

Advocacy brief: Arguments for updating the OECD Guidelines to improve business disclosure standards

Outcome sought: Update of the OECD Guidelines for Multinational Enterprises (Guidelines) to strengthen expectations for multinational enterprises (MNEs) on disclosure and transparency.

Problem: The OECD Guidelines do not reflect important new developments and standards on non-financial risk reporting, and do not explain the interrelation of disclosure with MNEs' fulfilment of expectations under all other chapters of the Guidelines

Transparency is a crosscutting topic and of crucial importance for MNEs' implementation of the standards in 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 handling of specific instances under the Guidelines.

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 the UN Sustainable Development Goals, and enable civil society stakeholders to play their role in monitoring MNEs' steps to achieve sustainable development. The 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. Chapter III does not call for disclosures on key topics important in assessing an MNE's human rights and environmental impacts, including its beneficial ownership and corporate structure. This lower expectation regarding environmental, social, and risk reporting is also problematically contradictory to the new communications expectations created by the 2011 revision on due diligence: the OECD's Due Diligence Guidance for Responsible Business Conduct (2018) clarifies that companies should 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 engage in remediation of those adverse impacts. The Disclosure chapter is not in line with this expanded expectation.

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 specific instances

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 Guidelines clarity around the important issue of due diligence;
- 2) Transparency expectations for MNEs that are so low they now actually conflict with many 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 human rights and environmental impacts of companies' activities; and
- 4) Diminished access to remedy for victims of adverse corporate impacts who seek to use the National Contact Point (NCP) complaint system to seek accountability, but are handicapped by having little access to data showing MNEs' impacts and responsive actions:
 - 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.

Solution to the problem: Update the OECD Guidelines' chapter on Disclosure to set new minimum reporting expectations

To address the impacts above and ensure greater internal consistency, simple updates to the OECD Guidelines would strengthen expectations for disclosure. The following updates would be beneficial:

Chapter II (General Policies) should:

- Explicitly call for disclosure of risks and impacts to rightsholders, and of MNEs' findings and actions at all six steps of the due diligence process, as an essential element of RBC and prerequisite for MNEs' fulfilment of the standards in the other chapters of the Guidelines.

Chapter III (Disclosure) should:

- Eliminate the current distinction between material MNEs "should" disclose (principles 1 and 2) and material that MNEs are merely "encouraged to" disclose (principle 3). MNEs should be expected to disclose all of the items identified in principle 3 as well as the other principles, and the items further outlined below and across these OECD Watch advocacy briefs;
- Call for reporting according to new, broadly accepted standards, to include reporting of the following at a minimum:
 - All six steps of MNEs' due diligence process, in a continuous fashion;
 - MNEs' beneficial ownership;
 - Country-by-country reporting;
 - Data on employment statistics and impacts to both workers and communities that is disaggregated by gender;
 - The names and locations of supply chain partners;
 - Wages paid to workers in supply chains and how those wages relate to minimum and living wages;³
 - GHG emissions of MNEs' own and business partners' operations as well as other impacts of themselves and their value chains on the climate; and
 - Profits earned and where, taxes paid per country and for what operations, and all tax-related financial vehicles used.

These disclosure expectations could be cross-referenced in the other relevant chapters of the OECD Guidelines.

Parallel laws and standards

An update of the Guidelines could draw on new standards in various international initiatives:

- The EUs' Non-Financial Reporting Directive (NFR Directive),⁴ 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),⁵ 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;⁶
- The UNGPs' reporting framework,⁷ 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;⁸
- The Corporate Human Rights Benchmark,⁹ 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 initiatives¹⁰ shows that several of them also include new reporting requirement on due diligence.

Why address this issue now?

The OECD Guidelines, originally drafted in 1976, have not been updated 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 and laws 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 completed a comprehensive stocktaking to identify what gaps exist in the Guidelines and assess whether an update is needed to close them. The stocktaking results show broad consensus among NCPs, stakeholders, and the public that the Guidelines are not adequately clear on this and other issues. The Investment Committee is now considering whether to update the Guidelines, as it has done every decade since 2001 and before that as well. Such an update would provide an opportunity for OECD governments to address the problems OECD Watch and others have identified. **Wholesale update is not needed. Instead, smart, targeted edits to principles and/or commentary in key sections would go a long way in closing the gaps.**



Who needs to act?

OECD governments should 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 over limitations in the Guidelines' standards and complaint system, by improving the Guidelines through a textual update. Governments have a critical opportunity right now to close the gaps identified by NCPs and stakeholders. OECD Watch asks all states to support ongoing discussion on specific textual edits on the issues civil society is prioritizing and encourages those states that wish to champion various concerns of civil society to present proposals to resolve the gaps found. OECD Watch stands ready to support individual states and the Committee during the anticipated update process.

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 See, E.g., Clean Clothes Campaign, Break the chains: transparency in 2020 supply chain(s), October 2020, available at: <https://cleanclothes.org/news/2020/break-the-chains-transparency-in-the-2020-supply-chains>

⁴ 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.

⁵ Financial Stability Board, Task Force on Climate-related Financial Disclosures, available at: <https://www.fsb-tcfid.org/>.

⁶ 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>.

⁷ Shift, UN Guiding Principles Reporting Initiative, available at: <https://www.ungpreporting.org/>.

⁸ 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/>.

⁹ Corporate Human Rights Benchmark, available at: <https://www.corporatebenchmark.org/>.

¹⁰ 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-ecj-publishes-updated-map-and-comparative-analysis-of-mhrdd-laws-and-legislative-proposals-in-europe>.