

Comments on the OECD draft Due Diligence Guidance for Responsible Business Conduct (Draft 2.1)

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The CorA Network for Corporate Accountability is a network of over 50 German development, human rights and environmental organizations as well as consumer associations and trade unions including Bread for the World, Greenpeace, Misereor, Oxfam, verdi.

The network welcomes the opportunity to comment on the draft Due Diligence Guidance for Responsible Business Conduct. The Guidance provides a great opportunity to enhance businesses' understanding of what their responsibilities are in the field of human rights, employment, environment, combating bribery among others. This is important in order to create an international level playing field for business - in regards to the MNE Guidelines as well as to what is expected from them under national action plans for the implementation of the UN Guiding Principles on Business and Human Rights.

However, the Guidance will only be able to fulfil its role as an important reference if it sets a high standard and while on the one hand clarifying and elaborating on what is expected of business, at the same time not falling behind relevant external developments and existing standards and guidance in the field of business and human rights. In this context we would like to highlight five aspects of the draft Guidance, where we see weaknesses especially from a human rights perspective and would advise further specifications. Regarding the further process we believe that it is essential and good practice that the OECD publish all submissions it received in regards to the draft Guidance on its website. Additional comments to those made in this document can be found in the submission of OECD Watch which we endorse.

1. Stakeholder engagement

Meaningful stakeholder engagement is a key element of due diligence, being “an ongoing process of interaction and dialogue between a company and its potentially affected stakeholders that enables the company to hear, understand and respond to their interests and

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concerns, including through collaborative approaches.”¹ Our experience in a large variety of cases concerning negative human rights impacts of German companies shows that stakeholder consultation, participation and adequate communication were largely missing, even in evident cases of severe human rights risks, and human rights risk analyses, if in place at all, were limited to desk research.

In this light we believe that meaningful stakeholder engagement is not sufficiently highlighted and specified in the draft Guidance and needs significantly more emphasis. We therefore suggest the following amendments:

- **Specific section on stakeholder consultation and communication:** Both the *Guidance* and *Companion* should include a specific section on stakeholder consultation including information on how to identify and engage with the right stakeholders, how to include and not endanger vulnerable groups, at what times stakeholder engagement is crucial, in the process but also prior to decisions being made over a project and what information needs to be disclosed and consulted on with stakeholders to ensure meaningful engagement.
- **Include stakeholder engagement in summary of Key actions:** Stakeholder consultation is crucial in order to identify and address RBC Risks. Therefore this should be part of the key actions to put a due diligence process in place. Under II A and II B the requirement of meaningful stakeholder engagement needs to be added.
- **Strengthen the wording in Part I No. 12:** The language in this passage on stakeholder engagement is too weak. Participation and consultation are not just helpful or advisable but absolutely crucial for effective due diligence. The wording should be amended accordingly. Additionally, the Guidance should stress the requirement that companies respect the right to Free Prior and Informed Consent (FPIC). Companies have to respect if indigenous peoples or other communities reject activities of a company in their territory.

2. Transparency:

The Guidance highlights the importance of communication about due diligence processes. Transparency on human rights risks and what the company is doing to address these is absolutely crucial for stakeholders to measure a company’s performance, for stakeholders to have the necessary information to meaningfully engage with the company but also for other business partners within the supply chain to behave responsibly. Unfortunately provisions on

¹ United Nations High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, p. 8

transparency and disclosure remain weak throughout the text referring to additional information in the OECD guidelines which is equally weak.

We therefore recommend:

- Transparency should be added as a Core Concept in Part I of the draft Guidance.
- The wording in Section II D should be strengthened, using shall instead of “can” or “is encouraged to” when speaking of disclosure requirements.
- Consideration for “business confidentiality and other competitive concerns” highlighted in several parts of the text should not be able to override the responsibility to disclose information necessary for the realization of human rights.
- Section II D should be a lot more specific on what the companies are requested to disclose. Disclosure of “general findings on risks” will not be sufficient for stakeholders to evaluate and engage with a company on due diligence processes. Reporting requirements under the OECD Minerals Supply Chain Due Diligence, the EU Directive on Nonfinancial Reporting and the UN Guiding Principles reporting framework go a lot further. For example, the OECD Minerals Guidance requires communication of risks identified in the supply chain and risk management plans, including risk mitigation, monitoring and involvement of affected stakeholders.²

Therefore II D. C. 2 bullet point 3 should include:

- a company’s policy on human rights and how it is communicated internally and externally, operationalized throughout the enterprise and in relation to business relationships, monitored and evaluated, and whether and how objectives are met,
- disclosure of specific risks and specific prevention and remediation efforts, (including specific instances of abuse that the enterprise acknowledges and concerns consistently raised by affected people even if contested by the enterprise),
- engagement with and response from affected people and measures to remediate impacts and avoid recurrence,
- all risk assessments and audits conducted,
- investment and other agreements with governments, the terms of all relevant licences and permits,
- detailed supply chain information, including the names, addresses and contact details of supplier facilities and other business partners, subcontracted suppliers and labour agents managing home-working facilities.

² Pages 52 and 53 (third edition)

3. Risk Identification and Assessment

The Guidance should be careful not to give the impression that companies must only consider severe risks and can ignore other risks. Both the OECD Guidelines and the UN Guiding Principles expect due diligence systems to be capable of identifying all risks to human rights.³ Focusing on severe or known risks can lead to companies ignoring other impacts that have been out of the radar but could also cause serious harms. The text should therefore clarify that, despite the possible need for prioritization, companies remain responsible for all of their risks and harms.

Furthermore the Guidance should stress that the identification and assessment of potential and actual impacts is a clear requirement of RBC. In the introduction to the key action in section II-A, the Guidance should underline that enterprises “shall” instead of “can” take these actions. Furthermore in the actions and explanations part, the Guidance should mention key principles of human rights impact assessments that are generally accepted: a) Human Rights and other RBC aspects should form the normative basis of the assessment; b) the assessment should pay particular attention to vulnerable groups or people in vulnerable situations; c) consultation of these vulnerable groups as well as human rights defenders and other relevant civil society organizations such as trade unions should be a key part of the assessment, d) the process, methods, findings as well as the resulting mitigation plan should be made transparent to affected people and the public.

4. The concept of “linked to” / supply chain due diligence

The Guidance should be careful not to unduly limit the responsibility of companies directly linked to abuses. This is currently especially the case concerning the passages on remediation, which lift any responsibility to remediate from companies linked to human rights abuses. While companies should not be responsible for remediating every harm they are linked to, it should be made clear that a company that continuously fails to act with due diligence to identify and/or take credible measures to prevent or mitigate these harms while profiting from these should then also be responsible to remediate or collaborate in remediation. The Guidance should acknowledge more clearly that while a company can be only “directly linked” to begin with, the failure to react with appropriate due diligence measures can lead to the company contributing to abuses and increase the responsibility to mitigate and remediate.

³ See also step 1 of the due diligence process under the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas