

BSR Submission to Public Consultation: Targeted update of the OECD Guidelines for Multinational Enterprises

FEBRUARY 2023

This is a precise copy of the BSR submission, which was limited to 2000 characters per section (except the final section, which was limited to 4000 characters).

GENERAL COMMENTS

BSR welcomes many of the updates introduced and the effort to conceptually align with other international standards and emerging legislation, and to update the text to better reflect the challenges of the next decade, notably regarding climate, biodiversity, and technology. BSR emphasizes three points:

- **The importance of clarifying that the scope of due diligence extends to a company's entire value chain.** We welcome the broadened definition of “business relationships” (in commentary 16 to Chapter II) and its use throughout as a replacement for the term “supply chain”, in alignment with the UN Guiding Principles on Business and Human Rights (UNGPs). However, the Guidelines would benefit from an unambiguous clarification that due diligence (1) should encompass downstream impacts and (2) includes impacts linked to how a company's products or services may be used by individual end-consumers or “users”.
- **An opportunity to better future-proof the Guidelines.** We welcome the amended text acknowledging the changed global business context, notably relating to environmental and technological developments. However, some of the language is unduly restrictive and, we think, misses an opportunity to embrace an even more progressive agenda and better future-proof the Guidelines.
- **The content relating to the human rights impacts of technology could better capture the risks that exist.** We welcome the expanded language in Chapter IX recognizing the specific risks to human rights that stem from the development, sale, and use of technology. However, parts of this section were ambiguous on whether they applied to all enterprises deploying technology or only those developing and selling technology. The former must be clear. We also recommend clearer guidance to support enterprises faced with tension between domestic laws and requirements that adversely impact upon individuals' privacy or other rights and the need to honor the Guidelines to the fullest extent possible.

PREFACE

While the Guidelines are written for Multinational Enterprises (MNEs), they carry an important political message to all actors involved, and especially the states as enablers of trade through efficient, impartial, and non-discriminatory governance. The original Guidelines described the duties of States/Governments very well and we see no positive reason to diminish these in the new text.

We are concerned that the proposed deletion and replacement of text describing the State's responsibility lessens the role of governments. Given a complex emerging political environment of growing protectionism and nationalistic sentiment, we believe that the duties of Governments described in the original text is essential to the MNEs ability to fulfill the expectations of the Guidelines and should be retained.

For clarity, we propose that the following text is retained:

“Governments can help by providing effective domestic policy frameworks that include stable macroeconomic policy, non discriminatory treatment of enterprises, appropriate regulation and prudential supervision, an impartial system of courts and law enforcement and efficient and honest public administration. Governments can also help by maintaining and promoting appropriate standards and policies in support of sustainable development and by engaging in ongoing reforms to ensure that public sector activity is efficient and effective. Governments adhering to the Guidelines are committed to continuous improvement of both domestic and international policies with a view to improving the welfare and living standards of all people”

CHAPTER I: CONCEPTS AND PRINCIPLES

We welcome the strengthening of requirement 2 to make clear that enterprises should honor the guidelines (not just “seek ways” to do so) when domestic laws conflict with the principles and standards therein and *also* when domestic laws set lower expectations.

CHAPTER II: GENERAL POLICIES

We welcome the greater alignment with the UNGPs, notably on the scope of due diligence extending to business relationships, prioritizing impacts based on severity and likelihood, taking into account an enterprise's leverage, and the remediation of adverse impacts.

The most important amendment to this section is the clarification that **the scope of due diligence should extend to an enterprise's full value chain**, not just its supply chain, and include downstream impacts linked to the **use of its products and services that may adversely impact individuals**.

The reference to “business relationships” clarifies that due diligence should extend beyond an enterprise's supply chain and contractual relationships (as stated in commentary 20), but the text should make clearer that this includes impacts linked to buyers, users, and consumers of products and services, as well as other individuals and communities potentially impacted by an enterprise's operations, products, or services. This should be made more explicit in the core requirements (A11, 12, 15) and commentary 16. Commentary 18 should clarify that a risk-based approach be taken across the enterprise's value chain.

We welcome the emphasis on “**meaningful**” **engagement with stakeholders** (A16) and its importance to effective human rights due diligence (commentary 28). However, the text should focus on rightsholders in line with the UNGPs, starting with a definition of stakeholders that includes rightsholders and persons impacted by activities of the enterprise's business relationships. It should also clarify that engagement is required in all stages of due diligence and remedy, to: (1) identify and evaluate impacts, (2) inform actions to address and remedy impacts, (3) develop effective grievance mechanisms.

The reference to transparency and integrity of **lobbying activities** (A5) should extend to other corporate political influence, including activities through trade associations, political contributions, and hiring practices.

CHAPTER III: DISCLOSURE

We welcome the strengthening of paragraph 3 to recognize the importance of companies communicating “responsible business conduct information” and its connection with due diligence, but recommend this be articulated as an action enterprises “should” take (in line with the rest of the guidelines).

It would be helpful to expand the definition of responsible business conduct information to include:

- An accurate description of enterprise’s operations and value chain, including material business relationships, to enable external stakeholders to evaluate the enterprise’s identified areas of significant impact or risk (as required to be disclosed by new guideline 3c).
- Information on the enterprise’s business model and strategy, including impact on business conduct issues and a description of how responsible business conduct matters have been considered.

We recommend a more unambiguous endorsement of “double materiality” (i.e., “financial materiality” and “impact materiality”) **as a matter of principle**, rather than making impact materiality and related disclosures contingent on jurisdictional requirements (commentary 31) or becoming material to investors over time (commentary 32). We welcome the reference to both the International Sustainability Standards Board and Global Reporting Initiative (commentary 37) but recommend that the Guidelines state that enterprises **should** implement approaches to materiality and disclosure based on both. We believe the emerging consensus around “double materiality” and the accompanying alignment of reporting standards to be one of the most encouraging developments in responsible business over the past decade, and the Guidelines should re-enforce that.

CHAPTER IV: HUMAN RIGHTS

We recommend that the core requirement that companies should meaningfully engage with stakeholders be repeated (in the strengthened form as recommended in comments to Chapter II above) in Chapter IV on Human Rights as it is in Chapter VI on Environment. This Chapter should emphasize the particular importance of stakeholder engagement to human rights due diligence and access to remedy (and on an ongoing basis) to (1) identify and evaluate impacts on rightsholders, (2) inform actions to address and remedy impacts, (3) develop effective grievance mechanisms. Stakeholders are currently only referenced in commentary 46 (in relation to operational grievance mechanisms and remedy), which does not adequately reflect their importance.

The reference to situations of armed conflict (commentary 40) should be strengthened with more relevant and practical guidance for companies operating in conflict-affected and high-risk areas (not just situations of armed conflict) to conduct enhanced due diligence that accounts for context and the business’s impact on that context. BSR recommends that existing text (“in situations of armed conflict enterprises should respect the standards of international humanitarian law, which can help enterprises avoid the risks of causing or contributing to adverse impacts when operating in such difficult environments”) be replaced with text that more clearly conveys the importance of enhanced human rights due diligence, for example:

“[I]n conflict affected and high-risk areas, enterprises should conduct enhanced human rights due diligence to identify, prevent and mitigate heightened risks and adopt a conflict sensitive approach to the severe risk of gross human rights abuses. Enterprises should avoid contributing to violations of international humanitarian law”.

CHAPTER V: EMPLOYMENT AND INDUSTRIAL RELATIONS

This Chapter would benefit from cross-reference to Chapter IV on Human Rights to explain that the expectations in both chapters are overlapping and mutually reinforcing. In other words, the requirements in Chapter IV on Human Rights (including the duty to conduct due diligence and provide for and/or cooperate in remediation) cover impacts related to employment and industrial relations, and more specifically applicable expectations relating to those types of impacts are detailed in Chapter V.

We welcome the reference to potential impacts on workforce of changes linked to energy transition, automation, and digitalization (commentary 58). We recommend broadening this point beyond the requirement to train an enterprise's own workforce to a consideration that should inform any decision likely to have a significant impact on the numbers, activities, or working conditions of a given workforce (for example linked to requirement 6 "in considering changes in their operations which would have major employment effects").

CHAPTER VI: ENVIRONMENT

We welcome the clarification that enterprises should conduct risk-based due diligence (as described in Chapter II) on their environmental, health and safety (EHS) impacts including the types of impacts listed in the chapeau. Risk-based due diligence should be carried out to identify, prevent and mitigate **all** EHS impacts which are violations of internationally recognized objectives and prohibitions included in environmental conventions, for example those listed in Part II to the Annex of the EU Corporate Sustainability Due Diligence Directive.

We support the inclusion of elements which recognize that business must operate within planetary boundaries for both climate and nature. This includes references to sustainable production and consumption, minimization of energy and material inputs and reparability and recyclability. This naturally connects to the instruction that company targets should be science-based.

Science-based company action is clearest on greenhouse gas emission reductions aimed at the Paris Agreement's goals, and the draft properly includes scope 3 (value chain) emissions to the extent possible. More future-proofed guidelines would explicitly provide for new international agreements to establish new science-based standards, including the new Kunming-Montreal Global Biodiversity Framework and the plastics treaty under negotiation in the UN Environment Assembly.

We note the conceptual incoherence for climate targets to encompass the full value chain (scope 3) where possible (commentary para. 75), while limiting the scope of due diligence to the upstream supply chain elsewhere.

Finally, we welcome the recognition of interlinkages between adverse environmental impacts and associated environmental management, and other matters covered by the Guidelines. Increasingly our avoidance of adverse climate, nature, and human rights impacts, for example, will stand or fall together.

CHAPTER IX: SCIENCE, TECHNOLOGY, AND INNOVATION

We welcome the enhanced language in this Chapter, especially the language stating that enterprises of all sectors (and not simply those enterprises which develop technology) should undertake due diligence in relation to technology. However, the chapeau requires that this be done "in a way that is consistent with ... applicable national laws and requirements, including privacy and data protection requirements". Many laws and requirements in this sector (e.g., data localization and assisting security and law enforcement agencies) create challenges for companies seeking to respect human rights, and particularly the right to privacy. We recommend

that, as elsewhere in the Guidelines, this Chapter reiterates that enterprises should honor the Guidelines “to the fullest extent which does not place them in violation of domestic law”.

We welcome the language in (commentary 98) highlighting the risks stemming from the theft of data and other privacy breaches, but recommend editing this to read: “Paragraph 2 reinforces these benefits, but also acknowledges risks related to data theft, *the irresponsible use of data*, and other data-related practices that have impacts upon privacy and other human rights”.

The language in paragraph 4 on the transfer of technology is clear, but undermined by confusing language in commentary 99, where we are unclear why the concept of proportionality is referenced, the meaning of the term “unintended consequences”, and the reasoning for the reference to actors benefiting from technology transfer in order to misuse civilian technology. In the absence of clarity over what these sentences mean, we recommend their deletion.

Paragraph 100 appears to be limited to the technology sector (i.e., enterprises that sell, license, transfer or export technology). This paragraph should be clear that **any enterprise seeking use or deploy technology should conduct due diligence on its potential impacts**, and so we recommend removing the words “in the technology sector”.

IMPLEMENTATION PROCEDURES

NCPs serve a critical role in the promotion and implementation of the Guidelines; they also help ensure accountability and action to prevent and address adverse impacts on human rights and the environment. While we welcome many of the proposed revisions under this section, the Guidelines should explicitly recognise how NCPs can and should contribute to a robust remedy ecosystem and encourage MNEs to fulfil their responsibilities on access to remedy under the UNGPs. In addition, we make the following recommendations to improve the structure and functioning of NCPs:

- **Institutional arrangements:** While we recognise the importance of government in ensuring NCPs’ effectiveness, we welcome changes under A2 that eliminate the possibility of having only government official(s) as the NCP. If the NCP is not multi-stakeholder or fully independent, we suggest prescribing at a minimum the inclusion of independent experts or stakeholder representatives in an oversight or advisory body. In addition, we suggest adding specific reference to national human rights institutions (NHRIs) or other bodies and accountability mechanisms with mandates to protect human rights and promote access to remedy in A2, A3 and in C as well as in the Cm to the Procedures under Cm9d, Cm11, Cm13, and Cm35.
- **Admissibility:** It is critical that NCPs publish a statement on their initial assessment of whether a case warrants further examination (4a). However, the criteria for that decision (Cm32) should not go beyond baseline admissibility criteria or consider 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.
- **Participation:** Repeatedly specifying that participation in specific instances is “voluntary” is unnecessary (Cm10f, Cm24). Adhering governments should take steps to strongly encourage business to participate and implement recommendations from NCPs. We suggest deleting “voluntary” under Cm10f and Cm24.

- **Recommendations:** The Procedures provide that NCPs “may” include recommendations or set out views on whether the enterprise observed the Guidelines in its final statement (4b-c, Cm44). We suggest replacing “may” with “should” issue determinations on the alignment with the Guidelines (and where relevant, whether the MNE has implemented recommendations or agreements as part of the specific instance process). Furthermore, the Procedures should empower NCPs to propose actions for governments to undertake to support the implementation of the recommendations, as well as the ability to recommend consequences for MNEs that fail to adhere to the Guidelines, implement agreements as part of the specific instance process, and/or participate in the process in good faith (A4, Cm42-43).
- **Follow up:** In the Procedures (C5), follow up is discretionary, whereas it is encouraged under Cm45. We believe that follow-up monitoring is an important accountability function and suggest that NCPs should conduct follow up unless the circumstances do not warrant such action. We recommend adjusting the language to establish a clear expectation that follow up is a part of the specific instance process.
- **Transparency:** While there may be certain circumstances that justify restricted access to sensitive information, transparency should be the rule rather than the exception. The current emphasis on confidentiality over transparency is inconsistent with the fundamental principles of procedural fairness (Cm46). We suggest deleting Cm47 and Cm48 and stating that NCPs are expected to disclose all information on which its decisions are made to all parties and provide the public and third parties with reasonable access to information about the specific instance. Furthermore, the Procedures should not prevent parties from publishing their submissions or responses or allow NCPs to prohibit such publications under their rules of procedure.

ABOUT BSR

BSR is a sustainable business network and consultancy focused on creating a world in which all people can thrive on a healthy planet. With offices in Asia, Europe, and North America, BSR provides its 300+ member companies with insight, advice, and collaborative initiatives to help them see a changing world more clearly, create long-term value, and scale impact.

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