

Considerations for the consultation with the OECD Working Party on RBC

26th April, 16:00h-17:00h CET (virtual)

1. Annual report on National Contact Points Activity

- BIAO has always underlined our support for the NCP-system and the unique nature of the NCP process in line with the MNE Guidelines, which aims to provide a mediation platform for dialogue instead of legal disputes, and to support the identification of forward-looking solutions to issues that arise in the context of the Guidelines.
- To that end, we were pleased to see that the annual report reconfirmed the key role of NCPs and their double mandate of mediation and promotion of the Guidelines. The annual report states that *“NCPs actively contribute to the uptake and implementation of the Guidelines by companies through ... specific instances, which often leads to positive changes with respect to the issues at hand and better implementation of the Guidelines on the ground”*. Yet, the annual report also noted that there remain gaps in the functioning of some NCPs resulting in a lack of functional equivalence across NCPs.
- BIAO has advocated for a focus on strengthening NCPs, which are lagging behind, in line with the Guidelines in any potential follow up to the stocktaking exercise. We thus appreciate discussions about how to ensure that the Guidelines remain ‘institutionally fit’, but do not see an explicit need to revise the Procedural Guidance of the Guidelines.
- Our key priorities for work with NCPs going forward:
 - BIAO continues to support flexibility in NCPs set up, but underlines that adequate resourcing and appropriate stakeholder support are crucial. The report notes that the majority of NCPs still have to rely mostly on part-time staff, with their proportion increasing, and that insufficient human and financial resources continue to be a major concern for NCPs. This indicates that additional efforts by the part of governments are needed.
 - We stress that visibility of NCPs remains improvable in certain cases, and that the awareness of the MNE Guidelines, too, sometimes remains somewhat limited. More promotional activities should be considered, but NCPs should also have a solid representation in place. The report notes that while almost all NCPs have now websites in place, content and information of respective websites are in some cases lagging behind. This indicates a focus area for increasing visibility.
 - BIAO believes in the potential of peer reviews, which can and should play a central role to support functional equivalence among NCPs. We appreciate the ambition to have

the entire NCP network peer reviewed as part of the new 2022-2024 NCP action plan and call on governments to engage with the process.

- We further underline that in addition to work on the technical set up of/framework for NCPs, additional efforts are needed to improve the understanding of and strengthen confidence in the process. Respective goals anchored in the latest Action Plan are thus appreciated. NCPs must have a good understanding of and respect the procedural guidance and should communicate clearly about the nature of the process. NCPs must also manage expectations of the parties involved, foster good faith engagement and ensure that confidentiality and absence of any pressures against parties are met to safeguard trust in the process. This will ultimately also foster and support good faith engagement in the process.

2. Draft Recommendation on Strengthening the Role of Government in promoting Responsible Business Conduct

- We take note of the changes that have made across the different version of the draft, appreciate smaller additions and clarifications (e.g. on national action plans), but - as mentioned at the March meeting and in our letter to the Chair - continue to have concerns related to some of the proposed wording of the instrument.
- We fear that the current language, specifically in II.2. (*‘considering introduction of legislation or regulation to address potential gaps in implementation’*) and II.4. (*‘aligning with RBC standards and in particular OECD Due Diligence Guidance when developing new policies, laws, ...’*) could reinforce a proliferation of unilateral approaches to national due diligence legislation (a ‘spaghetti bowl’), which creates large challenges for businesses on the ground.
- To that end, we had suggested that the Recommendation should not call for the introduction of legislation. We also provided a suggestion for rewording II.2 and II.4.
 - BIAAC continues to believe that, while it is a reality that more and more mandatory due diligence legislation is emerging, it should not be considered a panacea for preventing RBC challenges and that potential unintended consequences, such as disengagement from high-risk areas must be taken into account.
 - Relatedly, we recall that the Guidelines’ provide voluntary principles and stimulate responsible behaviour, not to trigger legal disputes.
 - We also continue to stress that it is important to recognize that the Due Diligence Guidance does not have the same legal standing as the Guidelines and that it has been

developed to provide practical support for companies and that the Guidance recognizes that ‘not every practical action will be appropriate for every situation’.

3. **Brief comments:**

Discussion on Ukraine

- While the war is causing insurmountable human suffering, it is also bringing about large macroeconomic and geopolitical implications that are reinforcing business uncertainty. We therefore believe that these developments should be reflected in the current programme of work and to that end welcome the organization of a dedicated webinar on the RBC policy implications of the Russian invasion of Ukraine as well as the development of initial analysis on the conflict.
- Further to the observations in the background paper that responsible business conduct tools can support companies in navigating the complex grounds, we would like to share a few more business realities that we observe on the ground:
 1. Businesses are supporting government action against Russia, and are thus bearing an important share of the burden to defend our common values - especially those invested in and trading with Russia. Where policy-makers consider and apply economic sanctions, close dialogue with the private sector is indispensable to ensure that such measures are effective, well-targeted, transparent, and minimize unintended consequences.
 2. While as outlined in the background paper, due diligence may prove conducive to sanctions compliance, it also must be borne in mind that there are immense practical challenges related to the unprecedented scope of sanctions and in particular personal sanctions against oligarchs, whose involvement in economic activities and business relationships is not always obvious.
 3. As pointed out in the background paper, many businesses are taking actions that go beyond sanctions, partly as a strong signal of commitment to our shared values, but also responding to public pressure from media and in some instances from politicians. As companies are stopping trade with Russia, divesting their stakes, or halting new foreign investment into Russia, many businesses are facing important ethical questions on how to respond in the short term but also on how to deal with autocratic regimes going forward. The paper presents a set of initial considerations for (responsible) disengagement but more work on dealing with this complex issue may be warranted going forward and business stands ready to provide insights into these discussions.

Sustainable finance and RBC

- We are following this work and are coordinating internally across our BIAC Environment and Finance Committees to provide inputs to this work.
 - BIAC is part of the Advisory Group developing the paper on Due diligence for Responsible Project and Asset Finance and has also provided initial comments to discussions around the Climate tool for institutional investors at a meeting of the OECD Working Party on Climate, Investment and Development last year.

Digitalisation and RBC

- Our BIAC Digital Economic Policy Committee is actively following and contributing to the work on trustworthy AI, working in close cooperation with the OECD Digital Economy Policy Division, and we stand ready to provide inputs as this work stream is being further developed.