

Business considerations for the June OECD RBC meetings

Meeting of the Working Party on RBC (27-28 June 2022) and Meeting of the Network of National Contact Points (29 June 2022)

Item 3.a. **27 June, 11:00-12:00: Targeted Guidelines updates: Fit for Issues – views from institutional stakeholders**

We would like to recall that over the last decade, the Guidelines together with the UN Guiding Principles have become the international instrument and reference document on RBC. The Guidelines have **profoundly changed the corporate RBC culture** and have thus had an enormous impact. Yet, it is also clear that more can and should be done.

The success of the Guidelines also hinged on the fact that from, the beginning there **was full involvement** of the two institutional stakeholders and advisory bodies to the WPRBC, *Business at OECD* (BIAC) and TUAC, as well as OECDWatch. This approach ensured commitment to the process and **support and buy-in to the end result** from all three sides.

In effect, **Business views** on any future decisions on the Guidelines are in effect critical, as the instrument will ultimately be implemented by businesses and the impact of the instrument, therefore, hinges on their uptake and buy-in.

We would also like to recall that consultation should in the first place take place with *Business at OECD*, TUAC, and OECDWatch, which all implement a mandate to provide **representative, consensus-based inputs** reflecting the views of businesses, trade unions, and non-governmental organizations respectively. Relatedly, their inputs should be given special consideration and emphasis in the context of any potential **future public consultations**, which we understand have become increasingly prevalent.

On the substance, the aim of the stocktaking was to ensure that the Guidelines remain fit for purpose. The stocktaking report showed that the Guidelines and the NCP system are still highly valued and largely fit for purpose (38 NCPs provided an average rating of 8.1. out of 10 for suitability) We have therefore **advocated against a review of the instrument**. We have underlined that the focus of any follow-up actions should be on strengthening the **implementation** of the existing text and fostering **awareness and buy-in on a global scale**.

To that end, we will check the proposed amendments against the following conditions:

1. They must have **clear added value**
2. They must be **proportionate** to the potential impact that it may create (keeping the update targeted and ensuring an efficient process) and
3. They must be **workable, realistic, and implementable for multinational enterprises of all sizes** and do not generate any unintended consequences.
4. The **main concepts** of the Guidelines should be maintained and safeguarded. These include:
 - a. The voluntary nature of the instrument
 - b. The clear distinction of responsibilities
 - c. The recognition of limits to leverage

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- d. The recognition that due diligence expectations must be commensurate to the characteristics and size of the company
 5. The Guidelines must **not become overly complex** or overly detailed
 6. The **essence of the NCP process must be preserved**. That essence entails the provision of a platform for mediation and identification of forward looking solutions based on good faith engagement. It is thus clearly distinguishable from a more adversarial legal process
 7. The **primacy of standards** in the other international organizations – such as the ILO – or specific OECD work streams – such as on taxation- should be respected

In the absence of any concrete text proposals that have been shared with the institutional stakeholders, we will reiterate our messages on the issues, which have been discussed so far in the consultation group.

Specifically, we have noted that:

- The Human Rights chapter has been and remains highly relevant. This was also confirmed by the stocktaking exercise, during which NCPs ranked Chapter IV high in terms of the **continued relevance** of 8.6 out of 10. We, therefore, **do not see the need for any fundamental changes** and highlight the **importance of safeguarding** the clear distinction between a company's own acts and acts of others (**'cause-contribute-linked to' framework**) as well as the acknowledgment that **responsibilities should not be shifted** from the entity causing an adverse human rights impact to the enterprise with which it has a business relationship.
- Concerning the Environment chapter, we note that the **principles** established in the environment chapter, addressing environmental management systems and encouraging improvements in environmental performance, **are still relevant**. Yet, recognizing significant developments in the area of environment and climate over the recent years smaller adjustments to the commentary, could be further explored. . Any potential references to relevant standards, however, should **explicitly reflect the spirit and principles of these frameworks**. To that end, we underline that, while many individual companies are making efforts to cut emissions in line with the Paris agreement, they cannot and **should not be held responsible for governments' commitments/NDCs under the agreement**. Moreover, it is important to note that **the detailed due diligence framework cannot be translated one-for-one to environmental and climate impacts**. This could lead to unintended consequences and complications, recognizing prevailing data, measurement, and reporting challenges as well as the difficulty of clarifying business relationships in the case of environmental impacts.
- On the Concepts & Principles chapter, we note that NCPs have ranked Chapter I with a **high-continued relevance** of 8.2 out of 10 and stress that the **current, broad definition of MNEs (I.4.) should be maintained**.
- The same applies to the General Policies chapter, in which NCPs ranked with a **high-continued relevance** of 8.7 out of 10. Regarding discussions to include references to the due diligence guidance, we recall that the **guidance has been developed with the objective of providing practical support to companies** on the steps of the due diligence process foreseen by the Guidelines and not with the intent to create another standard for companies. We further stress that the **'case-contribute-linked to' framework**, along with the recognition of **limits to leverage** and the recognition that **due diligence expectations must be commensurate** to company characteristics and size must remain key pillars of this chapter.

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- As far as the Disclosure and Employment chapters are concerned, we stress the **primacy of the ILO** to develop labor standards and the **importance of alignment with the OECD/G20 Corporate Governance Principles**, which need to be respected and maintained.

Turning from the principles to the practice, we believe that a core focus should be the **functioning of the NCP system**. While there is a series of NCPs that function very well in practice and that promote best practices, there are still cases where improvements are possible and needed. This has been a consistent message from all three stakeholders over the recent years. What is therefore needed is a serious discussion on how to enhance – substantially - **functional equivalence**, while respecting the principle of **flexibility**. **Peer reviews** can play a key role in his regard.

Coming back to the process and the involvement of the stakeholders, we call on the OECD to ensure an inclusive update process, as was the case in 2010/2011. So far, the three institutional stakeholders have been heard in the consultation group meetings, for which we have also submitted written comments. However, while we have been consulted, we have not been able to take part in the actual discussions, the brainstorming and the exchanges, which are essential to forge the way forward. Even more so, the Working Party is now discussing a zero draft that has not been shared with the stakeholders. For the next phase of the process, we would therefore like to **plead for full inclusion**, as was the case in 2010/2011, and for which there is ample proof that it has worked well.

Item 4.a. 28 June, 09:00-10:00: Targeted Guidelines updates Institutionally Fit – views from institutional stakeholders

We have consistently promoted a **well-functioning NCP system as an essential component** of the implementation of the Guidelines. It is thereby important to recognize their role in the overall system of remedy. The NCP is not a semi-public prosecutor. The NCP is a non-judicial grievance mechanism that offers a process, which is much faster and cheaper than legal proceedings and which is, importantly, centered on mediation and the identification of forward-looking solutions. This is precisely how the NCPs generate **added value** next to emerging mandatory due diligence, civil liability and company grievance mechanisms.

This also implies that caution is needed with **determinations or other efforts to make the process more stringent**, which may induce companies to shy away from the process. Instead, the focus should be on **positive encouragement** and awareness raising for the unique nature of the NCP process.

As outlined previously there is **much room for improvement as concerns functional equivalence** of NCPs, while at the same time maintaining the **principle of flexibility**. What is essential are real **commitments by adherents** to provide NCPs with necessary resources and render them functional. These efforts are complementary to expectations towards businesses to comply with the Guidelines and are all the more important as the gap in NCP performance is growing. Meanwhile, it is also important to recognize that there is **a clear link between the quality of NCPs and the willingness of businesses to engage** in the NCP process.

In this respect, we consider, **peer reviews** to be a key tool for ensuring functional equivalence. This is where the focus should lie. After 11 years of experience and more than 500 cases, and with a critical mass of NCPs that are well functioning, however, many of the uncertainties that have led to a very cautious approach in 2011 have now faded. It is therefore time to move.

We have at this point **no concrete proposal to amend the Procedural guidance or the existing mandate** but will consider and evaluate any suggestions according to the seven criteria, which we have elaborated on in the previous session.

In previous consultation group discussions concerning the institutional fitness of the Guidelines, we have further underlined that:

- We believe that the **functional equivalence criteria** of visibility, accessibility, transparency, and accountability **remain relevant**.
- We are convinced that **additional efforts are needed** to improve the **resourcing as well as the visibility of those NCPs**, that are lagging behind, in order to ensure functional equivalence and enable NCPs to live up to their mandate. **Peer reviews** can play a critical role in this regard. Nevertheless, NCPs should **continue to be granted flexibility** in how they chose their institutional arrangements.
- The **current wording of the Procedural guidance does provide considerable guidance** and that in our view the main focus should be on the **peer reviews**, whose role and relevance were also reconfirmed by the latest NCP annual report.

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- The annual report confirmed that ‘NCP Peer reviews offer an important opportunity to appreciate and share the internal workings of an NCP and any barriers the NCP may face in realising its objectives, as well as achievements and good practices in discharging its functions. The peer reviews also include an examination of the NCP’s procedures and approach to handling of specific instances which can help improve consistency going forward.’ We would further add that including the stakeholders in the peer review exercise can help identify concerns and foster trust in the process. **Broad-based participation in peer reviews** should therefore continue to be encouraged.
 - The **dual mandate** of NCPs as non-judicial grievance mechanisms and promoters of the Guidelines **remain relevant, yet, more efforts are needed** to implement this mandate.
 - We strongly believe that **stakeholder trust** is a critical prerequisite to engagement by the respective parties, and with that, ensures the proper functioning of the NCP system.
 - In order to ensure trust, there must be a sound understanding of how the process works and what it can deliver. The OECD has developed a large [body of best practices and recommendations](#) on how to manage different aspects of the process. The priority should thus be to ensure that **NCPs have profound knowledge** and display high respect for the procedural guidance and that they also **communicate clearly to the parties** about the expectations for the process. There should also be a clear understanding of the relationship between the NCP process and other forms of grievance mechanisms.
 - **Due respect for confidentiality, good faith engagement as well as the absence of pressure against any party involved** are also critical to ensure confidence and encourage participation in the process. (NB: OECD has developed in 2019 a [Guide for NCPs on confidentiality and campaigning when handling specific instances](#))
 - Rendering the process **more deterministic**, by contrast, may induce companies to turn away from engaging in the process.

Meeting of the Network of NCPs

Item 2. **29 June, 14:10-15:00: Updates from NCP network**

Item 3.a. **29 June, 15:00-15:30: Developing promotional plans for NCPs – views from institutional stakeholders**

- Promotion is part of the **two part of the mandate** of the NCP and plays a **key role for the implementation of the Guidelines**. Unfortunately, awareness for the instrument **still lagging behind**. Relatedly, we also have the impression that **awareness and understanding for how the instrument and the NCP procedure is working** could also be improved.
- Linked to this, we see a **need for NCPs to be more visible** across the board. Promotional and outreach activities are one aspect of this, but it is equally important to have easily accessible and informative (and ideally multilingual) **web-representation** in place.
- To that end, we appreciate the ambitions embedded in the latest **NCP action plan** to improve visibility of NCPs and **plans to provide NCPs with further guidance** on promotion. We are aware that the Secretariat has produced a **set of targeted guidance documents** on various aspects of case handling and other critical issues and we consider these types of documents very useful.
- To inform guidance on stepping up promotional activity for NCPs, **exchange and best practice sharing** among NCPs will be important. The meeting today is a good start. Another source of insights can also be the **learnings drawn from peer review processes** and the preparation of the previous annual reports
- From the point of view of *Business at OECD*, there are **5 key elements**, which we believe are important to take into account when discussing how to advance promotional activity:
 1. As a core prerequisite/starting point, **it must be ensured that NCPs are sufficiently equipped to carry out their obligations and carry out promotional activity**. The background paper mentions a lack of resources and high staff turnover as obstacles to promotional activity. As we underlined previously, and in line with our [joint statement with TUAC and OECDWatch from 2015](#), it is essential that adherent governments live up to their responsibility under the Guidelines, which is maintain well-equipped, and well-staffed NCPs. This is also relevant as more promotional activity should normally lead to **more specific instances**, so NCPs must ensure that they are ready and equipped to deal with additional enquiries.

The background paper further notes that guidance would also aim to **support NCPs in setting strategic priorities for promotional activities** to accommodate for their limited resources. This is certainly a very reasonable approach; however, the **broader aspect of strengthening NCPs' resources should not be forgotten**.

2. Our second point relates to **stakeholder engagement**. The background paper points towards a link between promotional activity and stakeholder involvement in the NCP. *Business at OECD* broadly supports the promotion of **NCPs' engagement with**

representative stakeholders, yet, we continue to believe that NCPs should be granted flexibility with respect how they chose their set and how they choose to engage with stakeholders as ‘best approaches’ to may vary across countries.

3. As a third point, we would like to stress the importance of **well-designed communications materials**, which are the basis for outreach and promotion. Such materials should be **concise and formulated in plain language**, and can contain references to other more in depth materials and guidance. We would also like to remind that providing materials in the **local language** can further play an important role, especially in engaging with smaller and medium sized enterprises.
4. In addition, we see an important role for promotional activities to **educate about the unique value of the NCP process and clarify the nature of the proceedings**. In other words, promotional activities should aim to raise awareness for the **opportunities of engaging** in the mediation process, which also means preventing costly and lengthy legal proceedings. They should also aim to develop a sound understanding of what the process can deliver (and what it cannot deliver) and of what is expected from the parties involved, in order to manage expectations.
5. One final, yet important aspect in the context of promotional planning is that NCPs need to **clearly identify** and be aware of their target audiences. While this is also pointed out in the background paper, we would like to underline the importance of avoiding **‘preaching to the choir’**. As the background paper notes, NCPs often engage with and target the same audiences and stakeholders, with whom they have interacted before. However, in order to effectively promote the Guidelines, it is important that NCPs also reach broader audiences. This may certainly be challenging, but one way this could be approached could be by **partnering more closely with national business organizations** and the local and partner organizations.