

OECD Public Consultation: Targeted Update of the OECD MNEGs for Multinational Enterprises

Business at OECD Comments

General Comments (1875 characters)

- The text should be significantly mainstreamed, shortened, and become practicable to enable companies to implement the MNEGs.
- A general disclaimer must be added to underline the voluntary and aspirational nature of the MNEGs, making clear that they should not be used for regional or national legislation as they are intended to be a soft law instrument, which cannot be implemented one-to-one in national tort law, administrative law or civil law.
- The tone of the document should adequately reflect its purpose and nature. Instead of "enterprises should," modify to "enterprises should consider" or "enterprises should take into account". Similarly, wherever edits indicate a "business responsibility" it should be a "business responsibility to respect sth. in carrying out".
- Substantive issues of strong concern include the following points which should be addressed throughout the text:
 - (1) The extension of DD expectations to the full downstream part of the value chain is in practice unworkable for business.
 - (2) A clear distinction is needed between the OECD Guidance documents and the MNEGs, which must remain the only reference for potential specific instances.
 - (3) The significant and material expansion of DD to the Environment and Science and Technology chapters can have unintended consequences and require significant clarification. The MNEGs must not transfer responsibility or liability from laggard states to lawfully operating firms. In cases of environmental impacts, lawful conduct of companies must not be assessed as causing or contributing to an adverse impact.
 - (4) Several broad references and vague concepts should be sufficiently clarified or deleted to avoid unintended consequences for companies and significant interpretational challenges.
 - (5) Interpretations of the MNEGs must remain the responsibility of the OECD Investment Committee and the OECD WPRBC.
- All references to other legal instruments should reproduce the identical text without paraphrasing.

Chapter I Concepts and Principles (702 characters)

- The OECD should clearly underline the voluntary and aspirational nature of the MNEGs, and add a clause recognizing that the MNEGs are a soft law instrument, which cannot be implemented one-to-one in regional and national law given their different purpose and status.
- We propose further clarification to the definition of MNEs. If a company is not established in more than one country, it should only under specific circumstances qualify as an MNE, such as conducting a significant amount of business in more than one country.

- Specific recognition should be given to proportionality, and exemptions should be considered for SMEs which face unique challenges, especially but not only related to often limited resources to implement such explicit standards (Para 4).

Chapter II General Policies (1603 characters)

- Environmental issues should not in general be considered human rights issues (Para 10).
- The recommendation for meaningful engagement with stakeholders should be explicitly limited to matters covered by the MNEGs (Para 16).
- The definition of "improper involvement" in political activities is vague and will lead to diverging interpretations. The deletion of "local" in the phrase "local-political activities" has large and potentially unconstitutional consequences. As controversies are inherent in all aspects of scientific debates "covert, deceptive or misleading evidence or data" can be particularly difficult to establish (Para 17).
- The reference to vague or non-defined wording should be deleted, including those referring to "potentially affected" communities, or "social partners and other relevant representatives" (Comm 2).
- Language shall not prevent companies from freely participating in the public discourse and make reports. Companies have in many states a constitutional right to free speech and involvement in policy debates (Comm 6).
- The note on self-regulatory practices is overly narrow and prescriptive. Such initiatives can be voluntarily aligned with key international standards addressing RBC (e.g. OECD-UN-ILO) thereby taking into account the autonomy of social partners and stakeholders (Comm 12).
- The guidance documents should not be included in the MNEGs in a way that puts them on the same level. Explicitly recognize that 'Not every practical action will be appropriate for every situation' (Comm Para 15).
- We disagree with the extended responsibilities downstream, and beyond contractual relationships (Comm 19).
- Companies cannot be expected to mitigate the impacts of disengagement and we would like to stress that such measures should only be taken as a last resort. Companies can take potential adverse effects into account when deciding to disengage (Comm Para 25).

Chapter III Disclosure (125 characters)

- Companies can only be expected to take into account established disclosure regulations in the countries in which they operate and consequently, they may merely be encouraged to also take into account disclosure needs and expectations of – the main or relevant – stakeholders.
- The final version of this chapter should take into account the ongoing update of the G20-OECD Corporate Governance Principles.
- Multinational enterprises should remain "encouraged to communicate" RBC information (Para 3).

Chapter IV Human Rights (383 characters)

- As outlined in the overarching comments, we remain very concerned about the reference to the diligence guidance and sectoral guidance and request adapting the language to clarify the relationship between the MNEGs as the authoritative standard and the DD guidance, providing merely voluntary practical support.

Chapter V. Employment and Industrial Relations (1873 characters)

- Regarding the right of workers, the deletion of the qualifier related to workers “employed by the MNE” should be reversed as this could lead to far-reaching claims without respecting potential limits to oversight that companies may be facing. A deletion would have implications on the notion to create the problematic category of “supply chain workers” (Para 1 a) & b).
- The chapter should be balanced and therefore also refer to workers rights not to establish or join trade unions and representative organizations. Addition of the phrase “consistent with applicable national law and practice” is *essential* (Para 1 a).
- We suggest not to make a reference to the ILO Indicators of Forced Labour, which could create uncertainty. The indicators include for example “excessive overtime” as indicator and say that “the presence of a single indicator in a given situation may in some cases imply the existence of forced labor” (Comm Para 53).
- “Just transition” is an emotive term with many unofficial definitions and understandings, and this should not be included in the OECD MNE MNEGs, including in other chapters. ILO MNEGs on a JT provide that to be achieved, JT requires negotiation with a trade union which may be what the workplace and circumstances require but should not be externally mandated (Comm Para 58).
- We oppose the references to automation, which would broaden the scope of the MNEGs and could lead to large interpretational uncertainty. Automation is part of structural change and respective developments may hardly be foreseeable for companies themselves. (Comm Para 59).

Chapter VI. Environment: (1984 characters)

- The MNEGs must not transfer government responsibility or liability from laggard states to lawfully operating firms. Recognizing important “ambition gaps” and “implementation gaps” on environmental matters, it is inappropriate to ask single private organizations through the MNEGs to align with collective international environmental objectives that governments have committed to, but which are not translated into according national frameworks. It is the right of governments to set national development priorities, and a deviation from principles such as “common but differentiated responsibilities” should be avoided.
- International standards such as the MNEGs are more and more used to define an unwritten duty of care in civil jurisdiction. Precise definitions and actionable MNEGs are therefore of particular importance in this chapter. Where such cannot be provided, no changes should be made.
- A clear distinction is needed between high-level commitments, government expressed objectives and legal frameworks (Para 1, 2b).
- We do not support the explicit inclusion of DD in the environment chapter. Significant practical limitations remain on the ground when it comes to “identify, prevent and mitigate” impacts. It is also not clear how to apply the “cause-contribute-directly linked to” framework to environmental matters. The OECD should qualify that “Lawful conduct of companies should in principle not be assessed as causing contributing or being directly linked with an adverse impact” and that “the nature and extent of DD depend on the circumstances of a particular situation” (Para 1).
- In the list of environmental impacts “overconsumption” is a relative and imprecise notion and should be deleted, just as “harmful generation” of waste should be deleted as the focus should be on waste mismanagement (Para 1).
- Mention of the “just transition” should only be included to the extent that it is mentioned in the framework of an NDC submitted to the UNFCCC COP by a government (Para 3).
- All stakeholders should work towards collective environmental objectives. Suggest deleting “Governments, business and consumers are jointly responsible for achieving environmental objectives” (Comm Para 60).

Chapter VIII – Consumer Policy

- We recommend amending the provisions on representations to prevent the unintended consequence of exposing enterprises to claims from individuals who have an adverse reaction to a product that could not have been anticipated.

Chapter IX. Sciences Technology and Innovation (1993 characters)

- We are concerned about the explicit expansion of the DD concept. Enterprises involved in the development of new technology cannot always realistically anticipate and address the ethical, legal and social challenges raised by novel technology. It is further not clear how the ‘*cause-contribute-directly linked to*’ framework – and relatedly expectations on companies to act upon impacts - would apply to technology and science matters. (Para chapeau & Comm Para 100-101).
- We are concerned about applying the DD concept to the “sale, licensing, trade and [end] use of technology.” Establishing downstream whether “the use of technology, including gathering and using of data, is done in a way that is consistent with the MNEGs” is an unmanageable responsibility. Downstream relations may no longer be limited in time and scope, making it impossible for companies to monitor relations and foresee potential impacts and use their leverage to impact downstream actors (Para Chapeau).
- We consider “end use” of any good as problematic limited traceability in practice. This may be more feasible in the context of specific goods such as cybersecurity goods, military goods and dual-use goods. Specify [direct business partners] to limit the downstream effect (Para 1).
- The introduction of the concept of adverse impacts in relation to science, technology and innovation policies is new and requires further definition of its scope and materiality (Para 4).
- We strongly advise to use language adopted by all OECD members and Advisory bodies in the “Recommendation of the Council on Enhancing Access to and Sharing of Data” (OECD/LEGAL/0463).
- We suggest deleting the reference to “Internet Freedom”, which is not a term used in a prior OECD context, or other fora. We propose using similar language to the as already adopted by OECD countries in relevant digital guidance. (i.e. Declaration on a Trusted, Sustainable and Inclusive Digital Future, OECD, 2022) (Para 7).

Implementation Procedures (1780 characters)

- As for the notion for NCPs to promote the DD Guidance (B1.), we stress that it is important to recall that the MNEGs and the Guidances are very different nature: The MNEGs contain the principles and standards; the Guidances are tools providing practical support. A key sentence in this respect is that “not every practical action will be appropriate for every situation.” To that end, while both documents could be used for promotion, the focus must be on the MNEGs, which provide the sole basis for specific instances. Importantly, the difference between the two must be clearly set out to the target group.
- We are critical about the role for NCPs in policy advocacy, which should be considered an option, not an obligation given different country contexts and individual limitations with respect to resource availability. The focus should be on the promotion of the MNEGs and the provision of the NCP’s good offices for the resolution of any specific instances that may arise in the context of the MNEGs. We further stress the difference between policy advocacy and expert advice.
- We underline that confidentiality and protection of sensitive business information is key to ensuring trust and allowing for the creation of a safe space for discussion as the basis of the

process. To that end, we stress the importance of the clarifications that “in the interest of resolving the issues, the NCP shall keep certain information confidential from the other party” (I, C, 6) and that “information (...) shall be kept confidential by the parties and shall not be disclosed publicly or to a third party during or after the proceedings unless the sharing party agrees to their disclosure or not disclosing would be contrary to the provisions of national law.” (I,C,7.).

- In general, the DD Guidances must not be elevated to the same level as the MNE MNEGs, which constitute the underlying standard and should not provide a basis for the interpretation of specific instances or DD obligations.
- The DD guidance and sectoral guidance contain very detailed elaborations on DD expectations, which would add another layer of complexity to the MNEGs. Importantly, the Guidances explicitly recognize that ‘Not every practical action will be appropriate for every situation’, while the MNEGs themselves establish general expectations.
- It must be clarified that the interpretation of the MNEGs must remain the sole responsibility of the OECD Investment Committee and the OECD Working Party on RBC.