

Identified gap in the OECD Guidelines: general policies chapter

Outcome sought: Broad and comprehensive stocktaking of the OECD Guidelines for Multinational Enterprises (Guidelines) that addresses gaps in the general policies chapter.

Problem: Chapter II (General Policies) does not adequately establish fundamental principles and set the tone for the remainder of the OECD Guidelines

The Commentary to General Policies (Chapter II) of the Guidelines notes that the chapter is the first to contain specific recommendations to MNEs, and “As such it is important for setting the tone and establishing common fundamental principles for the specific recommendations in subsequent chapters.”¹ This intent is not fulfilled by the text of the chapter due to internal ambiguities and omissions.

The fundamental principle of due diligence is not outlined as directly as possible in Chapter II and could be more clearly aligned with the UN Guiding Principles. For example, the framing in Chapter II does not, as in Chapter IV (Human Rights) address the concept of remedy directly in principles as opposed to commentary. It also does not clarify (as again is clarified in Commentary 42 to the Human Rights chapter) that “activities” through which an MNE could be linked to harm can include actions *and omissions*. The terminology on “supply” chain due diligence in Chapter II and elsewhere in the Guidelines could be reframed as “value” chain due diligence to clarify the application of the Guidelines to all types of MNEs and to guide their due diligence over all of their business partners – not just their suppliers. Such a framing would better clarify the application of the Guidelines to MNEs such as financiers, lobbyists, auditors, consultants, and contractors. Further, as outlined further below and in other OECD Watch advocacy briefs, the due diligence provisions of Chapter II do not link smoothly with other chapters drafted before the supply chain due diligence language was added (such as the Employment and Industrial Relations chapter and the Environment Chapter). This disconnect has more than just facial consequences: because, for example, the Environment chapter is largely not framed around actual adverse environmental impacts, it is difficult for notifiers to apply Chapter II’s due diligence framing in provisions 10, 11, and 12, which focuses on adverse impacts, to address breaches of principles in Chapter VI. Further, reference to “own operations” in both the Environment and Employment and Industrial Relations chapters could cloud MNEs’ understanding of the scope of their due diligence expectations.

Regarding tone and internal harmony between chapters, a number of elements are problematic. First, the chapter’s chapeau introductory sentence states that “Enterprises should take fully into account established policies in the countries in which they operate.” The term “established policies” is unclear, as it could refer to established policies of the MNE itself, of other businesses operating in the country, or of the host country. More critically, since host country policies may contradict the Guidelines when they contain, for example, discriminatory language against certain groups or laws that facilitate tax avoidance, the sentence does not help set the tone that MNEs should implement the highest standard of RBC possible that does not place them in contradiction with domestic law, even if that means going beyond national-level requirements.² Second, the chapter unnecessarily makes a distinction between activities enterprises “should” undertake versus those they are only “encouraged to” undertake. Finally, the chapter does not ensure internal harmony with the rest of the Guidelines, because it fails to mention – and thereby underscore – several important policies that appear in the following chapters. For example, it fails to address disclosure, including in relation to the steps of the due diligence process. It also does not call for special attention in the due diligence process towards marginalised or disadvantaged groups including women, children, Indigenous

peoples, people of low caste, etc. The chapter's provisions do not call for avoidance of corruption and tax avoidance. Provision 9 rather narrowly discourages retaliation against workers, but not all human rights defenders. Provision B.1 also does not adequately address the importance of addressing impacts from digitalisation, instead only narrowly mentioning promotion of internet freedom. The incomplete coverages of topics in Chapter II does not set the right tone regarding the scope of general policies MNEs should adopt in order to act responsibly in accordance with the rest of the Guidelines.

Impact of the problem: Lack of clear standards for MNEs

Because Chapter II does not fully clarify the fundamental principle of due diligence and corresponding expectations for MNEs based on their relationship to the harm, nor emphasize the leading topics that will be addressed in the other chapters of the Guidelines, nor highlight several cross-cutting issues, the chapter misses an opportunity to set the tone by which MNEs should understand all the other expectations in the Guidelines.

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 OECD Guidelines, Chapter II (General Policies), Commentary on General Policies, para 1.

² OECD Guidelines, Chapter I (Concepts & Principles), principle 2.

