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Prof. Dr. Roel Nieuwenkamp
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OECD
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Dear Roel,

Many thanks for inviting me to contribute to the OECD Workshop on *Understanding relationships to impact under the OECD Guidelines for Multinational Enterprises: Considering "Cause", "Contribute" and "Directly Linked."* My teaching schedule makes it impossible for me to attend or call in, but I hope you will allow me to share a few thoughts with participants through this letter.

At the outset, I want to say how pleased I am that the OECD has convened this workshop. The subject is of great importance to all businesses. Rather than respond to your detailed scenarios, however, I thought it might be best if I simply offered a few key overarching reflections on the topic at hand.

Efforts to further elaborate the core concepts of the UN Guiding Principles (GPs) and the 2011 edition of the OECD Guidelines (GLs) at more granular levels for particular business sectors and operational contexts are helpful. Those of us who produced these texts have encouraged that. But what is not helpful is the introduction of new language that is inconsistent with and potentially undermines their actual and intended meaning.

Examples include the use in the Debevoise paper of such terms as business conduct that "materially increases" the risk of harm as a determinant of "cause," and company "benefits" in relation to its being "linked" to harm. The Thun Group of Banks uses the term "proximity" to harm by banks, and claims that it is determined by the nature of the financial product or service. These are unhelpful because they have no basis in and are not aligned with the GPs and GLs. Therefore they cannot constitute more granular elaborations; instead, they potentially undermine well-established meanings.

There is a related problem in the current draft of the overarching OECD Human Rights Due Diligence Guidance. It uses the term "significant" in determining a business contribution to harm. What the GPs and GLs actually state is that where it is necessary for a company to prioritize actions to address harms, it should first address those that are most severe or even irremediable. In other words, severity modifies expected action by companies; it does not determine the fact of their involvement in harm.

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Similar constrictions of established meanings can also be found around the notion of "business relationships." In drafting the GPs, I sought to protect against overly broad interpretations: at the extreme, "the CEO is friendly with the Minister thus the company is connected to everything abusive the government does." Putting the word "directly" before "linked" was intended to stress that any abuse must be linked to the company's operations, products or services, not merely to the fact of a relationship itself.

But some recent efforts have pushed too far in narrowing the range of business relationships that companies need to consider. For example, the Thun paper conceives of "contributing" to human rights harm in such a way that banks virtually by definition cannot contribute to harm committed by clients. This is not only inconsistent with the GPs and the GLs; it also defies common logic and recent conduct.

The Debevoise paper asserts that for linkage to exist there needs to be a relationship of "mutual commercial benefit." But this excludes any number of business relationships involving companies in possible human rights harms that they have had to deal with. Not the least is with state agents, whether law enforcement personnel providing asset protection in their in public capacity, or other state agencies seeking private information from internet service providers and social media companies. The term "commercial relationship" has also found its way into the current draft Annex to the OECD Guidance.

In addition, the Debevoise paper rejects the idea that there is a continuum among cause/contribute/linked. Instead. it argues that these terms "are best understood as founded on two distinct bases: risk and benefit." The paper further claims that "benefit" is the basis for direct linkage—that only when a business benefits from a harm can it be directly linked to it. But this isn't an elaboration of what "directly linked" means in a particular context. It introduces an entirely new and arbitrary definitional element into the very concept of "linked," one that is inconsistent with and diminishes the scope of the GPs and GLs.

Of course, at the end of the day a decision needs to be made whether a specific instance falls into the "contribute" or "linked" category. But getting to that decision requires judgments that may not be readily captured by binary distinctions or simple hypothetical scenarios. What is needed is greater understanding of the factors that can drive a situation towards one or the other category. A variety of factors can determine this. They include the extent to which a business enabled, encouraged, or motivated human rights harm by another; the extent to which it could or should have known about such harm; and the quality of any mitigating steps it has taken to address it. Moreover, a company's involvement may not be static, but can change over time. These factors should not be considered in isolation from each other, but as part of a totality of circumstances.

Finally, both the Thun and Debevoise papers rest on deeply flawed premises and therefore draw unhelpful inferences and conclusions. The former makes this assertion at its outset: "Under UNGP 13, a bank would generally not be considered to be causing or contributing to adverse human rights impacts arising from its clients' operations because

the impact is not occurring as part of the bank's own activities." There is absolutely no justification for this in the GPs or the GLs.

The latter rests on this claim: "The involvements terms [cause/contribute/linked] are critical parameters of this [the Debevoise] framework: they shape the expected scope of due diligence and remedy under the Guidance [GPs and GLs]." But this has it exactly backwards. The scope of due diligence is set by a company's activities and business relationships. On that basis, it then conducts due diligence to determine whether and how it may be involved in human rights harms.

In sum, my main concern with regard to the cause/contribute/linked discussion is to stress the critical difference between further operationalizing elements of the GPs and GLs for particular sectors and contexts, which is both desirable and necessary, and introducing entirely new premises and terminology that misconstrue and diminish the actual and intended meaning of the two texts.

I hope these comments are useful. Best wishes for a successful consultation.

Cordially,