OECD MasterClass
Risk-Based Due Diligence for RBC
Asia

THE ESSENTIALS: CHARACTERISTICS OF DUE DILIGENCE

Due diligence is preventative

The purpose of due diligence is first and foremost to avoid causing or contributing to adverse impacts on people, the environment and society, and to seek to prevent adverse impacts directly linked to operations, products or services through business relationships. When involvement in adverse impacts cannot be avoided, due diligence should enable enterprises to mitigate them, prevent their recurrence and, where relevant, remediate them.

Due diligence involves multiple processes and objectives

The concept of due diligence under the OECD Guidelines for Multinational Enterprises (MNEs) involves a bundle of interrelated processes to identify adverse impacts, prevent and mitigate them, track implementation and results and communicate on how adverse impacts are addressed with respect to the enterprises' own operations, their supply chains and other business relationships. Due diligence should be an integral part of enterprise decision-making and risk management. In this respect it can build off (although it is broader than) traditional transactional or "know your counterparty" (KYC) due diligence processes. Embedding RBC into policies and management systems helps enterprises prevent adverse impacts on RBC issues and also supports effective due diligence by clarifying an enterprise's strategy, building staff capacity, ensuring availability of resources, and communicating a clear tone from the top.

Due diligence is commensurate with risk (risk-based)

Due diligence is risk-based. The measures that an enterprise takes to conduct due diligence should be commensurate to the severity and likelihood of the adverse impact. When the likelihood and severity of an adverse impact is high, then due diligence should be more extensive. Due diligence should also be adapted to the nature of the adverse impact on RBC issues, such as human rights, the environment and corruption. This involves tailoring approaches for specific risks and taking into account how these risks affect different groups, such as applying a gender perspective to due diligence.

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Due diligence can involve prioritisation (risk-based)

Where it is not feasible to address all identified impacts at once, an enterprise should prioritise the order in which it takes action based on the severity and likelihood of the adverse impact. Once the most significant impacts are identified and dealt with, the enterprise should move on to address less significant impacts. Where an enterprise is causing or contributing to an adverse impact on RBC issues, it should always stop the activities that are causing or contributing to the impact and provide for or cooperate in their remediation. The process of prioritisation is also ongoing, and in some instances new or emerging adverse impacts may arise and be prioritised before moving on to less significant impacts. In the case of prioritising risks to human rights, the severity of a potential adverse impact, such as where a delayed response would make the impact irremediable, is the predominant factor in prioritising responses.

Due diligence is dynamic

The due diligence process is not static, but ongoing, responsive and changing. It includes feedback loops so that the enterprise can learn from what worked and what did not work. Enterprises should aim to progressively improve their systems and processes to avoid and address adverse impacts. Through the due diligence process, an enterprise should be able to adequately respond to potential changes in its risk profile as circumstances evolve (e.g. changes in a country's regulatory framework, emerging risks in the sector, the development of new products or new business relationships).

Due diligence does not shift responsibilities

Each enterprise in a business relationship has its own responsibility to identify and address adverse impacts. The due diligence recommendations of the OECD Guidelines for MNEs are not intended to shift responsibilities from governments to enterprises, or from enterprises causing or contributing to adverse impacts to the enterprises that are directly linked to adverse impacts through their business relationships. Instead, they recommend that each enterprise addresses its own responsibility with respect to adverse impacts. In cases where impacts are directly linked to an enterprise's operations, products or services, the enterprise should seek, to the extent possible, to use its leverage to effect change, individually or in collaboration with others.

Due diligence concerns internationally recognised standards of RBC

The OECD Guidelines for MNEs provide principles and standards of responsible business conduct (RBC) consistent with applicable laws and internationally-recognised standards. They state that obeying domestic laws in the jurisdictions in which the enterprise operates and/or where they are domiciled is the first obligation of enterprises. Due diligence can help enterprises observe their legal obligations on matters pertaining to the OECD Guidelines for MNEs. In countries where domestic laws and regulations conflict with the principles and standards of the OECD Guidelines for MNEs, due diligence can also help enterprises honour the OECD Guidelines for MNEs to the fullest extent which does not place them in violation of domestic law. Domestic law may also in some instances require an enterprise to take action on a specific RBC issue (e.g. laws pertaining to specific RBC issues such as foreign bribery, modern slavery or minerals from conflict-affected and high-risk areas).

Due diligence is appropriate to an enterprise's circumstances

The nature and extent of due diligence can be affected by factors such as the size of the enterprise, the context of its operations, its business model, its position in supply chains, and the nature of its products or services. Large enterprises with expansive operations and many products or services may need more formalised and extensive systems than smaller enterprises with a limited range of products or services to effectively identify and manage risks.

Due diligence can be adapted to deal with the limitations of working with business relationships

Enterprises may face practical and legal limitations to how they can influence or affect business relationships to cease, prevent or mitigate adverse impacts on RBC issues or remedy them. Enterprises, in particular SMEs, may not have the market power to influence their business relationships by themselves. Enterprises can seek to overcome these challenges to influence business relationships through contractual arrangements, pre-qualification requirements, voting trusts, license or franchise agreements, and also through collaborative efforts to pool leverage in industry associations or cross-sectoral initiatives.

Due diligence is informed by engagement with stakeholders

Stakeholders are persons or groups who have interests that could be affected by an enterprise's activities. Stakeholder engagement is characterised by two-way communication. It involves the timely sharing of the relevant information needed for stakeholders to make informed decisions in a format that they can understand and access. To be meaningful, engagement involves the good faith of all parties. Meaningful engagement with relevant stakeholders is important throughout the due diligence process. In particular, when the enterprise may cause or contribute to, or has caused or contributed to an adverse impact, engagement with impacted or potentially impacted stakeholders and rightsholders will be important. For example, depending on the nature of the adverse impact being addressed, this could include participating in and sharing results of on-site assessments, developing risk mitigation measures, ongoing monitoring and designing of grievance mechanisms.

Due diligence involves ongoing communication

Communicating information on due diligence processes, findings and plans is part of the due diligence process itself. It enables the enterprise to build trust in its actions and decision-making, and demonstrate good faith. An enterprise should account for how it identifies and addresses actual or potential adverse impacts and should communicate accordingly. Information should be accessible to its intended audiences (e.g. stakeholders, investors, consumers, etc.) and be sufficient to demonstrate the adequacy of an enterprise's response to impacts. Communication should be carried out with due regard for commercial confidentiality and other competitive or security concerns. Various strategies may be useful in communicating to the extent possible while respecting confidentiality concerns.