

To: OECD Working Party on Responsible Business Conduct (WPRBC)
From: OECD Watch
Re: Civil society recommendations on the second draft of Targeted Updates to the OECD Guidelines for Multinational Enterprises (Guidelines)
Date: 10 November 2022

OECD Watch welcomes the opportunity to provide input to the WPRBC's ongoing effort to update the Guidelines.

- First draft of updates: As stated during the 28 September stakeholder consultation, we believe the first draft of updates proposed to Chapters I-XI set a strong baseline of improvements reflecting, on the whole, many priorities civil society advanced in prior submissions, such as on respecting rights of marginalised groups and human rights defenders, avoiding impacts to the environment include climate change, and mainstreaming due diligence across the substantive chapters, among others.
- Second draft of updates: Civil society considers the second draft of updates proposed to Chapters I-XI to be, on the whole, a further improvement. However, some topics we have prioritised still need attention, and some changes made between the first and second drafts are negative in the view of civil society. As regards the Procedural Guidance, we are disappointed with the updates proposed, which if implemented would still not meaningfully improve the effectiveness or functional equivalence of National Contact Points (NCPs), and in some cases could reduce the effectiveness of NCPs.

We will present detailed track change edits by the deadline for final written comment. Topline priorities are laid out below.

Part I, Chapters I-III

1. Clarify text on human rights defenders, meaningful stakeholder engagement including with marginalised groups, and related due diligence processes.

- We appreciate the addition of positive language around the topics of a) how MNEs should respect the rights of *human rights defenders*; b) what *meaningful stakeholder engagement* entails including with respect to overcoming barriers to involvement for *marginalised groups*, and c) ensuring that MNE *due diligence processes* identify risks and impacts both to defenders and marginalised groups.
- The baseline text is overall good, but these topics are both jumbled amongst each other (including across Chapters IV and VI) and not always in alignment with language that has been or is being advanced in parallel initiatives (particularly around human rights defenders).
- We are working with civil society experts to propose non-controversial amendments to clarify and synchronise these topics across Chapters II, IV, and VI. We also urge that the WPRBC/secretariat consult the UN (particularly the UN Working Group on Business and Human Rights) and other entities engaged in parallel work closely to ensure alignment between texts.

2. Clarify text on the non-static nature of an enterprise's relationship to adverse impacts.

- As we presented in the first round of edits, a provision needs to be added to the commentary of Chapter II explaining that an MNE's relationship to harm is not static, but can evolve with time and inadequate action. This critical point is already agreed in the Due Diligence Guidance for Responsible Business Conduct and several sectoral guidance documents, and it appears in some legislative proposals on mandatory human rights due diligence. This point is

not controversial and should be made clear for MNEs in the text, with sufficient explanation of the concept to guide NCPs' interpretation in practice.

3. Clarify application of due diligence to downstream business relationships.

- Following debate during the stakeholder consultation on 28 September, we see that the concept of “value chain” has been removed from the text and replaced by examples of business relationships that include downstream relationships. We believe the phrasing used entities that “receive products or services” seems to imply a contractual relationship is necessary. The phrasing should be corrected, and further examples of downstream relationships, to convey the broad scope of due diligence downstream.

4. Include taxation under the scope of due diligence and, at a minimum, make amendments to clarify the language in the Taxation chapter.

- Civil society believes strongly that enterprises' tax policies and practices should *not* be exempt from due diligence (as they are in Chapter II currently). We urge that due diligence language be incorporated into a new chapeau for Chapter XI and the subsequent principles.
- The language in the Guidelines is outdated on responsible tax policy, including vis-à-vis RBC and tax initiatives in other fora: The *GRI initiative*, a transparency standard widely implemented (including by major stock markets in OECD countries) goes [deep into the importance of corporate tax governance/policy](#), general behaviour of corporations, and tax risk of interest to investors, citizens, and broader stakeholders. The *OECD* has been working towards major international tax reform, and the well over 100 nations that have agreed to the recent [two-pillar solution](#) to address tax challenges arising from digitalisation have effectively recognized that the current international tax system is not fit for purpose or in line with advances in globalization and digitalization over the past century. Meanwhile the *EU's Unshell proposal* is being advanced to reduce artificial profit shifting within the EU.
- The Guidelines – which are a soft law standard intended to last for at least another decade – should echo and advance these developments, not already fall behind them.
- OECD Watch has proposed edits clarifying that to act responsibly, including with a view to enabling host governments to fulfil their duty to provide for the welfare of their societies, MNEs should refrain from avoiding tax payments or exploiting gaps between the spirit and letter of tax laws in home, host, and other relevant jurisdictions in order to pursue private fiscal benefit.

5. Replace language clarifying that MNEs “should also disclose responsible business conduct information.”

- From the first to the second draft of proposed updates, an amendment in Chapter III has reduced the expectation around RBC disclosures from “also should disclose” to “It is also important that enterprises disclose” RBC information.
- The framing “should disclose” should be reinstated. Disclosure on RBC issues is already expected (“should”) of MNEs under the language of due diligence, and it is a critical step in enabling MNEs themselves, as well as governments, civil society, and other stakeholders, to assess and help strengthen the conduct of MNEs. The non-legal phrase “It is important that” unhelpfully muddies the message, appearing to go backwards against a concept already well-established in connection with due diligence – and already supported by other initiatives such as the GRI initiative.

Part I, Chapters IV-V

6. Include language on land rights, including the right to FPIC for indigenous peoples

- As we have elaborated our prior submissions, land rights, as well as land security more generally, underpin the realisation of numerous other human rights, such as to housing, food and freedom from hunger, health, and security of person. Land security is already threatened for many marginalised groups, especially women and customary or communal tenure holders, because of non-recognition of their legitimate tenure status by states. Land security is even more threatened through the activities of MNEs, given the high number of MNEs operating in the land-intensive agriculture, extractive, and infrastructure sectors. Finally, defenders of land rights, including indigenous people in particular, are among the most at risk of adverse impacts for their human rights advocacy.
- For all these reasons, it is vital that the OECD Guidelines call on enterprises a) to respect specifically the right to free prior and informed consent of indigenous people, and b) to avoid adversely impacting the land security of all rightsholders, as an essential step to respecting their human rights.
- We strongly urge that expectations on land be woven into Chapter IV and/or Chapter VI.

7. Clarify in Chapter VII that the scope of due diligence for impacts related to corruption extends to corruption-linked impacts to which the MNE is directly linked through its business relationships.

- It is important that enterprises understand they should conduct due diligence of impacts linked to corruption or bribery caused by their business relationships, not only corruption or bribery in their own operations. The phrasing does not clarify this point; meanwhile, because the term ,business relationships is only mentioned only in relation to avoiding bribery of business relationships, the point could be misunderstood by MNEs.

Part I, Chapter VI

The second draft of updates generally improved upon the first, but several topics still require further work. We are working with civil society experts to propose specific edits to, among other things:

- Streamline the presentation of due diligence
- Clarify the definition of Just Transition (and consider referencing emerging definitions in key documents to avoid the Guidelines’ definitions becoming out of date)
- Strengthen the link between avoidance and remedy of environmental impacts and respect for human rights (broadly, not just health and safety)
- Strengthen reference to environmental human rights defenders and land security
- Include language discouraging misinformation/greenwashing of environmental impacts
- Strengthen language discouraging lobby activity counterproductive for strengthened environmental policies

Part I, Chapter IX

Following further consultation with civil society experts on technology and human rights, we urge a comprehensive overhaul of the science and technology chapter. Particularly as the field of technology is so fast-moving, the text needs to be very broad and high-level to remain relevant for at least ten years. Yet while the WPRBC shares this view, the attempt to retain the narrow and non-impacts-focused framing of the 2011 text, paired with limiting updates largely to specific topics covered in OECD instruments, has produced a text that is piecemeal in its coverage of relevant issues and overly positive about the value of technology. It also, concerningly, uses language in some key instances (privacy, concept of “youth”), that is novel or not always in synch with laws on the subject.

We suggest a framing that echoes that of the human rights chapter with spare, broad principles calling on MNEs to avoid adverse human rights and environmental impacts in the technology arena, and with spare commentary elaborating application of these principles to a non-exhaustive range of technologies and the full array of potentially-impacted human rights. The intent of this approach is not to push the WPRBC beyond existing OECD instruments, but, quite to the contrary, to craft a more timeless explanation of the need for and steps towards responsible business conduct in the context of digitalization.

Procedural Guidance

While a number of updates to the Procedural Guidance are positive, on the whole they fall far short of the expectations of civil society and will not meaningfully improve the effectiveness of NCPs in carrying out their dual mandate.

We have all agreed that the dual mandate of NCPs is to promote MNEs' alignment with the Guidelines and help achieve resolutions of specific instances that are Guidelines-compatible. It is important that WPRBC delegates understand that, because the standards and complaint mechanism are voluntary, MNEs have *no incentive* to align with the Guidelines, and *no incentive* to participate in specific instances. Therefore, to ensure an NCP can actually achieve its dual mandate, **a government must give the NCP specific instance rules of procedure that create incentives for MNEs both to participate in specific instances and align with the Guidelines moving forward, including by implementing Guidelines-compatible solutions agreed or recommendations given in the complaint process.**

Several NCPs successfully use a few primary tools in tandem with each other **to incentivize enterprises to engage**: these are **transparency** by the NCP and the notifier during most of the complaint process, **determinations** of the MNE's alignment with the Guidelines, public **follow-up** on agreements reached or recommendations given, and **consequences** for an MNE's refusal to engage in mediation or implement agreements or recommendations. Meanwhile, **simple admissibility criteria** help ensure plausible, credible claims are heard and solutions to potential breaches of the Guidelines are found.

We urge updates that simplify the admissibility criteria and ensure NCPs truly prioritize transparency, use determinations in certain contexts, publicize follow-up statements, and request consequences when warranted.

OECD Watch Secretariat (c/o SOMO)

KNSM-laan 17
1019 LA Amsterdam
The Netherlands

Ph: +31 20 6391291
info@oecdwatch.org, www.oecdwatch.org

Marian Ingrams, Esq., Network Director,
m.ingrams@oecdwatch.org

Katharine Booth, Esq., Researcher and Policy
Advisor, k.booth@oecdwatch.org

Dr. Joseph Wilde-Ramsing, Senior Advisor,
j.wilde@oecdwatch.org