



SOMO

Justice  
for Iran  
عدالت برای ایران  
NO MORE IMPUNITY

fidh



## Under a watchful eye

### Due diligence expectations of telecoms companies doing business with repressive regimes – the case of Italtel & Iran

SOMO, JFI & FIDH discussion paper | April 2021

In September 2017, three NGOs (the International Federation of Human Rights (FIDH), REDRESS and Justice for Iran) filed a complaint at the Italian National Contact Point (NCP) for the OECD Guidelines against Italtel regarding the Italian telecom giant's provision of telecommunications services in Iran.<sup>1</sup> The complaint alleged that Italtel, a global telecommunications company headquartered in Italy,<sup>2</sup> breached the OECD Guidelines for Multinational Enterprises by failing to conduct appropriate human rights due diligence (HRDD) when it entered into a Memorandum of Understanding (MoU) with the Telecommunications Company of Iran (TCI) on 13 April 2016.<sup>3</sup>

TCI is Iran's main provider of internet and mobile phone services.<sup>4</sup> Crucially, since 2009 the majority share of TCI has been held by a consortium of companies controlled by the Islamic Revolutionary Guards Corps (IRGC) – Iran's most powerful military and security entity.<sup>5</sup> As a result, the IRGC exercises total control over Iran's telecommunications and internet traffic.<sup>6</sup> A 2017 report by the human rights organisation Article 19 referred to the close relationship between the IRGC and Iranian Cyber Army, whose members are reportedly trained in cyber-attacks, hacking and surveillance of internet users.<sup>7</sup> The IRGC "played a crucial role in crushing political dissent and civil liberties throughout the country and more recently in cyberspace."<sup>8</sup>

This paper analyses the OECD Guidelines complaint against Italtel, drawing lessons and recommendations to improve human rights due diligence by multinational ICT companies doing business with repressive and authoritarian regimes. The paper also contains recommendations drawn from the Italtel case for NCPs, national governments and the OECD itself.

### Provision of tech to repressive regimes

On 9 June 2020, a group of civil society organizations called on the European Commission to strengthen its regulations to prevent European companies from selling cyber surveillance technology to repressive governments.<sup>9</sup> The NGOs noted:

*"[Since 2011,] we have observed alarming trends indicating exponential and unconstrained growth in the market of digital surveillance technology. Intrusion and interception spyware tools are weaponized by repressive regimes raising the stakes and dire need for the protection of human rights. We also observe the emergence of intrusive biometric surveillance and its increased use for unlawful surveillance and repression."<sup>10</sup>*

These technologies are often 'dual-use', meaning that they can be used for both civilian and military applications. They have enabled numerous violations of human rights, including the rights to privacy, freedom of expression, assembly and association, and non-discrimination.<sup>11</sup> The NGOs called on the European Commission to adopt legislation requiring companies to carry out human rights due diligence (HRDD) and to require EU member states to deny export licenses for cyber surveillance technology if there is a substantial risk that it may be used to violate human rights.

On 10 November 2020, the European Council and Parliament agreed to update export rules that restrict the sale of cyber-surveillance goods to repressive regimes.<sup>12</sup> Covert surveillance, including monitoring, collecting and analysing information, of individuals will fall under the new restrictions.<sup>13</sup>

This briefing paper examines a complaint against a company that entered into an agreement to provide 'dual-use' telecommunications technology to Iran. This technology was subject to an EU Council Regulation on the export of dual-use items.<sup>14</sup> Central to the complaint was the claim that these technologies, especially when controlled by repressive and authoritarian governments, have immense potential to negatively impact the civil and political (human) rights of their users.

## The OECD Guidelines complaint against Italtel

According to the complaint, Italtel, as part of its MoU with TCI, agreed in writing to "cooperate with TCI on the development of the Iranian telecommunications sector", specifically in relation to "IP-NOC, IP-BB projects as well as provision of equipment for the implementation of the Iranian telecom network..."<sup>15</sup> An IP-NOC (Internet Protocol Network Operations Center) is a location where a telecommunications network can be directly supervised, monitored and maintained – relevantly, without the end-user (e.g. Iranian citizens) being aware of the IP-NOC's presence.<sup>16</sup> An IP-BB (Internet Protocol Broadband; also known as an 'internet backbone') refers to the infrastructure that connects a country to the global internet. The IP-BB project in particular carried a high risk of adversely impacting human rights because it is at this 'backbone' level that state-directed restrictions on control over the flow of information may be imposed, affecting Iranians' internet access.<sup>17</sup>

The Iranian government has increasingly resorted to internet restrictions and disruptions as weapons to crush dissent. The government has worked hard to develop

its ability to censor, monitor and block access to online information and communications and has routinely exercised that ability to disrupt access to the global internet at will. It has demonstrated this capacity by imposing internet blackouts and shutdowns of popular social media services, including in parts of the country during anti-government protests in 2017 and 2018.<sup>18</sup> It reached a new peak when during the deadly crackdown of protesters in November 2019, access to the global internet was almost completely shut down for approximately one week, inhibiting international knowledge of the state's crackdown because people had great difficulty getting any information out of the country.<sup>19</sup> Access to the global internet from inside Iran was again very briefly shut down in January 2020 in response to further protests.<sup>20</sup>

The OECD Guidelines complaint detailed the extensive interference of the Iranian government in the online activity of its citizens (including: control and censorship of internet content; cyber-attacks and hacking of political opponents; and monitoring and targeting of dissidents, sometimes leading to extrajudicial arrests and detention, torture and ill-treatment), affecting a variety of human rights, particularly the rights to freedom of information and expression and the right to privacy.<sup>21</sup>

## Human rights due diligence expectations of Italtel under the OECD Guidelines

Under OECD Guidelines Chapter II (General Policies) article 10<sup>22</sup>, companies are expected to conduct due diligence to prevent adverse human rights impacts from their activities. In Chapter II article B1, the OECD Guidelines pay special attention to the need for companies to (seek to) prevent adverse human rights impacts in relation to telecommunication.<sup>23</sup> Importantly, this responsibility exists even if the company does not itself cause the impact; the company is expected to seek to prevent adverse impacts that are caused by another entity, even if this is a government, if there is a risk that the impact would be directly linked to the company's products or services through a business relationship. This was the case with the adverse human rights impacts caused by the IRGC in Iran that would be directly linked to Italtel's services through its business relationship with TCI.

Equally important is that the OECD Guidelines stipulate that due diligence must be an ongoing process involving meaningful stakeholder consultation.<sup>24</sup> Companies are expected to start consultation early, beginning from the planning phase even before contracts are signed or project implementation starts, and consultation is expected to

continue through project implementation to project closure. When (contemplating) doing business in high-risk countries such as those with authoritarian regimes like Iran's, the OECD Guidelines expect companies to prioritise these risks and do heightened due diligence, which means taking extra precautions, implementing extra checks (e.g. with stakeholders), and being especially transparent about its business activities and relationships.<sup>25</sup> Notably, this heightened due diligence should take place "prior to forming new first-tier high-risk business relationships".<sup>26</sup>

The complaint outlined a number of HRDD expectations that the NGOs claimed Italtel had failed to meet in several important ways. The complaint alleged that:<sup>27</sup>

- 1 Italtel had failed to have a policy in place to conduct (heightened) HRDD when exploring potential business relationships with high-risk authoritarian regimes, in breach of step one of due diligence as stipulated in OECD Guidelines Chapter II (General Policies) article 10 and Chapter IV (Human Rights).
- 2 Italtel had failed to identify the risks of being directly linked or even contributing to potentially severe, negative human rights impacts by doing business with TCI (and the IRGC), despite widespread and well-documented violations of Iranians' human rights to freedom of (online) expression, assembly and association,<sup>28</sup> in breach of step two of due diligence and Chapter II (General Policies) article B1, which specifically focuses on human rights in relation to telecommunications.
- 3 Italtel had failed to publicly disclose or communicate to its stakeholders any information about the extent of Italtel's business activities in Iran or what due diligence steps – if any – the company had taken to seek to prevent adverse impacts prior to or after entering into the MoU with TCI, in breach of step 5 of due diligence and Chapter III (Disclosure).<sup>29</sup>
- 4 Italtel had failed to meaningfully engage with stakeholders prior to or following the signing of the MoU with TCI, in breach of a core concept of due diligence and OECD Guidelines Chapter II (General Policies) paragraph 14.<sup>30</sup>

The complaint emphasised that it was *not* intended to prevent Italtel from doing business in Iran nor from participating in the development of Iran's telecommunications sector. Rather, the complaint sought to ensure that Italtel complied with its obligations (including HRDD expectations) under the OECD Guidelines, that Italtel used its leverage to ensure that the technology provided to Iran would not be used to facilitate human rights violations,

and that the company adopted a human rights and privacy policy in compliance with the OECD Guidelines to prevent adverse impacts on the Iranian people.

## Italtel's reply to the complaint

Rather than making use of the opportunity to engage with relevant stakeholders about its due diligence policies and practices, as it is expected to do under the OECD Guidelines, Italtel adopted a defensive position and insisted the NCP dismiss the complaint outright.<sup>31</sup> Italtel's defence focused on four main arguments.

First, Italtel insisted that the MoU with TCI was "not a legally-binding contract" and therefore – in Italtel's opinion – did not constitute a business relationship under the OECD Guidelines that would make it responsible for conducting due diligence to address human rights risks (implying that its due diligence would only start if it actually signed a legally-binding contract).<sup>32</sup>

Second, Italtel insisted that various other entities had reviewed and approved of the situation, and that this constituted sufficient due diligence such that additional measures on the part of Italtel were not necessary. Italtel submitted that it had engaged two law firms on compliance aspects related to the Italian, US and EU laws, as well as Know Your Customer 'due diligence' on TCI, to check whether any EU and US sanctions and restrictions applied to TCI.<sup>33</sup>

Third, Italtel also claimed that there was no link between the project and the risk of a potential impact on internet freedom. Italtel relied on its decision – which was made after the complaint was initially filed to the Italian NCP – not to contribute to any IP-BB project of TCI.

Fourth, Italtel also pointed to the Italian Government's approval of the project. The MoU was signed in the context of the lifting of economic sanctions imposed on Iran and closer political relations between the Italian and Iranian governments.<sup>34</sup> Italtel stated that the MoU was signed under the aegis of the Italian Government, with the purpose of improving quality of life in Iran by providing the Iranian people with improved telecommunications.<sup>35</sup> The Italian Ministry of Economic Development had also acknowledged that the proposed project complied with the relevant EU Regulations, and that Italtel had obtained the necessary EU/Italian authorizations for the export of certain technologies to Iran.<sup>36</sup> Italtel also highlighted its participation in the UN Global Compact and corporate social responsibility (CSR) awards that it had won as evidence of its responsible behaviour, insisting that it was "actively engaged in the international debate on human rights".<sup>37</sup>

Italtel's response indicates a fundamental misunderstanding about what risk-based HRDD under the OECD Guidelines is supposed to comprise. Italtel appears to have leaned heavily on the so-called 'due diligence' or evaluation conducted by the law firms into whether any sanctions or restrictions applied to TCI or the proposed project. This 'due diligence' concluded that no such sanctions or restrictions applied, and Italtel seems to have taken this as a green light to proceed with the project. This narrow focus on ensuring compliance with the international and individual states' economic and trade sanctions against Iran dangerously overlooks the significant human rights risks potentially associated with such operations and activities. The OECD Guidelines are clear that companies have a responsibility that goes beyond legal requirements to conduct robust due diligence and address adverse human rights risks potentially linked to their products and services through a business relationship. By signing the MoU with TCI, Italtel initiated a business relationship directly linking its telecommunications products and services to the IRGC, one of the main violators of human rights, internet freedom and freedom of expression in Iran. That Italtel appears not to have conducted adequate due diligence nor meaningfully consulted stakeholders about these risks indicates a breach of the OECD Guidelines, regardless of whether Italtel had or had not complied with US and EU sanctions.

Regarding the bilateral cooperation between Italy and Iran, in 2018 the OECD Investment Committee separately reaffirmed what is already clearly laid out in both the OECD Guidelines and the UN Guiding Principles on Business and Human Rights (UNGPs) – that companies' responsibilities to respect human rights and conduct HRDD to avoid causing or being linked to human rights abuses exists independently of any actions taken or agreements reached by governments.<sup>38</sup> Bilateral cooperation between the governments of Italy and Iran may be relevant for Italtel's operations, but it is not a substitute for due diligence. Similarly, awards for or recognition of its CSR efforts are neither a guarantee nor a substitute for actual and effective due diligence and compliance with the OECD Guidelines.

## The Italian NCP's Initial Assessment

On 7 May 2018, the Italian NCP provided the parties with its draft Initial Assessment (IA). One month later, following additional submissions by the parties on the draft IA, the NCP adopted its final IA.

## Relevant criteria for IAs of NCPs

The Procedural Guidance of the OECD Guidelines provides that, in making an IA of whether the issue raised merits further examination, an NCP must determine whether the issue is *bona fide* (meaning real or authentic<sup>39</sup>) and relevant to the implementation of the Guidelines. In making this assessment, an NCP must consider six criteria, including whether the issue is material and substantiated, and whether there seems to be a link between the company's activities and the issue raised in the complaint.<sup>40</sup> These two criteria are of particular relevance to the complaint against Italtel.

The OECD's Guide for National Contact Points on the Initial Assessment of Specific Instances (OECD Guide) elaborates on the expectations of NCPs on these criteria. According to the OECD Guide, 'material and substantiated' respectively refers to the significance of the issue raised in the submission and the extent to which it has been authenticated.<sup>41</sup> The OECD Guide emphasises that IAs are intended to be *initial* or preliminary; that is, it is not necessary for the NCP to undertake fact-finding or a thorough assessment of all the issues at this early stage of the process.<sup>42</sup> Regarding the link between the company's activities and the issue raised in the complaint, the OECD Guide explains that this simply refers to the link between the company (or entities of the corporate group, or activities directly linked to them) and the issue. All that is required to satisfy this criterion is for there to be a link between the company (Italtel) and the issue (potential adverse impacts of its provision of technology to TCI under the MoU). Clearly, these criteria do not set a high bar for the complainant to reach during the IA process.

## Decision of the Italian NCP

Following an extended IA period, the Italian NCP rejected the complaint, concluding that it was not material nor substantiated, nor was there a link between Italtel and the possibility of breaches of the OECD Guidelines. Particularly given the above guidance from the OECD regarding IAs, in our view this decision contains several errors, including an incorrect understanding of the Procedural Guidance for NCPs and the concept of due diligence. Several of these errors are discussed here.

First, in our opinion the NCP set an inappropriately high bar for the 'materiality and substantiation' of the complaint. Given that the complaint directly addressed Italtel's HRDD process and risks to human rights – two issues clearly relevant to and covered by the OECD Guidelines – the complaint cannot be said to not be 'material'. The NCP misinterpreted these two criteria in its assessment of the following two elements: the parties' 'business relationship' and the 'preventative' HRDD undertaken by Italtel.

The NCP concluded that there was no 'business relationship' between the parties because:

*"The present IA procedure has highlighted that no contract with TCI has been signed by Italtel after the MoU; thus, at present, the contents and the details of the prospective contract are not finalized and they may change over the period. This inevitably implies that the current business relationship cannot be assessed as an actual or potential breach of the OECD Guidelines."*<sup>43</sup>

Despite the NCP's acknowledgement that a "current business relationship" existed by virtue of the MoU, the NCP categorised the business relationship as not being covered by the OECD Guidelines. The Italian NCP appears to have adopted Italtel's flawed reasoning by implying that only a "finalised" contract was relevant for the OECD Guidelines. There is no precedent for this conclusion. The OECD Guidelines broadly define 'business relationship' to include "relationships with business partners, entities in the supply chain and any other non-State or State entities directly linked to its business operations, products or services."<sup>44</sup> All business relationships are potentially relevant for – and thus covered by – the OECD Guidelines and due diligence expectations. There is no requirement for such a relationship to commence with the execution of a final contract. In fact, the OECD Guidelines are clear that due diligence and meaningful consultations with stakeholders must occur in the "planning and decision making"<sup>45</sup> phase and "when forming business relationships"<sup>46</sup> – that is, before contracts are signed. The Guidelines recognise that it is exactly the pre-contract planning phase in which companies have and can use leverage to push potential business partners to respect human rights. This leverage often evaporates after contracts are finalised. The OECD could not be any clearer: "Engagement with stakeholders [as part of due diligence] should ideally occur during the project design or planning stage".<sup>47</sup> Simply because the scope or exact terms of a project may change as a result of pre-contractual negotiations, does not mean that the OECD Guidelines are not applicable to those negotiations.

In its assessment of the materiality and substantiation of the complaint, the NCP also appears to have misunderstood what due diligence under the OECD Guidelines comprises. The NCP refers to the "preventative due diligence process" conducted by Italtel that "identified the risks connected with operations in Iran and decided to seek to prevent adverse impacts".<sup>48</sup> This 'preventative due diligence' was, according to the NCP, "of such a nature as to prevent the risks of a potential distorted use of the communication tools offered to the TCI, also taking into account the requirements set forth in the EU and US Regulations."<sup>49</sup> The NCP noted that these regulations pay attention to the risk of human rights violations in Iran.<sup>50</sup>

In our opinion, several errors are apparent in the NCP's assessment. First, mere identification and prevention of risk does not equate with adequate HRDD under the OECD Guidelines. As explained in the OECD Due Diligence Guidance for Responsible Business Conduct (OECD Guidance), meaningful stakeholder engagement and ongoing communication as to how impacts are addressed are both essential elements of HRDD.<sup>51</sup> These two elements are entirely absent from Italtel's processes.

Furthermore, compliance with EU and US sanctions and dual-use export regulations is not equivalent with HRDD requirements under the OECD Guidelines (only briefly referred to by the Italian NCP in the reasoning of the IA) and OECD Guidance (not once referred to by the NCP in the IA). Sanctions and export regulations serve the specific purpose of regulating state responsibility in the international sphere – not regulating corporate behaviour as provided for by the OECD Guidelines. Unlike in HRDD, respecting human rights is not the primary purpose of EU and US export control regulations. Human rights considerations are only one of many competing factors that are taken into consideration. Other factors, such as national security, economic interests and foreign policy often outweigh human rights in EU and US export control regulations.<sup>52</sup> Furthermore, states are accorded a great deal of discretion when deciding whether to grant an export license, and states are under no obligation to grant a license if there is a risk of human rights abuses. Thus, the purpose of sanctions and regulations and the purpose of HRDD are considerably different and the two procedures should not be considered to be overlapping. Applying for and in fact receiving a dual-use license does not exhaust the obligation to conduct HRDD, nor provide a 'free pass' for companies that hold such licenses to not perform HRDD.<sup>53</sup> Italtel and the Italian NCP's reliance on such regulations sufficiently taking into account human rights considerations is, therefore, misplaced.<sup>54</sup> In our opinion, the OECD Guidelines required Italtel to independently assess the actual and potential human rights impacts of the proposed project between Italtel and TCI, not merely rely on external legal regimes.

In rejecting what was a legitimate, *bona fide*, and highly material complaint at the IA phase, the Italian NCP prematurely ended what could have been a useful dialogue between Italtel and some of its key stakeholders on an issue of high importance and relevance to respect for human rights and Italtel's business operations. In doing so, the Italian NCP did not fulfil one of its core purposes, namely promoting the implementation of the OECD Guidelines by Italian businesses and resolving disputes related to them. The NCP's decision was a lost opportunity for it to fulfil its role as an accessible and equitable mechanism under the OECD Guidelines.

## Other issues: Significant delay and lack of clarity in NCP's initial assessment

The OECD Guidelines provide that an IA should be concluded within three months, although more time may be needed to collect necessary information.<sup>55</sup> In the Italtel complaint, the Italian NCP handed down its IA almost eight months after the complaint was filed. According to letters from the NCP to the parties, there were two reasons for this considerable delay. First, as Iran is not a member of the OECD, the NCP required more time to develop an understanding of the issues involved.<sup>56</sup> Second, and more significantly, an ongoing export authorisation of dual-use goods and technologies was being considered, and ultimately granted, by the Italian Ministry of Economic Development – the same Ministry that hosts the Italian NCP.<sup>57</sup> In this context, it is worth noting that the OECD Guidelines state that parallel administrative or legal procedures, such as a dual-use goods procedure, should be identified but do not necessarily take precedence over the NCP complaint handling process.<sup>58</sup> In such cases, NCPs should evaluate whether its involvement could make a positive contribution to the resolution of the issues raised by them, regardless of the outcome of the parallel export authorisation of dual-use goods procedure.<sup>59</sup> In short, the IA of the NCP should not be delayed until the parallel procedure is concluded nor be dependent on its outcome.

The NGOs expressed concern that by connecting the complaint to the dual-use authorisation procedure, the NCP might not appropriately consider the full extent of Italtel's business activities in Iran. The NGOs were also not provided with any details about Italtel's dual-use application of the products subject to the procedure. It was also not made clear whether Italtel submitted the application prior to or after the NGOs contacted them and proceeded to file the complaint to the Italian NCP.

## Direct and indirect impacts of Italtel case

Despite the Italian NCP's refusal to accept the complaint at the IA stage, the NCP succeeded in facilitating the exchange of arguments between the parties to the case. Before the interventions by the NCP, Italtel repeatedly refused to respond to any of the enquiries made by the complainants. However, as part of the IA process, Italtel responded to requests for information on several occasions by the NCP. The important role of the NCP and the benefit of initiating formal proceedings under the OECD Guidelines is further demonstrated by the fact that, following the NCP's decision to reject the complaint, Italtel again refused to respond to follow-up communications by the NGOs enquiring about developments in Italtel's relationship with

TCI. This was despite the NCP encouraging the parties to engage in further dialogue "if the commercial project were to develop in the future".<sup>60</sup>

The NCP was also open to receiving updates and submissions by the NGOs, which was crucial given the changing political and economic context in Iran. During a meeting with the NCP, the complainants informed the NCP that they wished to provide further information and developments in relation to the recent changes within the Board of Directors of TCI. The NCP welcomed this additional information, which highlighted the close relationship between the Board of Directors of TCI and the IRGC, and that it was the IRGC that unquestionably exercised control over TCI not least through the appointment of its Directors.

Despite the rejection of the complaint, the case led to notable impacts and achieved some of the objectives that might be expected of such interventions by civil society. After the NGOs filed the complaint against Italtel, and arguably as a direct result of that complaint, several developments took place regarding the Italtel-TCI business relationship. For instance, Italtel reassessed the risks of engaging in business with TCI following the complainants informing the parties to the complaint about the link between TCI's new Board of Directors and the IRGC.<sup>61</sup>

More significantly, during the course of the complaint, Italtel withdrew some of the items it had previously offered to provide to TCI. The original MoU signed by Italtel and TCI included among the technologies and services to be provided to TCI "IP-BB". The press release published by TCI expressly confirmed that under the MoU Italtel would provide the "IP-BB [backbone] project". However, in a U-turn following the submission of the complaint, Italtel arguably changed its mind and declared to the NCP that it "would not perform any activity, or deliver any system related to the IP backbone network (no mobile services or data services are included in the perimeter of the project)."<sup>62</sup> This is an important outcome with regard to the potential abuse of Italtel's 'internet backbone' products by TCI, but Italtel has not communicated about its reasons for making this decision nor whether it is in any way related to human rights due diligence.

More generally, Italtel's decision in this respect was also further evidence of the crucial role of civil society in encouraging companies, particularly in sensitive sectors, to act more responsibly in their business relationships with authoritarian regimes.

## Conclusion and key recommendations

Despite the errors in the Italian NCP's decision and Italtel's refusal to engage its stakeholders on this issue, the case and its handling generated a number of important lessons and recommendations for companies, NCPs, governments and the OECD itself.

### Recommendations for tech companies

- 1 Tech companies must recognize that ICT is increasingly vital to repressive states and used extensively (and often effectively) by them to perpetuate repression. Therefore, a heightened level of scrutiny is required by tech companies when considering doing business in any authoritarian context.
- 2 Companies should be aware that a 'business relationship' does not simply commence upon the execution of a final, legally binding contract. Rather, the OECD Guidelines define 'business relationships' very broadly, such that these relationships may include pre-contractual meetings, negotiations and MoUs/statements of interest. The OECD Guidelines are engaged from the outset of business activities. In fact, it is at the project design and planning stage when companies can most effectively use leverage to encourage potential business partners to respect human rights. Importantly, simply because the project terms may change as a result of pre-contractual negotiations does not mean that the OECD Guidelines are not applicable.
- 3 HRDD under the OECD Guidelines is not a simple 'tick-the-box' exercise. Due diligence is a six-step process according to which companies are required: (1) to embed responsible business conduct into their policies and management systems; (2) to identify actual or potential adverse impacts on RBC issues; (3) to cease, prevent or mitigate those impacts; (4) to track the implementation and results of due diligence; (5) to communicate how identified impacts are addressed; and (6) to provide for or cooperate in remediation when appropriate.<sup>63</sup>
- 4 Companies should responsibly disengage from (or not engage in the first place with) business relationships if, following due diligence, they determine that they cannot minimise or avoid human rights abuses by their business partners.<sup>64</sup> Responsible disengagement may be necessary in the case of tech companies providing sensitive, dual-use technologies to repressive regimes, when there is no way for those companies to ensure that such technologies will not be used to facilitate human rights violations.
- 5 Companies should not solely rely on legal regimes not specifically intended for the purpose of HRDD to assess human rights impacts when conducting HRDD. Such HRDD must be conducted in view of, at minimum, the OECD Guidelines and OECD Guidance.
- 6 Similarly, companies cannot rely on their internal (human rights) policies, nor external approval of those policies or processes, in arguing that they have complied with their responsibilities under the OECD Guidelines. In our view, internal policies and external recognitions are neither a guarantee nor substitute for HRDD under the OECD Guidelines.
- 7 A key issue that emerges from our analysis of the Italtel complaint is the fact that the company disclosed minimal information to the public, including to its stakeholders, about its business relationship with TCI. Engaging in business relations with a country such as Iran –which has a well-documented track record of engaging in systematic and serious human rights violations – is fraught with risk and the heightened potential for involvement in human rights violations, and thus it is especially important for companies to be extra transparent in their due diligence and to provide timely, accurate, clear and complete information to stakeholders about these business relationships, in particular when the products or services that may be provided are controversial (or, as in this case, dual-use items). Disclosure of clear and complete information is an essential component of companies' responsibilities under the OECD Guidelines: "To improve public understanding of enterprises and their interaction with society and the environment, enterprises should be transparent in their operations and responsive to the public's increasingly sophisticated demands for information."<sup>65</sup>
- 8 Companies should be aware that political and legislative efforts to make human rights and environmental due diligence mandatory are multiplying across Europe.<sup>66</sup> Given the growing momentum for mandatory due diligence legislation, it is sensible for companies to ensure that their HRDD processes comply with the OECD Guidelines, in order to be ahead of the pack when mandatory due diligence legislation is introduced.

## Recommendations for NCPs

- 1 In accordance with the OECD Guidelines, NCPs should not apply overly burdensome requirements or an unreasonably high threshold for the “material and substantiated” criterion at the IA phase. The test is “plausibility”, and the IA is only a very basic test as to whether the complaint is *bona fide* and opens up the possibility of a dialogue. An IA is not a final determination of fact or breach of the OECD Guidelines. In order to be accessible (one of the four core criteria for NCPs), NCPs should ensure that all *bona fide* claims pass the IA stage, as is required by the Procedural Guidance of the OECD Guidelines.
- 2 The OECD Guidelines and the OECD’s due diligence guidance documents should be at the core of NCP’s reasoning for their decisions.<sup>67</sup> Accordingly, it is important for NCPs to refer to and apply the relevant principles of the OECD Guidelines in decisions. Similarly, when handling cases of potential human rights violations, these cases should be closely scrutinised, having regard to the submissions of both parties to the complaint, as well as the circumstances surrounding the complaint (including national and international laws). NCPs’ decisions should be supported by the facts, but importantly also primary OECD guidance sources.
- 3 NCPs should consider engaging in joint peer learning activities when handling cases involving companies doing business with or operating in authoritarian states.<sup>68</sup> Such peer learning may be carried out through meetings at the OECD or through direct cooperation between NCPs.

## Recommendations for governments

- 1 Governments must comply with the Procedural Guidance of the OECD Guidelines in relation to NCPs. Specifically, they must ensure that NCPs function in a visible, accessible, transparent and accountable manner. Accessibility was a key issue in the Italtel case, in that the Italian NCP’s premature rejection of the complaint at the IA stage resulted in a closed door for dialogue between Italtel and some of its stakeholders. Impartiality requires NCPs and their employed personnel to be independent from both parties to a complaint, as well as to ensure that the necessary safeguards are in place to prevent perceptions of bias or conflict of interest with the government department in which they are based and their national governments.

- 2 Enact mandatory due diligence legislation so due diligence expectations are not left to voluntary mechanisms that do not legally require companies to respect human rights. Several large multinational companies, including Unilever, Nestle, Mars, Mondelez, H&M Group, Inditex and Adidas, have expressed support for an EU framework on mandatory human rights and environmental due diligence to provide a uniform standard of conduct applying to all business sectors.<sup>69</sup> Similar national legislation on mandatory due diligence is already in place or under discussion in a number of European countries, including France, Germany and the Netherlands.<sup>70</sup>
- 3 Encourage the OECD Investment Committee and Working Party on Responsible Business Conduct to revise the OECD Guidelines in order to provide more guidance on due diligence for RBC with regard to tech/ICT.

## Recommendations for the OECD

- 1 Consider revising the OECD Guidelines to be more up-to-date on technology/ICT issues, particularly with regard to due diligence and companies providing technology to authoritarian regimes.
- 2 Consider revising the OECD Guidelines in order to clarify the requirements for companies to undertake HRDD, taking into account the OECD due diligence guidance documents when handling cases, and conducting IAs so as to meet the core NCP criteria of visibility, accessibility, transparency and accountability, and the guiding principles for the handling of specific instances, namely impartiality, predictability, equitability and compatibility with the OECD Guidelines.
- 3 Consider providing training and support to NCPs on the guiding principles for IAs and complaints more generally. Such training and support should focus on the practical implementation of these principles into the work of NCPs.



## Endnotes

- 1 A draft of this paper was provided to Italtel and the Italian NCP, with a two-week period for comment. Neither Italtel nor the NCP provided a response.
- 2 Italtel, "About Italtel," no date, <<https://www.italtel.com/about/about-italtel/>> (4 January 2021).
- 3 FIDH, REDRESS and Justice for Iran, Specific Instance Against Italtel to Italian NCP Dated 13 September 2017, page 4. Available at OECD Watch's case database: <[https://complaints.oecdwatch.org/cases/Case\\_496](https://complaints.oecdwatch.org/cases/Case_496)>.
- 4 Ibid, p. 6
- 5 Ibid, p. 7. An IRGC-controlled consortium of companies holds the majority share of TCI, and IRGC appoints the managing directors of TCI: ibid, p. 11, 26-27.
- 6 Ibid, p. 11.
- 7 Ibid, p. 12. See also Article 19, "Tightening the Net, Part 2: The Soft War and Cyber Tactics in Iran," 2017, <[https://www.article19.org/data/files/medialibrary/38619/Iran\\_report\\_part\\_2-FINAL.pdf](https://www.article19.org/data/files/medialibrary/38619/Iran_report_part_2-FINAL.pdf)> (4 January 2021).
- 8 Specific Instance Against Italtel (see footnote 9), p. 4.
- 9 Human Rights Watch, "EU: Strengthen rules on surveillance tech exports", 9 June 2020, <<https://www.hrw.org/news/2020/06/09/eu-strengthen-rules-surveillance-tech-exports>> (4 January 2021).
- 10 Human Rights Watch, "Joint letter re: Strengthening the European Commission position on Dual-Use Recast," 9 June 2020, <<https://www.hrw.org/news/2020/06/09/joint-letter-re-strengthening-european-commission-position-dual-use-recast>> (4 January 2021).
- 11 Ibid.
- 12 Samuel Stolton, "EU to restrict sale of cyber-surveillance goods to repressive regimes," Euractiv, 10 November 2020, <<https://www.euractiv.com/section/digital/news/eu-to-restrict-sale-of-cyber-surveillance-goods-to-repressive-regimes/>> (4 January 2021).
- 13 Ibid.
- 14 Council Regulation (EC) No. 428/2009 of 5 May 2019 on Setting up a Community Regime for the Control of Exports, Transfer, Brokering and Transit of Dual-Use Items (Recast).
- 15 Ibid. Referring to Italtel's press release available at Annex 1 of the Specific Instance Against Italtel.
- 16 Ibid, p. 9.
- 17 Ibid, p. 10.
- 18 Laura Smith-Spark, "UN experts urge Iran to respect rights of protesters, end Internet crackdown," CNN, 5 January 2018, <<https://edition.cnn.com/2018/01/05/middleeast/iran-protests-united-nations-intl/index.html>> (4 January 2021); "Iran protests: Telegram and Instagram restricted," BBC News, 31 December 2017, <<https://www.bbc.com/news/world-middle-east-42529576>> (4 January 2021).
- 19 See Amnesty International, "Iran: Internet deliberately shut down during November 2019 killings – new investigation," 16 November 2020, <<https://www.amnesty.org/en/latest/news/2020/11/iran-internet-deliberately-shut-down-during-november-2019-killings-new-investigation/>> (4 January 2021); Article 19, Iran: Tightening the Net 2020: After Blood and Shutdowns, no date, <<https://www.article19.org/ttn-iran-november-shutdown/>> (4 January 2021); Center for Human Rights in Iran, Gunning Them Down: State Violence against Protesters in Iran, 2020, <<https://iranhumanrights.org/wp-content/uploads/Iran-Human-Rights-November-2019-January-2020-Protests.pdf>> (4 January 2021).
- 20 Freedom House, "Freedom on the net 2020: Iran," no date, <<https://freedomhouse.org/country/iran/freedom-net/2020>> (4 January 2021).
- 21 Specific Instance Against Italtel (see footnote 9), p. 16-17.
- 22 OECD Guidelines, Chapter II (General Policies), article 10: "Enterprises should: Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation."
- 23 OECD Guidelines, Chapter II (General Policies), article B1: "Enterprises are encouraged to: Support, as appropriate to their circumstances, cooperative efforts in the appropriate fora to promote Internet Freedom through respect of freedom of expression, assembly and association online."
- 24 OECD Guidelines, Chapter II (General Policies); see also OECD Guidance, Questions Related to the Overview of Due Diligence for Responsible Business Conduct, p. 49-51.
- 25 OECD Guidance, p. 66.
- 26 Ibid, p. 68
- 27 Specific Instance Against Italtel (see footnote 9), section VI.
- 28 Ibid, p. 33.
- 29 OECD Guidelines, Chapter III (Disclosure), paras 1, 2 and 4(e):
  - "1. Enterprises should ensure that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance. This information should be disclosed for the enterprise as a whole, and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns."
  - "2. Disclosure policies of enterprises should include, but not be limited to, material information on: e) related party transactions; f) foreseeable risk factors..."
  - "4. Enterprises should apply high quality standards for accounting, and financial as well as non-financial disclosure, including environmental and social reporting where they exist. The standards or policies under which information is compiled and published should be reported..."
- 30 OECD Guidelines, Chapter II (General Policies), para 14: "Enterprises should: Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities."
- 31 Italian National Contact Point, Initial Assessment of Specific Instance Submitted by FIDH, REDRESS and Justice for Iran about Italtel, para 38. Available at OECD Watch's case database: <[https://complaints.oecdwatch.org/cases/Case\\_496](https://complaints.oecdwatch.org/cases/Case_496)>.
- 32 Ibid, para 38(A) and (C).
- 33 Ibid, para 38(H) and footnote 13.
- 34 Specific Instance Against Italtel (see footnote 9), p. 7.
- 35 Initial Assessment (see footnote 31), para 38(B).
- 36 Initial Assessment (see footnote 31), para 38(I) and (J).
- 37 Initial Assessment (see footnote 31), para 37.

- 38 OECD Investment Committee Response to the Substantiated Submission by OECD Watch Regarding the Australian National Contact Point, 30 November 2018 (DAF/INV(2018)34/FINAL).
- 39 OECD, *Guide for National Contacts Points on the Initial Assessment of Specific Instances*, p. 5.
- 40 OECD Guidelines, *Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, Commentary on the Implementation Procedures of the Guidelines, para 25.
- 41 OECD, *Guide for National Contacts Points on the Initial Assessment of Specific Instances*, p. 7.
- 42 Ibid.
- 43 Initial Assessment (see footnote 31), para 48.
- 44 OECD Guidelines, Chapter II (General Policies), Commentary on General Policies, para 14.
- 45 OECD Guidelines Chapter II (General Policies), para 14: “Enterprises should: Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities” (emphasis added).
- 46 OECD, *OECD Due Diligence Guidance on Meaningful Stakeholder Engagement in the Extractive Sector*, p. 24.
- 47 Ibid, p. 61.
- 48 Initial Assessment (see footnote 31), para 57.
- 49 Ibid., para 58.
- 50 Ibid., para 60.
- 51 OECD Guidelines, Chapter II (General Policies), Commentary on General Policies, para 25. Refer also to the OECD Guidance.
- 52 See Council Regulation (EC) No 428/2009 of 5 May 2009 Setting up a Community Regime for the Control of Exports, Transfer, Brokering and Transit of Dual-Use Items (Recast).
- 53 Notably, in November 2020 the European Parliament and the Council reached an agreement on a proposal for the modernization of EU export controls on sensitive dual-use goods and technologies. If implemented, the agreement will require exporters of dual-use goods to conduct due diligence. See: European Commission, “Commission welcomes agreement on the modernization of EU export controls,” 9 November 2020, <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2209>> (21 January 2021).
- 54 See, for example: Coalition Against Unlawful Surveillance Exports, *A Critical Opportunity: Bringing Surveillance Technologies Within the EU Dual-Use Regulation*, 2015, <[https://privacyinternational.org/sites/default/files/2018-02/CAUSE\\_8.pdf](https://privacyinternational.org/sites/default/files/2018-02/CAUSE_8.pdf)> (4 January 2021). In 2016, the French NCP issued its final statement in *ADHRB vs. SAE Alsetex, Etienne Lacroix Group*. The case concerned the supply of security equipment (including teargas) by Alsetex, a French company, to Bahrain. The French NCP considered that compliance with the French licensing requirement for the export of dual-use goods was sufficient for due diligence as one of the criteria for those licenses required consideration of human rights impacts. See: OECD Watch, “ADHRB vs. SAE Alsetex, Etienne Lacroix Group”, no date, [https://complaints.oecdwatch.org/cases/Case\\_472](https://complaints.oecdwatch.org/cases/Case_472) (21 January 2021). We respectfully disagree with the French NCP’s decision. The NCP’s reasoning that respecting the legal requirement for dual-use exports is sufficient for HRDD is, in our opinion, contrary to the OECD Guidelines and UNGPs. The UNGPs are clear that states and companies have complementary yet independent responsibilities and duties in relation to human rights. Compliance with legislative requirements *per se* cannot be deemed sufficient to exclude corporate responsibility and, therefore, cannot be considered equivalent to HRDD. Companies have a responsibility to conduct HRDD, independent of their responsibility to comply with national, regional and international law.
- 55 OECD Guidelines, *Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, para 40(1).
- 56 Initial Assessment (see footnote 31), para 12; see OECD Guidelines, *Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, para 39.
- 57 Initial Assessment (see footnote 31), paras 13 and 38(J).
- 58 See OECD Guidelines, *Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, para 25, bullet 4.
- 59 See OECD Guidelines, *Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, para 26.
- 60 Initial Assessment (see footnote 31), para 84.
- 61 Initial Assessment (see footnote 31), para 56.
- 62 Initial Assessment (see footnote 31), para 38(E).
- 63 OECD Guidance *Due Diligence Guidance for Responsible Business Conduct*, Section II, Due Diligence Process.
- 64 See: Global Forum on Responsible Business Conduct, “Session note: Responsible disengagement,” 30 June 2017, <<https://mneguidelines.oecd.org/global-forum/2017-GFRBC-Session-Note-Responsible-Disengagement.pdf>> (25 January 2021); SOMO, “Should I stay or should I go?,” April 2016, <<https://www.somo.nl/wp-content/uploads/2016/04/Should-I-stay-or-should-I-go-4.pdf>> (25 January 2021).
- 65 OECD Guidelines, Chapter III (Disclosure), Commentary on Disclosure, para 28.
- 66 See British Institute of International and Comparative Law, “Webinar Series: Human Rights Due Diligence for Climate Change Impacts,” no date, <<https://www.biicl.org/events/11395/hrdd-forum-webinar-series-human-rights-due-diligence-for-climate-change-impacts>> (4 January 2021).
- 67 See generally: OECD, *Structures and Procedures of National Contact Points for the OECD Guidelines for Multinational Enterprises*, 2018.
- 68 See: OECD Guidelines, *Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Peer Learning, para 19.
- 69 Support for EU framework on mandatory human rights and environmental due diligence, 2 September 2020, <[https://media.business-humanrights.org/media/documents/EU\\_Business\\_Statement\\_Mandatory\\_Due\\_Diligence\\_02092020.pdf](https://media.business-humanrights.org/media/documents/EU_Business_Statement_Mandatory_Due_Diligence_02092020.pdf)> (4 January 2021).
- 70 Business & Human Rights Resource Centre, “26 companies, business associations, and initiatives make joint call for EU mandatory human rights & environmental due diligence,” 28 August 2020, <<https://www.business-humanrights.org/en/latest-news/eu-mandatory-due-diligence/>> (4 January 2021).

## Colophon

Layout: Frans Schupp

Photo: Grigorev Vladimir for iStockphoto: Yazd, Iran - April 22, 2017: A young man uses a smartphone while sitting on a chair in a tin shop

This discussion paper is published by SOMO, FIDH and JFI.



Sarphatistraat 30  
1018 GL Amsterdam, The Netherlands  
T: +31 (0)20 639 12 91  
info@somo.nl – www.somo.nl

SOMO investigates multinationals. Independent, factual, critical and with a clear goal: a fair and sustainable world, in which public interests outweigh corporate interests. We conduct action-oriented research to expose the impact and unprecedented power of multinationals. Cooperating with hundreds of organisations around the world, we ensure that our information arrives where it has the most impact: from communities and courtrooms to civil society organisations, media and politicians.

fidh

contact@fidh.org - www.fidh.org

FIDH (International Federation for Human Rights) is an international human rights NGO federating 192 organisations from 117 countries. Since 1922, FIDH has been defending all civil, political, economic, social and cultural rights as set out in the Universal Declaration of Human Rights.



info@justiceforiran.org - www.justice4iran.org

Justice for Iran (JFI) is a London-based human rights NGO which seeks freedom from impunity and accountability for perpetrators of widespread and serious human rights violations in Iran. To achieve its mission, JFI researches, documents, reports, litigates, and further raises public awareness and participates in human rights advocacy. JFI has a business and human rights programme that aims to increase corporate accountability and respect for human rights among businesses and financial actors engaging in business activities in Iran.

**Acknowledgements:** SOMO, FIDH and JFI are particularly grateful to Katharine Booth for her contribution to this discussion paper. The authors would further like to thank the following individuals for their input on a draft of this paper: Mariette van Huijstee (Rathenau Institute), Karen Kramer (Center for Human Rights in Iran), and Marlena Wisniak (European Center for Not-for-Profit Law). Though the authors benefitted greatly from the insights provided by these individuals, the content of the paper remains the full responsibility of the authors and does not necessarily reflect the viewpoints of the individuals nor their organisations.

