

Identified gap in the OECD Guidelines: disclosure

Outcome sought: Broad and comprehensive stocktaking of the OECD Guidelines for Multinational Enterprises (Guidelines) that addresses gaps on MNE disclosure.

Problem: The OECD Guidelines do not reflect important new developments and standards on reporting and do not refer to the interrelation of disclosure and MNEs' fulfilment of expectations under all other chapters of the Guidelines

Transparency is a crosscutting topic and of crucial importance for MNEs' full compliance with many of the other chapters of the OECD Guidelines and thus with responsible business conduct (RBC) itself. Transparency is also crucial for the effective mediation of disputes over corporate conduct (at a minimum essential between disputing parties), and thus for the successful working of grievance processes.

Since 2011, consensus has grown among governments, investors, and business and civil society stakeholders that traditional MNE annual reports are unable to provide enough relevant information on human rights, social, and environmental impacts. Whether it is called ESG reporting, sustainability reporting, or integrated reporting, there is a growing push for greater transparency from MNEs over not merely their financial but their non-financial data, to support efficient market functioning, promote corporate contribution to sustainable development goals, and enable civil society stakeholders to play their role in monitoring steps to achieve sustainable development. The latest (2020) report of the *Carrots and Sticks* project¹ shows that many OECD governments use more than 10 (up to 18 or 20 in countries such as the UK, Spain, Canada and the US) parallel mandatory and voluntary instruments that either require or encourage companies to report sustainability-related information. The number of instruments illustrates the number of issues where transparency is required. Currently, instruments used by governments particularly focus on environmental issues including in relation to climate impacts; social issues; human rights impacts including due diligence information; gender equality; corporate governance, and anti-corruption and bribery. In addition to such instruments used at national level, there are multiple developments on disclosure in multilateral settings as well.

The OECD Guidelines – the leading standard on RBC conduct for MNEs – include a chapter on Disclosure (Chapter III), but it presently falls far behind these latest developments. The chapter divides disclosures into two types: those on material matters about the corporation – essentially limited to common financial disclosures – and those related to “areas where reporting standards are still evolving, for example, social, environmental, and risk reporting.”² While the Guidelines assert that enterprises “should” disclose the former, they are merely “encouraged to” disclose the latter. To set trends in RBC, the Guidelines should instead call clearly (“should”) for companies to disclose ESG data, including setting and publicizing clear targets on greenhouse gas emissions and climate impacts, disclosing beneficial ownership and country-by-country reporting, and disclosing profits earned and taxes paid. Critically, the disclosure chapter should also reflect the new due diligence communications expectations created by the 2011 revision on due diligence, which in Chapters II (General Policies) and IV (Human Rights) expect companies to communicate at every one of the six steps of due diligence, namely by communicating their policies on RBC, their actions to identify actual and potential adverse impacts to people and the planet, their actions to address those risks or impacts, the outcomes of their actions to address those risks or impacts, and their efforts to remediate adverse impacts. Because Chapter III does not address disclosure as an important element of all six steps of due diligence, it appears out of synch with the provisions in Chapters II and IV. In

sum, these unambitious, vague, and muddled disclosure requirements risk making the Guidelines obsolete as a leading standard on RBC and disclosure.

Impact of the problem: Lack of consistency within the Guidelines, incomplete and inadequate standards on disclosure for MNEs, and limited ability for stakeholders to assess corporate adherence to the Guidelines and seek accountability via complaints

The Guidelines' weak standards for MNEs on disclosure have several harmful consequences:

- 1) Muddled messaging on the scope of disclosure in the Guidelines, weakening not only that chapter but the impact of the entire set of Guidelines;
- 2) Lowered transparency expectations for MNEs that actually conflict with many higher national reporting requirements and international reporting initiatives, creating a confusing double standard for MNEs;
- 3) Limited ability of communities, civil society, unions, shareholders, and policymakers to assess the social, environmental, and human rights impacts of companies' activities and hold companies to account.
- 4) Diminished access to remedy for victims of adverse corporate impacts who seek to use the NCP complaint system to request accountability, but are handicapped by having little access to data outlining corporate actions regarding their human rights and environmental footprint.
 - a. In OECD Watch's experience, many complaints break down because civil society cannot produce adequate evidence of what actions corporations took or didn't take to address their adverse impacts, in part because companies refuse to release much data critical to evaluating their human rights and environmental due diligence.

Parallel laws and standards

The stocktaking of gaps in the Guidelines could consider developments on MNE disclosure expectations in various international initiatives:

- The EUs' Non-Financial Reporting Directive (NFR Directive),³ which came into effect in all EU member states in 2018; all 28 countries have adapted the Directive into national law. The NFR Directive is currently being reviewed with the objective to improve disclosure of climate and environmental data by companies. The European Commission already published additional guidelines on reporting climate-related information, and additionally a new forthcoming Taxonomy Regulation will be integrated. The EUs' Taxonomy is part of the EUs' Green Deal and is a classification system for environmentally sustainable activities that will be mandatory in the reporting of larger companies;
- The Task Force on Climate-related Financial Disclosures (TCFD),⁴ an initiative of the Financial Stability Board (FSB) to develop consistent climate-related financial risk disclosures for use by companies, banks, and investors in providing information to stakeholders;
- The OECDs' BEPS initiative, in particular Action 13, which requires all MNEs to prepare a country-by-country report with aggregate data on the global allocation of income, profit, taxes paid, and economic activity among tax jurisdictions in which it operates. This standard is one of four minimum standards and all BEPS-adhering countries must implement it. The latest report informs that the coverage has increased quickly to 131 jurisdictions in 2020;⁵
- The UNGPs' reporting framework,⁶ created as the world's first guidance for companies to report on how they respect human rights;
- The Global Reporting Initiative, which is updating its guidance on Human Rights reporting;⁷
- The Corporate Human Rights Benchmark,⁸ which assesses the human rights disclosures, among other issues, of 230 global companies; and

- A rising number of mandatory human rights due diligence laws and proposals. A comparative legal analysis of these initiatives⁹ shows that several of them also include new reporting requirement on due diligence.

Why ensuring a comprehensive stocktaking on gaps is important

The OECD Guidelines, originally drafted in 1976, have not been revised since 2011 and are out of date in many ways. Ten years of implementation of the current text of the Guidelines have revealed numerous gaps in the text that cause both a serious lack of clarity and coherence in international norms on key elements of responsible business conduct, and diminish victims' chances for remedy and accountability via the NCPs. Meanwhile, recent developments in RBC standards made beyond the OECD Investment Committee are threatening to make the OECD Guidelines comparatively less useful or even obsolete. The OECD Investment Committee's Working Party on Responsible Business Conduct (WPRBC), responsible for the OECD Guidelines, has begun a stocktaking to identify what gaps exist in the Guidelines and assess whether steps are needed to address them. A comprehensive stocktaking that addresses all the gaps identified by civil society and other stakeholders is essential to evaluate whether the Guidelines are still fit for purpose.

Who needs to act?

OECD Watch urges governments to show commitment to keeping the OECD Guidelines up to date with evolving issues in the field of business and human rights – and acknowledge civil society's concerns regarding the current limitations in the Guidelines' standards and the NCP complaint system – by ensuring that the stocktaking studies all the issues of concern to civil society. OECD Watch also urges that states ensure the final stocktaking report responds to each concern raised by civil society. OECD Watch welcomes the stocktaking and stands ready to support the review process and any further steps taken to address gaps identified.

About OECD Watch

OECD Watch is a global network with over 130 member organisations in more than 50 countries. Founded in 2003, OECD Watch's primary aim is to help support CSO activities related to the OECD Guidelines and the work of the OECD's Investment Committee. Membership consists of a diverse range of civil society organisations – from human rights to environmental and development organisations, from grassroots groups to large, international NGOs – bound together by their commitment to ensuring that business activity contributes to sustainable development and poverty eradication, and that corporations are held accountable for their adverse impacts around the globe. For more information, please visit www.oecdwatch.org.

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¹ Carrots and Sticks, available at: <https://www.carrotsandsticks.net/> (a stocktaking initiative of sustainability disclosure requirements world-wide, based on a global survey of corporate sustainability reporting by KPMG in collaboration with GRI and USB).

² OECD Guidelines, Commentary 33.

³ EU, Non-Financial Reporting Directive, available at: https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en.

⁴ Financial Stability Board, Task Force on Climate-related Financial Disclosures, available at: <https://www.fsb-tcfid.org/>.

⁵ OECD, BEPS Initiative, available at: <https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-shows-progress-in-implementing-tax-transparency-through-action-13-country-by-country-reporting.htm>.

⁶ Shift, UN Guiding Principles Reporting Initiative, available at: <https://www.ungpreporting.org/>.

⁷ Global Reporting Initiative, “Topic Standard Reporting Project for Human Rights,” available at: <https://www.globalreporting.org/standards/standards-development/topic-standard-project-for-human-rights/>.

⁸ Corporate Human Rights Benchmark, available at: <https://www.corporatebenchmark.org/>.

⁹ European Coalition for Corporate Justice, “Updated map and comparative analysis of mHRDD laws and legislative proposals in Europe,” available at: <https://corporatejustice.org/news/16808-eccj-publishes-updated-map-and-comparative-analysis-of-mhrdd-laws-and-legislative-proposals-in-europe>.