

Institute for Human Rights and Business  
34b York Way  
London  
N1 9AB  
United Kingdom

**Your reference**

**Our reference**

DLD/UKDP  
UKM/89274038.1

14 May 2018

**By Email Only : [commodities@ihrb.org](mailto:commodities@ihrb.org)**

Dear Sir/Madam

**DRAFT COMMODITIES TRADING SECTOR GUIDANCE ON  
IMPLEMENTING THE UN GUIDING PRINCIPLES ON BUSINESS AND  
HUMAN RIGHTS**

Thank you for the opportunity to comment on the draft [Commodities Trading Sector Guidance on Implementing the UN Guiding Principles on Business and Human Rights](#) ("**Draft Guidance**"). We have organised our comments with reference to four key themes. Recommendations in respect of each theme are arranged according to the section of the Draft Guidance in which they appear.

**1. ALIGNMENT WITH OTHER RELEVANT GUIDANCE**

1.1 The Draft Guidance is intended to align with other relevant guidance, specifically:

1.1.1 the [OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas](#) ("**Mineral Supply Chain Guidance**");

1.1.2 the [OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector](#) ("**Stakeholder Engagement Guidance**"); and

1.1.3 the draft [OECD Due Diligence Guidance for Responsible Business Conduct](#) ("**RBC Guidance**").<sup>1</sup>

1.2 The Draft Guidance also draws, in a number of places, on [The Corporate Responsibility to Respect Human Rights: An Interpretive Guide](#) ("**Interpretive Guide**").<sup>2</sup>

1.3 However, in some sections the Draft Guidance appears to depart from the language of other relevant guidance. It is unclear whether those departures are intended.

DLA Piper UK LLP is authorised and regulated by the Solicitors Regulation Authority.

DLA Piper UK LLP is a limited liability partnership registered in England and Wales (number OC307847) which is part of DLA Piper, a global law firm, operating through various separate and distinct legal entities.

A list of members is open for inspection at its registered office and principal place of business, 3 Noble Street, London, EC2V 7EE and at the address at the top of this letter. Partner denotes member of a limited liability partnership.

A list of offices and regulatory information can be found at [www.dlapiper.com](http://www.dlapiper.com).

**UK switchboard**  
+44 (0)8700 111 111

<sup>1</sup> Draft Guidance, page 4.

<sup>2</sup> See, for example, Draft Guidance, page 8.



- 1.4 We consider that, in developing sector-specific guidance, any intended departures from the language of other relevant guidance and standards should be identified and explained. Unintended departures should be avoided.
- 1.5 This assists to ensure that the sector-specific guidance contributes to a cohesive body of international best practice by applying a consistent interpretation of the UN Guiding Principles on Business and Human Rights ("UNGP"), while acknowledging sector-specific applications.
- 1.6 Accordingly, we suggest that the Draft Guidance:
- 1.6.1 in **part 3** generally, emphasise the importance of embedding respect for human rights into management systems in addition to policy, consistent with language used in the [Swiss Commodities Trading Industry: A Mapping Study](#) ("**Mapping Study**"), the Mineral Supply Chain Guidance and the RBC Guidance,<sup>3</sup> including by:
- 1.6.1.1 amending the **heading of section 3.1** to read "*Developing a Policy Commitment and Embedding Respect for Human Rights **into Management Systems***"; and
- 1.6.1.2 amending **section 3.1(iv)** generally, to include more specific reference to internal management systems, for instance, internal controls and traceability systems, adequate resources and training to staff. We suggest that the Draft Guidance emphasises not only policy alignment but also alignment with internal management systems;
- 1.6.2 in **section 3.1(i)**, delete the word "*all*" in the first dot point to align with the exact wording in UNGP 12 and consider, in substitution of the existing footnote,<sup>4</sup> repeating the remainder of the wording in UNGP 12, being:
- "understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work";*
- 1.6.3 in **section 3.2(i)**, review the wording "*the assessment should focus on risks to people and not on risks to the business, although these may overlap*" so as to avoid any suggestion that human

---

<sup>3</sup> See, for example, Mapping Study, page 17 and RBC Guidance, page 14.

<sup>4</sup> We note that the existing footnote appears to incorporate a typographic error as it refers to "*Part 2.A of this Guidance*", which does not exist. We assume it refers to "*Part 2.1 of this Guidance*".

rights risks and business risks are separate and instead demonstrate the correlation and often causation between the two;

- 1.6.4 also in **section 3.2(i)**, clarify the distinction between the identification of risks, which should appear in this part of the Draft Guidance, and the taking of action to address them, which should be included in the next part of the Draft Guidance;
- 1.6.5 in **section 3.3**, clarify that the scope of relevant activities includes both actions and omissions, consistent with the commentary to UNGP 13;
- 1.6.6 in **section 3.3(ii)**, clarify that risks need to be prioritised with reference to both severity **and likelihood** while noting, as emphasised in the UNGP and RBC Guidance,<sup>5</sup> that severity is more important than likelihood, including because the scale, scope or irremediability of a risk can cause serious legal, reputational and commercial consequences and that a severe human rights risk that is likely to occur should be prioritised for action; and
- 1.6.7 in **section 3.5**, include express reference to the "*legitimate requirements of commercial confidentiality*", which appears to have been left out of the Draft Guidance.

## 2. APPLICATION ON A STAND-ALONE BASIS

- 2.1 We consider that sector-specific guidance in relation to the implementation of the UNGP should be capable of being read, understood and applied on a standalone basis. While the Draft Guidance should be aligned with other relevant guidance, it should not assume that sector participants are familiar with, or have the resources to analyse and apply, that other guidance.
- 2.2 This is particularly the case for the commodities sector, given the findings of the Sizing Study,<sup>6</sup> referenced in the **Mapping Study**, indicating that 48 per cent of responding firms were SMEs, a figure that was considered to be representative of the sector as a whole.<sup>7</sup> The Mapping Study also noted that it was larger firms, rather than SMEs, that tended to have strong management systems.<sup>8</sup>
- 2.3 In that context, the development of sector-specific guidance provides a critical opportunity to draw on and consolidate existing expertise, particularly written sources, for the benefit of sector participants. Within the bounds of applicable intellectual property protections, sector-specific guidance should

---

<sup>5</sup> RBC Guidance, page 17.

<sup>6</sup> Nina Eggert, Giovanni Ferro Luzzi (2017) "*Commodity Trading Monitoring Report*", available at: <http://www.sric-foundation.org/index.php/research/publications> (.)

<sup>7</sup> Mapping Study, page 12.

<sup>8</sup> Mapping Study, page 19.

draw liberally on commentary, examples, tables and diagrams in other relevant guidance, obviating the need for sector participants to refer to a multitude of sources.

2.4 We acknowledge that this is the intent of the boxes included in the Draft Guidance.

2.5 Accordingly, we suggest that the Draft Guidance:

2.5.1 in **section 2.1**, consider incorporating:

2.5.1.1 additional illustrative examples of potential adverse human rights impacts associated with the sector, including by drawing on section 5 and annex 5 of the Mapping Study and examples in [Human Rights Translated 2.0: A Business Reference Guide](#) (as cited in an existing footnote to this section), building on the existing information in **box 4**;

2.5.1.2 where possible, anonymised case studies of real life examples showing how human rights risks have materialised for commodity trading firms, that is, what legal, financial, reputational and other business risks have resulted for businesses that have not implanted effective human rights risks management and due diligence processes; and

2.5.1.3 a more explicit link between the issue areas identified in section 5 of the Mapping Study, areas of domestic policy and regulation and international standards in order to assist commodity trading firms to understand better how human rights risks can emerge in relation to business activities and relationships in language that is familiar to them;

2.5.2 in **section 3.1(i)**, in relation to the content of a policy statement, consider including a reference to standards against which due diligence is to be conducted, with possible reference to examples such as the [Corporate Human Rights Benchmark](#) or the [UNGP Reporting Framework](#), as well as details of any applicable grievance mechanism;

2.5.3 also in **section 3.1(i)**, include reference to the importance of mapping existing company policies to identify existing coverage, consistent with best practice and as referenced in [A Guide For Business: How to Develop a Human Rights Policy \("Policy Guide"\)](#);<sup>9</sup>

- 2.5.4 in **sections 3.1(ii)** and **3.1(iv)**, emphasise:
- 2.5.4.1 the criticality of involving "*cross-functional personnel in the process of policy development to build understanding, know-how and a sense of common purpose*",<sup>10</sup> in the place of the existing suggestion that "*consulting all relevant staff... can be helpful in policy development*" (**section 3.1(iii)**) and as a precursor to "*the implications of the policy commitment should be further elaborated by other departments*" (**section 3.1(iv)**); and
  - 2.5.4.2 the utility of a cross-functional approach, led by senior management, that includes legal, sustainability, procurement, logistics, compliance, health and safety, external affairs and other relevant teams in developing both appropriate policy commitments but, most importantly, effectively embedding those commitments across business functions and into management systems;
- 2.5.5 in **section 3.1(iii)**, emphasise:
- 2.5.5.1 that caution needs to be taken with widely drafted policy commitments which make sweeping statements, capable of misinterpretation;
  - 2.5.5.2 that legal risks may be minimised by actually setting out the specific steps which a company or group is taking (and any exceptions), rather than stating an aim to achieve a wide goal, which may or may not be possible, and may take some time to achieve; and
  - 2.5.5.3 that a company must actually do what it says it has done or will do;
- 2.5.6 also in **section 3.1(iii)**, note that a business should acknowledge that it is in a different position in relation to, for example, its own employees as opposed to employees of franchisees or suppliers, and policy commitments should reflect this reality;
- 2.5.7 in **section 3.1(v)**, consider incorporating reference to appropriate disclosure requirements in supplier contracts, in a manner consistent with commodity-specific recommendations in the Mineral Supply Chain Guidelines, in addition to existing suggestions regarding contractual obligations requiring compliance with human rights policy commitments;

- 2.5.8 in section **3.2(i)**, emphasise that "*human rights due diligence can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders*" in line with UNGP 17, acknowledging that human rights risks and business risks are intertwined rather than separate;
- 2.5.9 in section **3.2(ii)**, consider elaborating on operating contexts by supplementing the existing references to conflict-affected and high-risk areas with references to weak governance zones, countries included on international sanctions lists and countries where monitoring and enforcement of relevant laws are known to be weak or absent, and possibly including express references to resources that can assist analysis, such as UN Human Rights Council publications,<sup>11</sup> ILO publications,<sup>12</sup> Transparency International's Corruption Perception Index, human rights reports published by governments,<sup>13</sup> and reports from credible civil society sources, including Amnesty International and Human Rights Watch;
- 2.5.10 in section **3.2(iii)**, consider giving further direction as to how to assess business partners' capacity, including by pointing to potential red flags, such as where a business partner has no information on human rights policies, processes and performance or is unable to identify salient risks or to discuss priorities for human rights risk management, possibly noting the UNGP Reporting Framework as a key resource;
- 2.5.11 in section **3.2(iv)**, emphasise the role of either human rights impact assessment, or the incorporation of human rights impacts into environmental and social impact assessments, consistent with the commentary in relation to UNGP 18;
- 2.5.12 in section **3.2(v)**, consider incorporating and, where necessary, adapting relevant steps and indicia from the Stakeholder Engagement Guidance in relation to identification of, and consultation with, stakeholders;
- 2.5.13 in section **3.3(ii)**, consider illustrating the interplay between severity and likelihood by the use of a heat map or risk matrix;
- 2.5.14 in section **3.3(iii)**, emphasise:

---

<sup>11</sup> For example, Universal Periodic Review country reports, Treaty Body review reports, Special Procedures reports.

<sup>12</sup> For example, Observations and Direct Requests of the ILO Supervisory System.

<sup>13</sup> For example, US State Department Human Rights Reports, UK Overseas Business Risk reports.

- 2.5.14.1 the necessity of proper human rights due diligence in order to understand the extent of leverage in a human rights context, as distinct from traditional commercial leverage. This is particularly important when businesses are engaging with state or state-owned enterprises; and
- 2.5.14.2 the possibility of increasing leverage through collaboration with other sector participants, consistent with the commentary in relation to UNGP 19, given the limitations identified in the Mapping Study.<sup>14</sup>

### 3. BENEFITS OF ADOPTING A HUMAN RIGHTS-BASED APPROACH

3.1 We suggest that the Draft Guidance could better articulate certain benefits of adopting a human rights-based approach. These benefits include:

- 3.1.1 the potential for a human rights-based approach to strengthen and streamline existing company policies;
- 3.1.2 the potential for respect for human rights to operate as a unifying principle for a range of policies, including environmental, social and other policies, providing a unifying set of principles, whether expressed in a single integrated policy or through a range of separate policies;
- 3.1.3 discharging obligations under applicable regulatory requirements, including reporting requirements;
- 3.1.4 mitigating reputational, financial and legal risks, including in some instances, in relation to parent company liability; and
- 3.1.5 addressing the governance gaps created by differences between domestic policy and regulation across operating contexts and also between domestic policy and regulation and international human rights standards, especially in relation to the issue areas identified at section 5 of the Mapping Study.

3.2 Accordingly, we suggest that the Draft Guidance:

- 3.2.1 in **section 3.3**, note that the development of appropriate responses to adverse human rights impacts contributes to mitigation of legal, financial and reputational risks and emphasise the linkages between human rights risks and effective risk management across a supply chain;

---

<sup>14</sup> Mapping Study, page 23.

- 3.2.2 in **section 3.5**, emphasise the role that implementation of human rights policy commitments into management systems can play in anticipating and meeting developing regulatory requirements (particularly reporting requirements); and
- 3.2.3 in **sections 3.6(i) and 3.6(ii)**, note that the application of local access to remedy, for example, through an operational level grievance mechanisms, is a key tool in the management of emerging global legal risks and, with particular reference to **section 3.6(ii)**, note that local remediation is typically more appropriate than remedy pursued outside of the jurisdiction where the harm occurred. At least in a litigious context, it is often the case that remediation is limited to monetary compensation whereas in a human rights context other forms of remediation might be more appropriate.

#### 4. CHALLENGES TO IMPLEMENTATION

- 4.1 We suggest that the Draft Guidance could better articulate certain risks of inadequate implementation of the UNGPs. Some illustrative examples of risks include:
  - 4.1.1 potential legal liability arising from policy commitments and public statements that are not properly crafted and that do not properly reflect the reality on the ground, see above at paragraphs 2.5.5 and 2.5.6;
  - 4.1.2 inherent limitations of, or other risks arising from, the use of contractual terms to compel and monitor performance, including:
    - 4.1.2.1 the risk of allegations being made that this creates legal "*control*", whereby a parent company or business at the top of a supply chain could be targeted for legal action arising from the local company's operations, even if they do not have in-depth knowledge, let alone control, of what is happening on the ground;
    - 4.1.2.2 the need to ensure that such provisions are carefully considered and, where applied, drafted so as to take effect only where there is a certain threshold of knowledge or in conjunction with an auditing and compliance monitoring regime focusing on specific high-risk operations;
  - 4.1.3 risks to business operations, for example, potential for business interruption and associated liabilities, where local stakeholders are not properly consulted and any concerns adequately remediated;



- 4.1.4 potential loss of investment in the event of inadequate due diligence or remediation shown and difficulty of re-establishing investor trust;
  - 4.1.5 potential inability to secure insurance (or reinsurance for large companies with a captive insurer) where inadequate due diligence or remediation is shown - in particular, for key risks to the viability of a company, including business interruption cover; and
  - 4.1.6 where sufficient local knowledge is not leveraged, it is possible that mitigation actions and remediation will be only a short-term solution, with the potential to re-surface after a relatively short amount of time.
- 4.2 Accordingly, we suggest that the Draft Guidance:
- 4.2.1 in **section 3.1(v)**, more clearly distinguish between the use of contractual frameworks to facilitate disclosure (including through information and audit mechanisms), seek assurances as to compliance (through warranties and covenants), establish fora which can contribute to remedy (through dispute resolution provisions) and note some of the inherent limitations of contract law, including:
    - 4.2.1.1 the risk of unenforceability arising from vague or uncertain language, particularly where provisions seek simply to co-opt international instruments in their entirety and particularly where some or all of the provisions of those instruments are directed toward states;
    - 4.2.1.2 the primacy of compensatory damages as a remedy and its inadequacy in relation to human rights risks, particularly where contract counterparties may suffer no quantifiable loss; and
    - 4.2.1.3 the "*bluntness*" of termination as a means of remedy, particularly in the circumstances where commodities trading firms consider they have little leverage, as articulated in the Mapping Study;<sup>15</sup> and
  - 4.2.2 in **section 3.5**, acknowledge the comments in the Mapping Study to the effect that some commodity trading firms find it challenging to communicate openly with external stakeholders<sup>16</sup> but note that, to the extent this is driven by an aversion to risk,

---

<sup>15</sup> Mapping Study, page 37.

<sup>16</sup> Mapping Study, page 24.

that risks created by communications generally arise because communications do not reflect the reality on the ground or are not sufficiently precise, rather than the fact of communication itself.

## **5. OTHER COMMENTS**

We suggest that the Draft Guidance include a comparative table showing the relationship between the steps outlined in the Draft Guidance, and accordingly the UNGP and RBC Guidance, and other relevant frameworks relied on, specifically the five-step framework in the Mineral Supply Chain Guidance.

Thank you once again for the opportunity to provide comments on the Draft Guidance.

Yours faithfully

**RHYS DAVIES**  
**Partner**  
**DLA PIPER**

Rhys.Davies@dlapiper.com

**SARAH ELLINGTON**  
**Legal Director**  
**DLA PIPER UK LLP**

Sarah.Ellington@dlapiper.com

**DANIEL D'AMBROSIO**  
**Associate**  
**DLA PIPER UK LLP**

Daniel.Dambrosio@dlapiper.com