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

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

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.
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 built 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.
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.