



THE DANISH
INSTITUTE FOR
HUMAN RIGHTS



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Directorate for Financial and Enterprise Affairs
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Comments to the Draft OECD Due Diligence Guidance and Companion for Responsible Business Conduct

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 These categories, which are used throughout the draft Guidance and the Companion document, are indeed useful to assess potential and actual human rights impacts as well as determine what constitutes appropriate action.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*”¹. Limited concrete, practical and authoritative guidance is available today to determine in which category an adverse impact will fall². 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”³, 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 HRIsAs may be useful in certain contexts of heightened human rights risks⁴. It is suggested that HRIsAs 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.

¹ OECD (2016), Due Diligence Companion (Draft), p. 16.

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.

³ OECD (2016). Due Diligence Companion (Draft), p. 35.

⁴ 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

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 RBC risks⁵, identify impacts⁶, as well as assess the severity of the adverse impacts⁷. 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 severity⁸ and other places assessing severity is needed to prioritise⁹. In other instances, severity is used in combination with probability¹⁰ and other places it is made clear that severe impacts should be prioritized even if they are unlikely¹¹. Applying severity to communication¹² 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 Terms¹³.

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 17¹⁴.

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

⁵ OECD (2016). Due Diligence Companion (Draft), p. 11 (Box 9).

⁶ Ibid, p. 12.

⁷ Ibid, p. 20.

⁸ OECD (2016). Due Diligence Guidance for Responsible Business Conduct (Draft 2.1), p. 5.

⁹ Ibid, p. 20.

¹⁰ Ibid, p. 10.

¹¹ Ibid, p. 20.

¹² Ibid, section II-D.

¹³ Ibid, p. 3.

¹⁴ OECD (2016). Due Diligence Companion (Draft), p. 20.

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 law¹⁵ 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 engagement¹⁶. 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 Principles¹⁷. 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”¹⁸. 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 G7¹⁹.

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”²⁰.

We further recommend that establishing or participating in **operational level grievance mechanisms is not framed as an option**²¹, but rather a requirement, in line with the UNGPs²² and that it is included as a Key Action²³.

¹⁵ ICCPR, Art. 19.

¹⁶ OECD (2016). Due Diligence Guidance for Responsible Business Conduct (Draft 2.1), p. 12.

¹⁷ OHCHR (2011). Guiding Principles on Human Rights and Business, Art. 21.

¹⁸ OECD (2013). OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, p. 19.

¹⁹ G7 Summit (2015). [Leaders' Declaration](#), p. 5.

²⁰ OECD (2016). Due Diligence Companion (Draft), p. 38.

²¹ OECD (2016). Due Diligence Guidance for Responsible Business Conduct (Draft 2.1), p.27.

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.

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²² OHCHR (2011). Guiding Principles on Human Rights and Business, Guiding Principle 21.

²³ OECD (2016). Due Diligence Guidance for Responsible Business Conduct (Draft 2.1), p. 26.