



## SESSION NOTE

### Promoting due diligence: the role of Governments

Thursday 21 June 2018 – 14:15-16:15

Room CC1 - OECD Conference Centre

Expectations of due diligence for supply chain responsibility are growing and increasingly being reflected in international and national policy and legal developments. For example, in their [2017 Declaration](#), leaders of the G20 underlined the responsibility of businesses to exercise due diligence and committed to working towards establishing adequate policy frameworks, including national action plans on business and human rights. A 2017 revision to the [ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy](#) also articulated the expectation that multinational enterprises carry out due diligence. In addition, National Action Plans on Business and Human Rights and Responsible Business Conduct (NAPs) – totalling a number of 21 as of June 2018 – also include increasing commitments to strengthen due diligence for business.

Governments have a range of tools at their disposal to advance company due diligence, including through providing incentives through procurement policies or licensing processes that are favourable to businesses with strong due diligence approaches, providing resources and guidance to companies to conduct due diligence, and introducing regulations with respect to RBC due diligence. The “toolbox” for Governments to advance due diligence has expanded significantly since the 2011 revision to the OECD Guidelines which defined supply chain responsibility for the first time.

#### Facilitating and promoting due diligence

Governments can facilitate corporate RBC due diligence in several ways. Convening different stakeholders, for instance, has proven useful to support partnerships between government, business, unions and NGOs to address risks in specific sectors and encourage a common understanding of RBC due diligence. In the Netherlands, the government has been developing so-called [International Responsible Business Conduct \(IRBC\) Agreements](#) with businesses, unions and civil society to work together to address human rights abuse and environmental degradation. IRBC agreements currently exist for the garment, gold, banking and vegetable protein sectors. Agreements have also been developed to promote sustainable forestry and to address challenges in the procurement of natural stone. Agreements for metallurgy, floriculture, the food industry and pensions are currently under development. Hybrid multi-stakeholder agreements have also been signed in Germany and Finland and are being discussed in Switzerland.

Effective due diligence requires accurate, credible and up-to-date information on RBC risks across sectors and geographies. Providing thematic risk-based information to companies and coordinating with other Governments around common RBC challenges can be an important tool to advance RBC due diligence. The U.S. Department of Labor's [List of Goods Produced by Child Labor or Forced Labor](#) is illustrative in this regard. The list supports companies to pinpoint sectors and countries where the risk of child labour or forced labour is high. It has also opened new opportunities for engagement with other Governments to combat forced and child labour.

Through their National Contact Points (NCPs), Governments can also strengthen uptake of due diligence among companies active in or operating from their jurisdiction. As the unique grievance mechanism of the OECD Guidelines, a core task of the NCPs is to promote the OECD Guidelines and associated sectoral guidance to the business community and other stakeholders.<sup>1</sup> Ensuring well-functioning NCPs is an important avenue for Governments to ensure broad awareness of what due diligence on responsible business conduct can look like in practice and its uptake by businesses.

Governments can also promote due diligence for RBC by offering incentives for business and leading by example in their own activities, including through public procurement, economic diplomacy, and as owners of enterprises. These can be powerful levers for governments to guide corporate behaviour and support best practice on RBC, including due diligence. For example, some national public procurement processes have made a direct link with the OECD Guidelines or have used OECD tools to clarify the expectations on suppliers to provide risk assessment and mitigation strategies with regard to potential or actual adverse impacts of violations in their supply chain.

Integrating responsible business conduct standards and requirements for due diligence into investment policies and agreements can help ensure accountability by setting out what is expected of businesses and ensuring consequences of not meeting these expectations. Some countries have included such criteria in their investment laws.<sup>2</sup> As development actors and brokers of new development financing models for the Sustainable Development Goals (SDGs), Governments can also use their official development assistance and other SDGs-related partnerships to encourage the implementation of due diligence processes by domestic and foreign businesses, for example by supporting the participation of domestic industries in multilateral responsible business conduct efforts.

Efforts to strengthen company due diligence can also be supported through the adoption of National Action Plans on Business and Human Rights (NAPs). Germany's [National Action Plan](#) commits the government to examine steps to take further action, including legislative measures if more than 50% of all German-based companies with over 500 employees have not taken credible action to integrate human rights due diligence in their operations by 2020.

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<sup>1</sup> Recommendations of the OECD Council on the sectoral due diligence developed by the OECD, recommends that Adherents and where relevant their NCPs, with the support of the OECD ensure the widest possible dissemination of the Guidance and its active use.

<sup>2</sup> Myanmar, for example, explicitly references responsible investment in the 2016 Investment Law and includes various RBC criteria in the 2017 implementation rules Government of Myanmar (2017), Myanmar Investment Rules, Ministry of Planning and Finance Notification No. 35 / 2017, Unofficial Translation, 30 March 2017, [https://www.dica.gov.mm/sites/dica.gov.mm/files/document-files/mir\\_english\\_0.pdf](https://www.dica.gov.mm/sites/dica.gov.mm/files/document-files/mir_english_0.pdf).

## The role of regulation

In efforts to push supply chain due diligence further, some Governments have also turned to regulation to mandate company due diligence.

Some regulations have focused on thematic issues. These include, for example, the [UK Modern Slavery Act](#) (addressing slavery and human trafficking), the [US Dodd Frank Act](#) (covering due diligence requirements with regards to conflict minerals) and the [proposed due diligence law on child labour in the Netherlands](#). Other regulation has focused on sectors. For example, in May 2017, the EU adopted a [regulation](#) that will require importers of tin, tantalum, tungsten and gold minerals and metals to carry out supply chain due diligence aligned with the OECD Minerals Guidance. The EU Parliament is pursuing similar efforts to adopt a binding regulation for due diligence in the garment sector.

Others have opted for laws with a broader RBC scope, applying to all sectors and RBC issues. For example, in 2016 France introduced the [Duty of Care Law](#) which imposes a duty of vigilance on large companies to prepare, implement, and publish details of their due diligence plan to prevent severe adverse human rights and environmental impacts associated with their operations and supply chains. Similarly, in June 2018, the National Council of Switzerland voted in favour of a [petition](#) proposing mandatory human rights due diligence for Swiss companies, passing the proposal on to the Council of States for further treatment. At the EU level, a [mandatory non-financial disclosure directive requires](#) reporting on due diligence, including on environmental impacts and human rights, for large public interest companies.

While these emerging regulatory and policy directives can represent a stronger inducement for companies to carry out due diligence, a proliferation of expectations can also create challenges for businesses operating globally that may be subject to various expectations. Divergent understandings of what due diligence means in practice can also be a challenge, including among Governments. The adoption of new regulatory and policy directives also raises questions around how they can, and should, best be enforced and monitored. Promoting uniformity and clarity around expectations on due diligence will be important in this regard.

To promote a common understanding on due diligence for business subject to various domestic obligations and international instruments and avoid the potential for conflicting expectations, the OECD released in May 2018 its [Due Diligence Guidance for Responsible Business Conduct](#). Building on the [sectoral guides](#) that have already been developed by the OECD, this guidance provides practical support to companies operating in any sector of the economy by providing a plain language explanation of the due diligence recommendations in the OECD Guidelines.

## Purpose of the session

Based on the experiences of Governments and other stakeholders, this session will provide an overview of the different approaches governments are using to encourage due diligence and discuss the benefits of various approaches. It will also focus on the role of regulation in promoting due diligence and seek to collect various stakeholder perspectives on this issue. The session will consider the following questions:

- What does a “smart-mix” of government approaches to promote due diligence look like?
- Is there need to introduce regulation (or more regulation) on due diligence?
- What are the risks of more regulation and what role should soft standards and government monitoring play?

- How can governments work together to ensure consistency in obligations with respect to due diligence, particularly for business operating transnationally?
- For governments that are considering introducing regulation, what form should this regulation take (e.g. disclosure obligations, licensing requirements, obligations attached to financial penalties)? What are the strengths and weaknesses of different approaches?