OECD Due Diligence Guidance

BIAC Comments on draft 3.1

Business at OECD (BIAC) appreciates the opportunity to submit comments on draft 3.1 of the OECD Due Diligence Guidance. As the final outcome will be an important reference document, it is essential that the language is both clear and balanced, taking into account business considerations and the practical needs of MNEs of all sizes.

We welcome that several of our comments have been taken into consideration, including on the broad-based references to “omission” and the “authoritative reference”, on which we had expressed serious concerns. We also appreciate that there is a clear distinction between the actual draft guidance, which should not become longer than the current 15 pages, and the second part, which is entitled “examples and explanations”, which as the text states do not introduce new or additional recommendations with respect to due diligence.

While we appreciate these improvements, we strongly suggest that the following comments be taken into consideration in the revised draft:

- There should be a clear understanding that this Guidance is supposed to be a **practical guide to companies** and that it is not intended to serve as a basis for the submission of specific instances, for which the OECD MNE Guidelines are the sole authoritative reference.

- The Guidance must be **fully in line with the MNE Guidelines and should not go beyond them**. The Guidance should not be intended to create any new obligations for companies. For example, the recommendation to share some of the decision making power by moving away from the enterprise as a primary decision maker does not reflect legal and practical considerations and must be removed (p. 22). Companies cannot **require all** their business relationships to carry out environmental impact assessments (p. 36). Additional examples are highlighted in our specific comments on the Guidance.

- The **prescriptive nature of several of the recommendations** remains a sensitive point. We therefore suggest the addition of several qualifiers, as mentioned in our specific comments.

- It is very important for business to clarify that the proposals on the due diligence process and practical steps are suggested **steps “to be considered”**, but not an exhaustive tick box list where every single step applies to every single situation. This recognizes the fact that according to the MNE Guidelines, the precise nature and extent of due diligence depends on the precise circumstances.
The influence companies can have in their supply chains continues to be overestimated. In line with our earlier comments, the fact that there are clear limitations and practical challenges companies face in having concrete influence in the supply chain should be more duly highlighted in the Guidance.

It should be further highlighted that exercising due diligence in the supply chain and having leverage can be extremely complex, taking into account that in particular smaller companies often have very limited influence.

Disengagement is only a last resort, and consequences must be taken into account, including for the MNE, the supplier as well as the potential social and economic impacts in the country concerned.

As mentioned before, it still seems an unsolved issue **how in practice to prioritize risks** across the different chapters of the Guidelines based upon likelihood and severity of harm.

While a lot of the language is based on the UN Guiding Principles, there should be further consideration of how and to which extent these concepts can be applied or should be adapted to other sections of the MNE Guidelines which are not human rights related.

The inclusion of disclosure in the scope of the Guidance still creates challenges and inconsistencies rather than resulting in practical guidance. In addition, the issue of confidentiality, the fact that only relevant information should be disseminated and that national law must be respected should be more duly reflected.

The requirement of “systematic due diligence” is disproportionate.

With regard to stakeholders, the recommendations are often too broad. As mentioned previously, we recommend focusing on “relevant” stakeholders and underline that they must act in good faith in line with the provisions in the MNE Guidelines.

We also recommend including a list of definitions of the main key words.

**Additional detailed comments in track changes and comment boxes** are included in the attached draft 3.1.

As a general comment, we would like to note that in addition to producing a guidance document, BIAC continues to underline the importance of practical outreach and capacity building, both at the level of countries and business. The important role of the OECD as a platform for collaborative approaches (as has been illustrated for example by the work on responsible supply chains of minerals from conflict-affected areas) should be given due attention.

**Encl.: Specific comments in Draft 3.1**