OECD MasterClass Risk-Based Due Diligence for RBC Asia

WHAT DO WE MEAN BY…?

A GLOSSARY OF TECHNICAL TERMS RELATED TO DUE DILIGENCE

Background

The *OECD Due Diligence Guidance for Responsible Business Conduct* (OECD Guidance for RBC) helps businesses to understand and implement due diligence for Responsible Business Conduct (RBC) as foreseen in the OECD Guidelines for Multinational Enterprises (OECD Guidelines for MNEs). The OECD Guidance for RBC promotes a common understanding amongst governments and stakeholders on what due diligence for RBC means in practice.

The OECD Guidelines for MNEs provide enterprises with the flexibility to adapt the characteristics, specific measures and processes of due diligence to their own circumstances. Enterprises should thus use the OECD Guidance for RBC as a framework for developing and strengthening tailored due diligence systems and processes, and seek out additional resources for further in-depth learning as needed.

All page numbers below refer to the English version of the OECD Guidance for RBC.

1. Due diligence

The process through which enterprises can identify, assess, prevent and/or mitigate and account for how they address actual and potential adverse impacts in their own operations, supply chains and business relationships, as recommended in the OECD Guidelines for MNEs.

For more information, see the Introduction of the OECD Guidance for RBC [pp. 16-19].

2. Risks and Adverse impacts

Due diligence addresses actual or potential adverse impacts (risks) related to the topics covered in the OECD Guidelines for MNEs: human rights, including workers and industrial relations, the environment, bribery and corruption, disclosure, and consumer interests.

For many enterprises, the term "risk" means primarily risks to the enterprise – financial risk, market risk, operational risk, reputational risk, etc. Enterprises are concerned with their position in the market vis-à-vis their competitors, their image and long-term existence, so when they look at risks, it is typically risks to themselves. The OECD Guidelines for MNEs however refer to the likelihood of adverse impacts on people, the environment and society that enterprises cause, contribute to, or to which they are directly linked. In other words, it is an outward-facing

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approach to risk. Enterprises can identify risks on RBC issues by looking for divergences between what is recommended in the OECD Guidelines for MNEs on the one hand, and the circumstances associated with their operations, supply chains or business relationships on the other.

For more information, see Questions 1 [pp. 38-40] and 20 [pp. 62-23] of the OECD Guidance for RBC.

3. Risk-based due diligence

Due diligence is based on risks when the nature and extent of due diligence is commensurate to the severity and likelihood of adverse impacts. Companies can prioritise risks by using the parameters of scale, scope and irremediable character.

For more information, see Characteristics of due diligence [p. 17], Question 3 and Table 3: Scale, Scope and Irremediable character [pp. 42-45] of the OECD Guidance for RBC.

4. Directly linked

"Linkage" is defined by the relationship between the adverse impact and the enterprise's products, services or operations through another entity (i.e. business relationship). "Directly linked" is not defined by direct contractual relationships, for example "direct sourcing". For example, if an enterprise sources cobalt mined using child labour which is then used in its products the enterprise can be directly linked to the adverse impact (i.e. child labour). In this case, the enterprise did not cause or contribute to the adverse impact itself, but nevertheless there still can be a direct link between the enterprise's products and the adverse impact through its business relationships with the entities involved in its sourcing of the cobalt (i.e. with the smelter, minerals trader, and mining enterprise using child labour).

For more information, see Question 29 of the OECD Guidance for RBC [pp. 70-71].

5. Grievance mechanism

A grievance mechanism is a formal, judicial or non-judicial, complaints process that can be used by individuals, workers, communities and/or civil society organisations that are being negatively affected by certain business activities and operations. A wide variety of grievance mechanisms exist at the project, company, sector, national, regional and intergovernmental levels.[1] Operational level grievance mechanisms meet the core criteria of legitimacy,

[1] SOMO, "What Are Grievance Mechanisms?", available at https://www.somo.nl/hrgm/what-are-grievance-mechanisms/

accessibility, predictability, equitability, compatibility with the OECD Guidelines for MNEs, transparency and being dialogue-based.

For example, legal processes such as prosecution, litigation and arbitration are common examples of state-based processes that enable remediation. Examples of non-judicial state-based mechanisms are specialist government bodies, consumer protection agencies, regulatory oversight bodies, environmental protection agencies and the National Contact Points to the OECD Guidelines for MNE.

For more information, see Questions 51, 52, 53 and 54 of the OECD Guidance for RBC [pp. 89-91] and Section I of the *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* [p. 95].

6. Meaningful stakeholder engagement

Stakeholders include persons or groups who are or could be directly or indirectly affected by the actions of the enterprise and its business relationships. Meaningful stakeholder engagement is characterised by two-way communication and depends on the good faith of the participants on both sides. It is also responsive and on-going, and includes in many cases engaging with relevant stakeholders before decisions have been made.

For more information, see Q9, Q10 and Q11 [pp. 49-51] of the OECD Guidance for RBC, as well as the *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*. Although this document was specifically developed for companies in the extractives sector the definitions, lessons and recommendations are broadly applicable to all sectors.

7. Leverage

Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm. Enterprises seeking to prevent or mitigate adverse impacts directly linked to their operations, products or services by a business relationship are expected to influence its business relationship to prevent or mitigate the adverse impacts.

The way enterprise apply leverage will depend on the adverse impact in question, the degree of leverage an enterprise possesses with its business relationship, and other characteristics specific to the sector and/or nature of the business relationship. For example, companies can engage with the companies they are in a business relationship with (suppliers) to urge them to prevent and/or mitigate impacts through letter-writing, emails, telephone calls or face-to-face meetings at operational, senior management and/or board level to express views. Companies can also build expectations around RBC, and due diligence specifically, into commercial contracts or link business incentives – such as the commitment to long-term contracts, payment terms and future orders – with performance on RBC.

For more information, see Questions 35, 36 and 37 of the OECD Guidance for RBC [pp. 77-79].

8. Control point/choke points

Control point or choke point enterprises have greater visibility and/or leverage over their own suppliers and over business relationships further up the supply chain than enterprises closer towards consumers or end-users.

They can have the following characteristics:

- Point of transformation. They are located at key points of transformation in the supply chain where traceability or chain of custody information may be aggregated or lost.
- Low number. There are relatively few enterprises at this specific point in the supply chain that process or handle a majority of inputs that they pass further down or up into the chain.
- High Leverage. The greatest point of leverage of enterprises located towards the end of a supply chain (downstream).
- Audits occur here. Points where schemes and audit programmes already exist to leverage these systems and avoid duplication.

Example of choke points may include global commodities merchandisers for cotton and rubber supply chains; chemical plants for synthetic fibres supply chains, smelters and refiners for mineral supply chains, coffee exchanges for coffee supply chains. Supply chains may have more than one control point.

For more information, see Box 5 of the OECD Guidance for RBC [p. 69] and Box 3 of the *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* [pp. 60-61].

9. Prevention

"Prevention" refers to actions taken to prevent harm from occurring or re-occurring. In other words, prevention measures are taken before harm occurs.

For example, with respect to occupational health and safety the removal of the hazard is recognised as the best means to prevent injuries and ill health in the first instance.

For more information, see Question 32 of the OECD Guidance for RBC [p. 74].

10. Mitigation

Actions taken to diminish or eliminate harm if an adverse impact occurs. Mitigation measures may be taken before, during, or after an event with the aim of reducing the degree of harm.

For example, installation of water treatment processes may mitigate water pollution impacts by decreasing the level of effluents in the water.

For more information, see Question 32 of the OECD Guidance for RBC [p. 74].

11. Remediation

"Remediation" and "remedy" refer to both the processes of providing remedy for an adverse impact and to the substantive outcomes (i.e. remedy) that can counteract, or "make good", the adverse impact.

At its core, remedy aims to restore individuals or groups that have been harmed by a business's activities to the situation they would have been in had the impact not occurred. Where this is not possible, it can involve compensation or other forms of remedy that try to make amends for the harm caused.

For more information, see Questions 49 and 50 of the OECD Guidance for RBC [p. 88].