

OECD Watch response to the Draft Terms of Reference for an Update of the Guidelines for Multinational Enterprises

OECD Watch welcomes the draft Terms of Reference (ToR) for an Update of the Guidelines for Multinational Enterprises. Many of the issues addressed by various stakeholders including OECD Watch are covered in the draft ToR.¹ In the context of the consultations with stakeholders on the draft ToR to be held on 24 March, OECD Watch would like to take this opportunity to reiterate a number of critical elements that must be part of the review and provide a number of specific suggestions for amendments to the text of the ToR. OECD Watch looks forward to a continued inclusive review process that involves all relevant stakeholders in all working groups and expert meetings.

Critical elements for the update of the Guidelines

- **Scope of the Guidelines:** There is broad agreement that the scope of the Guidelines must be broadened and that the application of the concept of “investment nexus” is outdated, has not been useful and should be discarded. In OECD Watch’s view, it is essential that it be made clear that the Guidelines apply to all types of business activity, including trade relationships, supply chains, financing, etc. and not be restricted to investment or investment-like relationships only. As noted in the draft ToR (§ 10), SRSG Ruggie’s work on the concept of “due diligence” can be helpful in this respect. OECD Watch would suggest that the update also take into account other initiatives and thinking on supply chain responsibility and sphere of influence, such as from other respected bodies like ISO (26000 Guideline on Social Responsibility), GRI, and the Danish Institute for Human Rights.
- **NCP Performance.** While the draft ToR does recognize such, OECD Watch wishes to reiterate that improvement in NCP performance is a prerequisite for a more credible, coherent and effective grievance mechanism. The Procedural Guidance should therefore be revised to ensure upward harmonisation of institutional arrangements and handling of specific instances.
- **Consequences for breaches:** In order to enhance the authority and credibility of NCPs and enable them to function more effectively, it is absolutely essential that when an NCP determines that there have been breaches of the Guidelines or when companies refuse to constructively engage in the specific instance procedure, this have implications for the company in question. Recent specific instances in the UK and the Netherlands have revealed that the absence of such consequences allows companies to blatantly ignore NCPs’ calls for mediation and final statement recommendations, effectively rendering the Guidelines useless as a tool for enhancing responsible business conduct. The draft ToR should therefore indicate that a revision of the Procedural Guidance will include a discussion on what guidance can be given to NCPs and adhering country governments regarding the incentives and consequences that will allow NCPs to effectively and efficiently fulfil their task. Encouraging NCPs to follow up on mediated agreements and final statement recommendations is also crucial in this regard.
- **Resources for the update:** OECD Watch heartily supports the OECD IC Secretariat’s work on the update. In order to enable the Secretariat to facilitate a thorough and efficient update of the Guidelines, it is fundamental that the Secretariat has the necessary resources to properly prepare documents, consult (Southern) stakeholders, and provide participants in the update

¹ See “OECD Watch Key issues for the review of the OECD Guidelines”, December 2009, available at http://oecdwatch.org/publications-en/Publication_3419/view.

with the necessary information. OECD Watch thus calls on the OECD Council, as well as Member States and Adhering Countries to meet the Secretariat's request for voluntary contributions to finance their work on the update.

Specific suggestions for amendments to the text of the draft ToR

- **§ 2 Purpose of the update:** OECD Watch calls on the OECD to raise the ambition in the formulation of the purpose of the update – upgrade – of the OECD Guidelines, beyond *promotion* of responsible business to reforming the Guidelines as a tool that aims to *ensure* responsible business conduct. OECD Watch therefore suggests to amend the first sentence of this paragraph as follows: “The purpose of such an update of the Guidelines will be to *establish their role as a leading international instrument to ensure responsible business conduct.*”
- **§ 10 Supply chains:** Based on the reflections in point number 1 above, OECD Watch suggests adding the following sentence to this paragraph just after the sentence mentioning Ruggie: “*The discussion on supply chain should also take into account the work of other bodies such as ISO, GRI, and the Danish Institute for Human Rights, among others.*”
- **§ 16 Disclosure:** OECD Watch suggests amending the final sentence of the paragraph as follows: “Additional disclosure provisions may be called for with respect to supply chains, *environmental information including* greenhouse gas emissions, *access to information, and transparency in the reporting of profits, tax payments and other financial information*, the placement of which may not be necessarily in the Disclosure Chapter but in the relevant provisions dealing with the underlying subject matters.”
- **§ 18 Anti-corruption:** OECD Watch suggests adding the following sentence: “*The update may also consider broader anti-corruption issues and, given the fact that corruption is an issue that cuts across many thematic areas, making cross-references to the need for anti-corruption measures in other chapters such as Disclosure, Environment, Competition, and Taxation.*”
- **§ 21 Taxation:** OECD Watch suggests a broad examination of the Taxation chapter going beyond the EITI and the OECD Risk Awareness Tool. OECD Watch therefore suggests amending the first sentence as follows: “The update will examine whether the taxation chapter should include provisions the *public* disclosure of *profits*, taxes, royalties, and other payments to host governments.” A final sentence to the paragraph could suggest the update take into consideration recent discussions of the use of tax havens.
- **§ 22 Procedural Provisions:** OECD Watch suggests amending the first sentence of the paragraph as follows: “Mindful that the NCP mechanism...including in non-adhering countries, *and ensure that conflicts between business and affected communities are resolved and that negative impacts are reduced.*”
- **§ 26 Implementation in specific instances:** OECD Watch suggests adding the following sentence to this paragraph: “With a view to enhancing the capacity of NCPs to carefully consider specific instances, the update could discuss increasing the possibilities for NCPs to investigate, undertake fact-finding and research specific instances.” Furthermore, OECD Watch suggests amending the final sentence of the paragraph as follows: “It could also clarify the distinction between mediation and adjudication and discuss way of strengthening the NCP's mediation function as well as the NCP's role in monitoring the implementation of final statements' recommendations *and possible incentives and consequences that could further strengthen the NCP's authority.*”

- **Competition:** We're missing a reference in the ToR to the need to update the Competition chapter. The ToR could mention: "*The update should consider expanding the Competition chapter of the OECD Guidelines to include provisions taking into account the fact that suppliers and workers, in addition to consumers, can suffer from market dominance and abuse of market power.*"
- **General Policies on stakeholder engagement.** OECD Watch suggests adding an additional paragraph (just before or after §15) on stakeholder engagement. The paragraph could read as follows: "*Given that a core element of responsible business conduct is to have a systematic approach to the company's stakeholders, the update could explore the merits of making stakeholder engagement one of the general operational principles of Chapter II of the Guidelines (General Policies). Such a principle could include elements such as identification of key stakeholders, description of their main interests, actions taken to establish and maintain a systematic dialogue with the identified key stakeholders, and the outputs and result of the different stakeholder engagement processes.*"