

## Advocacy brief: Arguments for updating the OECD Guidelines to improve business standards in Chapter II (General Policies)

**Outcome sought:** Update of the OECD Guidelines for Multinational Enterprises (Guidelines) to clarify expectations for multinational enterprises (MNEs) in Chapter II (General Policies).

**Problem: Chapter II (General Policies) does not adequately set the tone for the remainder of the Guidelines, nor establish common fundamental principles for the specific recommendations in subsequent chapters**

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.”<sup>1</sup> This intent is not currently fulfilled by the text of the chapter.

The chapter does not adequately set the tone for the document. First, the chapter should reflect all the subjects contained (or that should be contained) in other chapters of the Guidelines, but at present, several major topics are missing or understated, such as on disclosure, anticorruption, taxation, digitalisation, and animal welfare. Second, the chapter does not urge MNEs to ensure that all their practices that cut across the topics discussed in the Guidelines standards - ranging from purchasing and outsourcing practices, to lobbying strategies, to judicial strategies, to communications activities, to shareholder engagement – be done in a manner that supports, rather than undermines, MNEs’ fulfilment of the standards laid out in the Guidelines. The chapter also unnecessarily makes a distinction between activities enterprises “should” undertake versus those they are only “encouraged to” undertake, creating a hierarchy amongst the issues addressed.

The chapter also does not adequately establish common fundamental principles. First and foremost, the fundamental principle of due diligence could be outlined more clearly. The principles relevant to due diligence (A2, A10-14) do not track neatly with the six steps of due diligence laid out in the later-drafted OECD Due Diligence Guidance for Responsible Business Conduct.

- Of particular note, the principles of Chapter II do not underscore MNEs’ responsibility to provide for or cooperate in remedy for adverse impacts; presently, while Chapter IV (Human Rights) addresses the concept of remedy directly in principles, the topic of remedy is only raised in commentary in Chapter II.
- Meanwhile, the provision on stakeholder engagement (14) confusingly suggests that stakeholder engagement is only relevant during planning and decision-making for activities that “may significantly impact local communities,” whereas the OECD has since made clear that stakeholder engagement is also essential during all six steps of due diligence.

Further, the framing of due diligence in Chapter II does not clarify (as again it 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*. Additionally, as outlined in other OECD Watch advocacy briefs, while the due diligence provisions of Chapter II technically apply to all the standards chapters in the Guidelines, they do not align cleanly with chapters drafted before the 2011 revision (such as the Employment and Industrial Relations chapter and the Environment chapter). Better alignment could be achieved in part by modifying those other chapters to ensure they discuss due diligence and identify the types of negative impacts that should be avoided and addressed through a due diligence process.

Beyond due diligence, other common fundamental principles are inadequately established. Several cross-cutting themes or issues are missing or incompletely covered. For example,

- The chapter does not highlight expectations for MNEs' respect for the rights of human rights defenders (a fundamental principle underpinning the other specific recommendations in subsequent chapters). The chapter discourages discriminatory or disciplinary action against workers specifically, without highlighting respect for the rights of *all* environmental and human rights defenders promoting RBC.
- The chapter does not highlight the particular importance and sensitivities of engagement with marginalised and disadvantaged groups including women, LGBTQ+ people, indigenous peoples, people of low caste, children, and others – another fundamental principle that underpins the other specific recommendations in the Guidelines.
- The chapter does not highlight expectations on issues such as MNEs' full payment of taxes, disclosure of information material to evaluating their RBC performance, and analysis of the effects of digitalisation on their RBC performance – all cross-cutting issues fundamental to fulfilling the other specific recommendations in the Guidelines.

### **Impact of the problem: Lack of clear standards for MNEs**

Because Chapter II does not adequately introduce the topics that will be addressed in the other chapters of the Guidelines, highlight expectations for responsible conduct across all of MNEs' business practices, clarify the fundamental principle of due diligence, and highlight critical cross-cutting issues and themes, the chapter misses an opportunity to set clear guidance for MNEs through which they should understand all the other expectations in the Guidelines.

### **Solution to the problem: Update Chapter II to clarify the principle of due diligence and set an appropriate tone and harmonisation across the rest of the Guidelines**

OECD Watch urges that updates be prioritized to Chapter II of the Guidelines, because this chapter sets out fundamental principles and guidance applicable to all the other chapters. The following updates would be beneficial:

- The principles relevant to due diligence (A2, A10- 14) should be clarified<sup>1</sup> to:
  - Reflect the six steps of due diligence, including the element of remedy and the importance of ensuring public communication (disclosure) and stakeholder engagement at each step;
  - Clarify that “activities” through which an MNE could be linked to adverse impacts can include actions *and omissions*, and clarify that an MNE's acts and omissions, alongside the notice it has of the risks and impacts to which it is directly linked, can change its level of responsibility for those impacts;
  - Reframe “supply” chain due diligence in Chapter II and elsewhere in the Guidelines as “value” chain due diligence to clarify the application of the Guidelines to business relations up and down MNEs' value chains, not just suppliers.
- Meanwhile, commentary elaborating on due diligence should explain:
  - The heightened due diligence needed to: address risks and impacts to individuals from marginalised and disadvantaged groups; account for how digitalisation may alter or worsen an MNEs' RBC impacts; and account for how poor animal welfare in value chains may impact an MNE's fulfilment of the standards in the other chapters.
  - The importance of ensuring due diligence over all business practices (to include lobbying activities, judicial activities, communications activities, shareholder engagement, and others),

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<sup>1</sup> Edits should also be made to other subsequent chapters of the Guidelines including Chapter V (Employment and Industrial Relations) and Chapter VI (Environment) to ensure explicit reference to due diligence for those issues and identify (especially in the Environment chapter) types of impacts over which an enterprise should do due diligence.

to ensure all business practices are undertaken in a manner that supports, rather than undermines, MNEs' fulfilment of the RBC standards.

- Targeted edits or additions to the principles in Chapter II should signal the following as critical elements of RBC:
  - Disclosing information material to understanding MNEs' fulfilment of the standards covered in the Guidelines (beyond financial disclosures);
  - Addressing risks and impacts to people including human rights defenders, workers, consumers, and individuals from marginalised and disadvantaged groups;
  - Addressing risks and impacts to the environment and climate change;
  - Avoiding corruption and tax avoidance; and
  - Promoting animal welfare in value chains.
- The distinction between recommendations that MNEs "should" implement (section A) versus simply "are encouraged to" implement (section B) should be dropped; there should only be one category of recommendations MNEs "should" implement;
- The chapeau introductory sentence should be simplified to something such as: *Enterprises should take into account the following:* (eliminating the reference to policies in countries, which may not meet the standards of the Guidelines).

### 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](http://www.oecdwatch.org).

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<sup>1</sup> OECD Guidelines, Chapter II (General Policies), Commentary on General Policies, para 1.

