

## Feedback to proposed updates to the OECD Guidelines for Multinational Enterprises, 2023

by Senior Consultant, Tara Skadegaard Thorsen, GLOBAL CSR

- The updates to the framing of international trade between the global South and North are warmly welcomed. It is read to strengthen the value and potential for global relevance of the OECD Guidelines (e.g., 'foreign investments' has been updated to 'cross-border trade and investments'; 'developing countries' has been updated to 'emerging and developing economies' – NB, old formulation 'developing countries' has not been edited in chapter 2, b2)
- The change in chap. 2 b2 from supply chain management to responsible business conduct is celebrated

### **Notes:**

#### **General:**

- The Guidelines separate chapters 'human rights', 'labour rights', 'Science, technology and innovation', 'consumer interests', etc. while describing human rights risks under each chapter. It is recommended that the guidelines either explicitly organise the chapters to reflect that they fit under human rights, and/or write explicit references to relevant human rights in other chapters, e.g. science, technology and innovation, we identified the following relevant rights: The right to benefit from technological development, the right to material gains from inventions, the moral rights of authors, the right to privacy, the right to freedom of speech, the right to freedom from degrading treatment, the right to freedom from national hatred.

#### **Preface**

- Section 4 (not updated text) states that the Guidelines provide voluntary principles and standards. It is recommended to consider the status of the guidelines as 'voluntary', since they are increasingly used and recognized as foundational for other legal frameworks, e.g., the minimum safeguards of the EU Taxonomy for responsible investments, the CSRD, CSDDD etc.
- Section 11 & 12: It is recommended to explicitly name the foundation in the UNGPs for the Guidelines development, e.g., with reference to the substantial update in 2011.

#### **Chapter 1:**

- Element 2: "Obeying domestic laws is the first obligation of enterprises. The *Guidelines* are not a substitute for, nor should they be considered to override, domestic law and regulation. While the *Guidelines* extend beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements. However, in countries where domestic laws and regulations conflict with, **or set lower expectations than** the

principles and standards of the *Guidelines*, enterprises should honour such principles and standards to the fullest extent which does not place them in violation of domestic law.”

- Comment: Since the OECD Guidelines present *processes* to prevent or mitigate adverse impacts, conflicts of standards are highly unlikely (and not yet seen in our practice). This is explicitly addressed by the source to the Guidelines, namely the UNGPs, that explicitly highlights, that human rights due diligence is *distinct from legal compliance*. We recommend: “Where a state mandates a business to have adverse impacts on an environmental, economic or social area (i.e., human rights, incl. labour rights), the business should seek to prevent or mitigate such impact to the extent possible, while complying with local law”.
- Element 4: “The Guidelines allow for a broad and flexible approach in identifying which entities may be considered multinational enterprises for the purpose of the Guidelines.”
  - Comment: Why create this uncertainty that the UNGPs dealt with?

## Chapter 2

- Section a5: Sustainability due diligence shall apply to all corporate activities. no reason to highlight lobbying activities (commentary repeated for commentary 6).
- Section b14: *(New paragraph) In this respect, enterprises should refrain from applying undue pressure or reprisals against any persons or groups who monitor or report practices of the enterprise that contravene the law or are inconsistent with the Guidelines, including through developing appropriate safeguards. Pressure is undue when it is retaliatory or discriminatory or based solely on the act or content of reporting or monitoring. This includes threats, reputational smears, slurs, harassment, intimidation, surveillance, Strategic lawsuits against public participation (SLAPP suits) intended for the sole purpose of censoring, intimidating or silencing critics, criminalisation of lawful activities, physical attacks and death.*
  - Comment: These are human rights impacts and such impacts should be reflected in an impact assessment. We recommend explicitly relating them to human rights, and emphasising that these rights are especially relevant when it comes to setting up grievance mechanisms etc. Moreover, effectively applying the principles for setting up grievance mechanisms in the UNGPs principle 31 would prevent impacts as described in the section.
- Section b16 comment: In the section, supply chain is emphasised when describing business relationships. We recommend editing it to ‘value chain’.
- Section b17: “The recommendation in paragraph A.11 applies to those matters covered by the *Guidelines* that are related to adverse impacts **associated with an enterprise’s operations, products and services, The recommendation in paragraph A.11** does not apply to the chapters on Science and Technology Competition and Taxation.”

- Comment: It is not clear why due diligence should not apply to anti-competition and taxation, as they would be elements of economic due diligence.
- Commentary 8 comment: Why highlight the stakeholder-based approach that is implicit in the principles-based approach where 'impacted' stakeholders shall be informed and included in due diligence.
- Commentary 12 comment: Participation in MSIs should not be expressed on par with the required 'self-regulatory practices and management systems' that form the core of responsible business conduct.
- Commentary 13: "enterprises are expected to promote employee awareness of company policies"
  - Comment: add – 'and due diligence'
- Commentary 15: "To that end the OECD Due Diligence Guidance for Responsible Business Conduct sets out a due diligence framework adhering countries have approved and committed to actively support and monitor. It outlines the following measures: 1. embedding responsible business conduct into policies and management systems; 2. identifying and assessing actual and potential adverse impacts of the enterprise's operations, products or services; 3. ceasing, preventing and mitigating adverse impacts; 4. tracking implementation and results; ..."
  - Comment: proposed formulation: 4. 'tracking effectiveness of preventing or mitigating adverse impacts'
- Commentary 15 cont'd.: 5. communicating how impacts are addressed;
  - Comment: Proposed addition: "... at minimum, to impacted stakeholders and business relationships,"
- Commentary 15 cont'd.: and 6. providing for or cooperating in remediation when appropriate
  - Please explain when the minimum requirements for due diligence are not appropriate
- Commentary 16: "... which supply products or services that contribute to the enterprise's own operations, products or services or receive products or services from the enterprise,
  - Comment: why are customers, investors, finance providers, not explicitly mentioned?
- Commentary 17 comment: why is there a limitation of due diligence expectations for competition and taxation?
- Commentary 18 comment: What about investors?

- Commentary 19: Includes a recommendation to prioritise areas of suppliers and other business relationships for engagement. (Areas where risk of impacts is most significant.)
  - o Comment: The section is not clear on whether this is a recommendation to prioritise based on geographical area. It is recommended to clarify that prioritisation can only be on the basis of dependency, frequency, spend and 'known risks'. Known risks include history of a specific relationship, industry risk, and if a business relationship operates in a conflict-affected area.
  
- Commentary 21: "If the enterprise identifies a risk of causing an adverse impact, then it should take the necessary steps to cease or prevent that impact."
  - o Comment: Proposed change: ...cease, prevent or mitigate that impact.
  
- Commentary 22: "If the enterprise identifies a risk of contributing to an adverse impact, then it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible. 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"
  - o Comment: Proposed changes in bold: "If the enterprise identifies a risk of contributing to an adverse impact, then it should take the necessary steps to cease, prevent **or mitigate** its contribution and use its leverage to **make the other contributing entity(ies) cease, prevent, or mitigate their contribution to the impact.** Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes **or contributes to** the harm."
  
- Commentary 23: "Meeting the expectation in paragraph A.13 would entail an enterprise, acting alone or in co-operation with other entities, as appropriate, to use its leverage to influence the entity causing the adverse impact to prevent or mitigate that impact."
  - o Comment: Proposed changes in bold: "Meeting the expectation in paragraph A.13 would entail an enterprise, acting alone or in co-operation with other entities, as appropriate, to use **or build** its leverage to influence the entity causing **or contributing to** the adverse impact to prevent or mitigate that impact.
  
- Commentary 25 original text: "The enterprise should also take into account potential social and economic adverse impacts"... "Enterprises should take reasonable and appropriate measures to mitigate adverse impacts related to disengagement."
  - o Consider including environmental impacts as well + consider "reasonable and appropriate measures to **prevent** or mitigate impacts...."

- Consider using 'effective measures' instead of "reasonable and appropriate measures"
  
- Commentary 28 comment: It is not clear why stakeholder engagement is emphasised as particularly important when it regards land and water. Stakeholder engagement is always important, where a company has impacts. With regards to projects, the guidelines may emphasise that stakeholder engagement prior to initiation of new projects in general should be conducted and be ongoing throughout projects.

### **CHAPTER 3**

- Section 3a comment: Why this limitation?
  
- Section 3c comment: Please do not make the exception (prioritisation) the main rule!
  
- Section 31 comment: Section describes an encouragement to conduct materiality assessments. Please reconsider the stakeholder-approach to RBC disclosure. UNGPs mandate identifying risks to stakeholders and engaging potentially impacted stakeholders. Not material risks to the company, selected from a list of issues highlighted by varying stakeholders, incl. owners /financial stakeholders who are not at risk of experiencing adverse impacts on human rights from business activities. Consider research initiative of benefits from these traditional materiality assessments before developing international guidelines based on such (cumbersome) approach, i.e., not based in UNGPs.
  
- Section 33 comment: List of relevant topics are confusing; some are part of RBC topics; however, RBC is emphasised as 'notably climate-related risks'.
  
- Section 35 comment: Due diligence should be the foundation for disclosure rather than support.

### **CHAPTER 5**

- Commentary 49 comment 1: The commentary emphasises that "due diligence is nevertheless expected *in the absence of employment relationships*". The above sections (1-8 labour rights) may indicate that managing labour rights would suffice as human rights due diligence where there is an employment relationship. A UNGPs aligned approach would require due diligence against all human rights. Consider clarifying to avoid such misreading, that could result in practices, where employees experience less respect of rights than other stakeholders (local community etc.) as not all their human rights are recognised/considered by the fundamental labour rights emphasised (+ right to work, bargain, stakeholder consultation/griev. mech.).

- Comment 2: Why emphasise sectors where due diligence outside of employee relationships is expected? Sectors: where informality, short-term working arrangements, decent work deficits and digital transformation are common. Due diligence should be expected in all sectors and regard any stakeholders whose rights a company may impact, whether they have an employment relationship or not.

## CHAPTER 6

- First paragraph: "enterprises should carry out risk-based due diligence as described in Chapter II, to identify, prevent and mitigate the adverse environmental, health and safety impacts of their operations, products and services, ..."
  - o Comment: NB it is not 'health and safety impacts' as these impacts only concern right to health, right to safe and healthy working conditions and possibly right to life. It is human rights impacts. The formulation is misleading - does 'health and safety' regard environmental impacts, or does it point back to the human rights chapter, however misguided on the scope of human rights due diligence?
  - o Change "prevent and mitigate" to 'prevent or mitigate'
- Section 2d: What is understood with environmental remediation? Remedying the environmental (reforestation etc.?) or is this a remedy to impacted stakeholders, which should be considered as part of human rights due diligence? Please clarify
- + Please note that expectations to use leverage for remedy, is explicitly not a requirement for human rights, where you are *linked to* adverse impacts. Should this section be read to propose that the responsibility is wider when addressing environmental impacts, or does it only concern impacts where a company contributes to adverse impacts? Please clarify.
- Section 3: This section could benefit from informing that a human rights impact assessment would include managing risks to human rights that may arise from environmental impacts.
- Section 4b comment: Why emphasise stakeholder engagement under environmental impacts, especially as they are presented as rights holders? This is part of human rights due diligence. Do you wish to emphasise environmental stakeholders as organisations /similar that work to protect the environmental areas?
- Commentary 60 comment: Areas for environmental sustainability are sourced from the 2030 agenda for sustainable development. These will be obsolete in 2030 and describe agreed state ambitions for specific targets by 2030. This would mean the guidelines should be updated in 2030 when the state targets expire.
- Commentary 62 comment: States that socio-economic systems and human health and welfare are environmental areas. It is unclear where socio-economic systems fit, and human health and welfare would be elements of human rights.

- Section 75 comment: Requires Scope 3 measurements from businesses (GHGe) - I.e., due diligence for your relationships + measuring what you can't really impact (it is an approximate account) + means CO2 reductions may be double-counted.
- Section 78 comment: References state targets that expire in 2030. Making OECD guidelines in need of update by then.

## **CHAPTER 9**

- Section 1 comment: The section encourages Carrying out due diligence on development, financing, licensing, sale, trade and/or use of technology, with respect to gathering data, end-use, as well as in the context of scientific research and innovation. This is already covered by the right to privacy, right to benefit from technological developments, and environmental areas: development of environmentally friendly technologies and diffusion of environmentally friendly technologies.
- Section 2 comment: This is also covered by moral rights of authors, non-discrimination, material gains from inventions.
- Section 7 comment: Why this new paragraph emphasising few rights, knowing that freedom of expression includes risks on e.g., freedom from hate-speech, harassment, and discrimination?
- CHAPTER 10 & 11: Why develop guidelines that emphasise corporate entities should follow competition and tax laws? Responsible business conduct is distinct from legal compliance. Legal behaviour and compliance should not be the aim of the Guidelines.