Unlocking the Potential of the New OECD Due Diligence Guidance on Responsible Business Conduct

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I. INTRODUCTION

Since 2011, we have seen significant progress by companies working to implement respect for human rights as set out in the United Nations Guiding Principles on Business and Human Rights (UNGPs). This progress has been aided by the increasing alignment with these standards achieved in other international instruments and guidance documents – in particular, the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises (the OECD Guidelines). The initial progress made by leading companies is encouraging. Now, it is important to deepen progress amongst companies already working to embed respect for human rights, and to scale action amongst the ‘unaware, unable and unwilling’, to draw on a phrase coined by the UN Working Group on Business and Human Rights.

On 31 May 2018, 48 countries adopted and agreed to support and monitor implementation of the OECD Due Diligence Guidance for Responsible Business Conduct (the Due Diligence Guidance). The Due Diligence Guidance seeks to provide practical support to companies on implementing the OECD Guidelines through plain language explanations of due diligence recommendations. It also seeks to promote a common understanding among governments and stakeholders on what constitutes good due diligence for responsible business conduct (RBC). The OECD intends that the Due

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Diligence Guidance will become the primary reference point for companies working to implement responsible business (including human rights) due diligence under the OECD Guidelines, the UNGPs and the International Labour Organization’s (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (the ILO Declaration).

Whether this ambition is realized will depend, to a large extent, on business uptake of the recommendations provided in the Due Diligence Guidance. This piece provides a brief overview of the Due Diligence Guidance and the context in which it has been developed. It then shares observations on the practical value of the guidance for business practitioners, with reference to its strengths and limitations. The piece then looks forward and asks what will be needed to ensure that the Due Diligence Guidance has real-world impact. It concludes that the new guidance has a number of encouraging features that may mean it will be a practical and useful tool for business practitioners – perhaps particularly those new to undertaking due diligence on RBC. However, to unlock its potential to support practitioners, targeted dissemination of the Due Diligence Guidance is needed to raise awareness amongst business of the guidance, and to mainstream the due diligence approach it recommends across all areas of responsible business practice and thinking.

II. AN OVERVIEW OF THE OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT

The Due Diligence Guidance was developed to provide practical support to business enterprises on the implementation of the OECD Guidelines by providing plain language explanations of the guidelines’ due diligence recommendations. It also seeks to promote a common understanding among governments and other stakeholders on due diligence for RBC.6

The Due Diligence Guidance is the first government-backed standard for corporate due diligence on RBC that covers all sectors of the economy.7 It describes the measures companies should take to implement due diligence on the issues addressed in the OECD Guidelines; specifically: human rights, employment and industrial relations, the environment, combating bribery, bribe solicitation and corruption, consumer interests and disclosure. To do so, it provides a step-by-step description of the due diligence process and supportive measures, with a focus on the following six core process expectations:

- embedding RBC into policies and management systems;
- identifying and assessing actual and potential adverse impacts associated with the enterprise’s operations, products or services;
- ceasing, preventing and mitigating adverse impacts;

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• tracking implementation and results;
• communicating how impacts are addressed; and
• providing for or cooperating in remediation.

The Due Diligence Guidance contains an Annex that provides additional explanations, tips and illustrations of due diligence for RBC, with specific focus on each of the six core process expectations.

The Due Diligence Guidance was developed through a multi-stakeholder process overseen by the OECD Working Party on Responsible Business Conduct. It involved OECD and non-OECD countries as well as representatives from business, trade and civil society, and incorporated a public consultation. It was adopted by 48 countries on 31 May 2018, and these countries also agreed to support and monitor the OECD Guidance’s implementation.

Importantly, the OECD’s ambitions for the Due Diligence Guidance are not limited to providing practical support to companies and promoting a common understanding amongst governments and other stakeholders on due diligence as set out in the OECD Guidelines. The OECD is explicitly seeking also to support business implementation of the due diligence recommendations provided in the UNGPs and the ILO Declaration. This ambition builds on ongoing efforts by the OECD, Office of the High Commissioner on Human Rights (OHCHR) and the ILO to align expectations of, and recommendations to, business and governments concerning RBC in recent years, perhaps particularly as regards business-related human rights challenges. These include, notably, the 2011 revision of the OECD Guidelines to incorporate the expectations of business concerning human rights due diligence as set out in the UNGPs, and to apply to other areas of RBC addressed in the OECD Guidelines the approach to due diligence adopted by the UNGPs to defining business involvement in adverse impacts and due diligence. They also include efforts by the OECD and OHCHR to coordinate on the provision of interpretive guidance on key concepts, such as ‘causation’, ‘contribution’ and ‘direct linkage’. The aim of achieving convergence around the concept of due diligence on RBC appears to be shared by the OECD, United Nations and ILO. It is reflected in the recent report of the UN Working Group on Business and Human Rights to the UN General Assembly, which cites the Due Diligence Guidance as an important reference.

This alignment is significant. It creates clarity for business, government and other stakeholders, and a common reference point for efforts to advance practice.

8 OECD, note 6, 3.
10 OECD, note 6, 3.
13 United Nations General Assembly, note 4, [5].
III. THE PRACTICAL VALUE OF THE GUIDANCE FOR BUSINESS

There are currently strong drivers for business to implement due diligence processes for RBC. These are likely to increase in the coming years. Many companies – particularly major brands – face significant pressure to meet the expectations of key stakeholders, including governments, investors, business partners, civil society, consumers and other stakeholders. The reputational, legal and financial risks of failing to meet these expectations provide a strong driver for some companies. However, emerging regulatory initiatives are now ‘hardening’ expectations into compliance requirements in an increasing number of jurisdictions, driving more companies to begin engaging seriously with human rights and other responsible business challenges. For example, a number of countries have introduced regulations requiring companies to report on non-financial risks and how they address modern slavery across their value chains. More recently, the French Duty of Vigilance Law introduced a requirement that certain large French companies undertake human rights due diligence across their own operations and supply chains. This trend towards the so-called ‘legalisation’ of business enterprise’s RBC responsibilities appears likely to continue in the coming years. If it does, one foreseeable effect would be that that large numbers of companies will need to quickly build familiarity with implementing due diligence for RBC and the know-how to do so.

In this context, one can see a valuable role for the Due Diligence Guidance to support companies to implement due diligence for RBC – and to support governments and legal institutions to begin to think through what ‘good’ looks like in meeting not only international standards, but potentially also emerging domestic requirements. This role may be particularly powerful if the Due Diligence Guidance becomes widely recognized as the key practical reference tool for due diligence under the UNGPs, the ILO Declaration and the OECD Guidelines. However, the Due Diligence Guidance will only achieve this impact if business practitioners – that is, corporate responsibility, compliance and other professionals working within companies to implement responsible business practices – find it useful.

It is still early to attempt to assess the value of the Due Diligence Guidance to business practitioners, although a clearer picture should emerge over time. However, the guidance has a number of encouraging practical features that indicate its potential utility for business practitioners.

First, the Due Diligence Guidance is practical, not theoretical. Where the OECD Guidelines set the expectations of business, the guidance explains these in plain language and with a focus on the practical action(s) a business enterprise should take. The focus on actions is likely to be very helpful to business practitioners – perhaps, in particular, those who are new to implementing RBC and are working to make sense of international standards and expectations.

Second, the Due Diligence Guidance’s practical orientation is reinforced by the provision of illustrative examples in the Annex. The usefulness of illustrative examples

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should not be underestimated. As a representative of a Global Business Initiative on Human Rights (GBI) member company observed: ‘The illustrative examples are a big added value for companies – and will be particularly helpful for those less familiar with the human rights topic and for small and medium-sized enterprises (SMEs).’\(^\text{16}\) Whilst the examples are not comprehensive – and the Due Diligence Guidance is careful to reinforce that they are not – the provision of these examples helps practitioners get a more concrete, real-life sense of the types of steps that need to be taken, and the types of issues or information that need to be looked out for. This can be particularly valuable for practitioners who are not familiar with due diligence for RBC because it provides an additional lens through which to make sense of technical terms and concepts. These examples also provide a starting point for practitioners to think creatively about other types of action that may be needed and appropriate.

Third, the Due Diligence Guidance recognizes the need for companies to take a flexible, context-specific approach to due diligence for RBC, and the sometimes messy realities of driving RBC across large, complex organizations and even larger value chains. More importantly, it provides practical guidance to practitioners on how to navigate decisions when things do not progress in a neat, linear fashion. By being open and realistic about how due diligence for RBC happens in practice, the Guidance offers a potentially valuable tool for business practitioners – and may help governments and other key stakeholders to understand these challenges better in turn.

Finally, the Guidance is applicable to all business sectors and across all issues addressed in the OECD Guidelines. This is helpful in creating a common reference point for companies – perhaps particularly those operating across multiple business sectors and those seeking to develop an integrated approach to due diligence on RBC – as well as for governments and others seeking a practical reference point for assessing whether companies are meeting expectations in this area. The guidance’s practical orientation may also make it a helpful tool for small and medium-sized enterprises (SMEs). Indeed, the Due Diligence Guidance explicitly recognizes that the circumstances and resources of SMEs may be different from those of larger companies and provides guidance on how to adapt due diligence processes to a company’s circumstances.\(^\text{17}\)

One practical challenge that the Due Diligence Guidance may present for some practitioners – perhaps, in particular, those with a sophisticated understanding of the expectations set out in the OECD Guidelines, UNGPs and ILO Declaration – concerns consistency of language. Despite the strong alignment achieved between these three instruments, each does use language slightly differently. For example, when discussing how to prioritize amongst adverse impacts, efforts to implement the UNGPs have focused on the concept of ‘salience’.\(^\text{18}\) By contrast, the Due Diligence Guidance use the concept ‘significance’.\(^\text{19}\) The practical difference between a ‘significant’ and ‘salient’ impact may be negligible; the definitions provided in the Due Diligence Guidance and, for example, the UN Guiding Principles Reporting Framework are substantially

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\(^\text{16}\) Relayed to the author during a confidential discussion on 12 September 2018.

\(^\text{17}\) For example, see OECD, note 6, 46.


\(^\text{19}\) OECD, note 6, 42.
identical. However, these small differences in language may present challenges to business practitioners working to ensure that their company is meeting expectations under each of these three instruments, and to determine which language to use in the company’s own communication of its practices and performance. That said, given the different terminologies employed in the business and human rights and broader responsible business space, it is difficult to see how this challenge could be avoided.

At this early stage, it appears that the Due Diligence Guidance has the potential to be a very valuable tool for business practitioners. In the words of a GBI member company representative: ‘At the beginning of the process to develop this guidance, one question asked by business representatives was “do we really need another guidance?” However, the final version is very useful – a practitioner’s tool.’

IV. LOOKING FORWARD: ENSURING THE GUIDANCE HAS REAL-WORLD IMPACT

The OECD’s aims for the Due Diligence Guidance – that is, to provide practical support to business enterprises and to promote a common understanding amongst governments and stakeholders on due diligence for RBC – are welcome. As efforts to embed RBC expectations in domestic law progress, a common reference point will be helpful to support consistency across jurisdictions, a level playing field and clarity for business and other stakeholders. This is likely to be critical to achieving meaningful outcomes for affected people in the years to come. Domestic laws necessarily need to be context specific. However, companies today operate globally. Accordingly, ensuring a common reference point for requirements will be key to supporting companies to advance RBC practice consistently across a company’s business activities and relationships, to share knowledge and to collaborate to solve problems.

The rigour and practicality of the Due Diligence Guidance will be key to achieving the OECD’s aims. However, I see two opportunities to strengthen the real-world impact of the guidance and to help ensure it achieves the aims set for it by the OECD.

First, broader dissemination will be needed. Some business practitioners are familiar with the Due Diligence Guidance. However, far too many business practitioners have limited – if any – familiarity with this guidance and other materials developed by the OECD to support business with the implementation of RBC. Identifying and acting on opportunities to disseminate the OECD Guidelines and the Due Diligence Guidance amongst business practitioners – and other relevant stakeholders – around the world will enable the guidance to become a true common reference point on RBC. For example, business and industry organizations can play a valuable role to disseminate new tools and guidance materials amongst the business community – indeed, the Responsible Business Alliance (RBA) has already produced a guide that maps RBA tools, processes and services against the Due Diligence Guidance. OECD National Contact Points also have convening power and an ability to disseminate the Due Diligence Guidance to business. Importantly, the OECD will need to reach beyond OECD countries to ensure

20 Relayed to the author during a confidential discussion on 12 September 2018.
the guidance becomes a true common reference point. Collaborating with local networks and associations will likely be key to achieving this.

Second, stronger alignment between the expectations set out in the OECD Guidelines (and the Due Diligence Guidance) and current thinking and practice in key areas of RBC is needed. The approach set out in the OECD Guidelines and the Due Diligence Guidance is closely aligned with emerging business practice to operationalize human rights due diligence as set out in the UNGPs. By applying this approach to other areas of RBC – such as the environment, bribery and corruption, and consumer interests – the OECD took a helpful step towards supporting the alignment of due diligence for RBC across issue areas. However, to build on this step, those expectations need to be operationalized across those issue areas. Drawing on anecdotal observations, even within companies who have implemented sophisticated due diligence processes for human rights aligned with the OECD Guidelines, due diligence for other areas, such as bribery and corruption and the environment, is often approached differently. Only by mainstreaming the Due Diligence Guidance into business enterprises’ (and other stakeholders’) practice across these other issue areas, can the full potential of the guidance (and the OECD Guidelines) be realized.

V. CONCLUSION

The Due Diligence Guidance has a number of encouraging features that may mean it will be a practical and useful tool for business practitioners – perhaps particularly those new to undertaking due diligence on RBC. These include that the guidance is indeed practical, that it provides illustrative examples of action, that it seeks to support practitioners to navigate the sometimes messy practical realities of implementing due diligence for RBC, and that it is applicable to all business sectors and all responsible business issue areas covered by the OECD Guidelines.

However, to unlock its potential to support practitioners, targeted dissemination of the Due Diligence Guidance is needed to raise awareness of the guidance amongst business, and to mainstream the due diligence approach it recommends across all areas of responsible business practice and thinking.