point 4 qui apporte les précisions nécessaires).

p. 14 - *D Support implementation and incorporation into appropriate management systems* : Il faudrait faire référence aux pratiques d'achats ainsi qu'à la politique d'audit de l'entreprise. Le paragraphe F page 15 pourrait être déplacé à la page 14 pour compléter le tiret « *accros all relevant departments and locations* » et devrait mentionner les pratiques d'achats.

p. 15 - *Incorporate business relationship into management systems and approaches* : il faudrait ajouter un tiret pour indiquer que les standards RSE sont à prendre en compte non seulement en amont de la relation (« *early* ») et lors de la contractualisation (« *at the contracting stage* ») mais également tout au long de la relation commerciale car les risques peuvent apparaître à tout moment.

p. 16 - *5 Involving internal and external stakeholders* : Il est proposé de supprimer les termes « interne » et « externe ». Le A pourrait être reformulé « Parties prenantes au sein de l'entreprise », comporter un tiret consacré au dialogue social et faire référence aux acheteurs (*buyers*).

p. 17 et suivantes - Revoir la partie II afin de supprimer « l'évaluation » des risques tout en expliquant qu'identifier les risques inclue leur analyse afin de pouvoir décider ensuite des mesures à prendre.

p. 17 - Encadré 9 : Ajouter les études d'impact sur les droits de l'homme.

p. 21 - Ajouter les pratiques d'achat et la sous-traitance (légale et illégale) comme facteurs aggravants les risques.

p. 36 - *4. Involving internal and external stakeholder [to prevent and mitigate adverse impact]*. Il faudrait ajouter un paragraphe sur le dialogue social dans l'entreprise et sur le dialogue social international ; l'action syndicale et les accords-cadres internationaux peuvent servir de support pour mener des actions de prévention des risques (formation, etc). Les initiatives multipartites et les actions collectives d'entreprises (de type Accord au Bangladesh) pourraient également être mentionnées pour renforcer la prévention dans les situations où les risques ou non-conformités sont systémiques. Enfin, les parties prenantes peuvent également être consultées dans la mise en œuvre des plans d'actions correctives découlant d'audit ou d'études d'impacts (ex : le *CSR Board* de l'usine Michelin en Inde cf.; saisine du PCN français).

p. 40 - *B. Moving from auditing to collaboration*. Ce paragraphe devrait plutôt figurer dans le pilier sur la **prévention**. La dernière phrase du 2^{ème} paragraphe devrait être scindée en deux pour présenter d'une part les initiatives de mutualisation des audits (qui ne portent pas que sur l'éthique mais peuvent également porter sur les questions sociales, environnementale et la sécurité) et les démarches collectives initiée par le secteur privé (par exemple sur la certification), et, d'autres part les initiatives pluripartites sans buts lucratifs.

p. 40 - *C Prioritising business relationships for tracking*. Il s'agit en fait du suivi des relations d'affaires à risques. Il semble pertinent de faire figurer cette mesure dans le pilier sur la prévention.

p. 45 - Part III Providing or cooperating in remediation. Il faudrait ajouter la possibilité – en cas d’incidences négatives - pour les entreprises de prendre part à l’indemnisation des victimes en recours à un fonds sectoriels. Le guide pourrait également suggérer d’avoir cours à des mécanismes assurantiels. Sur la remédiation : cf. Recommandation n°10 du Rapport Rana Plaza du PCN français.

SHERPA

*Submitted by Sandra Cossart, Responsable du Programme Globalisation et Droits Humains - RSE
Head of Globalisation and Human Rights - CSR Program:*

- **Preliminary observations:**

- **The need for mandatory RBC due diligence**

Sherpa - OECD Watch member - supports the OECD's goal to develop this general Due Diligence guidance in order to enhance the implementation of the recommendations contained within the OECD Guidelines, a non binding instrument on companies. Recent research has revealed that corporate uptake of non-binding standards for RBC such as the OECD Guidelines remains extremely weak, even in front-running countries.

According to the 1st pillar of the UNGP, States have a duty to protect human rights and the environment, including in the context of global supply chains. To meet this obligation, governments should regulate their businesses whether they operate domestically or abroad. When States impose a duty of care for multinationals or mandatory due diligence requirements, company transparency and accountability improve. France has taken this approach and by the 21st of February 2017, should have such legislation.

Although we recognize the importance of developing non-binding guidance, we are convinced that the best way to strengthen due diligence in the context of business operations is through a legally binding instrument, not only at national level but also at an international level. Therefore, the initiative to set up a UN treaty on business and human rights should be supported by the OECD countries.

- **The unnecessary due diligence companion document**

The due diligence companion document was never mentioned before as part of the process and tends to appear as a practical guide for multinationals enterprises. It therefore sends the wrong signals and could transform the institutional legitimacy of the OECD to establish international standards into an advising and consultancy role for companies. We would recommend to focus on the main guidance document and eliminating the companion document. If really necessary, additional tips and explanations for implementing the Due Diligence Guidance could be addressed later on.

- **Sherpa detailed comments for the guidance:**

1. Scope of the Guidance

In box 1, it should be added that enterprises have a responsibility for their impacts on human rights including through their supply chain and independently of home states' abilities to fulfill these obligations.

The Guidance also emphasis on «the private efforts to define and implement responsible business conduct», which is far from true for some businesses ignoring RBC and therefore violating human rights for costs reasons.

This declaration should therefore be deleted or at least nuanced; it should also be balanced by adding the requirement from companies to consult with stakeholders and to engage actively with potentially affected stakeholders.

2. Principle to avoid harm

Throughout the Guidance and especially box 4 the core objective of carrying out due diligence processes should be to avoid harm through a precautionary approach (as principle 7 of the Global compact calling on businesses to support a precautionary approach to environmental challenges) which means avoiding potentially serious or irreversible harm to human rights. Furthermore, the corporate responsibility to respect human rights requires avoiding any human rights abuses. This guidance should not be a way of facilitating enterprises' business in risky environments but a way of avoiding any human rights abuses.

On other hand, the objective to avoid harm should be stated as the core and not simply a core due diligence principle.

It follows that enterprises should not try to “mitigate” or “remediate” human rights abuses in case of unavoidable harms due to current business plans but should assess and rework their business plan or abandon the process to avoid any human rights abuses. Furthermore, in box 29, the companion document quotes some measures about remediation and remedy but never mention cessation of activity. According to the guidance which states that when there are potential or actual severe impacts, “an assessment will be necessary of how crucial the supplier is, legal implications, and how cessation of activities might change impacts on the ground”, an important aspect of remediation should also include the immediate and mandatory cessation of the activity causing the harm, in addition to the possible outcomes.

3. Control along supply chains

The due diligence guidance has to better take into account situations where enterprises fail to identify, prevent and mitigate risks of abuses in their supply chains. Indeed in situations where enterprises knew or should have known of such abuses, enterprises must remediate harms suffered in their entire supply chain.

Furthermore the text deals with remediation in cases where enterprises are “directly linked” to abuses. The text suggests that in these cases there is no responsibility to remediate and that this would be optional. The text should clarify the line between a situation where an enterprise contribute to abuses and situation where an enterprise could be directly linked.

While the responsibilities to provide remedy rest on enterprises that caused or contributed to abuses, the due diligence guidance should extend it to the directly-linked enterprises, especially because the distinction in practice is very unclear (as revealed also during the workshop on the DD garment and footwear industry 8th and 9th of February).

Indeed, such enterprises are expected to use their leverage to prevent, mitigate and remedy to abuse committed through their supply chains.

4. RBC policy and management systems

Under Key action 1 of Section “Embed responsible business conduct into policy and management systems”, the Guidance advises companies to “devise and adopt an RBC policy.” However, the guidance suggests that companies “can” but not “should” adopt this policy which is inconsistent in the human rights field with both the UNGPs and the OECD Guidelines which clearly state that companies “should” adopt a human rights policy.¹⁶²

In addition, the Guidance must indicate that the policy should, at a minimum, meet the standards mentioned in the OECD Guidelines. This includes international human rights law and standards which

¹⁶² UNGPs, Principle 16 and OECD Guidelines, Chapter IV on Human Rights, paragraph 4.

the OECD Guidelines refer to in its Human Rights Chapter.

5. Adverse RBC impact into all business operations

The due diligence guidance mentions that RBC expectations are required into supplier relationships but such a requirement should be extended into all aspect of business operations. In this way, the due diligence guidance should provide more detail and it must integrate other business relationship.

6. Risks rank

Both the Guidance and the companion document refer to “severe risks” when an enterprise is engaged in consultations with potentially affected stakeholders. It could be read as advising companies to concentrate on severe risks only. It is not acceptable in the human rights field that enterprises only remedy to “severe risk” and remediation should be encouraged not only for severe risks, but for all possible adverse risks.

7. Disclosure and transparency

Transparency should be added as a core transversal principle through the guidance.

The due diligence guidance states that enterprises “can take (...) actions to communicate how it has addressed adverse RBC impacts”.¹⁶³ In the human right field, transparency and disclosure require communicating a minimum threshold of information; such disclosure should at least include :

- a company’s policy on human rights monitored to assess whether objectives are met
- procedures to identify and address risks on human rights especially through the supply chain
- an assessment on actual human rights impacts with a plan to remediate impacts
- a transparency about the entire supply chain including contact detailed of supplier facilities and business partner.
- a diligence report should detail the measures that the company has taken in order to identify and prevent human rights and environmental risks resulting from the company’s activities but also the activities of its subsidiaries (that it “controls”) and the activities of its subcontractors and suppliers provided that they have “an established commercial relationship”
- That report must be published.
- Any person who can prove that they have standing can ask the company to adopt the report and/or to publish it This guidance should seek to expand and complete that list.

8. Remediation for adverse RBC impacts

Where harms identified under the OECD guidelines overlap with national law, remediation provided through these previous mechanisms should not be offered under a condition of waiving the right to claim reparations through national courts.

9. Human rights defenders / Whistleblower

In accordance with the UNGPs stating that “legitimate and peaceful activities of human rights defenders should not be obstructed”, and with other OECD due diligence guidances such as the due diligence guidance for meaningful stakeholder engagement in the extractive sector, the due diligence guidance should provide specific measures to identify, prevent and avoid risks of adverse impacts on human rights defenders.

¹⁶³ In part II-D. Due Diligence: Communicate, B. KEY ACTIONS.

SIEMENS

Dear OECD Team,

As Siemens has implemented a thorough Corporate Responsibility program for more than a decade, I could follow the OECD Due Diligence Guidance for Responsible Business Conduct easily. It matches our program perfectly. Excellent work – thank you!

Just one remark: in our philosophy Supply Chain Management is a crucial part of our operations (we purchase approx. half of our revenue from more than 90.000 suppliers in more than 160 countries). “Sustainability in the Supply Chain” is a fundamental part of our business relationships, however, it is hardly mentioned in this Guidance (although you refer to other OECD processes like minerals agriculture, which describe mainly the supply chain due diligence).

In my communication with other German-, European- and mostly US-MNEs one question rises in most discussions: is a company only responsible for their 1st tier suppliers? Often Government Officials, NGOs, international law (such as Dodd-Frank Act, Section 1502) etc. publicly expect MNEs to secure their complete supply chain to the nth tier.

If you wish further feedback/information please call me under my mobile number or send me an email. Looking forward to keep in touch.

With best regards,
Thomas Kentsch

Siemens AG
Supply Chain Management - Sustainability in the Supply Chain

TRANSPARENCY INTERNATIONAL

Author: Angela Reitmaier, Member Project Group Supply Chains and Chair, Working Group on International Agreements

1. Transparency International Germany welcomes the OECD’s efforts to publish a General Due Diligence Guidance for Responsible Business Conduct (Guidance) and a Due Diligence Companion Draft (Companion).

2. Combating Bribery, Bribe Solicitation and Extortion is dealt with in Chapter VII. of the OECD Guidelines on Multinational Enterprises (Guidelines). Consequently, the 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.

3. In our opinion, combating bribery, bribe solicitation and extortion would need to be addressed as a stand-alone issue and the differences between adverse impacts arising out of bribery and other matters covered under the Guidelines would need to be spelt out in the Guidance itself. We view the Companion as a document containing scenarios and best practice examples, but not substantive explanations.

4. We would therefore ask that the statement in Box 20 (page 23) of the Companion, where the “severity of the adverse impact” of bribery is measured by the “seriousness of the offense”, be included in the Guidance.

5. The Guidance should also clarify that state non-judicial complaint mechanisms or company grievance mechanisms not be a substitute for prosecution of criminal (or administrative) wrong-doing of enterprises in case of bribery, bribe solicitation or extortion. Also, the sentence on top of page 30 of the Guidance: “Where harms identified under the Guidelines overlap with national law, enterprises may be required to cooperate in state-based proceedings to address the harms” should be made mandatory as far as criminal (or administrative) wrong-doing of enterprises related to bribery is concerned.

6. While bribery needs to be addressed on its own, we also fully support the statement on page 11 of the Guidance:

“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: 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.”

There is often a correlation between the violation of human rights or damage to the environment and corruption. Anti-corruption is a cross-cutting issue and we fully support that the Guidance states this point clearly.

7. As a member organization of OECD Watch and the Corporate Accountability Network CorA we indorse the comments submitted by them.

8. The Guidance sets expectations of transparency for enterprises, for example to publish a responsible business conduct policy. We would welcome, if the process in which the Guidance is developed would also to be transparent. Therefore, we would ask that our comments be made public and those of all other commentators as well.

VALCAMBI

Submitted by nicoletta ferro, corporate affairs & communications:

Dear Sir,

Valcambi as a precious metal refiner implementing rigorous due diligence over the whole supply chain, strongly support OECD’s efforts in developing a general Due Diligence Guidance and supporting it with a Due Diligence Companion.

Considering the huge amount of effort the due diligence process requires for a company we were wondering whether the reason for having two different documents, the Guidance and the Companion, has to be attributed to a plan to make the OECD Due Diligence Guidance a standard to comply with in the near future. We have seen this before, as in the case of ISO, and fully understand the rationale behind this choice. If this is not the case what we suggest is, for the sake of clarity and usability on behalf of companies, the Due diligence Guidance and the Companion to be merged as to create a unique consultation document able to provide guide to the due diligence process whilst providing practical

examples to it. Having two different documents can be confusing and can discourage companies from committing seriously and rigorously to due diligence efforts.

The following are our comments on the Guidance:

- In the Due Diligence Guidance (section 10), we appreciate the distinction you made at point 10 of the Guidance between “Causing RBC impacts”, “Contributing to RBC impacts”, and RBC impacts directly linked to enterprises operations , product or services by a business relationship”. We therefore suggest to consider along with positive impacts and adverse impacts generated by enterprises a different category of impacts, those falling under the label of “unintended consequences/impacts” that can spread out of actions and measures taken by companies but that have not been properly considered the local setting.
- In section 12 we are wondering why not envisaging a post due diligence consultation as a further phase of engagement with stakeholders
- In section 13 we would like you to raise the issue of “due diligence costs”, a hot issue which frequently goes unnoticed. We consider , in certain circumstances, the shared cost of due diligence to be a viable option to initiate business. This idea is not shared by many of our counterparties. A guideline on behalf of OECD on this issue would be more than welcomed by all interested parties.
- In section III the part concerning remediation and remedy should probably be broadened to add more examples form the ground, that is basically where the guidance and the addendum risk to duplicate efforts, for example.

For what concerns the Due Diligence Companion, we consider the “good practices box” as very useful and practical. As an overall we note that some of the suggestions you make target companies that haven’t done any due diligence activities yet as they seem quite obvious and redundant for those companies with a good familiarity with due diligence practices.

We hope those few suggestions might be helpful in you activities
We remain at your disposal for any further issues and consultation process

Best regards,

Nicoletta Ferro

INDIVIDUAL 1

Hello,

Responding to the request for comments related to the following drafts: “OECD-Due-Diligence-Companion” and “OECD-Due-Diligence-Guidance-Responsible-Business-Conduct”, as guidelines for the implementation of the OCDE Guidelines for Multinational Enterprises, I propose to include in these documents the following topics that are considered globally in all companies in relation to the regulatory compliance.

OECD-Due-Diligence-Companion

a.**Embending Responsible Business Conduct into Policy and Management System.**

Comments:

A.**Purpose.** Include a reference that a global and systematic approach to the RBC can be supported by the company established Compliance Function as a figure that can help to supervise the regulatory compliance.

a.**Box 1.** Include that one of the reason for adopting a public commitment to RBC is to provide the compliance function a global framework as a reference for all regulatory requirements to comply with. This framework can set the initial and entity level elements (policies, procedures, compliance management systems, etc.) for developing the steps and activities needed for a continuous monitoring.

B.**Key Actions.** When assigning accountability to management include the figure of the compliance officer as the centralized and independent contact point in charge of the monitoring of the compliance and the reporting to management in case of any sign of non compliance. This can help to strengthen the ethic culture to be deploy to the whole organization from the staff to the Senior management, lead by the Board.

C.Further explanation of key actions.

a.Include a deep detail of how the figure of compliance officer or compliance function could help in the development of the Responsible Business Conduct across the entity (centralized figure, independent, reporting to Board and Senior Management, expert and getting the feedback from established responsables of different regulatory requirements, etc.).

b.Include more international standards as Antifraud.

c.Include that the enterprise's expectations of its workers can be set through a well defined, mandatory and communicated Code of Conduct that should be adhered by all member of the company as well as by the third related parties and stakeholders.

d.In order to make leadership and RBC clearly visible, it should be included a reference to the design of a communication channel directly linked to the figure of the compliance function for the resolution of doubts or to the whistleblower channel.

e.When defining the management system it should be included that it is needed to assign specific budget for the RBC requirements deployment, or to the compliance function in order to develop the work program stablished for strengthen the ethic and responsible business conduct. The definition of the resources should be described in a compliance management system, or the statute and have to be clearly defined in the company budget.

f.**Box 2.** We consider that a management system for address corruption is a part of the compliance function role, but it should be consider to include in the box that the example is not exhaustive, and that a compliance management system for all regulatory requirements can be set as best practice and a way for strengthen the ethic culture.

g.Include the idea of optimized compliance models. It is not necessary to create an specific compliance model for every regulatory requirement, there should be an optimized and centralized system capable to obtail a clear vision of the whole company compliance status. This would need the stablishment of an organization reporting structure from every local responsible to the compliance officer or compliance function.

h.**Box 1, page 6, Good practices box. Example of feedback loops.** In this example it is needed to include the reporting structure, where and to whom it is needed to report such a thing. If not the guidance could be considered weak.

II.Due Diligence: Identifying and assessing adverse RBC impacts.

a.Comments:

A. Further explanation of key actions.

a. Include the assessment of risks for each regulatory requirement and to develop and documented procedure for assessing risks and to embed the analysis of adverse impacts to the company risks maps.

b. **Box 3 and Box 4.** Include a disclaimer indicating that are non exhaustives examples.

- c. **Box 9.** As a contextual factor that could contribute to the RBC risks it should be included as the first step of the table the Control environment, because a poor control environment (without strong entity level controls) could lead to increase the risks of non compliance with requirements because it could be easy to override the rules and to increase non responsables conducts that could not be identified.
- d. Include the segregation of duties between the 3 lines of defense according with COSO, in the definition of the roles and responsibilities of each compliance function member, controls responsables, internal control and internal audit. It should be necessary to define clearly the role in order to coordinate the functions and to optimize the model for reaching the objectives of the Responsible Business Conduct.
- e. Include as a tool for analysis any information obtained from the Big Data Analysis that could be used for benchmarking and in order to know the status of companies in the same sector around the world.
- f. Include the control definition process that is needed for covering the risks identified and need to be monitored.

I. Due Diligence: Tracking Performance

a. Comments:

A. Further explanation of key actions.

- a. Include as a key point the need that the compliance function figure created for monitoring compliance has to be in contact with internal control and internal audit for developing the internal audit plans (with the review of patterns etc.) for monitoring the effectiveness of controls and to define action plans for resolution of incidences.

Kind regards

Alicia Burgueño Sepúlveda (CIA, CRMA), Spain

INDIVIDUAL 2

Thank you for the opportunity for the general public and practitioners to comment on the “OECD Due Diligence Guidance for Responsible Business Conduct (Draft 2.1). Implementing the due diligence recommendations of the OECD Guidelines for Multinational Enterprises”.

General Comments:

- The document provides specific guidance that will be useful for multinational enterprises in enhancing their social and environmental conduct.
- It provides a good narrative, easy to understand by any enterprise employee, general practitioner, and community stakeholder.
- The guidance focused largely on land and water, but enterprises can have effects on other key environmental elements such as forests, oceans, air, and social, for example, cultural heritage. I recommend expanding the references to environmental elements to be more inclusive.
- Although budgeting is an integral part of RBC planning, the guidance could make the need for budgeting more salient, in order to remind enterprises of the need to budget for RBC.
- The guidance is at times repetitive and sometimes obvious. The authors may want to streamline the document, which may help increase usage of the document by concerned parties. Eg; P.11. para 1: states three fairly obvious ways in which enterprises can have direct and/or indirect impacts.

Specific Comments:

P.8. BOX 1. **Workers relations:** payment of wages that do not meet the basic needs of workers and their families- suggest wording such as `wages that do not meet nationally established rates of compensation for work done`. The issue is that there may be multiple factors why a worker`s basic needs may not be met, ...even if a worker is paid fairly, eg; size of family; rates for shelter, food, electricity, etc. These may not be in line with nationally established wage rates, or meet the worker`s basic needs, even if the enterprise is paying fairly.

P.8. BOX 1.**Environment:** ecosystem degradation through land degradation, **fresh or marine** water resource depletion/**pollution, undue air pollution,** and/or indiscriminate destruction of (delete word pristine) forests, **cultural heritage,** and biodiversity.

P.8. BOX1. Environment. **Add:** Waste disposal that may affect human or environmental health.

P.8. BOX1. **Bribery:** bribing environmental inspection authorities to ignore (**delete** water use and) (**Insert** word environmental) environmental pollution.

References to remediation on P. 11, P.13, P. 26 seem to contradict (or at least responsibility is not clear), as follows: P.13. "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**."` Seems to contradict the spirit, if not the word, of P. 11 "When enterprises are directly linked to adverse RBC impacts caused **by others**, they are **not expected** to provide or cooperate in remediation." P. 26. "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".

Finally, I provide two recommendations for consideration:

Recommendation I: develop checklists for each step/component of due diligence: Embed Responsible Business Conduct into Policy and Management Systems ; Identify and Assess Adverse RBC Impacts: Prevent and Mitigate Adverse RBC Impacts; Track Performance; Communicate; Provide for or Co-operate in Remediation when appropriate. This would make it easier for enterprises to evaluate any missing elements in their RBC implementation.

Recommendation II: Develop case studies of successful, or unsuccessful implementation of RBC. This could greatly help in learning how real implementation happens, including any barriers, conducive or non-conductive contexts, and innovative approaches to overcome barriers.

Sincerely,

Moreno Padilla
Natural Resources and Environment Specialist

INDIVIDUAL 3

. (Pages refer to the pages of Guidance document for RBC (Draft 2.1))

- 1) Introduction: Add OECD's definition of RBC for clarification.

Reason: Acronyms are often interpreted and used in many ways, which causes the 'lost in translation' situation. Since RBC is a relatively new term for many 'CSR' related parties, it is important to clarify what RBC means for OECD. I personally hope that such explanation stresses the similarity between CSR (defined by the EU) and RBC rather than differences. I also hope that RBC recognises the companies' responsibility on their impacts on society, and such impacts can be both positive and negative. This way we can avoid many confusions in the future.

- 2) Page 3: Key Terms: add explanation on the term 'salient' and the difference and relationship with 'material'.

Reason: Companies are used to make prioritisation by what are 'material' for them and what are most 'risky' for them. What makes different for RBC impacts/risks from this traditional way of thinking is that impacts/risks are impacts/risks on society/individuals but not on companies (though both are the same in a long term). The explicit explanation on the difference between "salient" and "material" will help companies to understand better how to make prioritisation.

- 3) Page 14: **RBC policy** (or combinations of policies) ⇒ **RBC policy (or combinations of policies)**

Reason: Companies have already many policies in place such as Human Rights policy. Making "**RBC policy (or combinations of policies)**" in all bold letter will help companies to better understand that it is not always necessary to create a new overarching policy called "RBC policy".

- 4) Page 25: Eliminate "(for example, the Global Reporting Initiative)"

Reason: There are many reporting standards and companies choose the most appropriate one which meets their objective of reporting. As a document of OECD, it is better to avoid giving example of one reporting standard, GRI.

Kind regards,

Yukako Kinoshita
Manager, Corporate Responsibility and EU Policy Research
As individual

INDIVIDUAL 4

Dear Sirs

Thank you for the opportunity to comment on the OECD Guidelines. I have made some general comments, written as a concerned consumer. Please note my submission has been edited in August 2017 after the

deadline date of 9 February 2017.

The situation regarding Brexit, the UK General Election on Thursday 8 June 2017 and Trade Deals has moved on since February 2017. It is difficult for interested consumers to keep up with the latest developments and likely possibilities of the direction of regulation as well as possible directions of emerging technologies and Artificial Intelligence possibilities, advantages and disadvantages for example.

Of particular interest to me is the regulation of emerging technologies and consumer choice but there will be many environmental, trade justice, arms trade, human rights, animal welfare, Data Governance and other concerns that consumers have which I have not covered. Responsibility does not just rest with businesses we all have a responsibility.....

Opinion article:

<http://www.resilience.org/stories/2017-08-17/climate-change-isnt-biggest-environmental-problem-technology-wont-save-us/>

Trade Deals

This is very poignant as we approach the EU MEP CETA vote on 15 February 2017 and following the Brexit vote. I am writing from the UK. (I do not support a US/UK Trade Deal for various reasons from food and environment safety to human rights abuses and foreign policy decisions. I would consider a boycott of US products.)

I believe the Precautionary Principle is misunderstood by many multinational enterprises, some academic institutions and other organisations. I attach a Report regarding the Precautionary Principle. file:///C:/Users/User1/Downloads/2016-06-21_foodwatch-study_precautionary-principle.pdf

I believe there is no scientific consensus on GMO safety and I would like to see a level playing field for scientific debate. The problems associated with this level playing field were highlighted in a recent Scientists for Global Responsibility Conference, Universities for Sale in London in 2016. I would hope that Multinational Enterprises can adjust their business models in the long term and this includes the financial sector, to work towards levelling this playing field and that Governments would help this process. From a consumer's point of view (safety and the environment) it appears that science has become too specialised and profit orientated. Please see relevant Scientists for Global Responsibility Reports including conflict resolution discussions that may be of interest to the OECD.

Competition - John Bunzl of SIMPOL UK has made some suggestions regarding economic models as have many UK NGOs such as War on Want and Global Justice Now including an Alternative Trade Mandate.

I have objections about GM cross contamination. Why many establishment, EU, FDA and Government scientists and other specialist academics are ignoring related issues (such as consumer choice) and wider factors such as land grab is a big question? Consumers are being misled. I think academics have misunderstood why consumers object to GM crops and food (and the reasons will vary). I believe that the inclusion of Sir Paul Nurse in the High Level Group of Scientific Advisors of the EC Scientific Advice Mechanism is debatable and that the Scientific Advice Mechanism should be reformed. I believe the OECD will be misled by the International Network for Science Advice to Governments (INGSA) on some food issues. I believe the UK Government is being misled by the Legatum Institute (and other think tanks) on some issues.

I support a ban on GMO crops and food but failing that....regulation.

I support Testbiotech's GM regulation recommendations:

- Broaden risk assessment to include additional methods, compounds and plant characteristics

- Apply stress tests to assess the genetic stability of the plants
- Assess the impact on the immune system and reproduction
- Take into account long-term and accumulated effects
- Assess the residues from spraying with herbicides the plants were made resistant to
- Introduce independent control during the data generation,
- Define cut-off criteria such as a prohibition of market authorisation for genetically engineered organisms able to spread into native populations.

<http://www.testbiotech.org/en/node/1670>

"The regulation agreed in CETA is not sufficient to safeguard and maintain current EU standards. Under this free trade agreement, these products could be sold without labelling on the EU market."

<http://www.testbiotech.org/node/1816>

Testbiotech can be contacted for further regulatory suggestions as can the Institute for Agriculture and Trade Policy (also with regard to synthetic biology, nanotechnology and other emerging technologies). Regulation aside, many consumers do not want to eat GM food, want a ban on the growing of GM crops and are concerned about other emerging technologies. Cross contamination issues seem to be ignored and I believe there are conflicts of interest at ACRE, Advisory Committee on Releases to the Environment (UK). Consumers are justified in their concern regarding emerging technologies and the food chain.

CETA, like TTIP, is a deal that has aroused widespread public interest and opposition around Europe, with more than 3.4 million people signing a self-organised European Citizens' Initiative (<https://goo.gl/MuuZe9>) against both deals.

Pesticides

Regulators and businesses appear to be ignoring the concerns of rural residents regarding pesticide spraying. Georgina Downs (UK Pesticides Campaign) can be contacted regarding her suggestions as to how these concerns can be addressed. There is more information on the UK Pesticides Campaign website, www.pesticidescampaign.co.uk.

Maybe the issue needs to be looked at in the immediate, short and long term. See for example Georgina's recent article here: http://www.theecologist.org/News/news_analysis/2848400/its_not_just_glyphosate_and_neonicotinoids_w_hy_we_need_a_pesticidefree_future.html

The People's Food Policy also does not (currently) address the concerns of rural residents but I understand that this is hopefully being rectified. Please see: https://www.sustainweb.org/news/jun17_peoples_food_policy_launched/ and again http://www.theecologist.org/News/news_analysis/2848400/its_not_just_glyphosate_and_neonicotinoids_w_hy_we_need_a_pesticidefree_future.html

Brexit

I would like to include in my comments an opinion article by Professor John McMurtry. http://www.theecologist.org/blogs_and_comments/commentators/2989163/brexit_and_the_corporate_war_on_regulations_designed_to_protect_life_itself.html

I would add to this that I think people in the UK voted IN or OUT for various different reasons and that the often misunderstood Precautionary Principle is actually under attack so to speak in the European Union (partly due to pressure from the UK "political and academic establishment") and that various democratic reforms of institutes and think tanks are needed. Consumers need to have a voice.

The conclusion of the opinion piece reads:

"Brexit exemplifies the pathogenic pattern which is not seen by the private ad-driven press, the corporatised academy, or the captive state. The life-and-death meaning is blinkered out. The binding power of all EU life standards is abolished in equivocal style by the omnibus Great Repeal Act. The loss of voting rights are arrogantly ignored. The progress of life-serving democratic civilisation is reversed. The macro-economic pattern is carcinomic. Masked as 'Great Britain's sovereignty', unprecedentedly dominant private transnational money sequences grow and multiply in nano-second speculations,

unproductive titanic takeovers and debt-powered dispossessions to metastacise unseen into all corners with no defined policy, democratic mandate or committed life function whatsoever.” Professor John McMurtry

McMurtry was selected by the United Nations as organizing author and editor of Philosophy and World Problems, which will be included in the *Encyclopedia of Life Support Systems*."

Human Rights

I share the concerns of Reprieve <http://www.reprieve.org.uk/about/> especially, the death penalty, torture and solitary confinement.

I attach a Report from Amnesty International:

https://www.amnesty.org.uk/sites/default/files/uk_ncp_complaints_handling_full_report_lores_0.pdf

Exposing and challenging the politics of technology

Some of the issues being looked at by “Breaking the Frame” include:

Breaking The Frame is based on the idea that *everyone has the right to take part in decisions about technology*.

- What does a critical politics of technology mean in the 21st century: democratic control or ‘low technology’?
- History of industrial society and environmental crisis; challenging the concept of progress through technology
- Experiences in different campaigns and struggles
- Alternative visions of social and technological development, and the transition to a sustainable and socially just society.

I only became aware of the consultation today (9 February 2017) and may perhaps make further comments outside the deadline which may be of interest. I will try and send something regarding the Dakota pipeline.

Yours faithfully

Concerned Consumer UK (anonymous)

Submission edited 29 August 2017