

## **DRAFT**

### **GANHRI Business and Human Rights Working Group (BHR WG): OECD Public Consultation for the OECD Guidelines Update**

#### **i. General Comments (1,952/2,000 characters)**

The GANHRI Working Group on Business and Human Rights (GANHRI WG) congratulates the OECD for embarking on a public consultation exercise on a new draft of the OECD Guidelines for Multinational Enterprises (Guidelines).

Eleven years after the inclusion of chapter IV on human rights, as well as the adoption of the UN Guiding Principles on Business and Human Rights (UNGPs), with which the Guidelines are aligned, we consider this new revision on which the OECD is embarking to be of utmost importance. In particular, it is worth noting that the 2020 revision of the Guidelines, as well as the development of complementary guidance by the OECD, have led to significant progress in clarifying the human rights responsibilities of companies and the concept of due diligence on responsible business conduct. With 7 years to go to realise the ambitions of the 2030 Agenda for Sustainable Development, it is critical to firmly reaffirm that the most meaningful contribution that business can make to the Sustainable Development Goals is to respect human rights by conducting meaningful human rights due diligence to avoid and mitigate adverse impacts.

For the GANHRI WG, the Guidelines provide an important standard for engaging with companies and governments on human rights in the context of business activities. However, we believe that the standards and their implementation mechanisms could be further strengthened to address critical human rights challenges related to business activities.

The GANHRI WG would therefore like to draw your attention to the following general issues: a) Centre stakeholder engagement as a means for enterprises to identify and address impacts. We recommend that the guidelines refer explicitly to “rightsholders” as key stakeholders; b) Clarify that they apply to the full value chain, not just upstream supply chains; c) 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; d) 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.

#### **1. Concepts and Principles (1,831/2,000 characters):**

While making explicit in the preamble the Guidelines' subjection to the Guiding Principles on Business and Human Rights, we consider that a proper application of the UNGPs could substantively improve the chapter on "concepts and principles", in the following terms:

a) The chapter is based on a broad definition of "multinational enterprises" (MNEs). However, this broad definition means that the interpretation of the scope of applicability of the Guidelines varies in different jurisdictions according to the scope proposed by each NCP.

b) While it is explicitly stated in this chapter that the Guidelines apply to both transnational and domestic enterprises, it would be important to build on the Guiding Principles and explicitly recognise at the beginning of the chapter that they "apply to all States and to all enterprises, transnational and otherwise, irrespective of size, sector, location, ownership and structure" (UNGP, General Principles).

c) While the Guidelines focus on the responsibilities of companies in line with Pillar II of the UNGPs, their applicability to States when acting as economic actors, beyond state-owned enterprises only, should be clarified in line with Principles 5 and 6 of the UNGPs. Development agencies and development finance institutions, export credit institutions, public procurement authorities and intergovernmental organisations can be linked to negative human rights impacts through their business relationships.

d) The guidelines' contributions, with their focus on human, collective and environmental rights, which for some countries, are considered the rights of Nature, should be oriented not only towards companies and governments, but also towards peasant, indigenous and Afro-descendant communities, as well as nature, as a specific subject of rights, from a preventive approach.

## **2. General Policies (2,109/2,000 characters)**

a) The GANHRI WG recognises the effort to include human rights defenders potentially affected by pressures from companies (paras 9 and 10 of ch II and ct 14). However, we consider that in order for them to be consistent with IHRL instruments, the term "undue pressure", which is not found in other international texts, should be removed, from a human rights perspective any pressure or reprisals would be eminently undue or in breach of international standards. The Guidelines leave room for interpretation that certain pressures would be "due", which is not acceptable from a human rights perspective.

b) The new paragraph (10) also recognises the duty of companies not to exert undue pressure on human rights defenders who monitor or report on companies or entities that contravene the law or the Guidelines. From a human rights perspective the concept of "activities that are illegal or in contravention of the Guidelines" is also problematic. In this sense, this WG considers that human rights defenders have a legitimate right to protest against any type of project, they can even take on a preventive monitoring role in order to alert governments, states and companies themselves to human rights violations.

c) The GANHRI WG also welcomes the more detailed inclusion of due diligence processes (recognised in paragraphs A11-13). In particular the effort to include the due diligence steps in paragraph 15 of the comments is acknowledged. However, it is striking that comment 17 does

not apply to chapters X Competition and XI Tax Policy. Particularly worrying from a human rights perspective is that fiscal and tax policy has been left out of the due diligence processes. In this regard the WG urges that the due diligence thus addressed in paragraphs A11 to 13 should also apply to the tax practices of companies in order to identify and address adverse human rights impacts generated by company tax practices.

d) Finally, the WG would like to recommend the need to clarify terms in relation to value chain and the application to the downstream value chain in concrete wording suggestions.

### **3. Disclosure (1,613/ 2,000 characters)**

a) The GANHRI WG widely recognises the importance of transparency in company information, which not only allows for clarity on the human rights policies designed by companies, including their due diligence processes and responsible business conduct, but also the generation of adequate information for the different stakeholders.

b) In line with what has already been raised by this GANHRI WG, we consider it important that human rights policies comply with the minimum requirements of elaboration and transparency enshrined in the UNGPs. In this sense, we call for the Guidelines to make express reference to these obligations (see principle 16 of the UNGPs).

c) Transparency in the provision of information by companies allows for better participation of the different stakeholder groups. In this sense, it is suggested that the guidelines reflected in this section suggest methods of information delivery that allow the participation mainly of historically discriminated groups; this would mean generating disclosure models that allow different groups to access company information in an understandable way.

d) The WG, would like to also recommend that 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

### **4. Human Rights (2,263/2,000 characters)**

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. Comments 40-43 address the ways in which

measures should be taken to ensure respect for the human rights of historically discriminated or vulnerable groups, and this GANHRI WG would like to make some recommendations:

(a) Women and girls are often affected differently and disproportionately by business activities. Instruments aimed at shaping Responsible Business Conduct should include a gender approach in a broad sense. The OECD Due Diligence Guidance for Responsible Business Conduct contains recommendations urging companies to apply a gender perspective to due diligence. However, the Guidelines do not adequately address gender issues, which is a gap that should be addressed.

(b) The Guidelines should also provide guidance to multinational enterprises on supporting the rights of indigenous peoples, migrants, children and adolescents, persons with disabilities and other disadvantaged groups. Guidance could include seeking specialised or additional due diligence measures to ensure that the needs and rights of these groups are respected. It could also recognise the importance of intersectionality and interdisciplinary approaches.

c) Finally, the incorporation of indigenous peoples in comment 40 is welcome, however, we believe that it should be amended to note that indigenous peoples have unique rights, such as free, prior and informed consultation and self-determination. Finally, while it is good that reference is made to the UN Declaration on Indigenous Peoples, we consider that reference should be made to the entire international corpus of recognised rights, including Convention 169.

## **5. Labour and industrial relations (778/2,000 characters)**

a) The OECD supports collective bargaining as a means to improve working conditions and labour market outcomes in general. The OECD recalls that its report on collective bargaining in a changing world of work *Negotiating Our Way Up* (2019) identifies collective bargaining as a means to reduce unemployment and economic inequality. In this regard, the inclusion of collective bargaining in Chapter V, paragraph 7, is acknowledged.

(b) The clarification that companies are expected to remain neutral in relation to workers' decision whether or not to choose union representation is also acknowledged. The proposed update would eliminate the dominant influence of companies when management takes a position on union representation and collective bargaining (chapter V.1a and V.1b).

## **6. Environment (1,957/2,000 characters)**

The effort made by the OECD to thoroughly amend Chapter VI on climate change is acknowledged. From this perspective, the GANHRI WG recognises that the draft Guidelines allow for some improvements, including:

a) The link between environmental degradation, climate change and adverse human rights impacts should be made clearer in the Guidelines. Climate change is seen as the main threat to the enjoyment of human rights and the adverse impacts of climate change on human rights are increasingly recognised. Paragraphs 1 and 3, as well as the comments between 60 and 63, should explicitly highlight this correlation. Also, . Ch. VI lacks references to the right to clean and healthy environment as established by UN resolutions recognising access to a healthy and sustainable environment as a universal right.

b) Better include the UNGPs in this chapter. To this end, we suggest drawing on the guidance on business and climate change developed by the Office of the United Nations High Commissioner for Human Rights (<https://www.ohchr.org/sites/default/files/2022-05/KMBusiness-SP.pdf>), which points out, among other things, the need for companies to develop due diligence processes. In this regard, we find that in several places in paragraphs 2-5, the suggested actions fall short of what is expected under the due diligence provisions. For example, paragraph 3 suggests that companies should only "try to" address environmental impacts on workers and communities, but due diligence expects them to actually address and remediate.

c) It is important to take into account the effects that business activities can have on nature, not only from the perspective of the human right to a healthy environment, but also the care, protection and regeneration of nature itself as a source of life, which in some countries is considered a subject of rights; it is recommended that the due diligence actions of companies, both at a preventive and reparation level, should also be aimed at preventing or correcting such damage to nature.

## **7. Combating bribery and other forms of corruption (900/2,000 characters)**

a) The GANHRI WG acknowledges the OECD's effort to make a number of improvements to Chapter VII, in particular by broadening its scope to cover all forms of corruption.

b) It is suggested, however, that links be established between the different chapters, for example to establish how potential acts of corruption can have an impact on human rights and vice versa.

c) Finally, it is recommended that greater emphasis be placed on civil society organisations and historically discriminated or disadvantaged groups to gain access to information and control. This is because the monitoring work carried out by civil society organisations dedicated to the promotion of transparency and the fight against corruption is fundamental. In this area, the GANHRI WG recommends that mechanisms be put in place to enable them to fulfil their oversight role and prevent corruption and corporate capture of the state.

## **8. Consumer Interests (741/2,000 characters)**

- a) There is a need to better align the practices exercised by companies and states that use new technologies with consumer rights. While the Guidelines move in this direction, it is urged that this be expanded, including where necessary using examples, to protect consumers online, not only from potential competition, but also from the broad spectrum of human rights that may be threatened in this area.
- b) 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”.

## **9. Science, Technology and Innovation (2,424/2,000 characters)**

The Covid-19 pandemic has further accelerated the digitalisation of our societies. As the use of digital technology increases, the risks of adverse human rights impacts related to it have also increased. However, what CBR means in the digital sphere requires more attention and guidance. In order to ensure that the Guidelines remain relevant to these emerging challenges, it would be pertinent to ensure that they include a particular focus on digital technologies based on recent guidance from OHCHR and other actors.

Among others, it is suggested to incorporate:

- (a) A recognition that technologies can impact the broad spectrum of human rights, as the draft guidelines' clauses appear to focus primarily on privacy. For consistency, and in recognition of the many ways technology can impact both the environment and human rights, the text of guideline 1 an Cm 29 should add the sentence “and other human as well as environmental impacts”. 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.
- b) Incorporate transparency clauses in algorithmic decisions that have discriminatory potential. In this sense, it is essential to focus in more detail on state-business relations, mainly on public decisions that are made based on algorithms designed by private companies in the context of the Digital Welfare State.
- c) Prioritise transparency and human rights principles in the regulation of online content. Rather than facilitating censorship, internet regulation can seek to improve the transparency of companies' products and policies and institute procedural safeguards and remedies when users' content is restricted. Legal frameworks should also enshrine strong protections against intermediary liability for most user-generated and third-party content that appears, so as not to incentivise proactive censorship by companies.
- d) Recognise more explicitly the need for different stakeholders to be able to work collaboratively to understand and diagnose digital harms and to develop and implement tailored,

effective, sustainable and locally relevant approaches to address them. In turn, it requires explicit recognition that states and companies must take active measures to address misinformation directed at vulnerable groups. Particular attention should be paid to women activists, rights defenders, journalists and politicians and their impact.

In 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.

## **10. Competition (1,659/2.000 characters)**

a) Amendments could be made to Chapter X (Competition) to emphasise that companies should strive not to use competition laws as an excuse to avoid working together to address adverse impacts on a sector, and also be aware of how monopolisation adversely affects human rights and other issues covered by the Guidelines.

b) 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.

c) 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."

d) 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.

## **11. Fiscal Policy (1,831/2,000 characters)**

Fiscal policy is a fundamental instrument for guaranteeing rights. Without resources there are no rights, and just as budgets are the best reflection of the real priorities of States, tax systems in turn reflect the contribution of different actors to meet these priorities. This is even clearer in the face of challenges such as climate, economic or health crises, which require additional efforts to have States and companies cooperate with each other so that they can implement effective, transparent and redistributive policies that protect the rights of all people. In this regard, the GANHRI WG recognises the importance of sound tax policy for human rights and encourages the Guidelines to be aligned with the 15 Principles on Human Rights in Tax Policy (<https://derechosypoliticafiscal.org/es/principios-derechos-humanos-politica-fiscal>) and makes some recommendations in particular:

- (a) Regarding tax avoidance: paragraph 1, and comment 102 should be amended to make a more explicit call for companies to avoid taking advantage of legislative loopholes in different countries to reduce their tax liability (i.e. avoid tax) in the countries in which they operate.
- b) On tax avoidance paragraph 2 and comment 104 should be updated with language urging companies to ensure that their tax risk management strategies take into account the risk to rights holders, not (only) to the company, as well as the duty of governments in whose countries the company's activities take place to provide essential public services and ensure adequate infrastructure for economic development.
- c) Transparency of tax practices: Commentary 105 should include language seeking transparency of information relevant to identifying whether the company is engaging in transactions whose tax outcomes will potentially have adverse human rights impacts.

## **II. Implementation Processes (1,818/4,000 characters)**

### **a) Key role of National Contact Points and National Human Rights Institutions (NHRIs)**

In addition to their role in promoting the Guidelines, National Contact Points (NCPs) are a unique state-based non-judicial complaints mechanism with a clear mandate to address specific human rights-related instances under Chapter IV of the Guidelines. As widely recognised, access to effective remedy for victims of business activities remains a critical gap in the implementation of the UNGPs. In this regard, NHRIs, in their role as a non-judicial state remedy mechanism, have generated a sustained practice of human rights and business work. Although most NHRIs do not play a direct reparation role, they have generated foundational and promotional actions in this area, in addition to the exercise of judicial actions in this regard. This experience has been shared through, for example, collaboration agreements signed with NCPs, which has allowed them to gradually close the reparation gap in the implementation of the UNGPs.

However, we are concerned that, despite the principle of functional equivalence underlined in the Guidelines, NCPs differ considerably in how they are established and operate and how they address specific instances. The interpretation of the scope and content of the Guidelines varies greatly from NCP to NCP. Although more than 50% of the specific instances brought to the



attention of NCPs refer to chapter IV, human rights expertise is not represented in all NCPs, nor is the independence required for such bodies ensured in their structure. An innovative approach to address this problem is for NCPs to include independent human rights experts or to enter into an agreement with National Human Rights Institutions. In this way, the inclusion of human rights experts can be sought where necessary.