

The OECD Guidelines for Multinational Enterprises
**Draft OECD Due Diligence Guidance for Responsible Business Conduct
and Due Diligence Companion**
Submission by the Trade Union Advisory Committee to the OECD (TUAC)¹
February 2017

1. Introduction and summary

1. TUAC welcomes this public consultation on the draft OECD Due Diligence Guidance for Responsible Business Conduct and the opportunity to make a written submission. Overall, TUAC finds that there is much to commend in the draft Guidance. It is well structured, focused guidance that is largely anchored in and aligned with the due diligence framework described in the *OECD Guidelines for Multinational Enterprises (OECD Guidelines)* as well as the *UN Guiding Principles on Business and Human Rights (UNGPs)*.

2. However, TUAC considers that the guidance could still be improved in a number of areas particularly in terms of the accessibility of the text and the emphasis given to stakeholder engagement, including workers and trade unions, and transparency. The remainder of this submission sets out TUAC's recommendations for improving the text under the following headings:

- *Section 2: Substantive Points;*
- *Section 3: Accessibility/Use of Examples;*
- *Section 4: Terminology;*
- *Section 5: Companion Document.*

2. Substantive Points

2.1 Substantive Points: Overarching

2.1.1 Stakeholder Engagement: stakeholder engagement should be given a greater focus in the main Guidance document including in the 'Summary of "Key Actions"', and by providing examples:

- The *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* sets out an overall framework due diligence framework for stakeholder engagement, including the need to position stakeholder engagement strategically through a company policy or commitment on stakeholder engagement;
- The *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* lists likely stakeholders including employees, workers and trade unions in the supply chain (Section 1.2, page 8) as well as giving different examples of engaging stakeholders in the different stages of due diligence.

2.1.2 Role of trade unions and collective agreements:

- The Guidance should include examples of the role of independent trade unions at the local and international level in the different stages of due diligence, including the role of collective agreements between employers and trade unions. Specifically the text should explain that trade unions should be engaged (i) to facilitate worker involvement in the design and implementation of due diligence processes, (ii) to implement standards on workers' rights and hold enterprises accountable to them, or (iii) to raise grievances against enterprises in relation to workers' rights and that this can be done in the form of direct agreements. The approved OECD guidance on the Garment and Footwear Sector includes a section on 'Direct agreements with trade unions' (Section 2.1 p.10).

¹ This submission is endorsed by the International Trade Union Confederation (ITUC).

2.1.3 References to/examples of trade unions in the text

- The text omits reference to important labour issues that are included in the Guidelines, including the terms “trade unions” and “collective bargaining”, both of which are included in the text of the OECD Guidelines (Chapter VIa and 1b):

2.1.4 Review labour practices: it would be useful for the Guidance to explain that in conducting due diligence enterprises should review their labour practices, including whether the labour is directly employed or not. The decision to outsource activities of the organisation requires due diligence. The Guidance should explain that **the use of precarious work is a risk factor**. The ITUC has written a report on the hidden workforce which demonstrates both the prevalence of precarious work and the risk this represents for human/labour rights (<http://www.ituc-csi.org/new-ituc-report-exposes-hidden>).

2.1.5 Conflation of due diligence recommendations and other provisions of the Guidelines: the section on ‘*Part II. Practical Steps for Implementing Due Diligence under the Guidelines*’ conflates the recommendations of the Guidelines with the requirements of due diligence with respect to *adopting policies* (II.I.C.1) *stakeholder engagement* and *communicating on due diligence* (II.II-D.B.1). TUAC considers this to be highly problematic in particular in relation to the responsibility of companies to communicate on how they are identifying and addressing their adverse impacts, which should not be framed within the disclosure recommendations on material financial information (Chapter III.1 of the OECD Guidelines).

2.1.6 Mitigating actual adverse impacts: In the text of the OECD Guidelines, the recommendation to undertake mitigation applies only to the situation where a company’s adverse impacts are directly linked to its products and operations through its business relationships. Where an enterprise causes or contributes to adverse impacts its responsibility is to Cease, Prevent and Remedy. When it is directly linked to adverse impacts its responsibility is to use its leverage to influence the supplier to mitigate remaining impacts. This is represented visually in ‘Figure 1 – Addressing Adverse Impacts under the Guidelines’ (p. 20) of the Guidance. However, the text (II.II-B-C.1, p19) provides recommendations on mitigating adverse impacts, where the company has caused or contributed to adverse impacts. The text needs to be revised for consistency and also to better explain the relationship between prevention, mitigation and remedy where a company causes or contributes to adverse impacts.

2.1.7 Transparency: transparency should be given more prominence throughout the Guidance, in particular regarding business relationships/supply chains where the guidance should indicate that worksites and supplier locations should be made public. There is also a need for greater transparency in relation to remedy: the grievances filed and actions taken to remedy grievances.

2.1.8 Gender: there is no reference to gender in the Guidance:

- The OECD Due Diligence Guidance on Meaningful Stakeholder Engagement in the Extractive Sector makes recommendations on engaging with women stakeholders throughout the text, and includes a separate Annex on ‘Engaging with Women’;
- The OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector emphasises the importance of taking account of the position that women may have in any particular context (*Section 1.4. page 12*). Its recommendations include involving women in the design of monitoring and evaluation, and ensuring accessibility of grievance mechanisms.

2.2 Substantive Points: *'Introduction'*

2.2.1 Box 1: Characteristics of the OECD Guidelines for Multinational Enterprises

- Replace 'voluntary' with 'non-binding' to avoid the misinterpretation that the Guidelines are optional and to strengthen the authority of the guidance;
- Bullet points 1, 3, 4, and 5 make similar/ related points, which could be combined into one point, whereas other essential points about the Guidelines are missing, including the following:
 - o The explanation that MNEs have a responsibility for avoiding and addressing their adverse impacts, including in their supply chains and other business relationships;
 - o The recommendation that MNEs should conduct due diligence in order to meet this responsibility – this is the link between the OECD Guidelines and this guidance;
 - o The important point that the responsibility of MNEs to respect human rights under the Guidelines exists independently of States' abilities and/or willingness to fulfil their own obligations;
 - o A clearer explanation of the complaints mechanisms including the number and nature of cases filed under the Guidelines. The last bullet point uses the language of the Guidelines and is not easy to understand.

2.3 Substantive Points: *Key Terms*

2.3.1 'Salient risks': salient risks should be included in the section on 'Key Terms'.

2.3.2 'Severity': severity should be included in the list of 'Key Terms'.

2.4 Substantive Points: *Capturing the "Essence" of Due Diligence*

2.4.1 Conducting due diligence against specific adverse impacts: a bullet point should be included stating that due diligence should be conducted with respect to specific adverse impacts – it cannot be performed in an abstract way.

2.4.2 Salient risks or sector specific risks: a bullet point should be included stating that due diligence should begin with "salient risks" – these are risks of specific adverse impacts in all activities and all geographical locations that are generally understood/not difficult to identify. In many cases, where labour is involved, the abuse of workers' human rights will be such a salient risk. 'Salient risks' should be included in the section on 'Key Terms'.

2.4.3 Due diligence is the means not the end: there is concern within the trade union movement that due diligence will be misunderstood and that companies will consider that they meet their responsibility under the Guidelines by establishing a due diligence process, regardless of whether or not due diligence is effective in avoiding and addressing adverse impacts. While this is explained in the text of Core Concept 3 (p.8) it should also be included as a point in *Capturing the "Essence" of Due Diligence*.

2.4.4 Prioritisation is a matter of sequencing: The main text explains (*Prioritising prevention & the most severe impacts, II.II-B.C.2, p.20*) that prioritising risks on the basis of severity relates to the sequencing of responses where companies are unable to address all adverse impacts at once and does

not mean that companies do not need to address other less severe adverse impacts. Bullet point 3 of *Capturing the “Essence” of Due Diligence* on prioritisation (p.5) should be amended to reflect this.

2.4.5 Stakeholder engagement: strengthen bullet point 6 on stakeholder engagement as follows: “involves meaningful consultation with potentially affected groups and other relevant stakeholders directly or indirectly affected by its operations or business relationships”.

2.5 *Substantive Points: ‘Summary of “Key Actions” to put a due diligence process in place’*

2.5.1 Stakeholder Engagement: map stakeholder engagement on to the one-page schematic of the due diligence process so that it is clear that stakeholder engagement plays a role at different stages of due diligence.

2.5.2 Communicate: revise the points on II-D Communicate to reflect the requirements of due diligence and not the more limited requirements of Chapter III to disclose material information on financial information.

2.6 *Substantive Points: ‘Core Concepts for Implementing Due Diligence under the Guidelines’*

2.6.1 Core Concepts: This section covers a number of issues, not all of which are “Concepts”. The section could be renamed ‘Key Considerations’. The text could be made more accessible by reducing the complexity/presentation and not repeating descriptions that are covered in Part II:

- Shorter texts: the aim should be to present headline messages that users of the Guide really need to grasp before reading more detailed explanations in Part II;
- Bullet points: the accessibility of the text would be improved through use of bullet points rather than using dense text;
- Single issues: some paragraphs are quite complex covering a number of points:
 - E.g.: Core Concept 3 (p8) ‘RBC is a means for enterprises to meet their responsibilities to address RBC adverse impacts and differs in several ways from commercial or compliance due diligence’: Core Concept 3 covers three major points: that due diligence is a means not an end; that due diligence should be commensurate with the risks; and that the risks/impacts being addressed are the risks to society not for the enterprise. It would be better to address these separately.

2.6.2 Box 1: Examples of RBC Covered by the Guidelines (p7-p8): the examples for the section of the table on ‘Workers and Industrial Relations’ should include violations of trade union rights. Two-thirds of complaints brought by trade unions under the Guidelines concern violations of trade union rights (Chapters IV.1a and V1.a and 1b). The examples in Box 1 should include the following:

- intimidating, or otherwise discouraging workers from forming or joining a trade union;
- refusing genuine opportunities to bargain collectively;
- risks to trade union rights in the context of the issues of “contracting out” work.

2.6.3 Core Concept 4 ‘RBC due diligence can help enterprises obey domestic law...’ (p. 9): This heading should be changed to “RBC due diligence helps enterprises meet internationally-recognised standards on business behaviour, going beyond national law”. The paragraph is essentially about the fact that the Guidelines go beyond the law and an explanation of what it means for there to be a conflict with national law. The key point is not that due diligence can help companies obey the law, which they have to do anyway, regardless of the Guidelines.

2.6.4 Core Concepts 8 and 9 ‘RBC due diligence prioritisation’: Core Concepts 8 and 9 are quite confusing as they both have ‘prioritisation/prioritising’ in the header/title but address due diligence

in the context of a company's own activities and its business relationships respectively. The text and the headings could make the distinction clearer.

2.6.5 Core Concept 8 'RBC due diligence is risk-based and therefore involves prioritisation':

- Explanation of the factors for determining severity given on the last line of the second paragraph should be given more emphasis as this is a key element.
 - o As suggested above, a definition of severity should also be included in the list of 'Key Terms' at the beginning of the Guidance.
- The text should explain that prioritisation is a matter of sequencing and that companies also need to address other less severe adverse impacts.

2.6.6 Core Concept 9 'Prioritising RBC due diligence on business relationships

- Number of suppliers: the text should explain that having a high number of suppliers/complex supply chains is a risk factor. This is explained in the OECD Due Diligence Guidance for the Garment and Footwear Sector;
- Factoring in the costs of due diligence: the Guidance should explain that the cost of due diligence should in itself be a factor taken into account by the enterprise before deciding to undertake an activity or to enter into a business relationship – e.g., the decision to stitch leather footballs in Indonesia.

2.6.7 Core Concept 10 'Enterprises can be involved with adverse impacts in three ways...':

- Shifting responsibility: the Guidance explains that the expectations of MNEs with regard to business relationships do not shift the responsibility from the supplier/entity that is causing the abuses. The Guidance should also make clear that enterprises are, however, responsible for the decision to enter into the business relationship.

2.6.8 Core Concept 12 'Stakeholder Engagement'

- The text on stakeholder engagement should be strengthened to make it clear that enterprises should consult with stakeholders in conducting their due diligence;
- The text should also make clear that industrial relations are an important form of stakeholder engagement;
- The text conflates the recommendation of the Guidelines on stakeholder engagement and disclosure with the requirements of due diligence to hold meaningful consultations with stakeholders. This is confusing and obscures the requirements of due diligence;
- The text focuses on the need to engage with threatened groups (whistle-blowers) as stakeholders. The issue of non-retaliation against whistle blowers is an important one that deserves separate treatment in the text. But reference should also be made to other stakeholders:
 - o The approved OECD guidance on the Garment and Footwear Sector usefully provides an indicative list of stakeholders that includes employees, workers and trade unions in the supply chain (Section 1.2, p. 8). It also gives example of stakeholder engagement in the design and implementation of due diligence processes (identification, assessments, development of correction plans, tracking performance and the design of operational grievance mechanisms).

2.6.9 Core Concept 12 'Stakeholder Engagement': Consultation (p.12): "Consultation" is about informing a decision and it must take place before the decision has been made. The enterprise must also provide the stakeholder(s) with all of the information needed to make an informed decision in a

timely manner. The clarification of the difference between “communication” and “consultation” provided in the Guidance misunderstands the nature of consultation.

2.6.10. Core Concept 13 Collaboration can Enhance RBC Due Diligence (p.12): the text should explain that collaboration on “root causes” should not become a way for enterprises to use philanthropy to offset the adverse impacts that business decisions have caused or contributed to. Stressing “root causes” can easily lead to the substitution of philanthropy for responsibility.

2.6.11. Due diligence is proactive: an additional ‘Concept/Key Consideration’ should be included that says that ‘due diligence requires companies to “do something” – their responsibility goes beyond “doing no harm” and extends to being proactive in identifying and addressing their adverse impacts.

2.7 *Substantive Points: ‘Embed Responsible Business Conduct into Policy and Management Systems’*

2.7.1 II.1 Embed RBC into Policy and Management Systems. C.1 Key Actions (p.14): the first bullet point conflates the general responsibility to devise and adopt an RBC policy to support due diligence and recommendations made in the Guidelines to adopt policies on specific issues (disclosure, human rights and bribery). This is confusing.

2.8 *Substantive Points: Due Diligence Processes*

2.8.1 II.A. Due Diligence: Identify and Assess Adverse RBC Impacts:

- Key Action 1: add “including stakeholder engagement” in the 1st bullet point;
- C. Explanation of Key Actions, 1. Building RBC risk-identification, last bullet point: stakeholder engagement is not limited to the provisions of Chapter II, paragraph 14 of the Guidelines. It is an operational principle of due diligence (see UNGP 18).
- C. Explanation of Key Actions, 2. Using iterative investigative approaches: first bullet point: introduce the idea of conducting due diligence against salient risks.

2.8.2 II.B. Prevent and mitigate adverse RBC impacts: in the Guidelines the steps required are to **Cease, Prevent or Mitigate**.

- This is also the heading in the approved OECD Guidance for the Garment and Footwear Sector as well as in the Companion Document (p.16).

2.8.3 II.C Track Performance, Explanation of Key Actions, 1. Developing or adapting tracking systems (p.26): in relation to auditing the guidance should make it clear that private workplace inspection and “social auditing” performed by commercial enterprises, or similar auditing undertaken by collaborative initiatives (whether industry-led or multi-stakeholder) does not change the responsibility of the enterprise for any specific adverse impacts related to its activities. Commercial auditors are agents of the enterprises that engage them and enterprises must assume responsibility for the effectiveness.

2.8.4 II.D Communicate: the text conflates the requirement of due diligence to “**account** for how adverse impacts are addressed” and the disclosure responsibilities under Chapter III of the OECD Guidelines. The inclusion of Point II-D 1, a recommendation on the disclosure of ‘material’ financial information (Chapter III, paragraph 1 of the OECD Guidelines), is confusing. The result is that the responsibility to report on how adverse impacts were addressed, which should be directly stated, is obscured.

3. Accessible/Use of Examples

3.1 Accessibility: the readability of the Guidance could be improved, especially the Section on Core Concepts and the Companion Document:

- Core Concepts: suggest re-writing to focus on the main messages/essential explanations and greater inclusion of visual aids/examples;
- Companion Document: this should be far less text-based and included boxes and diagrams. It repeats much of the content of the main Guidance, which is confusing. It would be strengthened by less text/greater use of visual material (boxes/diagrams).

3.2 Increase the number of examples in the text including of adverse impacts: there are few examples of adverse impacts in the text. It would be useful to include detailed examples of adverse impacts in relation to workers' rights and specifically freedom of association.

4. Terminology

4.1 Adverse impacts: due diligence is required in relation to adverse impacts not positive impacts under the Guidelines, so the term that should be used throughout the text is “adverse impacts” or “adverse RBC impacts”. It would be better if the text used just one term throughout the text.

4.2 Right-holders/Stakeholder Engagement: the term ‘rights-holders’ should be used in addition to stakeholders. This is consistent with Chapter IV of the Guidelines on Human Rights.

4.3 ‘Business relationships’ not ‘business partner’: the term ‘partner’ should not be used as a synonym for business relationships. The term ‘partner’ generally denotes a relationship where gains and losses as well as risks and rewards, are shared in one way or another. This is not true for most business relationships, especially those in supply chains. In the text of the OECD Guidelines, business partner is used as one *example* of a business relationship, not as a synonym.

5. Companion Document

5.1 The purpose of the Companion is not very clear. There are many areas where it largely overlaps with the same recommendations provided in the main Guidance. Furthermore, the normative value of the Companion is blurred as it is described as “additional tips and explanations”. Instead of a Companion, it would be clearer and more coherent to develop an Annex to provide further guidance and good practice examples in relation to the concepts introduced in the Guidance.

- Given the time constraints, it may be better to focus on producing a stand-alone guidance document that includes examples, and to postpone the production of the Companion Document until a later stage.