

PUBLIC CONSULTATION: TARGETED UPDATE OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

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The OECD Guidelines for Multinational Enterprises (the Guidelines) set out recommendations from governments to businesses for ensuring responsible business conduct in all areas where business interacts with society, including human rights, labour rights, environment, bribery, consumer interests, as well as disclosure, science and technology, competition, and taxation. The OECD Guidelines are complemented by Implementation Procedures, which set out the role and functions of the National Contact Points for Responsible Business Conduct. The OECD Guidelines were last revised in 2011.

In 2023, the OECD opened a [public consultation](#) on proposed targeted updates of the Guidelines and Implementation Procedures. Stakeholders were invited to comment on a [consultation draft](#) through the following survey form, with limits on the length of submissions as noted.

Below are the full responses submitted by the Danish Institute for Human Rights.

GENERAL COMMENTS

Overall, we welcome the increased focus on role of Governments, the strengthening of NCPs, recognition of the importance of stakeholder engagement, and the focus on environment and climate and technology. Language should be streamlined throughout to ensure the Guidelines are broadly applicable and enduring, rather than limited by too much detail in the Guidelines (GL) and Commentary (Cm). Implications of detailed modification are difficult to analyse in a limited review period and constraints of the consultation format.

The GL must:

- Centre stakeholder engagement as a means for enterprises to identify and address impacts. The GL should refer explicitly to “rightsholders” as key stakeholders
- Clarify that they apply to the full value chain, not just upstream supply chains, e.g. when discussing enterprises’ due diligence obligations, consideration of impacts or business relationships
- Note that Chapters are interrelated, not separate silos; e.g. enterprises should consider human rights impacts of environmental impacts addressed under Ch. VI and vice versa

- Under Implementation, strengthen NCPs' role as a key avenue of redress for rightsholders, including by referring specifically to national human rights institutions as potential members of NCPs/advisory bodies and experts/stakeholders whom NCPs should engage meaningfully
- Recognise application to public or semi-public entities acting as economic actors (e.g. development (financial) institutions, export credit agencies, public procurement authorities, intergovernmental organisations). In the last sentence of Ch.I 4. change the word "enterprise" to "entity", also to bring in line with the OECD study on RBC in public procurement.

CHAPTER 1: CONCEPTS AND PRINCIPLES

2: We appreciate the edit in this paragraph which clarifies that enterprises should honour the principles rather than "seek ways" to honour, and that this remains the case where national laws set lower expectations than the guidelines. This is a critical update which must be maintained.

4: The text "a significant amount of" should be omitted from the addition "companies or other entities conducting a significant amount of business in more than one country".

CHAPTER II: GENERAL POLICIES

It is critical that the Guidelines clarify that due diligence is expected to be conducted across an enterprise's value chain, rather than limited to the supply chain. This approach is supported by the UN Guiding Principles on Business and Human Rights, is consistent with NCP approaches to Specific Instances and current business practice. Specific text edits follow:

A11: the text "across the enterprise's value chain" should be added after "due diligence".

A15: the text "within an enterprise's value chain" should be added after "business relationship"; "users and consumers" should be added after

“clients” and “franchisees of licensees” should be added after “joint venture partners”.

Cm16: to align with edits to Cm20, the definition of “business relationship” should include clear text confirming that it includes entities across the value chain, including the downstream. The text “within an enterprise’s value chain” should be added after “business partners”; “buyers, users and consumers” should be added after “clients” and “franchisees of licensees” should be added after “joint venture partners”.

Cm18: should clarify that the full value chain is within the scope of due diligence. Special provision for prioritisation of downstream impacts is unnecessary. The same risk-based approach informed by severity and likelihood should be used when prioritising impacts regardless of where they occur in the value chain. This text should be omitted.

Cm24: the references to “supply chain” should be replaced by “value chain”.

Other matters which should be addressed include clarifications on MSIs and HRDs. Comment and text edits follow:

Cm12: the final sentence is a critical addition which must be maintained.

Cm14: The text “or otherwise raise concerns about the human rights, environmental or social impacts of an enterprise or business sector” should be added after “inconsistent with the Guidelines”.

Cm28: should refer specifically to rightsholders as a key stakeholder.

CHAPTER III: DISCLOSURE

3: the text proposed is a critical addition which must be maintained.

The following text should be added as a new subparagraph:

“information on the enterprise’s business model and strategy including how responsible business conduct matters have been considered and

the impact of the enterprise's business model and strategy on responsible business conduct issues".

As we have noted previously in our submission to the revision of the G20/OECD Principles of Corporate Governance, materiality assessments should be done in accordance with the principle of double materiality, which requires enterprises to consider not only how RBC matters may impact the enterprise, but also what impacts the enterprise has on people and planet. This concept is taken from the EU Corporate Sustainability Reporting Directive. The latter aspect of materiality is referred to as "impact materiality" the forthcoming European Sustainability Reporting Standards.

The following text edits should be made to clarify the impact materiality principle:

Cm30: Delete "which may be material to an investor's decision making ... relevant for" and begin a new sentence as follows: "Disclosures of RBC information should include information necessary for an understanding of the enterprise's impacts on people, the environment and society throughout the value chain, and should not be confined to disclosures on RBC issues which may give rise to financial risks to the enterprise or are material to an investor's decision making. Determining what is material in terms of impacts on people, the environment and society should take into account the views of ..."

Cm30: Add "or others with whom the enterprise has a business relationship" to the conclusion of the final sentence.

Cm31: after "voting decisions" add the following: "or is necessary for an understanding of the enterprise's impacts on people, the environment and society".

Cm35: the text proposed is a critical addition which must be maintained.

CHAPTER IV: HUMAN RIGHTS

Ch. IV should centre stakeholder engagement as critical to business respect for human rights. Currently, stakeholders go unmentioned until a brief reference in the final Commentary (as collaborators on remedy, once harms have already occurred). The Guidelines should call for meaningful, ongoing stakeholder engagement that enables enterprises to hear the concerns of affected communities and more accurately identify and assess the human rights risks associated with their operations. Centring stakeholder engagement would also align with robust due diligence practices as described in the OECD's Due Diligence Guidance for Responsible Business Conduct.

5 and Cm45 should cross-reference the detailed due diligence steps outlined in Cm15. Cm45 should explicitly note stakeholder engagement as a way to consider “distinct and intersecting risks including those related to individual characteristics or belonging to vulnerable or marginalized groups.”

Cm40 could be broadened as follows:

- The new text noting that enterprises should take additional steps to assess and address adverse impacts on marginalised or vulnerable groups must be maintained. Cm40 should also mention additional steps to enable meaningful consultation of such groups, as they may face particular barriers to participation
- Human Rights Defenders should be mentioned explicitly as key stakeholders and watchdogs often targeted for speaking out on business activities
- In addition to references to women's rights, the text should note UN resolutions on protection against violence and discrimination based on sexual orientation and gender identity more broadly
- Language should be added to clarify that, when considering impacts arising under other Chapters, enterprises should consider how they might impact human rights to avoid siloing

Cm42 should include a final sentence encouraging businesses to explore possibilities to increase their leverage, not just to use their existing leverage.

CHAPTER V: EMPLOYMENT AND INDUSTRIAL RELATIONS

We welcome the updated references to relevant instruments. These updates should be maintained.

CHAPTER VI: ENVIRONMENT

We welcome the consideration of impacts on health and safety connected to environmental impacts. Nevertheless, impacts on the environment also have implications on other aspects of human rights such as right to an adequate standard of living including the right to food, housing, water etc. Ch. VI lacks references to the right to clean and healthy environment as established by UN resolutions formally recognising the right to a clean, healthy, and sustainable environment.

1: Text should be explicit that impact assessments and consultations must ensure that links between environmental effects and human rights are well understood, communicated and managed. This includes, among others, how impacts on ecosystems and biodiversity affect rights to water, food, an adequate standard of living, and cultural rights.

2b: The limited request of addressing only “known or reasonably foreseeable” impacts can conflict with the application of the precautionary principle (see Communication from the Commission of European Communities on the Precautionary Principle, 2 February 2000) and is an open door in cases where the science or knowledge is not enough to ascertain the impacts and/or their magnitude. This is especially relevant with the growth of new technologies and frontiers, such as deep-sea mining.

4: The current formulation implies that cost, administrative burden, etc. take precedence over communities’ and workers’ right to information and public participation in decision-making processes on environmental activities and products that may affect their health and wellbeing. The text should be better aligned with the Aarhus Convention and the Escazu Agreement.

Cm62 and 67 fail to recognise the importance of stakeholder engagement in the identification and assessment of impacts.

It must be clear that enterprises should take measures to ensure that strategies to mitigate or offset environmental impacts, including climate impacts, do not negatively affect human rights.

CHAPTER VII: COMBATTING BRIBERY, BRIBE SOLICITATION AND EXTORTION

N/A

CHAPTER VIII: CONSUMER INTERESTS

Ch. VIII should cover “end users” as well as “consumers” to keep pace with an evolving economy. For example, digital service users may not be consumers in the traditional sense of paying customers and thus may not be captured. To streamline edits, the introductory text should add “including end users,” after “When dealing with consumers”.

1: The addition of “an unreasonable risk to the health or safety of consumers” is critical and must be maintained, but “in foreseeable use or foreseeable improper use or misuse” should be omitted. Per our Ch. II comment, special provision for prioritisation of downstream impacts is unnecessary; the same risk-based approach should apply to all impacts arising anywhere in the value chain.

2: The revisions provide critical guidance to enterprises to ensure disclosures are accessible to consumers and incorporate substantive topics such as privacy and redress options. These additions must be maintained.

Cm85: The addition of ‘social’ is critical to ensure that enterprises respond to growing consumer interest in social as well as environmental impacts. With this addition, the OECD Guidelines would keep pace with regulatory developments, such as the EU’s ‘green’ taxonomy regulation and accompanying minimum safeguards, that recognize the inextricable link between environmental and social issues.

Cm87 should be edited to reflect the importance of including consumers and other stakeholders in the design and development of redress mechanisms, not just informing them of their existence and giving guidance on how to file complaints. Engaging stakeholders from

the start can ensure that complaint mechanisms are fit-for-purpose and accessible to consumers and other affected parties, thus increasing the overall effectiveness of such mechanisms and their positive impacts on enterprises' social license to operate.

CHAPTER IX: SCIENCE, TECHNOLOGY AND INNOVATION

It is critical that the OECD recognizes the need to update Ch. IX. We appreciate the intention to keep Ch. IX lasting and relevant given an ever-evolving field, and in terms of types and severity of human rights impacts. This however increases the importance of ensuring that the scope in terms of the types of technologies and their impact is sufficiently broad.

1 and Cm29: The text clearly mentions impacts on privacy as well as data protection, security, intellectual property protection and confidentiality obligations. For consistency, and in recognition of the many ways technology can impact both the environment and human rights, the text "and other human as well as environmental impacts" should be added. Further, it should be made clear that all enterprises, both those developing and using tech, should undertake due diligence to identify and address such adverse impacts of tech.

2 and Cm98: data handling (personal and non-personal) should be further clarified to ensure the needed protection and personal control over personal data, with language aligning with relevant national, regional and international legal instruments and standards on data protection. Cm98 should elaborate on the diverse adverse social and human rights impacts (not only data theft and privacy breaches) that can result from irresponsible use of data.

Cm100: We appreciate the mention of downstream impacts. Most adverse impacts of tech take place in the downstream. However, we suggest adding a reference to downstream adverse impacts associated with misuse of technology by government entities.

Cm102: We appreciate the specific emphasis on the need to consider the rights and interests of children and youth; however there is no specific mention of other rightsholder groups that may be particularly challenged in benefitting from technology developments, or who may be more at risk of being negatively impacted by technology. We suggest adding such a reference.

CHAPTER X: COMPETITION

The addition to Cm95 and framing of the newly added Cm100 could be read to discourage enterprises from participating in collaborative efforts to address social and environmental risks. This is problematic as many such issues (e.g. forced labour in the supply chain) are sector-wide, cannot be addressed by a single enterprise alone and will require joint efforts.

Cm95's new text should specify that enterprises should consider the intent of applicable laws and regulations (namely, to protect a robust, fair market), not use them as an excuse to deter collaborative efforts to address systemic risks like climate change and human rights impacts.

Cm100 should likewise be rephrased to encourage collaboration on RBD and due diligence within the bounds of competition law, not to frame competition law as a barrier to collaborative efforts. Simply reordering the text would help: "While enterprises and the collaborative initiatives in which they are involved should take proactive steps to understand competition law issues in their jurisdiction and avoid activities which could represent a breach of competition law, in many cases enterprises can collaborate on RBC initiatives and due diligence efforts without breaching competition law."

We appreciate the addition of Cm101, as anti-competitive effects increasingly affect labour (inputs), not just consumers (outputs). The text should be broadened to acknowledge threats to the labour market beyond wage-fixing or no-poach agreements: Enterprises can reduce overall job options by monopolising the market, thereby weakening workers' ability to advocate for stronger workplace policies (e.g. safety) by eliminating their ability to choose another job.

CHAPTER XI: TAXATION

1 and Cm102 should:

- More explicitly call on enterprises not to exploit gaps between the spirit and letter of the law to avoid taxes in all countries in which their activities take place.

- Call on enterprises to avoid using shell companies or structuring transactions in a way that avoids tax liability consistent with the underlying economic consequences of the transaction.

2 and Cm104: Text should be added calling upon enterprises to ensure their tax risk management strategies consider risk to rightsholders, not only to the business itself, in line with principles of double materiality. The commentary should encourage enterprises to consider how tax avoidance may adversely affect countries' abilities to mobilize resources in pursuit of the Sustainable Development Goals and that unethical tax practices will thus disproportionately harm already vulnerable or marginalised groups in society.

Cm105: Text should be added calling for transparency and access to information for stakeholders to identify whether the enterprise is engaging in transactions where tax results are inconsistent with the underlying economic consequences and evaluate potential adverse RBC impacts linked to the tax practices.

IMPLEMENTATION PROCEDURES

Clarifying and strengthening effectiveness criteria for NCPs to help foster functional equivalence amongst NCPs is welcome, given the wide range of institutional arrangements, procedures and interpretation of the Guidelines currently applied by different NCPs and the risks it entails for the effectiveness and trust in the mechanism. A1's emphasis on sufficient resources is also positive.

The Procedures however allow too much flexibility in institutional arrangements. While there is a need to leave some space to governments to establish NCPs suited to their particular context, we suggest removing from A2 the possibility of having only government official(s) as the NCP and, if the NCP is not multi-stakeholder or fully independent, prescribing at a minimum the inclusion of independent experts or stakeholder representatives in an oversight or advisory body, which is currently only an option.

While the updated text refers to NCPs' need to access expertise on RBC and to engage with stakeholders and experts, there is unfortunately no specific mention of national human rights institutions (NHRIs) as potential members of the NCP or an advisory body, nor as an expert or stakeholder to maintain meaningful relations with, despite NHRIs'

mandate regarding human rights protection and promotion and their recognised role (including in the UNGPs and by the UNWG) in facilitating access to remedy in cases of business-related human rights impacts. We suggest adding specific reference to NHRIs in A2, A3 and in C as well as in the Cm to the Procedures under Cm9d, Cm11, Cm13, and Cm35.

We welcome the institutionalisation of the NCP Peer review, the modalities of which will be defined at a later stage, as well as increased possibility for the Investment Committee to act in the event of a non-functioning NCP.

We welcome more detailed guidance on the process NCPs must follow in dealing with specific instances and the need to publish their case-handling procedures and final statements. Some areas to be improved:

- 4a: It is critical that NCPs publish a statement on their initial assessment of whether a case warrants further examination, but it is confusing that the criteria for that decision (Cm32) go beyond common admissibility criteria and already assess the merits of the complaint. We suggest deleting the addition under the second bullet point in Cm32 to keep these criteria as objective as possible to maintain transparency, accountability and functional equivalence.
- Cm10f and Cm24: Repeatedly specifying that participation in specific instances is “voluntary” is unnecessary and sends the wrong message to MNEs. Adhering governments should take steps to strongly encourage business to participate and implement recommendations from NCPs. We suggest deleting “voluntary” under Cm10f and Cm24.
- 4b-c: The Procedures provide that in its final statement a NCP “may” include recommendations or set out its views on whether the enterprise observed the Guidelines. We suggest replacing “may” by “is encouraged to” in 4b and 4c and adding a possibility for the NCP to recommend actions by the government to support implementation of its recommendations.
- C5: In the Procedures follow-up is at the discretion of the NCP but it is encouraged under Cm45. We suggest aligning C5 to make clear the expectation that follow-up will be undertaken.
- The guidelines should clarify that Specific Instances will be handled in accordance with basic principles of procedural fairness. This includes ensuring that all information on which an

NCP makes a decision is accessible to all parties and that the public and third parties have reasonable access to information about the Specific Instance. While it is accepted that it may be justified to redact or restrict access to sensitive information, the balance outlined between confidentiality and transparency in the Cm46 is sufficient and we suggest deleting Cm47 and Cm48.