



OECD GUIDELINES
FOR MULTINATIONAL
ENTERPRISES

NATIONAL CONTACT POINT
FOR RESPONSIBLE BUSINESS
CONDUCT THE NETHERLANDS

**Analysis of the draft Corporate Sustainability Due Diligence
Directive, on the basis of the OECD Guidelines**

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This document is a translation of the original Dutch report.¹ In case of differences between the two text versions, the Dutch text version is leading.

¹ See NCP Analyse van de concept CSDDD aan de hand van de OESO-richtlijnen, oesorichtlijnen.nl/documenten/publicatie/2023/07/26/analyse-concept-corporate-sustainability-due-diligence-directive-adhv-de-oeso-richtlijnen.

Summary

Introduction

On 13 March 2023, the Netherlands National Contact Point for the OECD Guidelines (NCP) was asked by the Permanent Parliamentary Committee for Foreign Trade and Development Cooperation “to interpret for the House the extent to which the European Commission Proposal on RBC (CSDDD) are in line with the content and meaning of the OECD Guidelines [translation NCP]”. On 11 May, the NCP received an additional request to include the position of the European Parliament in its analysis as well.

In this report, the NCP presents a comparative analysis of the Commission proposal for the Corporate Sustainability Due Diligence Directive (CSDDD, 2022) and of the Council position on the CSDDD (2022) (together referred to below as the CSDDD regulatory framework) using the text of the OECD Guidelines for Multinational Enterprises (MNEs) (2011) and of the OECD Due Diligence Guidance for Responsible Business Conduct (2018) (together referred to below as the OECD regulatory framework).

Comparison

The NCP compared the CSDDD regulatory framework with the OECD regulatory framework on a number of key points under the latter, in three categories: the due diligence process, the scope of due diligence and the essential characteristics of due diligence. The comparison is factual, non-exhaustive, and the focus is on the standards for corporate behaviour contained in the two frameworks. On this basis, the NCP identified notable points of divergence between the CSDDD regulatory framework and the OECD framework in 14 key areas. These pertain to each of the six steps of the due diligence process, different aspects of the scope of due diligence (companies and sectors, themes, reach within the supply chain) and various essential characteristics (the expectation that due diligence should be preventative, risk-based and dynamic, that it requires appropriate measures and stakeholder engagement, and that it does not shift responsibilities).

Points of attention

From the notable points of divergence between the OECD and CSDDD regulatory frameworks, the NCP has distilled several points of attention – one overarching and, by way of further elaboration, another ten in relation to specific aspects of the CSDDD – regarding limitations of the CSDDD framework compared with the OECD framework. In the NCP's view, these limitations could potentially have a negative impact on the OECD Guidelines' effectiveness and on compliance with them. The NCP draws no conclusion from this as to whether due diligence legislation (at EU or national level) pertaining to Responsible Business Conduct (RBC) is desirable or not.

The overarching point of attention is the concern that limitations in the CSDDD regulatory framework in comparison with the OECD framework will result in a dilution of RBC principles and standards of conduct from the OECD Guidelines and/or in a lack of clarity about what is expected from companies in terms of RBC and due diligence. There is a risk that companies that fall within the scope of the legislation will feel bound only by the legislation itself and no longer by aspects of the OECD Guidelines that are not included in the legislation. In addition, it is certainly not inconceivable that companies that fall outside the scope of the CSDDD will conclude that they are not or expected to carry out due diligence, or only to a limited extent.

Such a situation would compromise the integrity of the existing framework of due diligence standards and their further development and interpretation in the form of guidance by the OECD and rulings by NCPs in specific instances. Failure to carry out due diligence adequately (or even at all) may result in or perpetuate adverse impacts on people, the environment and society as a consequence of the operations of a company, its subsidiaries and/or its supply chain partners.

The NCP also notes that there are 10 specific aspects of the CSDDD where its divergence from the OECD regulatory framework entails a serious risk of detracting from the latter. The corresponding specific points of attention are as follows:

1. Integration of RBC into companies' own systems and actions;
2. Risk-based prioritisation of measures;
3. Appropriate measures;
4. Access to remedy;
5. Companies covered;
6. Financial sector;
7. Thematic scope;
8. Scope of and reach within the supply chain;
9. Companies' own responsibility;
10. Stakeholder engagement.

The NCP notes that some of these specific points of attention are addressed in the European Parliament position, namely points 2, 3, 4, 9 and 10. The NCP makes no judgment on whether these points are *fully* addressed; it merely considers whether the position of the European Parliament on the point in question is more in line with (i.e. diverges less from) the OECD regulatory framework than the Commission proposal and/or the Council position. The NCP also notes that there are still limitations in the European Parliament position with regard to points 1, 5, 6, 7 and 8.

Finally, the NCP's analysis indicates on which points the June 2023 update of the OECD Guidelines gives further clarification and/or greater emphasis. The points in question are 2, 4, 7, 8, 9 and 10.

Conclusion

The NCP concludes that notable points of divergence exist between the CSDDD and OECD regulatory frameworks on each of the six points of the due diligence process, several aspects of the scope of due diligence, and some of the essential characteristics of due diligence. The NCP believes that divergences are problematic when they create constraints that could lead to dilution of the RBC principles and standards of corporate behaviour set out in the OECD Guidelines and/or a lack of clarity about what is expected of companies in terms of RBC and due diligence. The NCP concludes that with respect to 10 specific aspects of the CSDDD, there is a serious risk that limitations of the CSDDD regulatory framework will detract from the due diligence standards in the UNGPs and the OECD Guidelines, as further developed and interpreted in OECD Guidance and NCP rulings in specific instances. The European Parliament's position addresses some of these limitations, but a number of others remain.

1. Introduction

1.1 Background to and purpose of this report

On 13 March 2023, the Netherlands National Contact Point for the OECD Guidelines (NCP) was asked by the Permanent Parliamentary Committee for Foreign Trade and Development Cooperation “to interpret for the House the extent to which the Council position and the European Commission proposal on RBC (CSDDD) are in line with the content and meaning of the OECD Guidelines [translation NCP]”. On 11 May, the NCP received an additional request to include the position of the European Parliament in its analysis as well.

The NCP consists of four independent members and a secretariat that is based at the Ministry of Foreign Affairs. One of its main tasks is to raise awareness of and interpret the OECD Guidelines for Multinational Enterprises.² The NCP’s tasks include responding to enquiries from stakeholders regarding information about the OECD Guidelines.

In this report, the NCP presents a comparative analysis of the OECD regulatory framework in relation to due diligence and the regulatory framework of the proposed Corporate Sustainability Due Diligence Directive (CSDDD) (the CSDDD regulatory framework). To this end, the NCP will consider the Commission proposal for a CSDDD and the Council position on this proposal in the light of the OECD Guidelines for Multinational Enterprises and the OECD Due Diligence Guidance for Responsible Business Conduct.

1.2 OECD Guidelines, due diligence and legislation

The OECD Guidelines for Multinational Enterprises (referred to below as the OECD Guidelines)³ are non-binding recommendations for responsible business conduct (RBC) in a global context, addressed by governments of OECD member states to multinational enterprises in those countries. They provide guidance for companies on how to deal with issues such as responsible supply chain management, human rights (including labour rights), child labour, environment and corruption. In the Netherlands, they form the basis for Dutch RBC policy in the sense that they serve as guidelines for what the Dutch government expects from companies when it comes to RBC in global value chains.⁴

The OECD Guidelines were drawn up in 1976 and have been revised several times since then. In 2011, they were adapted to reflect international developments relating to RBC and responsible supply chain management, like the UN Guiding Principles on Business and Human Rights (UNGPs). This included the adoption, by and large, of the standards concerning companies’ responsibility to respect the human rights of third parties from the second pillar of the UNGPs, including the principle of human rights due diligence. In the OECD Guidelines, these standards have been given a broader thematic scope in the sense that they cover the potential and actual adverse impacts of business operations not only in relation to human rights, but also in relation to employment and industrial relations, the environment, combating corruption, solicitation of bribes and extortion, consumer interests and disclosure.

² See Order establishing the NCP (2014) (in Dutch) [NCP Instellingsbesluit 2014-Staatscourant | Publicatie | Nationaal Contactpunt OESO-richtlijnen \(oesorichtlijnen.nl\)](#).

³ See OECD Guidelines (2011) [Full text.pdf \(oecd.org\)](#).

⁴ [Government promotion of Responsible Business Conduct \(RBC\) \(2020\)](#).

There are currently 51 countries that adhere to the OECD Guidelines. They are thus the only international guidelines for RBC to be formally endorsed by governments. They also represent the only international framework for RBC that includes a dispute settlement mechanism; each country that adheres to the OECD Guidelines is obliged to set up a National Contact Point (NCP). These NCPs should '[...] further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances.'⁵ The OECD has developed guidance to help enterprises carry out due diligence, including a general due diligence guidance and guidances for a number of specific sectors and supply chains.⁶

The principles and standards of conduct set out in the OECD Guidelines for internationally operating enterprises are not in themselves legally binding. In recent years, however, there have been initiatives in some EU member states, including the Netherlands, to make these standards mandatory through legislation.

In February 2022, the European Commission put forward a proposal for a Corporate Sustainability Due Diligence Directive (CSDDD), making RBC-based due diligence mandatory for large companies that are based in the EU or that generate a large turnover within the EU.⁷ In response, the Council of the European Union adopted an official position in December 2022.⁸ The European Parliament adopted its position on the CSDDD at the beginning of June 2023.⁹

1.3 Method

The NCP compared the text of the Commission proposal for the CSDDD (2022) and of the Council position on the proposed CSDDD (2022) (together referred to as the CSDDD regulatory framework) using the text of the OECD Guidelines for Multinational Enterprises (2011) and of the OECD Due Diligence Guidance for Responsible Business Conduct (2018) (together referred to as the OECD regulatory framework).¹⁰ This involved a comparative analysis of 20 key areas relating to due diligence under the OECD regulatory framework, in three categories: the due diligence process, the scope of due diligence and the characteristics of due diligence.¹¹ With respect to 14 of these key areas, the NCP identified notable points of divergence between the CSDD and OECD frameworks. From these, the NCP has distilled several points of attention regarding limitations of the CSDDD framework compared with the OECD framework that it believes could potentially impact negatively on the OECD Guidelines' effectiveness and observance thereof. These include one overarching point of attention and, by way of further elaboration, ten more specific ones. With regard to the latter, the NCP has considered whether they have been addressed to some extent in the European Parliament's position, and whether

⁵ See OECD Due Diligence Guidance for Responsible Business Conduct (2018) [OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf](#).

⁶ See. [Due Diligence - Organisation for Economic Co-operation and Development \(oecd.org\)](#)

⁷ See European Commission Proposal [Sustainable corporate governance \(europa.eu\)](#).

⁸ See Council of the European Union text [pdf \(europa.eu\)](#).

⁹ See European Parliament text [Texts adopted - Thursday, 1 June 2023 \(europa.eu\)](#).

¹⁰ Both the articles and the considerations were assessed.

¹¹ Key points in category I: step 1 in due diligence (DD) process; step 2 DD process; step 3 DD process; step 4 DD process; step 5 DD process; step 6 DD process. Key points in category II: companies and sectors; geographic scope; themes; relevant risks/adverse impacts; reach within the supply chain. Key points in category III: the expectation that due diligence should be preventative, risk-based, dynamic, situational and adaptable, and entail prioritisation, responsibility, stakeholder engagement and ongoing communication.

any relevant changes have been made to the points in question in the June 2023 update of the OECD Guidelines.

1.4 Structure of the report

[Chapter 2](#) of this report gives an outline of the OECD regulatory framework and looks at the 20 key areas that can be derived from it. [Chapter 3](#) contains an overview of 14 areas in which there are notable points of divergence between the CSDDD regulatory framework and the OECD regulatory framework. [Chapter 4](#) examines which of these points of divergence are, in the opinion of the NCP, points of attention. The conclusion with the answer to the research question is presented in [Chapter 5](#).

2. Due diligence according to the OECD regulatory framework

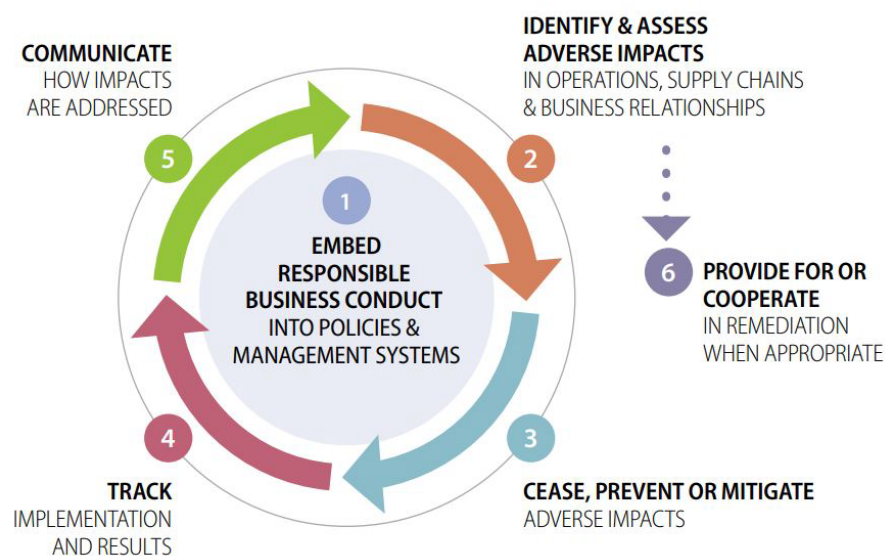
2.1 Introduction

This chapter gives an outline of the OECD regulatory framework on due diligence as set out in the OECD Guidelines for Multinational Enterprises (2011) and the OECD Due Diligence Guidance for Responsible Business Conduct (2018). It then looks at the due diligence process (2.2), the scope of due diligence (2.3) and the essential characteristics of due diligence (2.4). Lastly, it gives an overview of the relevant changes in the updated version of the OECD Guidelines issued in June 2023.¹²

2.2 Due diligence process

The OECD Guidelines describe due diligence as ‘... the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems’.¹³ The due diligence process that enterprises are expected to integrate into their corporate decision-making and risk management under the OECD Guidelines involves a bundle of interrelated processes.¹⁴ These can be shown as a cycle of six steps (see Figure 1): (1) embedding RBC into the enterprise’s policies and management systems; (2) identifying and assessing actual or potential adverse impacts of operations, products or services, (3) ceasing, preventing and mitigating adverse impacts, (4) tracking the practical implementation and results of the enterprise’s due diligence activities, (5) communicating how adverse impacts are addressed; and (6) providing for or cooperating in remediation.

Figure 1: Due diligence process and supporting measures¹⁵



¹² In the updated version, the name of the OECD Guidelines and the name of the NCPs have been changed to, respectively: ‘OECD Guidelines for Multinational Enterprises on Responsible Business Conduct’ and ‘National Contact Points on Responsible Business Conduct’.

¹³ See DD Guidance pp. 15-16. See also OECD Guidelines, Chapter 2, Commentary on General Policies, para 14.

¹⁴ See DD Guidance p. 16.

¹⁵ See DD Guidance p. 21.

2.3 Scope of due diligence

The OECD Guidelines and the responsibility enshrined in them for carrying out a due diligence process applies to all multinational enterprises (MNEs), regardless of their ownership structure, in all sectors and of all sizes, operating or based in countries adhering to OECD Guidelines for MNEs, including multinational, small and medium-sized enterprises (SMEs) and their parent companies, subsidiaries and local entities.¹⁶ They also apply regardless of where the business activities are conducted and regardless of local statutory provisions. In countries where domestic laws and standards conflict with the principles and standards of the OECD Guidelines, enterprises are expected to seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law.¹⁷ The due diligence process is expected to cover the following RBC themes from the OECD Guidelines: human rights; employment and industrial relations; environment; combating bribery, bribe solicitation and extortion; consumer interests; and disclosure.¹⁸

Due diligence under the OECD Guidelines does not relate to the risk of adverse impacts on the enterprise itself, such as reputational risk or financial risk as a result of litigation, but to adverse impacts on people, the environment and society.¹⁹ The responsibility of enterprises is not confined to adverse impacts caused or contributed to by their operations, but also extends to abuses that are directly linked with their operations, products or services through business relationships in their supply chain. If corporate activities result in actual or potential adverse impacts, the relationship of the enterprise to the adverse impacts determines how it should respond to them. There are, for example, higher expectations of enterprises that have actually or potentially caused an adverse impact than those that are directly linked with adverse impacts. Measures range from 1) preventing, ceasing or mitigating the adverse impacts, to 2) providing remediation, to 3) using leverage to mitigate the impact to the greatest possible extent.

2.4 Characteristics of due diligence

According to the OECD regulatory framework, due diligence has the following essential characteristics:²⁰

- **Due diligence is preventative**
The OECD regulatory framework states that due diligence should be preventative. The purpose of due diligence is first and foremost to avoid causing or contributing to adverse impacts on people, the environment and society, and to seek to prevent adverse impacts that are directly linked to the enterprise's operations, products or services through its business relationships.
- **Due diligence involves multiple processes and objectives**
The concept of due diligence under the OECD Guidelines for MNEs involves a bundle of interrelated processes. Due diligence should be an integral part of enterprise decision-making and risk management. Embedding RBC in policies and management systems helps enterprises prevent adverse impacts on RBC issues.

¹⁶ See OECD Guidelines, Chapter I Concepts and Principles, para. 4-6; DD Guidance p. 9.

¹⁷ See OECD Guidelines, Chapter I Concepts and Principles, para. 1-3.

¹⁸ See OECD Guidelines, Chapter II General Policies, para. 10 and Commentary on General Policies, para. 14. See also DD Guidance p. 10.

¹⁹ See DD Guidance, Box 1, p. 15.

²⁰ See DD Guidance pp. 16-19.

- **Due diligence is commensurate with risk (risk-based)**
 Under the OECD Guidelines, due diligence should be commensurate with the associated RBC risks. The measures that an enterprise takes to conduct due diligence should be commensurate with the severity and likelihood of the adverse impact. Due diligence should also be adapted to the nature of the adverse impact on particular RBC issues, such as human rights, the environment and corruption. This involves tailoring approaches to specific risks and considering how these risks affect different groups.
- **Due diligence can involve prioritisation (risk-based)**
 Under the OECD Guidelines, due diligence may require prioritisation. Where it is not feasible to address all identified impacts at once, an enterprise should prioritise the order in which it takes action based on the severity and likelihood of the adverse impact. Once the most significant impacts are identified and dealt with, the enterprise should move on to address less significant impacts.
- **Due diligence is dynamic**
 Under the OECD Guidelines, due diligence should be dynamic in the sense of an ongoing, responsive and changing process with feedback loops so that the enterprise can learn from what worked and what did not work. Enterprises should aim to progressively improve their systems and processes to avoid and address adverse impacts and should respond adequately to potential changes in their risk profile as circumstances evolve.
- **Due diligence does not shift responsibilities**
 Under the OECD Guidelines, due diligence does not shift responsibilities. Each enterprise is called upon to take responsibility for adverse impacts.
- **Due diligence concerns internationally recognised standards of RBC**
 The OECD Guidelines for MNEs provide principles and standards of RBC consistent with applicable laws and internationally recognised standards. Due diligence can help enterprises observe their legal obligations on matters pertaining to the OECD Guidelines. In countries where domestic legislation conflicts with the principles and standards of the OECD Guidelines, due diligence can also help enterprises honour the OECD Guidelines for MNEs to the fullest extent which does not place them in violation of domestic law.
- **Due diligence is appropriate to an enterprise's circumstances**
 Under the OECD Guidelines, due diligence should be appropriate to an enterprise's circumstances. The nature and extent of due diligence can be affected by factors such as the size of the enterprise, the context of its operations, its business model, its position in supply chains, and the nature of its products or services.
- **Due diligence can be adapted to deal with the limitations of working with business relationships**
 Under the OECD Guidelines, due diligence can be adapted to deal with the limitations of working with business relationships. Enterprises may face practical and legal limitations to how they can influence or affect business relationships to cease, prevent or mitigate adverse impacts on RBC issues or remedy them. They can seek to overcome these challenges to influence business relationships through various channels (such as contractual arrangements, pre-qualification requirements, voting trusts and cross-sectoral initiatives).

- **Due diligence is informed by engagement with stakeholders**
Under the OECD Guidelines, due diligence is informed by engagement with stakeholders. Stakeholders are persons or groups who have interests that could be affected by an enterprise's activities. Stakeholder engagement is characterised by two-way communication. It requires the timely sharing of the information needed for stakeholders to make informed decisions in a format that they can understand and access. Meaningful engagement with stakeholders remains important throughout the due diligence process.
- **Due diligence involves ongoing communication**
Under the OECD Guidelines, due diligence involves ongoing communication. Communicating information on due diligence processes, findings and plans is part of the due diligence process itself. Information should be accessible to its intended audiences (e.g. stakeholders, investors, consumers, etc.) and be sufficient to demonstrate the adequacy of an enterprise's response to impacts.

2.5 Relevant changes in the updated version of the OECD Guidelines

On 8 June 2023, the new version of the OECD Guidelines entered into force; this was an update of the 2011 version. No fundamental changes were made in relation to due diligence; in other words, the changes related mainly to clarification. To this end, many texts from the Due Diligence Guidance were incorporated into the OECD Guidelines; this reinforced the status and expectations of the due diligence process in the OECD regulatory framework.

The most significant changes in relation to the due diligence process in the 2023 version of the OECD Guidelines are as follows:

1. Clarification of the six due diligence steps and of most of the due diligence characteristics;
2. Addition of specified due diligence obligations to the chapters Disclosure, Environment and Combating Bribery and Other Forms of Corruption;
3. Thematic extension of due diligence to the chapter Science, Technology and Innovation;
4. Clarification of due diligence obligations relating to the downstream part of the value chain, including expectations associated with use of products and services by consumers;
5. Clarification of the requirement for stakeholder engagement in the due diligence process;
6. Clarification that business relationships extend beyond the first tier in the supply chain;
7. Clarification that consumers are not generally regarded as business relations, but that an enterprise could contribute to an adverse impact caused by the consumer;
8. Emphasis on enterprises' own responsibility for carrying out due diligence, even if they are part of a partnership at industry or multi-stakeholder level;
9. Emphasis on enterprises' obligation to share RBC information with stakeholders as part of due diligence;
10. Greater focus on the need for enterprises to devote more attention to adverse impacts on marginalised or vulnerable groups and individuals, such as human rights defenders and indigenous peoples, and their need to be mindful of the principle of free, prior and informed consent (FPIC).

3. Comparative analysis of the OECD and CSDDD regulatory frameworks

3.1 Introduction

This chapter presents an overview of notable points of divergence between the OECD and CSDDD regulatory frameworks in a number of key areas. In line with the overview in Chapter 2, the key areas to be discussed relate to, respectively, the due diligence process (3.2), the scope of due diligence (3.3) and the characteristics of due diligence (3.3).

Each key area will be prefaced by an outline of the main elements of the OECD regulatory framework; in other words, what is expected from enterprises under the OECD Guidelines (2011) and the Due Diligence Guidance (2018). An outline will then be given of the main elements of the CSDDD regulatory framework; in other words, the proposed obligations for enterprises under the Commission proposal and the Council position, with any significant differences between the two indicated by [...]. This will be followed by a point-by-point summary of notable points of divergence between the CSDDD and OECD regulatory frameworks, with a focus on expectations for corporate behaviour under the OECD framework that are reflected in a fundamentally different way, to a lesser extent or not at all in the CSDDD framework.

The following outline of the OECD and CSDDD regulatory frameworks for each key area is not exhaustive; the same applies to the list of divergences. The focus is on the standards of corporate behaviour embedded in the two frameworks; provisions relating to the CSDDD's implementation and enforcement have largely been excluded from consideration. Where reference is made to 'enterprises' or 'financial enterprises', this means financial and other enterprises that fall within the scope of the regulatory frameworks in question. Among the due diligence characteristics, a preselection has already been made of those on which there are notable divergences; these are discussed in full (and therefore not in bullet points). The observation in this Chapter that differences exist between the two regulatory frameworks is of a factual nature; a more normative analysis will follow in Chapter 4.

3.2 Due diligence process

➤ Step 1

Under the OECD regulatory framework, enterprises are expected to embed responsible business conduct into their policies and management systems. This is elaborated in three ways:

- 1) The enterprise should devise, adopt and disseminate a combination of policies on RBC issues that articulate the enterprise's commitments to the principles and standards contained in the OECD Guidelines for MNEs. This should contain a description of the enterprise's plans for implementing due diligence, which will be relevant for its own operations, its supply chain and other business relationships.
- 2) The enterprise should seek to embed its policies on RBC issues into its oversight bodies. The enterprise's policies on RBC issues should be embedded into management systems so that they are implemented as part of the regular business processes, taking into account the potential

independence, autonomy and legal structure of these bodies that may be foreseen in domestic law and regulations.

- 3) The enterprise should incorporate RBC expectations and policies into with suppliers and other business relationships.

Each of these three points is developed further in the Due Diligence Guidance in the form of practical actions to be undertaken by enterprises.

Under the CSDDD regulatory framework, enterprises are in essence required to embed due diligence in all their corporate policies and to have a due diligence policy. This policy should comprise:

- a) a description of the company's approach to due diligence,
- b) a code of conduct describing the rules and principles to be followed by the company's employees and subsidiaries [Council: and direct or indirect business partners],
- c) a description of the processes put in place to implement due diligence, including the measures taken to verify compliance with the code of conduct and to extend its application to established business relationships [Council: business partners].

The policy should be reviewed annually [Council: every 24 months] and in the event of relevant changes, and modified where necessary. In order to prevent or terminate identified adverse impacts, companies should seek to obtain contractual assurances from partners that they will ensure compliance with the code of conduct and that similar assurances will be obtained from other partners in the value chain, and they should take appropriate measures to verify compliance with the contractual assurances.

Notable points on which the CSDDD and OECD regulatory frameworks diverge:

- There is no requirement to develop specific policies for the main risks relating to the enterprise with a view to specifically addressing those risks;
- Provisions on communication, information-sharing, training, education and internal coordination in respect of the enterprise's policies on RBC issues (e.g. for employees and other workers) are for the most part lacking;
- There is no obligation to publish policies on RBC issues in full (for example on the website, at company premises or, if relevant, in the local language), in line with the reporting standards in the Corporate Sustainability Reporting Directive (CSRD).
- The Council position lacks any provisions relating to the integration of policies on RBC issues into the company's oversight bodies or at board level. The Commission proposal does include a provision about directors' responsibility for putting in place and overseeing due diligence measures and due diligence policy.
- What is largely missing are provisions on how to integrate policies on RBC issues into management systems so that they become part of routine business processes (for example, by assigning responsibility for aspects of such policies to appropriate departments, developing or adapting information and administration systems and communication channels, promoting coordination between teams and business units, developing incentives for employees and business units, establishing internal complaints procedures, and developing processes in the event of non-compliance with policies on RBC issues.
- The Commission proposal refers to a code of conduct with rules and principles to be followed (only) by the company's employees and subsidiaries; the proposal does however require a description

of the measures taken by the company to extend its application to established business relationships. The Council position refers to a code of conduct describing the rules and principles to be followed by the company's employees and subsidiaries and the company's direct or indirect business partners; here too, a description is required of the measures taken to extend its application to business partners.

- Companies are not expected to seek to understand in a general sense the barriers arising from the way the company does business that may hinder suppliers and other business partners from implementing RBC policies, or to address those barriers.

➤ Step 2

Under the OECD regulatory framework, enterprises are expected to identify and assess actual and potential adverse impacts associated with their operations, products or services. These expectations are developed further in four ways:

- 1) The enterprise should carry out a broad scoping exercise to identify all areas of the business, across its operations and relationships, including in its supply chains, where RBC risks are most likely to be present and most significant. Relevant elements include, among other things, information about sectoral, geographical, product and enterprise risk factors, including known risks the enterprise has faced or is likely to face. The scoping exercise should enable the enterprise to carry out an initial prioritisation of the most significant risk areas for further assessment. For enterprises with less diverse operations, in particular smaller enterprises, a scoping exercise may not be necessary before moving to the stage of identifying and prioritising specific impacts.
- 2) Starting with the significant areas of risk identified above, the enterprise should carry out iterative and increasingly in-depth assessments of prioritised operations, suppliers and other business relationships in order to identify and assess specific actual and potential adverse RBC impacts.
- 3) The enterprise should assess its involvement with the actual or potential adverse impacts identified in order to determine the appropriate responses (see Step 3, points 1 and 3). Specifically, it should assess whether it: caused (or would cause) the adverse impact; or contributed (or would contribute) to the adverse impact; or whether the adverse impact is (or would be) directly linked to its operations, products or services by a business partner.
- 4) Drawing from the information obtained on actual and potential adverse impacts, the enterprise should, where necessary, prioritise the most significant RBC risks and impacts for action, based on severity and likelihood. Prioritisation will be relevant where it is not possible to address all potential and actual adverse impacts immediately. Once the most significant impacts are identified and dealt with, the enterprise should move on to address less significant impacts.

Each of the four points is elaborated further in the Due Diligence Guidance in the form of practical measures to be undertaken by enterprises.

Under the CSDDD regulatory framework, companies are required to identify actual and potential adverse human rights and environmental impacts of their own activities or those of their subsidiaries and, if they are associated with their value chains [Council: chains of activities], those of their established business relationships [Council: business partners]. Such identification should be based on quantitative and qualitative information. Companies shall, where relevant, also carry out consultations with potentially affected groups, including workers and other stakeholders, to gather information on actual or potential adverse impacts. Identification of adverse impacts should include assessing the human rights and environmental context in a dynamic way and at regular intervals – at least once

every 12 months [Council: every 24 months], throughout the life of an activity or relationship. The Council position stipulates that companies should prioritise identified adverse impacts according to their severity and likelihood, if it is not possible to address all identified adverse impacts at the same time to the full extent.

Notable points on which the CSDDD and OECD regulatory frameworks diverge:

- The identification of RBC risks is limited to adverse impacts of the company's own operations, those of its subsidiaries and of its established business relationships (business partners) if they are associated with the company's value chain (chain of activities).
- There is no mention of identifying the main RBC risk areas (i.e. business areas, operations and relationships, including supply chains, where the likelihood of RBC risks is highest and most significant) or prioritising these as a starting point for further assessment of actual and potential adverse impacts.
- Companies are not asked to assess their involvement in the identified actual or potential adverse impacts (caused, contributed to or directly linked to) to determine the correct approach.
- The Commission proposal does not mention prioritisation of the main RBC risks and impacts to be addressed in cases where it is not possible to address all potential and actual adverse impacts at the same time. The Council position does include a provision on this.
- Companies are not asked when identifying adverse impacts [on human rights] to focus on potential adverse impacts on individuals from groups or populations that are vulnerable or at high risk of marginalisation, or to take into account the potentially different impacts on men and women.
- Companies are not asked to consult with business relations, other related companies or actually or potentially affected stakeholders when assessing the company's involvement in adverse impacts or on prioritisation decisions.
- There is no provision for cooperating in official mechanisms to resolve disagreements and enable remediation if stakeholders or rightsholders disagree with the company's assessment of its involvement in an adverse impact.
- Companies that fall within the scope of the CSDDD because they operate in a high-risk sector are only required to identify the adverse impacts relevant to the sector concerned.
- Financial enterprises are not required to assess the adverse impacts of their financial services on a dynamic basis or at regular intervals; they are only required to identify these impacts before the start of the service provision.

➤ Step 3

Under the OECD regulatory framework, enterprises are expected to cease, prevent and mitigate adverse impacts. This is developed further in two ways:

- 1) The enterprise should stop activities that are causing or contributing to adverse impacts on RBC issues. This should be done on the basis of the enterprise's assessment of its involvement with adverse impacts, as stated in point 3 of Step 2. The enterprise should develop and implement plans that are fit-for-purpose to prevent and mitigate potential (future) adverse impacts.
- 2) Based on the enterprise's prioritisation (Step 2, point 4), it should develop and implement plans to seek to prevent or mitigate actual or potential adverse impacts on RBC issues which are directly linked to the enterprise's operations, products or services by business relationships. These plans should detail the actions the enterprise will take, as well as its expectations of its suppliers, buyers and other business relationships. Appropriate responses to risks associated with business

relationships may at times include: continuation of the relationship throughout the course of risk mitigation efforts; temporary suspension of the relationship while pursuing ongoing risk mitigation; or, disengagement with the business relationship either after failed attempts at mitigation, or where the enterprise deems mitigation not feasible, or because of the severity of the adverse impact. A decision to disengage should take into account potential social and economic adverse impacts.

Each of these two points is developed further in the Due Diligence Guidance in the form of practical measures to be undertaken by enterprises.

Under the CSDDD regulatory framework, in respect of identified *potential* adverse impacts, enterprises are required to take appropriate measures to prevent, or where prevention is not possible or not immediately possible, adequately mitigate these impacts. This concerns the following measures:

- i) A prevention action plan, where necessary;
- ii) Contractual assurances from a business partner with which it has a direct business relationship [Council: direct business partners] that it will comply with the company's code of conduct and any prevention action plan, and will itself insist on corresponding contractual assurances from its partners;
- iii) The necessary investments;
- iv) Targeted and proportionate support for SMEs with which the company has an established business relationship [Council: SMEs which are business partners of the company], where necessary;
- v) Collaboration with other entities;
- vi) If these measures do not suffice, where possible a contract with a partner with which an indirect relationship exists [Council: indirect business partner], with a view to achieving compliance with the company's code of conduct or a prevention action plan.

With regard to the contractual assurances and any contract with a partner, appropriate measures should be taken to verify compliance. As regards potential adverse impacts that could not be prevented or adequately mitigated, the company shall be required to refrain from entering into new or extending existing relations with the partner in connection with or in the value chain [Council: chain of activities] where the impact has arisen and, where possible, suspend or, if the potential adverse impact is severe, terminate the existing commercial relations.

Under the CSDDD regulatory framework, in respect of identified *actual* adverse impacts, companies are required to take appropriate measures to bring these impacts to an end or, where that is not possible, to minimise the extent of such an impact. This concerns the following measures:

- i) Neutralising or minimising adverse impacts, including by the payment of damages to the affected persons and of financial compensation to affected communities;
- ii) A corrective action plan, where necessary;
- iii) Contractual assurances from business partners with which a direct business relationship exists [Council: direct business partners] that they will comply with the company's code of conduct and any corrective action plan and will themselves insist on corresponding assurances from their business partners;
- iv) The necessary investments;

- v) Targeted and proportionate support for SMEs with which the company has an established business relationship [Council: SMEs which are business partners of the company], where necessary;
- vi) Collaboration with other entities;
- vii) If these measures do not suffice, where possible a contract with a partner with which an indirect relationship exists [Council: indirect business partner], with a view to achieving compliance with the company's code of conduct or a corrective action plan.

With regard to the contractual assurances and any contract with a partner, appropriate measures should be taken to verify compliance. As regards actual adverse impacts that could not be brought to an end or the extent of which could not be minimised, the company shall [Council: as a last resort] refrain from entering into new or extending existing relations with business partners in connection with or in the value chain [Council: chain of activities] where the impact has arisen and, where possible, suspend or, if the potential adverse impact is severe, terminate existing commercial relations.

Notable points on which the CSDDD and OECD regulatory frameworks diverge:

- In a general sense, the measures to be taken make no distinction according to the company's degree of involvement (whether it caused the adverse impacts, contributed to them or is directly linked to them), although this does play a role on some specific points. The focus is not so much on the company's degree of involvement, but on the question of whose activities are causing the adverse impacts: the company's, its subsidiary's or (direct) business partner's, or those of its (indirect) business partner in the supply chain.
- As regards the measures to be taken, a distinction is made between potential adverse impacts on the one hand and actual adverse impacts on the other.
- The summary of appropriate measures is an exhaustive list; in other words, measures other than those listed are not mandatory under the CSDDD.
- The cessation of activities that cause or contribute to adverse impacts is not the CSDDD's main priority; its focus is on bringing impacts to an end.
- Provisions are lacking for assigning responsibility to senior management level for ceasing or preventing activities that cause or contribute to adverse impacts.
- The same applies to provisions for training a company's own and its business partners' employees.
- Provisions are lacking for the coordination or joint development of prevention or corrective action plans with business partners.
- Consultation with actual or potential affected parties is prescribed only in relation to the formulation of a prevention or corrective action plan, not to its implementation or to the elaboration of other appropriate measures.
- The expectation that the company will support relevant suppliers and other business partners in preventing or mitigating adverse impacts or risks (for example, through training, upgrading facilities or enhancing their management systems) is reduced to an obligation to provide support for SMEs with which the company has an established business relationship. Moreover, this obligation to provide support is limited to cases where compliance with the code of conduct or corrective action plan would jeopardise the SME's viability.
- There is less emphasis on using leverage on business partners in various ways (e.g., through pre-qualification requirements, voting rights, licensing or franchise agreements) to prevent, mitigate or bring to an end adverse impacts. This is reduced in the CSDDD to obtaining contractual assurances from direct supply chain partners or contracts with indirect supply chain partners on compliance with the RBC code of conduct or a preventive or corrective action plan.

- By way of exception, financial enterprises are not required to suspend or terminate business relationships if the measures taken are not adequate [if doing so can be reasonably expected to cause significant harm to the entity to which the service is being provided].

➤ Step 4

Under the OECD regulatory framework, enterprises are expected to track implementation and results. This is elaborated as follows:

The enterprise should track the implementation and effectiveness of its due diligence activities, i.e. its measures to identify, prevent, mitigate and, where appropriate, support remediation of impacts, including with business relationships. The lessons learned from tracking should be used to improve these processes in the future.

This is elaborated further in the Due Diligence Guidance in the form of practical measures to be undertaken by enterprises.

Under the CSDDD regulatory framework, enterprises are required to carry out periodic assessments of their own operations and measures, those of their subsidiaries and, where related to the value chains [Council: chains of activities] of the company, those of their established business relationships [Council: business partners], to monitor their effectiveness. Such assessments will have to be based, where appropriate, on qualitative and quantitative indicators and be carried out at least every 12 months [Council: every 24 months] and in the event of significant changes. Where a prevention action plan is developed and implemented to prevent, mitigate or bring to an end adverse impacts, it should contain reasonable and clearly defined timelines for measures and qualitative and quantitative indicators for measuring improvement, and should be drafted in consultation with stakeholders. Where, to prevent, mitigate or bring to an end adverse impacts, contractual assurances are obtained from a business partner with which an established business relationship exists [Council: direct business partner] or a contract is entered into with a partner with whom the enterprise has an indirect business relationship [Council: indirect business partner], these should be accompanied by appropriate measures to verify compliance. For the purposes of verifying compliance, the company may refer to suitable industry initiatives or independent third-party verification.

Notable points on which the CSDDD and OECD regulatory frameworks diverge:

- The Council position states that financial enterprises are only required to conduct periodic assessments in respect of their business partners to track the effectiveness of actions taken (Step 3), not the effectiveness of the identification of adverse impacts (Step 2).
- There is no mention of communicating the results of the tracking to relevant levels within the enterprise.
- Companies are not required to seek periodic reviews of relevant multistakeholder initiatives or initiatives from the sector to which they belong. Mention is made of guidance to be issued by the Commission to assess the suitability of such schemes, but it remains unclear who should conduct these reviews and how often.

➤ Step 5

Under the OECD regulatory framework, enterprises are expected to communicate how adverse impacts are addressed. This is elaborated as follows:

The company should communicate externally relevant information on due diligence policies, processes and activities conducted to identify and address actual or potential adverse impacts, including the findings and outcomes of those activities.

This is developed further in the Due Diligence Guidance in the form of practical measures to be undertaken by enterprises.

Under the CSDDD regulatory framework, companies that are not covered by the CSRD are required to report on the matters covered by the CSDDD by publishing on their website an annual statement in a language customary in the sphere of international business. The Commission shall issue further rules concerning the content and criteria for such reporting, specifying information on the description of due diligence, potential and actual adverse impacts and actions taken on those. Enterprises that are within the scope of the CSRD are already required to communicate externally relevant information on due diligence policies, processes and activities conducted to identify and address actual or potential adverse impacts, including the findings and outcomes of those activities. On 6 June, the European Commission published for public consultation a draft version of a delegated act with technical specifications relating to how enterprises can meet the reporting requirements in the CSRD (the European Sustainability Reporting Standards, ESRS).

Notable points on which the CSDDD and OECD regulatory frameworks diverge:

- Nine points can be derived from the Due Diligence Guidance in respect of which companies are expected to include information in their reporting:
 - i) RBC policies;
 - ii) measures taken to embed RBC into policies and management systems;
 - iii) the enterprise's identified areas of significant risks;
 - iv) the significant adverse impacts or risks identified, prioritised and assessed;
 - v) the prioritisation criteria; and
 - vi) the actions taken to prevent or mitigate those risks, where possible including:
 - vii) estimated timelines and benchmarks for improvement and their outcomes;
 - viii) measures to track implementation and results; and
 - ix) the enterprise's provision of or cooperation in any remediation.

Despite the fact that the ESRS (the technical elaboration of the CSRD) specifically states that this should enable the company to report according to the OECD Guidelines, it is impossible to say with any certainty until the ESRS is finalised whether the reporting standards it contains will actually lead to transparency on each of these nine points.

- For companies not, or not yet, covered by the CSRD, until the Commission has established criteria for the content of their annual statement, there is no certainty as to whether these criteria will be in line with what is expected under the OECD regulatory framework with regard to Step 5 of the due diligence process.

➤ Step 6

Under the OECD regulatory framework, companies are expected to provide for or cooperate in remediation when appropriate. This is broken down into two points:

- 1) When the enterprise states that it has caused or contributed to actual adverse impacts, it should address these impacts by providing for or cooperating in their remediation.
- 2) When appropriate, the enterprise should provide for or cooperate with legitimate remediation mechanisms through which impacted stakeholders and rightsholders can raise complaints and seek to have them addressed with the enterprise. Referral of an alleged impact to a legitimate remediation mechanism may be particularly helpful in situations where there are disagreements on whether the enterprise caused or contributed to adverse impacts (see Step 2, point 3), or on the nature and extent of remediation to be provided.

Each of the two points is developed further in the Due Diligence Guidance in the form of practical measures to be undertaken by enterprises.

Under the CSDDD regulatory framework, companies are required to take appropriate measures, where appropriate, to mitigate or bring to an end actual adverse impacts that have been or should have been identified [Council: and, where necessary, prioritised] pursuant to the CSDDD, including by the payment of damages to the affected persons and of financial compensation to the affected communities [Council: take the appropriate actions, including providing remediation to the affected persons and communities]. Companies are also required to provide the possibility for certain persons and organisations (including those who are actually or potentially affected, trade unions and NGOs) to submit complaints directly to them where they have legitimate concerns regarding actual or potential adverse human rights impacts and adverse environmental impacts with respect to their own operations, the operations of their subsidiaries and their value chains. They should establish a procedure for dealing with complaints and inform the workers and trade unions concerned of those procedures. Complainants are entitled to request appropriate follow-up on the complaint from the company and to meet with the company's representatives at an appropriate level to discuss potential or actual severe adverse impacts that are the subject of the complaint.

Notable points on which the CSDDD and OECD regulatory frameworks diverge:

- The provisions on providing remediation to affected parties do not form a separate part of the due diligence cycle (Step 6), but are part of a broader set of actions to be taken by the company in response to identified (and prioritised) actual adverse impacts (Step 3).
- There is no further elaboration regarding exactly what remediation entails or in respect of the different types of remedy that could be considered in this context. The Commission proposal puts considerable emphasis on financial compensation, which is just one of many possible remedies, as an appropriate measure to end actual adverse impacts. What is not clearly reflected is the requirement for restitution of affected persons to the situation they would have been in had the adverse impacts not occurred.
- The Council position discusses providing 'remediation to the affected persons and communities', which would seem to exclude remedial measures in respect of, for example, nature or biodiversity.
- Nowhere in the Council position does it stipulate that remediation should be proportionate to the significance and scope of the adverse impacts. According to the Council position, the determination of appropriate remedies should be based solely on who caused the adverse

impacts, in whose operations they occurred and, if caused by a business partner, the extent to which the company can influence that business partner.

- The requirement to provide remediation to affected parties is in principle not limited to cases in which the company caused or contributed to the adverse impacts, even though the Commission proposal does stipulate that the action should be proportionate to the extent to which the company contributed to the adverse impact.
- Provisions on consultation with affected parties on remedial measures are lacking, as is the obligation to determine or attempt to determine whether complainants are satisfied with the process and its outcomes.
- The CSDDD's system excludes state-based, non-judicial remediation mechanisms altogether. Although the possibility of filing a complaint with the supervisory authority does exist, this is not a remediation mechanism because the procedure is aimed at monitoring companies' compliance with CSDDD requirements and not primarily at remediation for affected parties.
- With the exception of operational-level grievance mechanisms, non-state-based remediation mechanisms do not feature in the CSDDD system, although the Council position does still discuss 'participation in collaborative complaints procedures, including those established jointly by companies, through industry associations or multistakeholder initiatives'.
- There are no provisions for cooperation with legitimate remediation mechanisms, for example where parties disagree about the degree of the company's involvement in the adverse impacts or the nature and scope of the remedy. It should be borne in mind that this gap is neither filled by the complaints procedure handled by the supervisory authority, which is not primarily aimed at remediation for affected parties, nor by civil liability procedures, which are essentially adversarial procedures and in respect of which there are no provisions on appropriate measures to remove legal, practical or other barriers that might impede access to redress.
- The operational-level grievance mechanism does not have to meet all the relevant effectiveness criteria for non-judicial complaints mechanisms (legitimacy, accessibility, predictability, fairness, transparency and engagement based on dialogue). The Commission proposal makes no mention of such criteria; the Council position only refers to accessibility, fairness and transparency, thus not mentioning legitimacy, predictability or engagement based on dialogue.
- The option of submitting complaints directly to the company only needs to be offered in the event of 'legitimate concerns' regarding actual or potential adverse impacts.
- The right of complainants to meet with representatives at an appropriate level in the company to discuss actual or potential adverse impacts pertaining to the complaint only applies in the case of 'severe adverse impacts'.
- Detailed provisions on the setup of this operational-level grievance mechanism are almost entirely lacking (for example, timeframes for dispute resolution; processes for responding to complaints if no agreement can be reached or if the impacts are severe; defining the scope of the mandate; consulting with stakeholders on the right form and on ways of resolving complaints in culturally sensitive and accessible ways; staffing and resources; and performance monitoring).

3.3 Scope of due diligence

- Companies and sectors

Under the OECD regulatory framework, due diligence is expected to be carried out by:

- All multinational enterprises (MNEs), regardless of their ownership structure, in all sectors and of all sizes, operating or based in countries adhering to the OECD Guidelines for MNEs, including multinational, small and medium-sized enterprises (SMEs).
- All the entities within the MNE group – parent and local entities, including subsidiaries.

The OECD Guidelines do not give a precise definition of a multinational enterprise; they state that MNEs usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed. MNEs operate in all sectors of the economy. Multinational and domestic enterprises are subject to the same expectations in respect of their responsible business conduct wherever the Guidelines are applicable to both.

Under the CSDDD regulatory framework, the CSDDD applies to:

- i) large EU-based companies (>500 employees with net worldwide turnover of > €150 million), and
- ii) slightly smaller EU-based companies (>250 employees and a net worldwide turnover of >€40 million) with at least 50% of their turnover being generated in one of the CSDDD-designated high-risk sectors;
- iii) companies based outside the EU with an annual turnover of >€150 million generated in the EU; and
- iv) companies based outside the EU with an annual turnover of >€40 million but <€150 million generated in the EU and which generate at least 50% of their net worldwide turnover in one of the CSDDD-designated high-risk sectors. Designated as high-risk sectors under the CSDDD are: a) the textile, clothing and footwear industries; b) agriculture, forestry and fisheries; and c) the extractive industries.

Notable points on which the CSDDD and OECD regulatory frameworks diverge:

- The CSDDD applies exclusively to large companies and to slightly smaller (but still large) companies operating in certain RBC-high-risk sectors. Other companies fall outside the scope of the CSDDD.
- The CSDDD justifies the selection of designated high-risk sectors by referring to existing OECD guidelines for those sectors. However, this erroneously implies that under the OECD regulatory framework, it is specifically, or only, these sectors that are considered high-risk sectors.
- The CSDDD does not distinguish between 'national' and 'multinational' enterprises. Given the limitation of the scope of the CSDDD to large and very large enterprises, and given the broad interpretation of the term 'multinational enterprise' under the OECD regulatory framework, this does not in practice provide any widening of scope compared to the OECD Guidelines.

- In the Council position, financial enterprises fall outside the scope of the CSDDD, unless a member state opts to include its own financial enterprises within it. The same applies to pension institutions that are considered to be social security schemes.
 - In the Council position, asset managers and fund managers (collective investment vehicles) fall outside the scope of the CSDDD.
 - Both the Commission proposal and the Council position also exclude investment activities and certain other financial services because of the way in which ‘value chain’ [Council: chain of activities] is defined. In practice, this means that institutional and other investors do not have to carry out due diligence in respect of the operations of the companies in which they are investing, or of the adverse impacts related to those companies.
 - In the Council position, the distribution, transport, storage and disposal of dual-use items (goods, software and technology that can be used for both civil and military purposes) and of weapons, ammunition and war materiel also fall outside the scope of the CSDDD.
- Themes

Under the OECD regulatory framework, the practice of due diligence applies to:

- Disclosure (Chapter III, OECD Guidelines)
- Human rights (Chapter IV, OECD Guidelines)
- Employment and industrial relations (Chapter V, OECD Guidelines)
- Environment (Chapter VI, OECD Guidelines)
- Combating bribery, bribe solicitation and extortion (Chapter VII, OECD Guidelines)
- Consumer interests (Chapter VIII, OECD Guidelines)
- Science and technology (Chapter IX, OECD Guidelines; since 2023)

Under the CSDDD regulatory framework, companies are required to carry out due diligence in respect of actual and potential adverse impacts on human rights and the environment. In this connection, an adverse human rights impact means an adverse impact on protected persons resulting from the violation of one or more of the rights in the Annex, Part I, of the CSDDD or of one or more of the prohibitions enshrined in the international human and labour rights conventions listed in the Annex. An adverse environmental impact means an adverse impact on the environment resulting from the violation of one of the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex, Part II.

Notable points on which the CSDDD and OECD regulatory framework diverge:

- The due diligence obligations in the CSDDD have a narrower scope in addressing RBC themes than the OECD regulatory framework, as they only address human rights and the environment. They do not address disclosure, employment and industrial relations, combating corruption, bribery solicitation and extortion, consumer interests or science and technology. It should be noted, however, that the standards included in the chapter on employment and industrial relations are broadly encapsulated in Part I of the Annex to the CSDDD on human rights.
- In addition, the CSDDD is not ‘open’ in terms of applicable thematic rights and obligations, as is the OECD regulatory framework. Where environmental rights and obligations are concerned, the due diligence to be carried out by companies under the CSDDD has a closed character. This limits the interpretation of the concept of ‘adverse environmental impact’ in the CSDDD. Where rights and

obligations in relation to human rights are concerned, the CSDDD has a less closed but still not entirely open character.

- Part I of the Annex to the CSDDD does not cover all relevant international human rights standards. The Council position in particular is more limited in this respect.
 - Part II of the Annex to the CSDDD does not cover all the standards included in the chapter on the environment in the OECD Guidelines. The list in Part II of the Annex to the CSDDD is limited (in the Council position: extremely limited) and has a closed character.
 - Although the CSDDD does include an obligation to prepare a climate adaptation plan, climate change does not fall under the RBC topics to be addressed through due diligence. In the OECD regulatory framework, however, this is most certainly the case under the June 2023 update to the OECD Guidelines.
- Reach within the supply chain

Under the OECD regulatory framework, enterprises are required to carry out due diligence in relation to activities in the supply chain and to all business relationships, such as suppliers, franchisees, licensees, subcontractors, joint ventures, investors, clients, contractors, customers, consultants, financial, legal and other advisers, and any other state or non-state entities in any way linked to their business operations, products or services. The OECD regulatory framework covers the whole of the value chain, both upstream (suppliers) and downstream (consumers of products and services). As far as reach within the chain is concerned, the OECD regulatory framework is 'open' and is thus in principle unlimited.

Under the CSDDD regulatory framework, rules will be adopted in respect of a company's obligations to perform due diligence in relation to actual and potential adverse impacts on human rights and the environment. This concerns adverse impacts resulting from their own operations, the operations of their subsidiaries and activities in the value chain [Council: chain of activities] carried out by entities with whom the enterprise has an established business relationship [Council: business partners]. The CSDDD regulatory framework does not cover the whole of the value chain and, in terms of reach within the chain, is limited to established business relations [Council: business partners].

Notable points on which the CSDDD and OECD regulatory frameworks diverge:

Definition of chain

- The Commission proposal refers to a value chain and defines it as: activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company.
- In the Commission proposal, the term value chain is limited where the provision of loans, credit and other financial services by financial companies is concerned to the activities of the clients receiving such loan, credit and other financial services and of other companies belonging to the same group whose activities are linked to the contract in question. It therefore applies only to the activities of direct clients, not to risks associated with those clients' business relations.
- The Commission proposal makes it clear that SMEs that receive loans, credit, financing, insurance or reinsurance from financial companies are not part of financial companies' value chain.
- The Council position is significantly more limited on this point. It refers to a 'chain of activities' and defines this as primarily upstream, and only downstream to a very limited extent. The due diligence

obligation in respect of the use (or misuse) of a product or service, by business clients as well as consumers, is not mentioned in the Council position.

- With regard to the downstream part of the chain, financial companies in principle fall outside the scope of the CSDDD in the Council position; member states can, however, opt in to make them subject to the CSDDD provisions. In that case, financial companies' chain of activities is limited to 'the activities of the counterparts receiving such services, and their subsidiaries benefiting from the service whose activities are linked to the service in question'. The activities of more distant chain partners are therefore not covered. SMEs also fall outside the chain of activities, as do 'counterparts that are households or natural persons not acting in a professional or business capacity'.

Reach within the chain

- The Commission proposal limits the Directive's reach within the chain to operations carried out by entities with whom the company has an established business relationship. This entails two conditions: i) the business relationship, whether direct or indirect, must be (or be expected to be) lasting, and ii) it must concern a relationship with a contractor, subcontractor or any other legal entity (partner) with which the company has a commercial agreement or to which the company provides financing, insurance or reinsurance, or that performs business operations related to the products or services of the company for or on behalf of the company. The words 'direct or indirect' indicate that it does not apply solely to partners in the first tier of the chain.
- The Council position limits the reach in the chain to activities carried out by 'business partners'. These are legal entities: i) with which the company has a commercial agreement related to the operations, products or services of the company or to which the company provides certain services (direct [business partner]); or ii) which performs business operations related to the operations, products or services of the company (indirect [business partner]). The first category relates to partners in the first tier, the second extends beyond that.
- Both the Commission proposal and the Council position thus diverge from the principle in the OECD regulatory framework that the scope of responsibility is determined by impact, regardless of how far upstream or downstream in the value chain the impact occurs.

3.4 Characteristics of due diligence

- Preventative

The OECD regulatory framework states that due diligence should be preventative. The purpose of due diligence is first and foremost to avoid causing or contributing to adverse impacts on people, the environment and society, and to seek to prevent adverse impacts directly linked to the enterprise's operations, products or services through its business relationships. When involvement in adverse impacts cannot be avoided, due diligence should enable enterprises to mitigate them, prevent their recurrence and, where possible, remediate them.

In the CSDDD regulatory framework, the preventative effect of due diligence is more limited in several respects. One example is the fact that companies are not expected to seek, in a general sense, to understand or address the obstacles in preventing adverse impacts arising from the way they do business, which may hinder suppliers and other business relationships when implementing RBC policies (see Step 1). Another example is the focus on contractual assurances and contracts with supply chain partners for the prevention of adverse impacts, while the OECD regulatory framework offers a

broader range of possible actions in this respect, including pre-qualification requirements, voting trusts and licence or franchise agreements (see Step 3).

- Risk-based

Under the OECD regulatory framework, due diligence should be commensurate with the RBC risks. The measures that an enterprise takes to conduct due diligence should be commensurate with the severity and likelihood of the adverse impact. When the likelihood and severity of an adverse impact is high, then due diligence should be more extensive. Due diligence should also be adapted to the nature of the adverse impact on RBC issues, such as human rights, the environment and corruption. This requires an approach tailored to specific risks, taking into account how these risks affect different groups, for example by applying a gender perspective to due diligence.

In the CSDDD regulatory framework, the risk-based element of due diligence is more limited in several respects. The most striking example is the fact that when identifying or addressing adverse impacts, companies are not required to pay special attention to adverse impacts on individuals from groups or populations that are vulnerable or may have a heightened risk of marginalisation, or to take account of the potentially different impacts on men and women (see, for example, Step 2). In addition, due diligence under the CSDDD only needs to be tailored to the nature of adverse impacts on specific RBC themes to a very limited extent (in other words, only in very specific cases). Moreover, this is the case only with respect to human rights and not with respect to other themes that may require a specific approach, such as the environment or corruption.

- Dynamic

The OECD regulatory framework states that due diligence should be dynamic. The due diligence process is not static but ongoing, responsive and flexible. It includes feedback loops so that the enterprise can learn from what worked and what did not. Enterprises should aim to continually improve their systems and processes to avoid and address adverse impacts. Through the due diligence process, an enterprise should be able to adequately respond to potential changes in its risk profile as circumstances evolve (e.g. changes in a country's legislation, new risks in the sector, the development of new products or the establishment of new business relationships).

In the CSDDD regulatory framework, the dynamic nature of due diligence is more limited in several respects. This is particularly the case in relation to the obligations that apply to financial undertakings. They are not required to assess the adverse impacts of their financial services in a dynamic way or at regular intervals (see Step 2). In contrast to the obligations that apply to other enterprises under the CSDDD and unlike what is expected under the OECD regulatory framework, they are only required to identify these impacts before the start of service provision. Another example is that under the CSDDD, no *periodic* assessment of relevant multi-stakeholder or industry initiatives is required of companies, while the purpose of the periodic assessment is to continue to assess the suitability of the partnership in question as a measure to prevent, mitigate or eliminate adverse impacts not only at the outset but also afterwards (see Step 4).

- Own responsibility

Under the OECD regulatory framework, due diligence does not shift responsibilities. Each enterprise in a business relationship has its own responsibility to identify and address adverse impacts. The due

diligence recommendations of the OECD Guidelines for MNEs are not intended to shift responsibilities from governments to enterprises, or from enterprises causing or contributing to adverse impacts to enterprises that are directly linked to those adverse impacts through their business relationships. Instead, they recommend that each enterprise address its own responsibility with respect to adverse impacts. In cases where impacts are directly linked to an enterprise's operations, products or services through a business relationship, the enterprise should seek, to the extent possible, to use its leverage to effect change, individually or in collaboration with others.

The CSDD regulatory framework allows companies to enlist third parties to perform due diligence on a number of points, for instance through multi-stakeholder and industry initiatives, third-party verification to determine whether the measures taken are effective, and contractual assurances from and contracts with supply chain partners. While these options do not in themselves conflict with the OECD regulatory framework and may even be very useful, it is important to stress that the company itself remains responsible. The question is whether this is sufficiently clear from the provisions in question. Another example of a provision that could potentially detract from enterprises' responsibility under the OECD regulatory framework is the provision in the Council position on due diligence at group level (Art. 4a), under which subsidiaries no longer have to independently comply with all aspects of due diligence.

- Stakeholder engagement

Under the OECD regulatory framework, due diligence is expected to be based on engagement with stakeholders. Stakeholders are persons or groups who have interests that could be affected by an enterprise's activities, including, for instance, rightsholders as well as NGOs and trade unions. Stakeholder engagement is characterised by two-way communication. It requires the timely sharing of the relevant information needed for stakeholders to make informed decisions in a format that they can understand and access. To be meaningful, engagement calls for all parties to show good faith. Meaningful engagement with stakeholders remains important throughout the due diligence process. Particularly when the enterprise may cause or contribute to, or has caused or contributed to, an adverse impact, engagement with impacted or potentially impacted stakeholders and rightsholders will be important. Depending on the nature of the adverse impact being addressed, this could include participating in and sharing results of on-site assessments, developing risk mitigation measures, ongoing monitoring and the establishment of a grievance mechanism.

In the CSDDD regulatory framework, the principle of stakeholder engagement is more limited in several respects. In general terms, it does not appear from the CSDDD that stakeholder engagement is important throughout the due diligence process (i.e. in relation to all six steps). Although it is mentioned under several specific points, there are also many points where, contrary to expectations under the OECD regulatory framework, there is no requirement in the CSDDD for stakeholder engagement. One example is the fact that under the CSDDD, in the assessment of companies' involvement in adverse impacts or in respect of prioritisation decisions, they are not asked to consult with business relations, other relevant companies or actually or potentially impacted stakeholders (see Step 2). Another example is the lack of provisions relating to consultations with impacted parties about remediation mechanisms, including the operational-level grievance mechanism to be set up by companies (see Step 6). Also absent in the CSDDD is a fundamental concept such as free, prior and informed consent for local communities in the planning and decision-making processes concerning projects or other activities involving, for example, the intensive use of land or water, which could

significantly affect local communities (see, for example, paragraph 25 under Commentary on General Policies in the OECD Guidelines for MNEs).

4. Points of attention

4.1 Introduction

From the notable points of divergence between the OECD and CSDDD regulatory frameworks (see Chapter 3), this chapter distills several points of attention regarding limitations of the CSDDD framework compared with the OECD framework. In the NCP's view, these could undermine the CSDDD's effectiveness and observance thereof. The NCP draws no conclusion from this as to whether or not RBC due diligence legislation (at EU or national level) is desirable.

In the following section, the NCP has formulated an overarching point of attention and, by way of further elaboration, ten more specific ones. For each of the latter, the NCP indicates whether the European Parliament position addresses it. The NCP makes no judgment on whether the point is *fully* addressed; it merely considers whether the European Parliament position on the point in question is more in line with (i.e. diverges less from) the OECD regulatory framework than the Commission proposal and/or the Council position. Where relevant, an indication is given as to what has changed in respect of each point in the updated version of the OECD Guidelines issued in June 2023.

4.2 Overarching point of attention

There is an overarching point of attention regarding the extent to which the CSDDD regulatory framework aligns with the content and meaning of the OECD Guidelines: the NCP fears that limitations in the CSDD regulatory framework compared to that of the OECD will lead to a dilution of the RBC principles and standards of corporate behaviour enshrined in the OECD Guidelines and/or to a lack of clarity about what is expected from companies in terms of RBC and due diligence. There is a risk that companies that fall within the scope of the legislation will feel bound only by the legislation itself and no longer by aspects of the OECD Guidelines that are not included in the legislation. In addition, it is certainly not inconceivable that companies that fall outside the scope of the CSDDD will conclude that they have fewer or no obligations to carry out due diligence.

Such a situation would prejudice the due diligence regulatory framework and its further elaboration and interpretation in the form of guidance by the OECD and statements by NCPs in specific instances. Failure to carry out due diligence adequately (or even at all) may result in the creation or continuation of adverse impacts on people, the environment and society as a consequence of the operations of the company, its subsidiaries and/or supply chain partners – adverse impacts that could have been prevented, mitigated or adequately remedied. Examples include poor working conditions and serious health risks for workers in the supply chain, such as the collapse of the Rana Plaza building in Bangladesh and child labour in the cobalt mines in the Democratic Republic of the Congo; widespread and persistent degradation of the environment, as in the case of the oil pollution in the Niger Delta and the large-scale deforestation in the habitats of indigenous peoples in the Amazon; and fundamental human rights violations, such as land grabbing in conflict regions and the oppression of indigenous peoples in China.

It is only natural that there are differences between a soft law system such as the OECD Guidelines and their reflection in hard, statutory standards of corporate behaviour as in the CSDDD. However, the NCP has flagged a number of specific points of divergence between the CSDDD and OECD regulatory

frameworks which, in the NCP's view, entail serious risks of detraction from the latter. These are the ten specific points of attention to be discussed below.

4.3 Specific points of attention

1. *Integration of RBC into companies' own systems and actions*

Proper integration of RBC policy into a company's management systems is crucial to ensure that it becomes part of the company's regular business processes and that it is supported by all the company's departments (i.e. not only the sustainability department) and at all levels from management to the shop floor. The CSDDD regulatory framework lacks provisions regarding the integration of RBC policy at the highest decision-making level within the company and into all systems and departments.

In particular, this concerns provisions on:

- a) integrating RBC policy into the company's oversight bodies and/or placing responsibility for due diligence at management level;
- b) integrating RBC policies into management systems so that they become part of regular business processes;
- c) understanding and addressing barriers arising from the way the company does business which could hinder suppliers and other business relations from implementing RBC policies.

Points b) and c) are addressed in the European Parliament position.

2. *Risk-based prioritisation of measures*

The core of the due diligence process is that it is tailored to the risks that business activities pose to people and the environment. The greater the likelihood and severity of adverse impacts, taking into account the potential vulnerability of specific affected parties, the more is expected from the company. The CSDDD regulatory framework gives a narrower interpretation of the risk-based element of due diligence, for example in terms of paying particular attention to certain vulnerable groups or prioritising the main RBC risks and impacts.

Specifically:

- a) enterprises are not asked, when identifying or addressing adverse impacts, to pay special attention to adverse impacts on individuals from groups or populations that are vulnerable or at high risk of marginalisation, or to take into account the potentially different impacts on men and women;
- b) there is no mention [in the Commission proposal] of prioritisation of key RBC risks or impacts to address;
- c) companies are not asked to consult with business partners, other related companies or actually or potentially affected stakeholders when assessing involvement in adverse impacts or on prioritisation decisions.

These points are addressed in the European Parliament position.

The updated version of the OECD Guidelines makes clear that special attention should be paid to potential adverse impacts on individuals and groups facing a heightened risk, such as human rights defenders and indigenous peoples.

3. Appropriate measures

For an adequate response to identified RBC risks, it is important that the company's plans and measures are commensurate with the nature and severity of the specific risks and the needs of the actually or potentially affected parties. At the same time, these plans and measures should suit the company's specific situation and the influence it can exert on other actors involved. The CSDDD regulatory framework limits the range of measures to be taken by the company and places strong emphasis on addressing adverse impacts in the supply chain through contractual arrangements with supply chain partners. The result is less, if any, focus on other possible appropriate measures.

Specifically:

- a) the list of appropriate measures is exhaustive, thus removing any incentive to take measures other than those listed, such as collaboration, improvement of procurement practices or capacity building;
- b) obligations to support business relationships or to align or cooperate with them are absent or limited;
- c) the company is only required to consult with actually or potentially affected parties in specific cases.

These points are addressed in the European Parliament position.

4. Access to remedy

Adequate remediation in the case of actual adverse impacts is an essential part of the due diligence process that is crucial for affected parties. Regardless of the level of involvement, it requires companies to take an active role in providing remediation and making available effective grievance mechanisms at operational level, as well as cooperating in dispute resolution through other mechanisms. In the CSDDD regulatory framework, remediation, including the forms it can take, the ways it can be obtained and the criteria for effective remedy, is severely limited.

Specifically:

- a) the definition of remediation and of the forms it can take is limited or non-existent;
- b) the list of effectiveness criteria to be met by operational-level grievance mechanisms is relatively limited;
- c) there is no expectation that companies will cooperate with legitimate grievance mechanisms.

These points are addressed in the European Parliament position.

The updated version of the OECD Guidelines specifically states that companies are expected to provide for or cooperate in remediation and adds criteria that an operational-level grievance mechanism is expected to meet.

5. *Companies covered*

The premise of the OECD Guidelines is that all multinational or national enterprises, regardless of size, sector or ownership structure, perform due diligence. In the CSDDD regulatory framework, small and medium-sized enterprises are exempt.

Specifically:

- a) SMEs fall outside the scope of the CSDDD;
- b) it is not made clear whether these companies are still expected to adhere to the OECD Guidelines.

These points are not addressed in the European Parliament position.

6. *Financial sector*

The premise of the OECD Guidelines is that all multinational and national enterprises, regardless of which sector of the economy they operate in, perform due diligence. Given the size and leverage of the financial sector, it plays a crucial role in this respect. The CSDDD regulatory framework's applicability to the financial sector is limited in several ways.

Specifically, the financial sector:

- a) is exempted in whole or in part (subject to opt-in by the member state in question) from application of the CSDDD;
- b) is only required to perform limited due diligence on several issues;
- c) is only considered directly linked when potentially or actually involved in adverse impacts
- d) is not obliged to suspend or terminate business relationships if the measures taken are not sufficient;
- e) is only required to perform due diligence in relation to certain supply chain partners.

Point a) is addressed in the European Parliament position.

7. *Thematic scope*

The scope of the OECD regulatory framework has no limitations as to the potentially relevant rights and obligations within the different RBC themes. This is intended to make the scope of due diligence as complete and future-proof as possible. In the CSDDD regulatory framework, the thematic scope of due diligence is limited to certain human rights and environmental standards.

Specifically:

- a) the scope of the concept of an 'adverse environmental impact' is limited in the CSDDD;
- b) climate standards are not covered by the due diligence requirements.

These points are not addressed in the European Parliament position.

The updated version of the OECD Guidelines explicitly states that due diligence should be applied to environment-related themes, such as climate change (scope 1, scope 2 and, where possible, scope 3 emissions), biodiversity, deforestation and waste processing.

8. Scope of and reach within the supply chain

In line with the principle of the OECD regulatory framework that the scope of responsibility is determined by impact, regardless of where in the value chain it occurs, the due diligence process covers the entire value chain – both upstream (suppliers) and downstream (consumers of products and services) – and in principle there are no limitations on its reach within the chain. The CSDDD regulatory framework defines the chain more narrowly than the OECD framework does.

Specifically:

- a) the downstream part of the supply chain is only included to a limited extent;
- b) reach within the supply chain is confined to certain supply chain partners.

Point b) is addressed in the European Parliament position.

The updated version of the OECD Guidelines clarifies that business relations: 1) extend beyond contractual, first-tier or direct relations; and 2) also include the receivers, buyers or users of the company's operations, products or services.

9. Companies' own responsibility

The OECD regulatory framework is based on the premise that each company is responsible for the adverse impacts on people and the environment that it causes or contributes to or which are directly linked to its operations, products or services through its business relationships in its supply chain. The CSDDD regulatory framework does not sufficiently emphasise that each company has its own responsibility, even when cooperating with or involving third parties in conducting due diligence.

In particular, this concerns the provisions relating to:

- a) participation in sectoral and multi-stakeholder initiatives;
- b) due diligence verification by third parties;
- c) appropriate measures in the form of contractual assurances from supply chain partners;
- d) due diligence at group level.

These points are addressed in the European Parliament position.

The updated version of the OECD Guidelines reaffirms the principle that each company has its own responsibility by stipulating that companies remain individually responsible for ensuring that their due diligence is carried out effectively when collaborating in industry or multistakeholder initiatives.

10. Stakeholder engagement

An essential element of due diligence is meaningful engagement with stakeholders throughout the due diligence process. The CSDDD gives the principle of stakeholder engagement a more limited interpretation on various points.

Specifically:

- a) it is not made clear that stakeholder engagement is important throughout the due diligence process;
- b) companies are not asked to consult with business partners, other related companies or actually or potentially affected stakeholders when assessing their involvement in adverse impacts or in respect of prioritisation decisions;
- c) there are no provisions relating to consultations with affected parties in respect of remediation mechanisms;
- d) the fundamental concept of free, prior and informed consent is missing.

These points are addressed in the European Parliament position.

The updated version of the OECD Guidelines emphasises that: 1) companies should engage meaningfully with stakeholders as part of carrying out due diligence and in order to provide meaningful opportunities for their views to be taken into account; 2) stakeholder engagement is a key component of the due diligence process; and 3) stakeholder engagement can also be a right in and of itself.

5. Conclusion

This chapter answers the research question posed by the House of Representatives to the NCP, namely: to what extent are the European Commission proposal for the CSDDD and the Council position in line with the content and meaning of the OECD Guidelines, and how does the position of the European Parliament relate to this?

The NCP has identified notable points of divergence between the CSDDD and OECD regulatory frameworks on each of the six points of the due diligence process, on several aspects of the scope of due diligence and a on number of the essential features of due diligence. In the NCP's view, differences are problematic when they create limitations that may lead to dilution of the RBC principles and standards for corporate behaviour contained in the OECD Guidelines and/or a lack of clarity about what is expected of companies in terms of RBC and due diligence. The NCP highlights a number of specific points of divergence which, in the NCP's view, entail serious risks of detraction in terms of the due diligence standards in the UNGPs and OECD Guidelines.

These relate to the following areas of concern:

1. Integration of RBC into companies' own systems and actions;
2. Risk-based prioritisation of measures;
3. Appropriate measures;
4. Access to remedy;
5. Companies covered;
6. Financial sector;
7. Thematic scope;
8. Scope of and reach within the supply chain;
9. Companies' own responsibility;
10. Stakeholder engagement.

The limitations relating to some of these concerns have been addressed in the European Parliament position, but limitations remain with regard to points 1, 5, 6, 7 and 8.