

THE 2011 OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

An introduction for business

V N O N C W



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November 2011

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1. INTRODUCTION

The OECD guidelines for multinational enterprises are one of the most important and comprehensive international instruments for promoting responsible business conduct. They are part of the OECD Declaration on International Investment and Multinational Enterprises, which aims to balance the promotion of an open and liberal investment climate by governments with responsible conduct by business.

The Guidelines reflect a political understanding on what constitutes appropriate and fair business behaviour vis-à-vis stakeholders and society in the globalised economy. At the same time they protect enterprises against unrealistic expectations on the part of stakeholders. The Guidelines exist alongside other leading instruments, such as the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the UN Global Compact and the UN Guiding Principles for Business and Human Rights. They also recognise the many initiatives on Corporate Social Responsibility developed by business itself.

The Business and Industry Advisory Committee to the OECD (BIAC), of which BDA and VNO-NCW are both a member, has been closely involved in the formulation of the Guidelines, and has accepted them upon their adoption by the OECD in May 2011. Not only the 34 OECD countries, but also Argentina, Brazil, Egypt, Estonia, Latvia, Lithuania, Morocco, Peru and Romania have signed the Guidelines.

This brochure provides a first introduction to the new text. It seeks to familiarise enterprises with the recommendations in the Guidelines and with the National Contact Point.

**The updated OECD Guidelines were adopted at the OECD ministerial meeting on 25 May 2011.
New features include:**

- A new and comprehensive concept to avoid adverse impacts of business activities, including a related due diligence provision.
- New provisions on how to promote observance of the Guidelines in the supply chain.
- A new chapter on human rights consistent with the UN Guiding Principles on Business and Human Rights.
- Amendments in the thematic chapters.
- Amendments to the NCP procedure to resolve disagreement over the implementation of the Guidelines
- A pro-active implementation agenda designed to help enterprises to meet their responsibilities.

2. THE 2011 OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

2.1. What are the OECD Guidelines for Multinational Enterprises?

The OECD Guidelines for Multinational Enterprises are recommendations from the OECD governments and 8 other adhering countries to their multinational enterprises (MNEs) on responsible business conduct abroad. They address business behaviour in ten areas: general policies, disclosure of information, human rights, employment and relations between social partners, environment, combating bribery and extortion, consumer interests, science and technology, competition and taxation.

Observance of the OECD guidelines by MNEs is voluntary. They are deliberately not legally enforceable, because they are intended to stimulate fair behaviour and not to trigger legal disputes. But enterprises are expected to fulfill the recommendations. The Guidelines have a special and unique status as an instrument for responsible business behaviour: the OECD governments have committed to promote their implementation.

To this end, the governments have, among other commitments, agreed to establish National Contact Points (NCP) to promote, implement and monitor business behaviour as recommended in the Guidelines. The Guidelines are the only internationally agreed code with such a mechanism. This shows that enterprises have to come to grips with the Guidelines and apply them. Trade unions and non-governmental organisations can invoke the assistance of the NCP, as a mediation and conciliation platform, in the case of disagreements over the implementation of the Guidelines. They increasingly use this mechanism.

2.2. What do the Guidelines mean by multinational enterprise?

The Guidelines do not provide a definition of a “multinational enterprise”. They recognise how diverse international business has become. But they note that multinational enterprises will usually be enterprises or other business units that are established in several countries and coordinate their operations in various ways. Ownership may be private, state or mixed.

The Guidelines apply to all units of a multinational enterprise, i.e. to parent companies as well as to independent business units. The different business units are expected to work together and provide mutual support in order to facilitate compliance with the Guidelines.

The Guidelines are not exclusively addressed to large enterprises: they expressly also relate to small and medium-sized enterprises which are active on a multinational scale.

2.3. The essence of the Guidelines: avoid adverse impacts

The updated Guidelines have introduced an important new recommendation: multinational enterprises should avoid adverse impacts of their own business activities on the interests that are covered by the Guidelines.

What does this mean?

In the first place, enterprises should prevent that their own activities cause an adverse impact on matters covered by the Guidelines or substantially contribute to any such adverse impact. Their 'own activities' also include their own activities in the supply chain.

Furthermore, multinational enterprises should seek to avert that their immediate business partners infringe the Guidelines in direct relation to the operations, products or services of the MNE. It is important to note that the Guidelines make very clear that this recommendation does not shift responsibility from the party that commits the infringement on to the MNE with which that party has a business relationship.

Thirdly, enterprises should, where practical, encourage their business partners in general, including suppliers and subcontractors, to apply the principles of responsible business behaviour in line with the OECD Guidelines for Multinational Enterprises.

How should MNEs do this?

It is clear from the above that the Guidelines are based on the principle that MNEs are responsible for their own behaviour and not for adverse impacts

caused by others. Therefore the Guidelines are more demanding as the enterprise is more directly involved in the adverse impact:

- when the enterprise itself is the cause of the problem, it should simply take the necessary steps to stop or prevent the adverse impact;
- when the enterprise is contributing to the problem, alongside with others, it should simply stop or prevent its own contribution; and it should use its influence to reduce any remaining impacts by others, insofar as possible;
- when an immediate business partner is infringing upon the Guidelines, the enterprise should use its leverage on this partner to influence him to prevent or reduce it;
- last but not least, enterprises are in general expected to encourage their business partners to behave responsibly.

The Guidelines recognise that the encouragement of business partners is subject to practical limitations. These depend on the circumstances of the situation, such as product-specific characteristics, the number of suppliers, the structure and complexity of the supply chain, or the enterprise's market position in relation to its suppliers. Depending on the situation, it can be appropriate for an enterprise to continue the relationship while working on improvement of the problem, or to suspend the relationship temporarily, or, as a last resort, to disengage while taking into account the social and economic consequences.

In cases where enterprises have numerous suppliers, they are encouraged to identify global areas of activity in which the risk of adverse effects is greatest, and to determine priorities for due diligence towards suppliers on the basis of this risk assessment.

In addition, enterprises are encouraged to take part in or support private or multi-stakeholder initiatives and dialogues with society on responsible management of the supply chain.

Enterprises should carry out due diligence in order to identify, prevent and reduce actual and potential infringements of the Guidelines.

The provisions in the Guidelines on adverse impacts and due diligence are carefully worded and they allow for flexibility in various ways.

What is due diligence?

Enterprises should carry out risk-based due diligence to avoid adverse impacts. Due diligence is the process whereby enterprises identify, prevent and mitigate actual and potential adverse effects, and also report how they take these effects into account in their decision-making and risk-management. The Guidelines do not mention specific procedural requirements for this process, except in the case of due diligence in the human rights field. No due diligence is foreseen in the fields of competition, science and technology, and taxes.

In the case of due diligence specifically for human rights, the procedure consists in:

- identifying actual and potential impacts on human rights
- taking account of the results of the assessment through appropriate measures
- verifying reactions and
- communicating on how these impacts are being addressed.

Human rights due diligence can be integrated in more general risk-management systems provided that it goes beyond simple identification and management of important risks for the enterprise itself and also includes risks for rights holders.

The Guidelines make clear that the nature and scope of due diligence demand a tailor made approach. The specific steps that are expected in a given situation are influenced by factors such as enterprise size, the context of the business activity, the specific recommendations in the Guidelines and, of course, the gravity of the adverse effects.

2.4. Further content of the Guidelines

The OECD Guidelines are divided into eleven chapters. The recommendations of each chapter are explained in greater detail in a commentary. The content of the Guidelines is:

Chapter 2: General policies, *inter alia*:

- economic, environmental and social progress with a view to achieving sustainable development
- respect of human rights
- human capital formation by creating employment opportunities and facilitating training opportunities for employees
- no discriminatory or disciplinary action against workers who make *bona fide* reports to management or, as appropriate, to the competent local authorities, on practices that contravene the law, the guidelines or the enterprise's policies ('whistle blowers')
- no attempts to secure exemptions from regulatory requirements
- prevent infringements of the Guidelines, and to that end introduce due diligence
- efforts to prevent infringements of the Guidelines by direct business partners
- developing and applying effective self-regulatory practices and management systems, as well as engaging with relevant stakeholders so that their views can be taken into account on planning and decision-making questions
- abstaining from improper involvement in the politics of the host country

Chapter 3: Disclosure, *inter alia*:

- publish regular information on activities, structure, financial situation, ownership, performance and governance
- encouragement to make additional non-financial information available on CSR and relations with workers and stakeholders
- apply high quality standards with regard to internal and external auditing as well as disclosure of financial and non-financial information (social and environmental reporting where this exists)
- an annual audit by an independent auditor

Chapter 4: Human rights, *inter alia*:

- respect of human rights
- efforts to prevent human rights infringements by business partners and to bring an end to existing infringements
- publication of a policy statement on respect of human rights
- due diligence specifically for human rights
- remediation in the case of human rights infringements in which the enterprise was involved

Chapter 5: Employment and industrial relations, *inter alia*:

- right of workers employed by MNEs to representation through trade unions
- elimination of child labour and forced labour
- ban on discrimination
- promote effective collective agreements
- disclosure of information to workers and their representatives
- employment of locals / training measures to increase qualification levels
- in developing countries, offer the best possible wages, benefits and conditions of work – including a wage at least adequate to satisfy the basic needs of workers and their families

Chapter 6: Environment, *inter alia*:

- generally, conduct business activities in a manner contributing to the wider goal of sustainable development
- establishment of an environmental management system
- information to the public and employees on potential environment, health and safety impacts
- preparation of contingency plans to prevent serious environmental and health damage
- continuous improvement of environmental performance by the enterprise and – where appropriate – by suppliers
- training of employees on environmental, health and safety issues

Chapter 7: Combating bribery, *inter alia*:

- no payments to public officials or employees of business partners
- introduction of management control systems which deter bribery and corruption
- promotion of employee awareness of and compliance with company policies and internal controls, ethics and compliance programmes
- no illegal contributions to candidates for public office or political parties

Chapter 8: Consumer interests, *inter alia*:

- ensuring product safety
- precise and clear product information
- effective treatment of complaints
- support for consumer education to improve their ability to better understand the social and environmental impact of their decisions
- protection of consumer privacy

Chapter 9: Science and technology, *inter alia*:

- promotion of know-how transfers
- contribution to expanding innovation capacities at local and national level

Chapter 10: Competition, *inter alia*:

- no anti-competitive agreements
- ensuring that employees are aware of the applicable competition laws and provisions

Chapter 11: Taxation, *inter alia*:

- punctual payment of tax liabilities and compliance with tax legislation

The Guidelines are complemented by the Procedural Guidance, which contains provisions on the role and functioning of the National Contact Points (NCPs) and the NCP procedure to resolve disagreements over the implementation of the Guidelines.

2.5. What happens if national law contradicts the recommendations set out in the OECD Guidelines?

The Guidelines are clear that the first duty of enterprises is to comply with applicable law of the countries where they operate. The Guidelines do neither take precedence over national laws and provisions, nor confront an enterprise with contradictory requirements. In countries where national laws and provisions conflict with the principles and standards of the Guidelines, enterprises should look for ways and means to comply with these principles and standards to the fullest extent possible without contravening the applicable law of the country.

3. IMPLEMENTATION OF THE GUIDELINES: THE NATIONAL CONTACT POINT AND THE NCP PROCEDURE.

3.1. What is the National Contact Point?

The OECD Guidelines oblige every adhering country to establish a National Contact Point (NCP). The task of the NCP is to further the effectiveness of the Guidelines by:

- increasing awareness of the OECD Guidelines and promoting their implementation;
- responding to general requests and specific individual questions concerning the implementation of the guidelines;
- assisting parties, as a mediation and conciliation platform, to resolve disagreements over the implementation of the Guidelines.

National Contact Points should be visible, accessible, transparent and accountable. The adhering countries have substantial flexibility as to how they organise their NCP. However, they should respect the Procedural Guidance of the Guidelines.

3.2. The NCP procedure to resolve disagreements over the implementation of the Guidelines.

Normally, the implementation of the Guidelines by MNEs will not give rise to disagreements. But in the event that interested parties have questions and complaints on whether an MNE has correctly implemented the Guidelines, they can bring them to the attention of the NCP. The NCP will examine these issues and involve the relevant partners, following the specific procedure provided in the Procedural Guidance. It will assist parties, as a mediation and conciliation platform, to find a solution and reach an amicable settlement. The conciliatory function of the NCP takes centre stage. The aim is to reach agreement between the parties involved on disputed questions with support from the NCP. The NCP procedure is used mainly by trade unions and NGOs, but other enterprises or individuals can also notify to the NCP cases of possible non-compliance with the Guidelines. Until now, only a limited number of cases were raised before the NCPs. The procedure has been substantially reviewed

in 2011. The OECD website refers to the procedure as the ‘complaint and mediation procedure’. This brochure will further use the term ‘NCP procedure’.

The NCP procedure consists of three phases:

1. the raising of an issue and the decision to accept a case,
2. the assistance process itself, and
3. the conclusion of the procedure.

1. Raising of an issue and decision to accept a case

The Guidelines do not specify exactly how a procedure starts: they merely note what NCPs should do when an issue ‘arises’. Normally, a group or an individual with an interest at stake will approach the NCP with a question or complaint. The National Contact Point (NCP) informs the parties involved about the substance of the issue that has been brought up and passes it on to the enterprise in question. It is then decided on the basis of an initial assessment whether the questions raised merit a more detailed and in-depth examination. The conditions for acceptance of a case are:

- Both parties should qualify: the issue should be brought up by a party with a justified interest in the contentious issue and should address a multinational enterprise.
- The NCP must be competent: questions are usually dealt with by the NCP of the country where they have come up. If a case comes up in a non-adhering country, the NCP of the home country of the MNE can be approached.
- The issue should qualify: it must be relevant for implementation of the Guidelines, be submitted in good faith and be adequately substantiated. It is sufficient if the objections are presented in a credible way. A strict duty of proof as in a court is not required.

The NCP can invite the enterprise to provide its views at this early stage. The enterprise is also free to express on its own initiative its views on the issues raised.

The NCP decides whether to reject or accept the case. If the case is rejected, the NCP informs the parties of the reasons for its decision. A statement of the NCP on the rejection of the case will be made publicly available after consultation with the parties. The NCP can decide not to publish the name of a party, if it considers publication unfair. Acceptance of a case means that an in-depth examination seems to be justified. It does not mean that there is

already a substantial assessment of the questions raised. Acceptance therefore does not imply that the NCP thinks that the MNE's behaviour in the issue is not in accordance with the Guidelines.

2. The assistance of the NCP: mediation and conciliation

When a case is accepted, the NCP contacts the parties involved and offers its assistance in resolving the issues. To this end, it conducts consultations with the parties. The NCP can hold separate discussions with the parties; it can also aim to bring them together for a joint discussion. The competent government department may also take part in these discussions. The NCP offers the parties a discussion forum, i.e. it is neutral and does not place the parties under pressure to reach a particular result. The parties have the opportunity to explain their positions and to clarify outstanding questions. The NCP maintains contact with the parties during the whole procedure and discusses the status of the procedure as well as any further steps with them.

For this phase, a comprehensive written position is generally required from the enterprise in question. The NCP will invite the enterprise to prepare this position.

Furthermore, where necessary the NCP seeks the advice of competent authorities including local embassies, as well as of business representatives, worker organisations and other non-governmental organisations and relevant experts. NCPs in other countries may also be consulted. The NCP can also ask the view of the OECD Investment Committee if there are doubts about how the Guidelines should be interpreted in particular cases.

In addition, the NCP can propose procedures targeting amicable out-of-court solutions such as mediation and settlement procedures, and facilitate access to these procedures.

3. Conclusion of the procedure

If the parties reach agreement on the issues raised, the NCP assistance has been successful and the procedure can be closed. The NCP will draw up a final report coordinated with both parties. The outcome of the procedure is made public, unless confidentiality is deemed in the interest of effective implementation of the Guidelines.

If the parties fail to reach agreement, or if the National Contact Point's assistance efforts are not accepted, the procedure is deemed to have failed. In such cases, the NCP will issue a statement which can include recommendations on how to implement the Guidelines.

Where appropriate, the NCP can follow up with the parties and monitor the implementation of their agreement or of the recommendations of the NCP.

3.3. Who can bring up an issue?

Any group or individual with an interest at stake can bring up an issue before the NCP. Most cases are brought up by NGOs and trade unions. The party must be able to demonstrate its interest in the matter at issue. This is checked in the initial assessment.

3.4. What happens in case of inappropriate use of the NCP procedure?

In the recent past, enterprises have been confronted in a number of cases with inappropriate use of the Guidelines for campaign purposes by trade unions and NGOs. In such cases, the intention of bringing up an issue is not to solve a particular implementation issue, but to attract public attention to a concern through the NCP procedure. To avoid this, the Guidelines now state that the complaint must be lodged in good faith. In the framework of the initial assessment, the NCP has to decide whether an examination of the issue that was brought up would contribute to the purposes and effectiveness of the Guidelines.

3.5. What happens to the information submitted in the course of the procedure?

National Contact Points are bound both by the principle of transparency and by the confidentiality of certain information. It is important that a balance is struck between these two principles in order to build up trust in the functioning of the NCP. In general, the NCP-procedure remains confidential while it is in progress. But in practice it has regularly occurred that NGOs and trade unions seek publicity during the procedure in order to gain public support for their case.

3.6. What are the obligations of parties?

In order to make an NCP procedure successful parties should work together. They should cooperate constructively with the NCP and provide relevant information without delay. They should be seriously interested in the goal of the mediation effort and avoid all steps that could cast doubt on this seriousness. They must respect the confidentiality of information obtained during the procedure.

3.7. What if the parties want to reach agreement outside the procedure?

Parties can agree to deal with the issue without assistance of the NCP. They must then both inform the NCP accordingly. The NCP then suspends the procedure. The procedure can be resumed in the event that these negotiations fail.

3.8. What is the relation with parallel legal or administrative procedures?

In case a parallel legal procedure has been conducted, is under way or is available, this does not automatically rule out acceptance of an issue by the NCP. The key point for an NCP to decide on acceptance of an issue in such a situation is whether an additional NCP procedure serves the objectives of the Guidelines and increases their effectiveness. The NCP procedure should have added value for the resolution of the issue, it should not create serious prejudice for either of the parties involved in the parallel procedure, and it should not create a 'contempt of court' situation. If the NCP procedure risks having a negative effect on the parallel procedures, it can be temporarily suspended at the request of one of the parties.

3.9. How long will an NCP procedure take?

National Contact Points should strive to complete procedures as rapidly as possible. However, the duration of a procedure depends on the individual characteristics of the case and is determined in part by factors which are beyond the NCP's sphere of influence. For instance, it may be necessary to request an expert statement, convene a council of experts or ask the OECD

Investment Committee for its position. Similarly, the duration of the mediation phase cannot be determined in advance. However, the Guidelines do provide an indicative timeframe for the NCP procedure. In general, NCPs strive to conclude the procedure within 12 months after an issue has been brought up; an initial assessment should normally be concluded within 3 months.

3.10. Do the Guidelines also apply in countries that have not adopted them?

The adhering countries encourage their MNEs to apply the Guidelines everywhere where they do business, while taking into account the specific characteristics of the host country.

Multinational enterprises from countries which have not signed the OECD Investment Declaration are in principle not affected by the Guidelines. However, the Guidelines invite the OECD to start a dialogue with these countries in order to ensure that their enterprises engage in responsible business too. OECD business organisations are invited to contribute to disseminating the Guidelines widely in non-OECD countries. This is necessary to provide an international level playing field.

3.11. Who supervises the National Contact Point?

The NCP informs the OECD Investment Committee on all issues that have been brought up. But findings and statements by NCPs cannot be questioned by a referral to the Committee. The non-binding character of the Guidelines prevents the Committee from pronouncing its views on the behaviour of individual MNEs. However, the Committee can give its interpretation on provisions of the Guidelines, if asked to do so by an NCP, and it can make recommendations on the functioning of NCPs.

The Investment Committee also considers substantiated submissions that an NCP has wrongly interpreted the Guidelines or has not respected the established procedures in particular cases.

4. WHERE DO ENTERPRISES GO FOR INFORMATION AND ADVICE?

BDA and VNO-NCW provide support to enterprises on the implementation of the Guidelines and on the NCP procedure, e.g. through exchanges of experience, individual advice and other means.

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In addition, the National Contact Points (NCP) are available as discussion partners for all questions linked to the guidelines.

An overview of the different national contact points can be found on the Internet at <http://www.oecd.org/dataoecd/17/44/1900962.pdf>.

www.vno-ncw.nl

www.arbeitgeber.de