Consultation on Guidance for the Oil and Gas (O&G) Sector on Implementing the UN Guiding Principles on Business and Human Rights

International Chamber of Commerce UK Response

1. Introduction
ICC UK welcomes the opportunity to respond to this consultation on the draft 'Guidance for the Oil and Gas (O&G) sector on implementing the UN Guiding Principles on Business and Human Rights'.

In developing our response, we have consulted widely within our membership which includes the majority of the majority of FTSE 100 companies, other European multinationals, business associations and SMEs. Our members are fully committed to the UN Guiding Principles (UNGP)—and, specifically, the business responsibility to respect the human rights of all those affected by their operations.

We have incorporated feedback and comments from member companies into our submission. However—as a cross-sectoral organisation—we have sought to limit our comments to a number of overarching issues which raise more significant concerns for business regarding the EU’s implementation of the UNGP.

2. General issues
We commend the Project Team for their considerable work on producing the draft guidance and note that certain sections have been enhanced following consultation on the discussion paper.

As a general comment, we support the approach of the European Commission to produce guidance that is “practical” and “useful” for business on implementing the UNGP. We are also encouraged to note that the guidance is intended to be "as globally relevant as possible" and "not... legally binding."

However, there remain a number of areas of concern for business in the draft guidance. These issues are outlined in the below. As you will note, many of the points raised relate to key principles or cross-cutting issues—as such, we have not sought to provide granular drafting suggestions. Given the fundamental nature of some of the comments, we would ask that consideration is given to a issuing a further draft of the guidance for comment before publication.
a. **Scope and reach of Guidance**

As we expressed in earlier representations, ICC UK recognizes the potential benefits of developing sectoral guidance, as certain businesses may face greater risks in terms of the impact of their operations on human rights.

However, we remain unconvinced of the value of EU-level guidance in addressing a global issue such as business and human rights. The O&G sector is truly global, and would derive greater value from international guidance of this sort.

In this context, we welcome the Project Team's aim in drafting Guidance that is as globally relevant as possible and believe that it is vital that the Guidance remains in line with existing international initiatives and global standards so as to not disadvantage EU business—e.g. by potentially burdening them with overly prescriptive guidance or recommendations.

We also welcome the reference to existing initiatives in the O&G sector to better address its potential impact on human rights. It should be noted, though, that the burgeoning amount of different standards and guidelines, both at national, regional, international and sectoral level risk leading to confusion and duplication for business.

As such, we recommend that the Project Team should take care in referencing to external documents or standards, particularly those that have not been developed through a similarly thorough process as the UNGP with strong input from business.

b. **Balancing the UNGP three-pillared approach**

As we noted in our previous response, we are concerned that the Guidance does not place equal emphasis on all three pillars. Instead, in parts, the Guidance presents a skewed view of the pillared approach by seemingly suggesting that business responsibilities in relation to human rights go further than the respect pillar.

The risk of conflating the state’s responsibility to protect, with the business responsibility to respect human rights must be avoided in order to not undermine the consensus surrounding the UNGP.

We feel strongly that the Guidance should be framed in a positive way, inviting businesses to consider their human rights impacts and put in place processes to manage them rather than antagonizing the business community. As such, we welcome the section referring to the positive impacts that business can have on human rights, in terms of energy provision and poverty reduction. More might be said, however, about the sectors outreach relating to the right to work, the right to health and safety, the right to adequate housing, and, for example, the right to education. This positive message should be referred back to throughout the Guidance, as this will ensure that there is no underlying assumption that the majority of business operations have a detrimental impact on the enjoyment of human rights.
Additionally, we view it as important that the Guidance does more to explicitly recognise the role of governments in protecting human rights throughout the text. We would stress that it is not the obligation of business to attempt to fill potential voids left by governments or states that fail to undertake their responsibility to protect the rights of their citizens. Without greater recognition of the interconnected nature of the three pillars of the UNGP, the Guidance risks overburdening business and ignoring the responsibilities of states and governments role in protecting human rights. In this sense, the Guidance might elaborate on what businesses should be able to expect from governments and national authorities.

c. **Legal status**

In a similar vein, the nature of the UNGP must be remembered, in that they are principles to guide business action to respect human rights. Therefore the Guidance, based on the UNGP, must not be seen as legally binding or an operational standard for businesses to meet. While this point is made briefly in the introduction, a clear statement from the Commission confirming the non-binding status of the document would be welcome.

The legal status of the document should be carried through the entirety of the Guidance, by ensuring that wording used reflects a principles based approach rather than *requiring* a business to take certain action. For example, the headings ‘*What the Guiding Principles Require*’ and the use of instructive terms such as "*should*" and "*must*" could be reframed to read “businesses might usefully consider” or similar. This would ensure that the Guidance remains a helpful tool for companies to use when looking at implementing and integrating the UNGP in their business operations.

3. **Ensuring workable Guidance for business**

ICC UK has underscored the importance of ensuring guidance that is workable for business in our initial comments to the discussion paper.

It is clear that for this Guidance to add value it must recognise the complex operational realities of multinational business. In this sense – we welcome the recognition that there is no one-size-fits-all approach to addressing human rights issues. This non-prescriptive, principles-based approach is also in keeping with the points made above relating to the legal status of the Guidance.

However, it is important that this approach is reflected throughout the document. For instance, while ICC UK welcomes the format of the ‘*Questions to ask*’ sections in the Guidance, some of the questions are formulated in such a way to suggest that there is only one correct answer or way of broaching certain human rights issues. The Guidance would do well to avoid this, instead the document should focus on engendering meaningful consideration of UNGP implementation and human rights risks rather than promoting what could easily become a check-list/box-ticking approach.

We remain concerned that this Guidance does not adequately recognize the complex environments faced by business, particularly in relation to a number of issues which we have set out thematically below.
a. Supply chains & business relationships

The current draft of the Guidance is far reaching in setting out how far a company should be responsible for impacts down its supply chain. Company supply chains, particularly in a multi-national context, are complex and constantly changing. In this sense, it is difficult for companies not only to be aware of their entire supply chain, let alone monitor and assess potential risks of impact on human rights.

The Guidance does recognize that that supply chain due diligence should be based on human rights risks and 'severity'; this remains a difficult issue which needs more attention.

We suggest that the Guidance should do more to emphasise a risk-based and proportionate approach to integrating the UNGP into a company's supply chain operations. This could include practical examples, lending greater insight into the terms used in the Guidance such as "severity" and "leverage". Such examples might also illustrate the practical difficulties faced by business when trying to establish the potential human rights impacts of their global supply chains.

We would also remind the Project Team that the UNGP must not be seen to apply only to first tier companies and large businesses. All companies within a supply chain have the same duty to respect human rights. However, given many companies' lack of awareness of the UNGP (particularly amongst SMEs) and their limited resources, the Project Team might usefully consider proving more simple information on how smaller businesses can play their role in respecting human rights (see point 4).

These points are also applicable in the context of business relationships. The definition of business relationships is far-reaching in the Guidance, as including "impacts that it causes or contributes to, as well as those that are directly linked to its operations, products or services by a business relationship, even where it has neither caused nor contributed to the impact itself;"

We are concerned that this conceptualisation of business relationships does not fully address the range of situations that companies may find themselves in given the different forms of business relationships. Indeed, this section might be improved by distinguishing in more depth the different types of business relationships. For example, partnerships that businesses enter into freely and with choice, will give rise different situations than those where companies have inherited contracts or are required to enter into joint ventures with state-owned enterprises.

Recognition of this differentiation would also necessitate a more detailed exploration of how companies should consider their "leverage" in assessing the impacts of their business relationships and operations on human rights.

b. Stakeholder consultation.

The Guidance calls on business to conduct "meaningful stakeholder engagement or consultation" with its "potentially affected stakeholders" which may include civil society,
local actors, and end users. While our members certainly recognise the value of external engagement in assessing the potential impact of their business operations on human rights, the extent to which the Guidance recommends such consultation is both impractical and overly burdensome for business.

In many situations it will be practically unworkable for companies to consult with all stakeholders with an interest in their operations. Additionally, in difficult markets a company's insistence on engaging with local actors could put those actors at risk in situations, for example, where they might oppose the views of national governments or state-owned enterprises.

The Guidance refers to "other avenues" including expert and third party advice to supplement business efforts of consultation and engagement; however we are concerned that such advice may force businesses to incur heavy costs and could risk creating an industry around stakeholder management which may detract from direct and meaningful corporate engagement with stakeholders.

c. Reporting and communication

We agree with the Guidance in that a frank and candid approach to reporting should be encouraged and will, in general, be of more use to stakeholders across the board. We would emphasise that the Guidance should be in line with existing requirements on companies in terms of reporting of non-financial issues, including business and human rights. This is particularly important in terms of KPIs or issues that should be reported on granularly. In this context, we welcome the Guidance's focus on “developing indicators” and recognition that each company should have the flexibility to decide what is material to their business and stakeholders and report accordingly.

We have some concern about the emphasis placed on "comparability over time" and "targets" in the assessment and reporting of human rights risks. We think there is a risk that such a focus would fail to capture the true scope of business actions in this area. The topic is human rights is large and complex, and is often difficult to quantify. This means that companies should be free to adapt their communications to their target audiences rather than seeking to set out quantitative targets. Additionally, the use of targets might also undermine the notion that business respect of human rights is an ongoing issue that is not achieved only through meeting targets/standards. In our view, it is rather a continuous process of assessing the potential impacts of a company’s operations on human rights and taking steps to mitigate any negative impacts.

The Guidance also seems to suggest that companies should report on the “full range of business relationships” and the steps taken by these partners to respect human rights. This point remains somewhat unclear. If the Guidance seeks to suggest that such information be included in formal (financial or narrative) reporting, this would raise significant concerns relating to the burdens it would pose on business. It would be unpractical and in some cases highly inappropriate to conduct this level of reporting of business relationships. Additionally, any concerns raised in relation to a third party’s ability to respect human rights could risk opening companies up to legal challenges from the parties involved if their identity could be inferred.
d. Access to remedy and grievance mechanisms

The Guidance rightly emphasises access to remedy, in line with the UNGP. However, the Guidance should do more to explicitly recognise that it is not necessarily a company’s responsibility to act on and provide access to remedy in relation to human rights breaches in its supply chain. In this context, it is important to remember that it is not just top tier of companies that are subject to UNGP – the principles should apply to all levels of the supply chain. (See point 4 for greater detail).

e. State actors and local laws

Whilst we support the suggestion in the Guidance that companies should focus their efforts on high-risk areas for human rights abuses, this fails to fully appreciate instances where local law may conflict with international standards and potential difficulties in dealing with state actors. This is particularly important given that experience has often shown that local human rights issues are more effectively managed at a local level.

In this sense, we would encourage the Guidance to emphasise the importance of local solutions, and present them as an option often worth considering when faced with potential breaches of human rights.

Additionally, the Guidance should carefully consider instances where local laws (particularly in countries outside the EU with less robust human rights processes) may conflict with international human rights standards or guidance and include practical advice for business in the Guidance where appropriate. (See point 3f below).

Indeed, the Project Team should be cognisant that a business may not be able to follow normal procedures when dealing with national governments or state-owned enterprises – a common feature of business relationships in the O&G sector. For example, some of the proposed actions a company might take to assess its business relationships may not be appropriate in the context of state actors. Companies would be hard pressed to monitor state performance and would risk upsetting relations in assessing Government’s capacity to manage its own human rights impacts. Additionally, in relationships of this nature, companies may struggle to access all relevant information necessary to make decisions in difficult situations relating to alleged human rights abuses.

Similar difficulties arise when considering how companies might engage with victims of human rights abuses where they have been carried out by state actors. Again, here it would be useful to highlight different options of non-judicial remedy depending on the type of actor(s) engaged in a business relationship.

f. Free and Prior Informed Consent

The guidance does not go far enough in recognizing the contested nature of FPIC. Indeed, it should be noted that some Governments do not recognise or adhere to the principles of FPIC, making it difficult for companies to meet potential stakeholder expectations in these areas. Such situations should be explored further.
4. **Target audience**

As a general point, more thought might be given to whom this Guidance is intended for. If the Guidance is to be targeted at practitioners and those with an understanding of business and human rights, this would allow for certain sections (particularly the introduction) to be shortened as they are currently overly descriptive of the UNGP framework.

Whilst we appreciate the Project Team’s aim in creating a Guidance that is applicable to businesses of all sizes in this sector, we think that the creation of specific Guidance for smaller companies would allow for both documents to be of more relevance and value to their target audiences.

Due diligence and other suggestions developed with multi-national companies in mind will most likely prove too complicated and/or overly burdensome for smaller companies with less experience in this area. However, we remain convinced that more thought must be given to engaging all companies—large and small—in this field and raising awareness of the UNGP framework. This is vital as all companies are to be encouraged to respect human rights throughout their operations. More action in this area is key to building global supply chains free of human rights abuses.

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Should any expansion or clarification of our views be of use, please contact the ICC UK Secretariat: Emilie Boman; Senior Policy Advisor (Responsible Business): +44 (0) 207 838 7457; [eboman@international-chamber.co.uk](mailto:eboman@international-chamber.co.uk).