

Public consultation: Targeted update of the OECD Guidelines for Multinational Enterprises

The OECD is currently inviting interested stakeholders to comment on a consultation draft of potential targeted updates to the OECD Guidelines for Multinational Enterprises. The public consultation is open to all interested stakeholders from all countries, including businesses, industry groups, civil society organisations, trade unions, as well as academia, interested citizens, international organisations and governmental experts (including from non-Adherent countries). For any questions, please contact rbc@oecd.org.

Name of submitting organisation or individual

Accountability Counsel

Please identify the organisation type of the submitting party

Civil Society Organisation

General comments — Please include any overall comments you wish to make on the consultation draft (max. 2000 characters)

Accountability Counsel acknowledges some positive proposed updates to the OECD Guidelines:

- a. Including climate change, biodiversity, animal welfare, and conservation as essential considerations for risk-based environmental due diligence;
- b. Stating that MNEs should exercise due diligence to prevent retaliation against human rights defenders, although the proposed language is overly restrictive;
- c. Focusing on the rights of Indigenous Peoples, although the right to Free, Prior, and Informed Consent, as well as the land rights and security of other people experiencing marginalisation should be further articulated; and
- d. Enhancing the core effectiveness criteria for NCPs in the Procedural Guidance, although baseline standards of NCP good practice are needed.

Significant advancements have been made over the past 10 years to define how MNEs should operate to achieve the 2030 SDGs, a just transition to a green economy, and improved supply chain governance, and the OECD Guidelines need to catch up. Sustainability-focused legislation, international impact management standards, and documents such as the ILO Guidelines for a Just Transition, the OHCHR Accountability and Remedy Project, and the UNGPs +10 Roadmap require additional sustainable business practices and better monitoring, measurement, and reporting of environmental, social, and human rights impacts.

More than targeted updates is needed to align the Guidelines with these normative advancements. The Guidelines must be updated in three essential ways:

1. Incorporate a responsibility of MNEs to respond to allegations of adverse human rights, environmental, or social impacts;
2. Mandate clear baseline expectations for effective NCP offices; and
3. Amplify the enhanced due diligence standards required of MNEs primarily focused on ESG/SDG/impact investing and privatised development finance, as are detailed by the OECD-UNDP Impact Standards for Financing Sustainable Development.

Chapter 1: Concepts and Principles – Please include any comments you wish to make on this specific chapter of the consultation draft (max. 2000 characters)

We support the following proposed language: “The Guidelines allow for a broad and flexible approach in identifying which entities may be considered multinational enterprises for the purposes of the Guidelines. The international nature of an enterprise’s structure or activities and its commercial form, purpose, or activities are relevant considerations in this respect.”

Numerous NCPs have rejected specific instances on the premise that no MNE was implicated by the complaint. For example, some NCPs have accepted specific instances implicating an Export Credit Agency (ECA), while others have rejected complaints because they did not consider an ECA to qualify as an MNE, despite the fact that ECAs offer numerous ways to support and enable international investments. Including a broad interpretation of MNEs in the Guidelines helps address this particular discrepancy, but the Procedural Guidance should also instruct NCPs to do the same. This will help correct overly rigid understandings of MNEs and encourage the widest possible observance of the Guidelines, a stated goal of OECD Member Countries. Additionally, the Procedural Guidance should address how NCPs should reconcile disagreements in the application of the Guidelines to promote baseline expectations of fairness and predictability in the handling of specific instances. We suggest including the following language under the sub-heading of “Specific Instances” in the Commentary on the Implementation of Procedures of the Guidelines:

To promote the fair and even implementation of the Guidelines, NCPs shall publish reasoned decisions regarding the acceptance or rejection of specific instances at the initial assessment stage. NCPs shall work to reconcile and publicly correct apparent contradictions concerning the disposal of specific instances to

promote consistency of practice and to optimise the accessibility and predictability of their respective offices.

Chapter II: General Policies — Please include any comments you wish to make on this specific chapter of the consultation draft (max. 2000 characters)

MNEs must respond to stakeholders' human rights, environmental, and social concerns. This includes engaging with NCP specific instances.

The critical flaw of the NCP framework is that MNEs need not respond to or engage with specific instances that NCPs determine to merit further examination. It is now inconceivable that an MNE can be presented with allegations of, for example, modern-day slavery or child labour in their supply chain and choose to decline accountability.

The right to remedy is ingrained in several international instruments, including the African Charter on Human and Peoples' Rights (art. 7), American Convention on Human Rights (art. 25), Convention for the Protection of Human Rights and Fundamental Freedoms (art. 13), and the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

With every legal right attaches a corresponding duty to protect the right; however, the NCP System has thus far failed by relying on strictly voluntary procedures that allow MNEs to disregard serious matters brought to their attention through a specific instance. Too often, well-founded complaints have been dropped at initial assessment because NCP offices were unable to convince MNEs to participate in a dialogue with aggrieved parties. It is time to set the expectation that MNEs must respond to complaints implicating human rights and serious environmental and social harm plausibly connected to their activities by engaging in good faith with NCP processes. We suggest the following language under a new Section C, covering the responsibilities of MNEs:

- C. Enterprises will respond to and engage in good faith with NCP processes if the NCP deems a specific instance to merit the good offices of the NCP. Governments should consider consequences, such as the withholding of trade support, for MNEs that fail to engage in good faith.*

Chapter III: Disclosure – Please include any comments you wish to make on this specific chapter of the consultation draft (max. 2000 characters)

The Guidelines should be harmonised with advancements in sustainability/ESG/Impact reporting regimes including (a) the OECD-UNDP Impact Standards for Financing Sustainable Development, (b) the UNDP SDG Impact Standards for Private Equity Funds, Enterprises, and Bond Issuers, and (c) the updated Global Reporting Initiative Universal Standards. A common thread of these standards is the requirement to disclose receipt and handling of grievances concerning adverse environmental or social impacts as a reflection of good governance. This is because the ability to receive and address internal and external feedback is not only critical for effective enterprise risk management, but also to promote net positive environmental and social impacts and verify corporate sustainability reporting in this regard.

MNEs should be expected to report on the availability, use, and outcomes of grievances received through their operational level grievance mechanisms and other non-judicial mechanisms, such as a NCP or those governing multi-stakeholder initiatives. Doing so would benefit public accountability and shareholder interests alike. We therefore recommend adding the following language under Paragraph 2 of Chapter III: Disclosure:

Disclosure policies of enterprises should include, but not be limited to, material information on:

- (j) the availability, use, and outcomes of grievance mechanisms intended to help identify actual and potential adverse impacts on the environment and people, including human rights impacts, across organisational activities and business relationships; and*
- (k) the management of risks and facilitation of remedy for actual negative impacts ascertained through a grievance mechanism, including any office of OECD NCP System.*

Chapter IV: Human Rights – Please include any comments you wish to make on this specific chapter of the consultation draft (max. 2000 characters)

The section on Human Rights should detail the steps required to manage reprisal risks to human rights and environmental defenders. The present language in Chapter II (General Policies, para.

10) that states MNEs should refrain from applying “undue pressure or reprisals” is both harmful and inadequate. First, the qualifier of “undue” implies that there are situations where reprisals may be warranted against defenders. Second, merely refraining from reprisals is not due diligence. Third, many defenders have experienced reprisals for engaging in activities outside of monitoring and reporting, and for opposing business activities based on principle regardless of legality or consistency with the Guidelines. The Guidelines rather should reference the 1998 Declaration on Human Rights Defenders in earnest reflection of the numerous ways and contexts that reprisals can occur. We recommend adding the below language to Chapter IV:

Enterprises should

7. *Adopt a zero tolerance approach to reprisals and proactively minimise risks of retaliation against human rights and environmental defenders concerned with their operations, and take all possible steps to protect those at risk while achieving the full consultation and consent of persons affected.*

Further, commentary 40 on the rights of Indigenous Peoples should be updated to reflect the duty to respect human rights articulated within UN instruments and other guidance, including the unique rights of groups traditionally marginalised, such as women and children. The paragraph should expressly reference the international jurisprudence and instruments entitling Indigenous Peoples to their unique rights to Free, Prior and Informed Consent, self determination, and cultural heritage. In this regard, we fully support the joint submission to this consultation by Indigenous Peoples Rights International.

Chapter VI: Environment – Please include any comments you wish to make on this specific chapter of the consultation draft (max. 2000 characters)

We support including language on land rights, but the current draft should do more than simply reference the FAO’s Voluntary Guidelines on the Responsible Governance of Tenure, Fisheries, and Forests in the Context of National Food Security (VGGTs) as one option for MNEs to consider to help safeguard against the dispossession of land and displacement of people. The standard should be that MNEs must respect human rights and legitimate tenure rights when considering their environmental impacts, and they should do so by implementing risk management systems to identify subsistence, usufructuary, and culturally significant uses of land not necessarily captured by land titles, and to respect internationally recognised land rights of Indigenous Peoples.

Commentary supporting the standard should detail the connection between land security and human rights. It should also clearly define what is meant by “legitimate tenure right holders,” which the FAO determined should be defined by non-discriminatory rulemaking through widely publicised consultation processes (see para. 4.4 of the VGGTs). The commentary should recognize the need for MNEs to investigate beyond political boundaries that are often a legal fiction attempting to demarcate Indigenous Peoples and circumscribe their land. In this regard, they should instruct MNEs on respecting the internationally recognised rights of self-identified Indigenous Peoples, including FPIC, with special attention paid to the vulnerability of environmental defenders advocating to protect the integrity of traditional lands.

Chapter IX: Science, Technology and Innovation – Please include any comments you wish to make on this specific chapter of the consultation draft (max. 2000 characters)

The Guidelines must explicitly recognize how the mishandling of personal data can create serious safety concerns for human rights advocates and defenders operating in non-democratic and suppressive contexts. This is acutely true for women human rights defenders, who face a disproportionate amount of threats and attacks that often are uniquely gendered and sexualized and compounded by other forms of discrimination intersecting with race, religion, ethnicity, disability, sexual orientation, socioeconomic status, or gender identity. To cover the range of adverse human rights impacts, beyond data theft and privacy breaches, that can result from the irresponsible handling, use, sale, and transfer of personal data and user communications, we urge adding the following language to Chapter IX:

[Enterprises should] Ensure that proper care and control of personal data and user communication is exercised, especially in contexts of suppressed civic space, to prevent the use of data to compromise the safety of human rights and environmental defenders through the disclosure or leaking of information related to their identities, locations, contacts, and communications. When unintentional disclosure or leaks occur, enterprises should be proactive in employing tactics and technologies to mitigate the wide dissemination of such information and to flag hate speech and disinformation intended to degrade, discredit, and otherwise threaten advocates and defenders of human rights.

Implementation procedures – Please include any comments you wish to make on this specific part of the consultation draft (max. 4000 characters)

The failure of the Procedural Guidance to outline good practice and baseline expectations for NCP structure and functions has resulted in wide discrepancies in the effectiveness of NCP offices. Many NCPs fall short of the criteria for effective non-judicial grievance mechanisms articulated by Principle 31 of UNGPs. Many operate non-transparently by failing to publish their procedures and by not maintaining an easily searchable database containing information on the registration, status, and outcomes of all specific instances received. Many lack access to human rights expertise and adequate stakeholder engagement to be considered legitimate. Others are positioned within bureaus focused squarely on promoting economic development and business interests, compromising their ability to equitably consider specific instances.

We urge the following minimum expectations for all NCPs to be articulated under Part II of Procedural Guidance for Implementing the Guidelines:

1. Initial assessments of specific instances should maximise accessibility. The Guidance should instruct NCPs to limit their consideration at this early stage to whether the allegations of harm are *plausibly* linked to the activities of the implicated MNE to warrant further inquiry, rather than adjudicating the merits of the allegations.
2. NCPs must be expected to operate with maximum transparency both in policy and complaints handling. This includes immediately publishing the actual specific instance complaints, initial assessments, final statements, determinations of compliance with the Guidelines, and monitoring reports, heeding requested confidentiality from complaint submitters and potential reprisal risks.
3. NCPs must be resourced to undertake monitoring of agreements achieved through dispute resolution. Follow-up is critical to ensure the effectiveness of the NCP system in achieving actual remedy for harm caused by failures in due diligence.
4. NCPs must be able to issue findings of an MNE's violation of the Guidelines and must be equipped with the human rights expertise to make this assessment. NCPs must be able to report an MNE's failure to respond to or engage in good faith with allegations of human rights violations and/or serious environmental or social harm caused by their activities. Governments in turn should use this information to restrict access to trade promotion or other government support for MNEs who fail to constructively engage in the NCP process. For the Guidelines and NCP system to be effective, MNEs must not ignore their due diligence responsibilities without consequence.
5. NCPs must develop procedures for managing reprisal risks as is expected of MNEs. There must be a baseline expectation of safety in using the NCP system. Standards for reprisal risk management are articulated in the "Guide for Independent Accountability

Mechanisms on Measures to Address the Risk of Reprisals in Complaint Management,” endorsed by Independent Accountability Mechanism Network, and the OHCHR’s ongoing coverage of good practices to prevent and reduce reprisals.

Finally, it is essential that the Guidance discuss enhanced due diligence standards required of MNEs focused on ESG/SDG/Impact Investing and operating in the space of privatised development finance. These enhanced requirements are articulated by the OECD-UNDP Impact Standards for Financing Sustainable Development. Failing to cover these important impact standards approved by the OECD Development Assistance Committee, would be a missed opportunity to provide focused due diligence guidance for MNEs purporting to lead on the SDGs using more robust environmental and social safeguards. Further, discrete guidance would assist NCPs in assessing and facilitating resolution to specific instances in the context of an MNE’s marketed development impact goals and/or sustainability commitments, thus providing the added benefit of addressing greenwashing that increasingly pervades ESG and impact investing.