

**Response from IT for Change to the**

**Consultation Draft of the OECD Guidelines for  
MNEs and their Implementation Procedures**

February 2023



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#### Overall Comments

The targeted updates being sought to the Organisation for Economic Co-operation and Development (OECD) Guidelines on multinational enterprises (MNEs) are very timely, especially from the perspective of changes in the technology sector. In the last decade, tech enterprises have become a majority of the top 10 corporations by market capitalization.<sup>2</sup> In this scenario, it is imperative that the guidelines address specific challenges that the technology sector brings, as seen through platformization and datafication – not just in the Science, Technology and Innovation (STI) chapter, but also across other chapters.

At the first instance, there has been an overhaul in the STI chapter in the Consultation Draft, which is welcome. Updating the STI chapter is imperative to keep up with the times and create a set of norms and rules that are rooted in abiding values and can stand the test of time in a rapidly changing techno-social context. Given that MNEs are focused on conducting risk-based due diligence through their value chains, data harms above and beyond privacy need adequate consideration. The severity of data harms can be established by the three factors that the OECD has already recognized – scale, scope, and irremediable character (as provided in the OECD Due Diligence Guidance on RBC). In the case of digitalization, both in traditional industry and platforms, these factors can lend themselves to make data harms significant, and thus, of priority for review with respect to the entire supply chain.

While mitigating and addressing the adverse impact on human rights and the environment by corporations is envisaged in specific sections in the current draft, certain technological harms, especially arising from **downstream data re-use, inferred data, algorithmic decision-making, artificial intelligence (AI) interventions, as well as ascribing liability for these harms requires specific focus**. It, thus, becomes imperative that the guidelines refer to these challenges that are increasingly prevalent in not just platform models and their value chains, but also in increasingly digitalized traditional MNEs.

Detailed submissions on chapters are given below.

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<sup>1</sup> For any clarification or queries, we can be reached at [itfc@itforchange.net](mailto:itfc@itforchange.net)

<sup>2</sup> Statista. (2022). *The 100 largest companies in the world by market capitalization in 2022*. <https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization/>

## Chapter-wise Comments on the Consultation Draft of the OECD Guidelines for MNEs

### 1. On the Disclosures Chapter

A key disclosure with regard to responsible business conduct (RBC) – under Paragraph 3 for tech enterprises and other MNEs that are digitalizing – is transparency around the data they collect in large amounts from their value chains and consumers. Data transparency obligations have been introduced under several laws in the European Union (EU). For instance, the General Data Protection Regulation (GDPR) under Articles 13 and 14, requires data processors to inform data subjects of what data is being collected and why. Similar obligations have been noted in the EU AI Act that is under consideration, which in Article 13 requires AI systems to be transparent, especially if they are high-risk, and in Article 52 seeks to inform users that they are interacting with an AI system. Other examples include terms and conditions of use (as in Section 27 of the Digital Services Act), as well as sufficient disclosure mechanisms for algorithms and their logic (source code), obligations for platform recommender systems<sup>3</sup> (as noted in Article 29, Digital Services Act and Commitment 15, of the 2022 Strengthened Code of Practice on Disinformation), and publication of reports of complaints received and action taken. The Digital Services Act enables its oversight authority to ask for data in order to assess potential risks and harms that the platform can have.<sup>4</sup> This is to ensure that the data pool that tech enterprises or other MNEs in digital value chains collect is available as knowledge commons for public initiatives like health services. Incorporating the need for data transparency measures within this paragraph will ensure reliability and trustworthiness of emerging technologies in the future.

### 2. On the Human Rights Chapter

The Human Rights chapter recommends that enterprises attempt to prevent, address, and mitigate the adverse human rights impact of their activity. In the case of Big Tech, these can range from e-commerce, including logistics, delivery, and the corresponding right to decent work, to social media giants, with content moderation and free speech implications.

Remedial action has been seen, for instance, in the case of Meta and its Oversight Board, which reviews the enterprise's actions to decide if such actions are in line with the community guidelines (the public policy document reflecting human rights values). However, Meta's example is also important to ensure due diligence risks are assessed on downstream partners. Meta's content moderators reviewing violent content

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<sup>3</sup> As noted in Article 29, Digital Services Act (European Union). <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0825&from=en>; Commitment 15, Strengthened Code of Practice on Disinformation. <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>

<sup>4</sup> Sinha, A. (2022). *Navigating transparency in EU's Artificial Intelligence Act: A policy proposal*. Knowing Without Seeing. <https://www.knowingwithoutseeing.com/essays/ai-act-policy-proposal>

are usually based in Global South countries, with poor pay and almost no mental health support.<sup>5</sup> Such activities need to be brought under the scanner of the guidelines.

The human rights impact of tech enterprises specifically implicates the right to privacy of individuals, which includes aspects of decisional autonomy, bodily integrity, and informational privacy.<sup>6</sup> So, targeted advertisements, nudging, and associated data collection by tech enterprises need a specific focus in the commentary.

In terms of economic rights, the right over one's data and benefits arising from the same requires acknowledgment in the commentary. In the current context of network-data infrastructures of Big Tech corporations, the benefit of large-scale data collection cannot be enclosed, and must be passed on to the 'source communities' or generators of data in some manner or form, as can be extrapolated from the Nagoya Protocol under the Convention on Biodiversity.

### **3. On the Employment and Industrial Relations Chapter**

In an increasingly digitalized work environment, recognition of the impact on workers and industrial relations is imperative. To that effect, the following updates to Chapter 5 will ensure that the chapter is in keeping with the times and forward-looking, and extends to platform models and traditional industries that are digitalizing rapidly.

Paragraph 4 should add the sub-section: (d) to recognize emerging forms of managerial control, especially algorithmic management, and the impact of automated decision-making, as noted in Article 22 of the GDPR. Workers are monitored, tracked, and profiled through algorithmic systems and their right to privacy and autonomy is deeply affected by the same. As a result, it is necessary to ensure that algorithmic models are explainable to those impacted; in this case workers, and that there is a 'human-in-the-loop' in decision-making. In that regard, the EU Platform Work Directive is a useful piece of legislation that can be incorporated into the commentary.

Commentary 48 should include recognition of workers' informational privacy as under the ILO Code of Practice on Workers' Personal Data, in addition to the rights provided by the ILO Declaration on Fundamental Principles and Rights at Work.

In Commentary 49, there is an explicit recognition of the responsibility of MNEs in cases where there is no formal employment relationship – prevalent in modern platform work arrangements. The commentary

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<sup>5</sup> BBC. (2022). *Meta being sued by ex-Facebook content moderator*. <https://www.bbc.com/news/technology-61409556>

<sup>6</sup> Privacy definition, available at <https://plato.stanford.edu/entries/privacy/>

should also add the term ‘platform work’ in particular, in addition to the new language of “informality, short-term working arrangements, decent work deficits, and digital transformation”.

#### 4. On the Environment Chapter

Sustainable development requires recognition of community/collective rights over data – with parallels to genetic resources as in the Nagoya Protocol.<sup>7</sup> The Guidelines must direct MNEs to share data that helps in achieving environmental targets with governments, NGOs, and data originators. There are also concerns that the data originators cannot utilize the benefits of data generated by them – such as farmers whose data is tracked and utilized by agricultural equipment enterprises.<sup>8</sup> The Guidelines should acknowledge these issues and direct MNEs to share the data, in a form that is accessible and provides value to the data originators.

Increased CO2 emissions and demands on minerals, electricity, and water are ramifications of digital technologies such as blockchain, AI, and cryptocurrency mining.<sup>9</sup> In line with the Declaration of the European Green Digital Coalition Members, the Guidelines should direct MNEs to deploy solutions minimizing their environmental footprint.<sup>10</sup>

#### 5. On the Consumer Interests Chapter

Paragraph 6 of the Consumer Interests chapter, while emphasizing the requirements of fairness, lawfulness, and transparency, does not incorporate the following cardinal principles pertaining to the processing of personal data as envisaged under Article 5 of GDPR: i) data minimization; ii) purpose limitation; and iii) storage limitation. Incorporation of these principles along with a direction to MNEs to provide consumers the right to access their personal data (Article 15, GDPR) will ensure consumer interests are at the forefront of the processing of personal data.

New paragraphs recognizing the right to data portability (Article 20, GDPR) and interoperability must be added to the Guidelines as these ensure consumers have the ability to migrate to platforms with better services and products, and strengthen the development of fair and transparent markets.

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<sup>7</sup> United Nations. *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*. <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>

<sup>8</sup> EU Science Hub. (2022). *A green and digital future: 7 insights from strategic foresight*. [https://joint-research-centre.ec.europa.eu/jrc-news/green-and-digital-future-7-insights-strategic-foresight-2022-06-30\\_en](https://joint-research-centre.ec.europa.eu/jrc-news/green-and-digital-future-7-insights-strategic-foresight-2022-06-30_en)

<sup>9</sup> UNEP. (2021). *The Growing Footprint of Digitalisation*. <https://wedocs.unep.org/handle/20.500.11822/37439>

<sup>10</sup> Digital Day. (2021). *Declaration of the European Green Digital Coalition Members*.

[https://ec.europa.eu/information\\_society/newsroom/image/document/2021-12/european\\_green\\_digital\\_coalition\\_declaration\\_-\\_final\\_-\\_digital\\_day\\_2021\\_E592503B-D1CC-A599-5EF97E6891B038DF\\_74943.pdf](https://ec.europa.eu/information_society/newsroom/image/document/2021-12/european_green_digital_coalition_declaration_-_final_-_digital_day_2021_E592503B-D1CC-A599-5EF97E6891B038DF_74943.pdf)

## 6. On the Science, Technology, and Innovation Chapter

The current updates recommended in the Consultation Draft's STI chapter are in the right direction as they recognize the changing and evolving direction of the tech sector – especially, the significance of privacy and data protection. However, there is still some distance to be covered in this chapter to ensure that the aim and intent of the guidelines are met.

The language in the STI chapter must be oriented towards the impact of tech enterprises, which are numerous – loss of privacy, right to public participation on social media, self-censorship on account of threat of violence, high precarity in jobs, to name a few. At present, the language is focused on how MNEs may benefit from tech and development endeavors.

There needs to be an acknowledgement of extractive data practices, without adequate benefit sharing with host economies, and impact on downstream suppliers and consumers.

A broad brush stroke approach to the text can make for abiding relevance, but the language also needs to be specific enough to capture the impact of AI and other emerging and frontier tech. Reference to newer technologies like machine learning, large language models like ChatGPT, or intelligent energy grids in smart cities will ensure that as newer forms of technology continue to get assimilated into society, MNEs are conscious of the potential impact of such technology.

References to responsible data governance practices may need explicit examples so as to ensure there is an accepted standard of data use and sharing, potential concerns with data re-use, and appropriate liability for harms caused.

The commentary for the provisions must recognize the impact of digitalization and Big Tech firms to emphasize the role and importance of due diligence.

Transparency obligations need to include how newer tech like AI is being trained and whose datasets are being used, as already discussed in Chapter 3 on Disclosures.

## 7. On the Competition Chapter

The Note of the UNCTAD Secretariat on Competition issues in the digital economy (henceforth referred to as 'Note') highlights specific features of digital platforms, such as economies of scale and scope, data control, and data-driven network effects that contribute towards high entry barrier.<sup>11</sup> The Note rightly points out that current antitrust frameworks do not adequately address concerns regarding personalized pricing (through

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<sup>11</sup> UNCTAD. (2019). *Competition issues in the digital economy, Note by the UNCTAD Secretariat*. [https://unctad.org/system/files/official-document/ciclpd54\\_en.pdf](https://unctad.org/system/files/official-document/ciclpd54_en.pdf)

algorithms), consumer privacy, and personal data protection. The Digital Markets Act has also underscored the ability of gatekeepers to leverage their access to data from one activity to another.<sup>12</sup>

The Guidelines in the present form do not contain any reference to promotion of competition in the digital economy, which in our view is a shortcoming. In order to ensure fairness in digital markets and data protection, the exigency to counter the anti-competitive practices of Big Tech must be acknowledged, and a new Paragraph 5 should be added in the Competition chapter to caution MNEs against self-preferencing (Recital 52, DMA) and exploitation of personal data for advertising (Article 5, GDPR).

## 8. On the Taxation Chapter

Addressing tax challenges arising from the digitalization of the economy is a key issue, as recognized by the OECD/G-20 Inclusive Framework on Base Erosion and Profit Shifting. It is imperative MNEs are subject to tax in jurisdictions where the services/goods are consumed, notwithstanding physical presence. Explicit recognition in the Guidelines of the intersection of tax implications and digitization, along with a commitment to move towards destination-based tax rules is essential to address developing countries' concerns.

The Two-Pillar Solution, while laudable for the attempt to re-allocate taxing rights, limits developing countries' share to MNEs with global turnover above 20 billion Euros and profitability above 10% (of which only 25% of residual profits shall be allotted to market jurisdictions).<sup>13</sup> Conversely, the implementation plan for the Two-Pillar Solution provides that all parties shall remove all Digital Services Taxes and other similar measures with respect to all enterprises and not introduce such measures in the future. Such restrictions, coupled with the high thresholds and minimal profit allocation, reflect that the framework may favor developed countries. There are also apprehensions that the tax benefits will accrue to developed countries as a consequence of the GloBE rules – for instance, as per the Income Inclusion Rule, the Ultimate Parent Entity (mostly located in developed jurisdictions) collects the difference between the effective tax rate and the minimum tax rate (15%).<sup>14</sup> In order to build an enduring and fair tax regime, it is imperative that the interests of developing countries are taken into account, and the Guidelines must aim to vanguard these.

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<sup>12</sup> Official Journal of the European Union. (2022). *Recital 3, DMA*. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925>

<sup>13</sup> OECD. (2021). *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*. <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf>

<sup>14</sup> Chowdhary, A.M., & Diasso, S.B. (2022). *Taxing Big Tech: Policy Options for Developing Countries*. IT for Change. <https://projects.itforchange.net/state-of-big-tech/taxing-big-tech-policy-options-for-developing-countries/>