

## ***Business at OECD (BIAC) contribution to the public online consultation on the Draft Recommendation on the Role of Government in Promoting Responsible Business Conduct***

*Business at OECD (BIAC)* takes the opportunity to provide input to the public online consultation on the proposed Draft Recommendation on the Role of Government in Promoting Responsible Business Conduct.

*Business at OECD (BIAC)* is the officially recognized business voice to the OECD, representing more than 7 million companies affiliated with the leading business and employers' organizations in OECD countries, selected non-member countries and international sectoral federations. *Business at OECD (BIAC)*, together with our trade union counterpart, the TUAC, is an institutional stakeholder of the organization and an acknowledged "advisory body" of the OECD Working Party on RBC, alongside OECD Watch, representing civil society. To that end, we provide comprehensive, consensus-based input from the business community and have worked closely with the OECD on related discussions around the proposed instrument.

In light of the above, we would like to remind the organization that the comments and assessments provided by the institutional stakeholders, *Business at OECD (BIAC)* and TUAC, representing a large OECD-wide constituency, as well as OECD Watch, should be given specific emphasis and due consideration. It is important to ensure that the special representative status of *Business at OECD (BIAC)* and TUAC, as well as OECD Watch as advisory bodies of the OECD Working Party on RBC is duly recognized in relation to public online consultations.

*Business at OECD (BIAC)* considers responsible business conduct, in line with the MNE Guidelines, to be a part of an open investment climate, helping to improve operations, employee engagement, maintain trust of customers, enhance resilience, and foster innovation. In conversations with our members, we gather insights about observed challenges and opportunities in the implementation of RBC on the ground. Against this backdrop, we underline that businesses have made more and more progress on adopting RBC policies in their operations over the past decade. We also stress the need for expectations on companies to be practical, realistic and to take into account differences between companies of different sizes, sectors etc.

On the proposed instrument, we would like to make the following points more broadly:

- As *Business at OECD (BIAC)*, we have long underlined the **important role governments should play in complementing business efforts**. In that respect, bringing together in a comprehensive recommendation the various existing provisions spread over a variety of OECD instruments can be a valuable contribution to improve government policies.

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- However, we are concerned that the proposed Recommendation in its current form goes beyond providing a synthesis of existing OECD work on RBC, introducing new provisions and challenging the nature of the OECD MNE Guidelines and the OECD Due Diligence Guidance.
  - The Recommendation also seeks to promote policy coherence. It should be stressed that policy coherence should be pursued not only on the domestic level, but also on the international level, between countries and within regions. A proliferation of – often substantially diverging – RBC standards and initiatives, both on national and international levels, creates serious practical challenges for business. The business community therefore supports efforts to ensure policy coherence, and to that end, we ask the OECD and states to bring the draft Recommendation in line with the MNE Guidelines in order to promote **coherence across international RBC standards** and international collaboration.
  - The proposed Recommendation should **not create new standards** or additional responsibilities for companies, which distracts resources from implementation of the Guidelines and may not lead to more effective outcomes. Against this backdrop, we reiterate the importance of ensuring that the instrument remains entirely based on the OECD MNE Guidelines and recall that the OECD Due Diligence Guidance is not a “RBC standard” as is mentioned in the draft several times. The **Due Diligence Guidance** document is a helping hand for the implementation of the Guidelines, **providing practical support** to practitioners and clarifying that “**not every practical action will be appropriate for every situation**” (OECD Due Diligence Guidance, page 11). The Due Diligence Guidance should thus not be equated with the MNE Guidelines (the standard). Moreover, we would like to recall that the **OECD MNE Guidelines provide voluntary recommendations to business**, although it represents a binding international obligation for governments. Where the Recommendation deviates from these assumptions, the nature of the Guidelines should be clarified.
  - As compared to the previous version of the draft instrument, **we regret that our comments on the draft Recommendation from April 2021 have not been reflected** in the latest draft. From our perspective, the Recommendation thus continues to contain problematic elements.
  - Meanwhile, the Recommendation does currently not address the core role of governments embedded in the State’s **duty to protect human rights** and **implement ratified international standards** on the ground through domestic laws and effective enforcement mechanisms. We thus encourage the OECD to include in the Recommendation a call to states to develop National Action Plans on Business and Human Rights (NAPs) to implement the UN Guiding Principles and underscore that, while business efforts are critical, governments duties should not be transferred to businesses.

More specifically, we have the following specific comments:

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- We welcome the **references to the UNGPs and ILO MNE Declaration**, which are aligned with the OECD MNE Guidelines, and which altogether provide the internationally recognized and widely used framework for responsible business conduct.
  - **II.3, VI.2.: NCPs** with their mandate of promoting the Guidelines, responding to inquiries related to the Guidelines and contributing to the resolution of cases, can play a key role in the promotion of RBC. However, as we have underscored in previous interactions with the OECD, as well as in our [joint BIAC-TUAC-OECD Watch statement from 2015](#), the support for and performance of a number of NCPs remains uneven. Respective references to ‘*periodically assess the adequacy of the NCPs’ institutional arrangement and the human and financial resources*’ and the call to ‘*take measures so that NCPs enjoy the confidence of social partners and other stakeholders and can effectively fulfil their responsibilities*’ are thus highly appreciated.
  - **Preamble and IV.2.:** We appreciate the explicit reference to the Guidelines on Anti-Corruption and Integrity in State-Owned Enterprises in the preamble and take note of the call to establish clear expectations and implementation mechanisms for **SOEs** to observe RBC standards. We are convinced that, in order to promote responsible business conduct, SOEs should lead by example.
  - **V.:** While it is appreciated that the Recommendation calls on Adherents to promote **stakeholder participation**, which is critical to ensure that RBC policy making reflects practical realities, we underline that such engagement should occur with relevant and representative stakeholders and in a transparent manner. To that end, we request the OECD to acknowledge in the wording of the Recommendation that *business* (V.1.) can refer to enterprises, industry and employers’ organisations.
  - **II.4.:** In its current form, this provision reads as if the Recommendation encourages Adherents to develop new legal frameworks on RBC based on OECD standards and guidance. This raises significant challenges. As mentioned above, businesses are already confronted with a **lack of coherence resulting from many different emerging regional and national mandatory due diligence approaches**. A call to individual governments to actively, unilaterally develop new mandatory due diligence legislation would thus be counterproductive. However, to the extent new legislation is already being developed, alignment with the Guidelines could help prevent a ‘spaghetti bowl’ of approaches and **maintain coherence** with respect to core approaches set out in the Guidelines (e.g. the protect-respect-remedy framework).

Yet, it is important to underline that:

- This does not imply that legislative approaches constitute the best approach to promote meaningful due diligence. In effect, **voluntary standards, multi-stakeholder initiatives and collective action** can play an important role to promote RBC and drive impact on the ground. Focusing narrowly on “*new policies, laws, or regulations, including secondary rules,*

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*legislative guidance, or sectoral policies”* may thus disregard the potential of these approaches.

- The call to develop legislation “drawing from RBC standards and in particular OECD Due Diligence Guidance” fundamentally challenges the fact that according to the MNE Guidelines “observance of the Guidelines by enterprises is voluntary and not legally enforceable” (Chapter I, 1.) and that the Guidelines “provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognized standards” (Preface 1.). It should thus be clarified in the draft Recommendation that the **Guidelines’ original intention is to provide voluntary principles and stimulate responsible behavior, not to trigger legal disputes**. Recognizing that the Guidelines were intentionally drafted as voluntary, they were drafted in an open way. In other words, they would never have been formulated in the same way if they were meant to become mandatory provisions.
- The **Due Diligence Guidance is formally not a RBC standard** and merely provides practical support for companies. Therefore, the Due Diligence Guidance should not be used as a basis for new laws and regulations.
- **III.2.:** The call to promote RBC through **trade and investment policies** (III.2.) should be considered with caution, noting that respective discussions are ongoing. There is a need to avoid duplications, keep a clear scope and make sure that investment treaties do not become overloaded with detailed provisions or introduce new burdens and corporate liabilities for companies. While references to the MNE Guidelines in trade and investment agreements entail potential for awareness raising and levelling the playing field, it must be borne in mind that the Guidelines constitute a voluntary standard. To that end, they do not foresee the implementation of binding obligations for companies in trade and investment agreements. Provisions should also take into consideration national conditions (including the level of development) and sectoral circumstances. Finally, there needs to be a balance with the treaties’ aim of providing investor security and guaranteeing fair competition between domestic and foreign companies and there should be a clear division of tasks between trade and investment agreements and domestic flanking policies.
- **III.4.:** We would further like to highlight that the MNE Guidelines are explicitly applicable to MNEs, which can also include multinational SMEs. SMEs which are not also MNEs are not directly addressed by the Guidelines. Moreover, for those SMEs, which are MNEs, the Guidelines contain an important number of flexibility/proportionality criteria. We are therefore concerned that creating “*expectations*” for **SMEs in general** could generate unnecessary bureaucracy and costs without considering the natural limits and constraints of SMEs. In this context, it is worth noting that it is good practice to include in legislations thresholds in order to disburden SMEs. Instead, Adherents should consider supporting SMEs with practical materials, such as information and tools (III.1.).

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- **IV.1., IV.3.:** With a view to calls to use **public procurement** as a strategic tool for RBC and including RBC in procurement policies and to link **government services/benefits** (e.g. equity, debt, grants, loans, guarantees, or insurance) to ESG criteria, we strongly urge the OECD to introduce qualifiers that help ensure that compliance criteria does not create additional burdens, but instead, provide sufficient flexibility across different sectoral contexts and company sizes, taking into account the needs of SMEs and mid-sized companies. Bidding criteria related to RBC should further not create discriminations and new legal burdens for enterprises.
  - **VI.1.:** While focused on the rights holders, the call to *“take appropriate measures so that those affected by non-observance of RBC standards by companies operating in or from their territories have access to effective judicial or non-judicial remedy mechanisms”* in its current form, suggests to introduce new liabilities and possibilities for lawsuits against companies for **“non-observance of RBC standards”**. We strongly oppose this idea, as this is not foreseen in the MNE Guidelines. As mentioned above, the MNE Guidelines are voluntary for businesses, carrying the intention to stimulate responsible behaviour, not to trigger legal disputes. A further complication to this provision arises from the fact that according to the UNGPs, states are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction (UNGP 2, Commentary).