

# OECD Governments Lead on Business and Human Rights

**Revisions to the OECD Guidelines for Multinational Enterprises effective 25 May 2011 include a new Chapter IV dealing with human rights. This is a significant development, particularly in view of the possibility for persons whose human rights are impacted by an enterprise to submit complaints to National Contact Points where the enterprise's conduct is alleged to be in breach of the Guidelines**

The Guidelines form part of the OECD Declaration on International Investment and Multinational Enterprises. The Declaration was first adopted in 1976 and involved a commitment by OECD members to improve the investment climate for enterprise, to encourage the positive contribution that multinational enterprises can make to economic and social progress and to minimise and resolve difficulties which may arise from their operations. Governments adhering to the OECD Declaration include all 34 OECD members, as well as 8 non-member adhering governments.

The Declaration and the Guidelines are subject to periodic review and were updated in 1984, 1992 and 2000. The most recent review commenced in 2010 and concluded on 25 May 2011. Significant revisions have been made to the recommendations dealing with supply chain management, disclosure, labour standards and the elimination of child labour, bribery, taxation and also in respect of National Contact Point (NCP) procedures.

In this briefing, we focus on the inclusion in the Guidelines of a new Chapter IV dealing with human rights.

## Application and Structure of the Guidelines

The Guidelines constitute recommendations to multinational enterprises by the adhering governments for '*responsible business conduct in a global context*'. In Chapter I of the Guidelines, it is stressed that the Guidelines are voluntary standards and that they are not legally enforceable. However, the principles and recommendations included in the Guidelines may reflect or come to be enforced via laws or regulations applicable at domestic or international level. In addition, it is possible for third parties to submit complaints to a relevant NCP in circumstances where the conduct of an OECD enterprise is alleged to be contrary to the Guidelines (as discussed further below).

A precise definition of multinational enterprise is deliberately avoided and it is expressly stated that the Guidelines are addressed to all the entities within a multinational group, including parent companies and locally incorporated subsidiaries. In terms of territorial application, the Guidelines are addressed to all enterprises operating '*in or from*' the territory of an adhering government.

The Guidelines are organised into two parts. Part I comprises 11 chapters which set out the principles and practices which multinational enterprises should follow in their operations, amongst other issues, in relation to employment and industrial relations, environment, bribery, consumer interests and taxation. Each chapter incorporates commentary elaborating on the recommended principles and practices and providing guidance on implementation. Part II deals with implementation procedures concerning the Guidelines, including with respect to the establishment and operation of NCPs.

## Key Issues

The OECD Guidelines have been revised to include recommendations addressed to multinational enterprises on the responsible management of human rights issues and impacts

The recommendations adopted by the OECD draw upon the work of the United Nations Special Representative on Business and Human Rights

Enterprises are expected to respect human rights and should seek to avoid and address adverse human rights impacts by carrying out 'human rights due diligence'

Third parties may bring complaints regarding an enterprise's conduct to a National Contact Point in the relevant OECD member country

If you would like to know more about the subjects covered in this publication or our services, please contact:

[Audley Sheppard](#) +44 (0)20 7006 8723

[Rae Lindsay](#) +44 (0)20 7006 8622

[Antony Crockett](#) +44 (0)20 7006 2332

To email one of the above, please use [firstname.lastname@cliffordchance.com](mailto:firstname.lastname@cliffordchance.com)

Clifford Chance LLP, 10 Upper Bank Street,  
London, E14 5JJ, UK  
[www.cliffordchance.com](http://www.cliffordchance.com)

### New Guidelines on Human Rights

Chapter IV of the Guidelines is entirely new. The principles and practices which enterprises should observe and adopt in relation to human rights are expressed in concise terms:

*States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:*

1. *Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.*
2. *Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.*
3. *Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.*
4. *Have a policy commitment to respect human rights.*
5. *Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.*
6. *Provide for, or co-operate through legitimate processes in the remediation of, adverse human rights impacts where they identify that they have caused or contributed to these impacts.*

These six paragraphs and the introductory '*chapeau*' draw upon the 'Protect, Respect and Remedy' framework elaborated by the Special Representative of the United Nations Secretary General on Business and Human Rights, and endorsed by the Human Rights Council in 2008. The OECD recommendations are also stated to be in line with the Guiding Principles on Business and Human Rights, which we commented on in a previous [briefing](#). The final text of the Guiding Principles was submitted to the Human Rights Council on 24 March 2011 and the Council will consider formal endorsement of the text during its seventeenth session, which is currently ongoing. The OECD decision to include recommendations in the Guidelines which draw upon the Guiding Principles is a significant development and has been interpreted by some commentators as a strong indication that the Guiding Principles will also be approved at the UN level.

The commentary to Chapter IV emphasises that respect for human rights lies at the core of what is expected of business: multinational enterprises should respect human rights, and they should do so regardless of any particular State's ability or willingness to fulfil its own international human rights obligations. The commentary also explains that a State's failure to enforce domestic laws, to implement its international obligations, or otherwise to protect human rights '*does not diminish the expectation that enterprises respect human rights*'.

### Which Rights? Whose Rights?

The substantive human rights which enterprises are expected to respect include '*as a minimum*' the internationally recognised human rights expressed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work. Enterprises must also have regard to the international human rights obligations of the countries in which they operate, as well as domestic laws and regulations. While business can impact upon '*virtually the entire spectrum*' of internationally recognised human rights, it is acknowledged that, in practice, some rights may be at greater risk than others in particular sectors or contexts. Examples provided include the rights of vulnerable groups (such as women or ethnic and religious minorities) and the rights of civilians in situations of armed conflict.

### Influencing Others

The commentary relating to paragraphs two and three of Chapter IV notes that an enterprise may be able to use its influence with third parties to seek to prevent or to mitigate human rights impacts attributable to those third parties (including States and State entities). While it is stressed that this does not shift responsibility or liability for the impact away from the person or entity who directly causes it, the implication is that an enterprise's failure to use its leverage over a third party to encourage avoidance of adverse human rights impacts would be inconsistent with the Guidelines. The Guidelines contemplate that enterprises will need to weigh various factors in determining how to react where a third party has caused an adverse human rights impact. For example, enterprises may need to consider terminating any business relationship with the third party but should also assess whether such a reaction (or other attempt to influence the third party) might aggravate the situation.

### Discharging the Responsibility to Respect Human Rights

Paragraph five of Chapter IV recommends that enterprises should carry out '*human rights due diligence*' and the commentary goes on to explain that this '*process entails assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed.*' Paragraph five and the associated commentary must also be read in conjunction with the 'General Policies' set out in Chapter II of the Guidelines which emphasise the development of good corporate governance practices, including through carrying out risk-based due diligence and incorporating this process into enterprise risk management systems. Human rights due diligence is described as an '*ongoing exercise*' which, (a) requires enterprises to account for how actual and potential adverse impacts are addressed; and (b) necessitates meaningful engagement with persons whose rights are affected or potentially affected by an enterprise's operations. It is also relevant to note that Chapter III of the Guidelines has been significantly revised to broaden the recommendations on enterprise disclosure policies, including to encourage disclosure of material information regarding stakeholder issues, which would encompass information relating to an enterprise's human rights performance.

Paragraph 6 of Chapter IV addresses the situation where an enterprise has determined that it has caused or contributed to an adverse human rights impact. In this context, it is recommended that enterprises have processes in place to enable remediation and the commentary explains that '*operational-level grievance mechanisms*' can be effective means of ensuring that adverse impacts are remedied. It is stressed, however, that voluntary remediation efforts (including via operational or enterprise-level grievance mechanisms) should not be used to undermine other mechanisms for addressing disputes, nor should enterprises seek to limit access to judicial and other processes through which victims might seek to raise grievances, including via the NCP process.

### The Role of National Contact Points

The previous review of the Declaration and the Guidelines in 2000 resulted in a decision that adhering countries should establish NCPs with a mandate to promote the Guidelines and also to contribute to the resolution of issues relating to their implementation in '*specific instances*'. The specific instance procedure in practice allows persons affected by an enterprise's operations and who consider that the enterprise has failed to comply with the Guidelines to lodge a complaint with the relevant NCP. It is also possible for persons who are not directly affected by an enterprise's conduct (such as trade unions, NGOs or other civil society groups) to submit complaints via the NCP process if they can demonstrate a significant interest in the matter or where they represent affected persons. Complaints will normally be made to the NCP of the country in which the breach is alleged to have taken place. However, if the government of the relevant country does not adhere to the Declaration or the Guidelines, but the complaint involves the operations of an OECD registered enterprise or any of its subsidiaries, complaints may be filed with the NCP in the country where the enterprise is registered.

The United Kingdom NCP is administered by the Department for Business, Innovation and Skills (BIS). At the conclusion of procedures relating to any specific instance, the UK NCP will produce a Final Statement including the outcomes of its examination. The Final Statement will normally include a decision as to whether or not the company is in breach of the Guidelines. Where appropriate, the UK NCP will make specific recommendations to the enterprise concerned on how its operations may be brought into line with the Guidelines. The Final Statement may also fix a date by which both parties should submit to the UK NCP an update on measurable progress towards meeting any such recommendations. Although the findings of the UK NCP do not create any legal liability in and of themselves, enterprises who are the subject of a UK NCP assessment may suffer significant reputational damage should they be found to have seriously failed to observe the Guidelines in conducting their business activities.

Final Statements and other decisions issued by the UK NCP are published on the [BIS website](#). The number of complaints submitted to the UK NCP appears to have increased in recent years and BIS has taken steps to streamline and improve the procedures for dealing with complaints, including through establishing a [Steering Board](#), involving representatives from government, business, trade unions and civil society organisations.

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