

Reaction of the Dutch NCP to the Concept-note of the OECD (December 2015) General Guidance on Risk Based Due Diligence

The Netherlands' NCP has reviewed the Concept Guidance Note (dated 8-9 December 2015) on Risk-Based Due Diligence for Responsible Business Conduct. Because of the importance of this Guidance Note, it has also been discussed at our recent NCP+ meeting, which not only includes the Independent Members and the governmental Advisory Members, but also representatives from FNV (trade unions), VNO-NCW (employers association), OECD Watch and the SER (Social Economic Council). Although this commentary is the joint opinion of the Independent Members of the Dutch NCP, we have considered all, and included some of the views of the participants involved. We also agreed that further public consultation with stakeholders in the Netherlands would serve a dual purpose to raise the awareness of this important Note and also to obtain further opinions, but such process is, of course, dependent time-availability and on your support for this.

Although the Guidance Note should not change the text of, or the concepts underlying the OECD Guidelines for Multinational Enterprises, we feel that on certain issues clarification thereof may be opportune:

1. although reference is made to the "supply-chains", we should more explicitly recognize that the broader "value-chain" concept is part of the concept expressed on the responsibility with respect to "adverse impacts directly linked to their operations, products and services by a business relationship" (Chapter II, Article 12). As NCP-NL we have dealt with a number of cases in the financial and the pharmaceutical sectors where the distribution of such services, products form such linkage.
2. clarification of "contribute to adverse impacts" to include "benefitting from" (with consequential remedy aspects); this is in particular important in the case of expropriation of land by governments for the benefit of a MNE (such as to open a mine, build a factory, create port facilities) from local communities and/or indigenous peoples without proper consultation, consent, compensation.
3. clarification of the scope of "directly linked": as this is an important issue for corporations to consider their responsibility, we would encourage this issue to be further defined by a WPRBC working group, building also on the practices of other NCPs; we would be happy to lead such exercise, if so desired. Similarly the issue of "responsible disengagement" (paragraph 25) warrants further guidance (and possibly a working group).

On the content of the Guidance Note we have following commentary:

4. more specific language may be considered as guidance for corporations in their due diligence on the basis of the Guidance Note, next to the UNGPs already referred to. An example of such reference may be the "Voluntary Guidelines for Land Tenure, Fisheries and Forests" (VGGT): as the issue of ICP/FPIC is becoming increasingly relevant in our NCP practice and policy coherence within the OECD and in other leading international agreements and fora is important for corporations to consider.
5. we would suggest that paragraph 17 on "Principles of Due Diligence" to have stronger language: "good faith efforts" is in our view too weak in comparison with language already in the Guidelines themselves and in other international agreements: also, the principle of "comply or explain why not" should be mentioned in this respect;
6. we would recommend in general an early engagement by corporations with relevant (interested and potentially adversely impacted) stakeholders; this should already be considered in Component I (paragraph 23); also the suggestion to use from the beginning "operational level grievance mechanisms" may be considered (paragraph 31)
7. in your paragraph 25, Figure 3: have you considered the views by NCP-NL in the APG/POSCO case in which we considered that the (prominent) size/standing/stature of a corporation (or a pension fund) has effects on the possible leverage and may be even more relevant than the size of a (minority-) shareholding-interest;

8. with reference to your paragraph 27, we consider public accountability and external reporting on (initial & ongoing) due diligence extremely important; also here the principle of "report or explain why not" should be adhered to.

Next to these clarifications, there may be specific issues which are not referred to in the current Guidelines and Guidance Note, but may nevertheless be referred to as part of the due diligence, such as animal welfare.