

# OECD Guidelines on Responsible Business Conduct: 2023 Revisions and the “Specific Instance” Grievance Mechanism

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On June 8, 2023, the Organization for Economic Cooperation and Development (“OECD”) [published](#) revised Guidelines for Multinational Enterprises on Responsible Business Conduct (the “Guidelines”). The Guidelines are non-binding recommendations for responsible business conduct, addressed from OECD member states to multinational businesses headquartered or operating in their territories.

The Guidelines have been highly influential in shaping responsible business standards. Despite their voluntary nature, many multinational businesses have taken steps to implement the recommendations, including by making public commitments and revising their corporate practices and policies. Their uptake has accelerated recently in response to binding legislation aligning with the Guidelines, such as the EU Corporate Sustainability Reporting Directive (see [here](#)) and the forthcoming EU Corporate Sustainability Due Diligence Directive (see [here](#)).

The Guidelines provide recommendations for responsible business conduct across areas including human rights, environment, bribery, consumer interest, competition, and taxation. For example, enterprises are expected to:

- conduct due diligence to identify and address potential adverse human rights and environmental impacts associated with their operations, products, and services;
- refrain from engaging in any act of corruption and develop adequate internal controls to prevent, detect, and address bribery and other forms of corruption; and
- comply with applicable competition and taxation regulations and cooperate with regulatory investigations.

The Guidelines’ implementation is supported by National Contact Points for Responsible Business Conduct (“NCPs”). NCPs are domestic government agencies or individuals in each of the 51 OECD member states that promote the Guidelines’ adoption and provide a “specific instance” non-judicial grievance mechanism to address

any alleged non-observance of the Guidelines. Complaints made to NCPs have been steadily increasing, with more than 650 cases globally handled to date.

We set out below (i) an overview of the recent amendments to the Guidelines; and (ii) some key considerations for multinational businesses navigating the non-judicial specific instance process.

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## 2023 Amendments

The OECD has described the revised Guidelines as a “targeted update” to respond to new environmental, social, and technological challenges that have emerged since the last revisions in 2011. Some of the key updates include:

### **Risk-Based Due Diligence**

The revised Guidelines recommend that enterprises consult the six-step due diligence framework contained in the OECD’s 2018 [Due Diligence Guide](#), which provides practical guidance on implementing due diligence measures. The revised Guidelines also emphasize that due diligence measures should be risk-based, commensurate to the likelihood and severity of the potential adverse impact. Adverse impacts that are more likely to occur or likely to be more severe should be prioritized. While earlier versions of the Guidelines recommended that enterprises conduct due diligence on potential adverse impacts caused by the enterprise itself or through its business relationships, the revised Guidelines more broadly define business relationship to include entities with which there is no formal contractual relationship. The emphasis on risk-based due diligence, carried out across an enterprise’s value chain, accords with current drafts of the EU Corporate Sustainability Due Diligence Directive.

### **Environment**

Due diligence recommendations now encompass a wider set of environmental impacts, including climate change, biodiversity loss, deforestation, and air, water, and soil pollution. The Guidelines have also been updated to align with internationally agreed goals and standards on climate change, biodiversity, and animal welfare.

### **Technology and Data**

Businesses are now encouraged to adopt responsible data governance strategies, conduct digital security risk management, and carry out due diligence on the development and use of technology, including gathering and using data.

## Human Rights

The revised Guidelines pay greater attention to vulnerable individuals and groups, such as human rights defenders and indigenous peoples, and suggest enhanced due diligence in situations of armed conflict and other situations where there may be a higher risk of gross human rights abuses.

## Responsible Business Conduct

The revised Guidelines encourage due diligence encompassing all forms of bribery and corruption, aim to ensure that lobbying activities are transparent, and encourage enterprises to disclose information on responsible business conduct, beneficial ownership, and board composition.

## National Contact Points

The revised Guidelines aim to strengthen accountability and efficacy across the board for each of the 51 NCPs. The goal is to ensure that complaints are handled in a consistent, transparent, and efficient manner, no matter which NCP is charged with examining the complaint.

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## Specific Instance Grievance Mechanism and Procedure

Implementation of the revised Guidelines will be supported by the NCPs. As noted above, NCPs are charged with the dual role of: (i) promoting the Guidelines and their application within the NCP's jurisdiction; and (ii) offering a specific instance non-judicial grievance mechanism to address any alleged non-observance of the Guidelines by companies headquartered or operating in the NCP's jurisdiction. Since the specific instance process was first introduced in 2000, NCPs have handled more than 650 cases relating to operations in over 105 countries and territories. Unlike national courts, NCPs cannot make binding orders, and participation in the process is voluntary.

Any individual or organization with a legitimate interest in an alleged non-observance of the Guidelines can initiate a specific instance process by filing a complaint with the relevant NCP. The specific instance process will then generally consist of three phases:

### Initial Assessment

The NCP conducts an initial assessment to determine whether the issues raised in the complaint warrant further investigation, soliciting comments from the complainants and multinational enterprises involved.

### **“Good Offices”**

If the NCP determines that further examination is warranted, the NCP then offers a non-adversarial platform (e.g., dialogue, mediation, conciliation) for the complainant and multinational enterprise to reach agreement on possible remedies for the challenged business conduct (e.g., monetary compensation, changes to company policy).

### **Final Assessment**

If the parties reach agreement, the NCP reports on the agreement and can make further recommendations. Alternatively, if no agreement is reached, or the initial assessment finds that the case does not merit further investigation, the NCP issues a final statement on the case, including any recommendations. Thereafter, the NCP may follow up on the parties’ implementation of the agreement or the NCP’s own recommendations.

While the length of a specific instance process will vary from case to case, the OECD and certain NCPs publish indicative timelines of several months for each phase, though complex and transnational cases may often exceed these.

### **Key Considerations for the Specific Instance Mechanism**

While participation in the specific instance process is voluntary for any multinational enterprise named in a grievance, there may be good reason for an enterprise to engage proactively with the complainants and present its case. We recommend close consultation with counsel to determine whether to participate in any particular specific instance grievance and, if so, how to do so carefully and considerately.

For example, an enterprise may welcome the opportunity to resolve a pending dispute through the non-adversarial methods offered by the NCP’s good offices. As an alternative to lengthy, costly, and public litigation, the specific instance process may be better equipped to resolve difficulties impacting an enterprise’s operations and services. This process may also offer an opportunity for enterprises to engage directly and productively with impacted stakeholders, through the offices of an experienced third party.

An enterprise may also wish to participate in the specific instance process to correct the record. For example, the complaint might misstate relevant facts or misdirect the request for relief to the wrong party, which can be the case in complex cross-border arrangements. Participation in the specific instance process may also be beneficial in cases of acquisitions of distressed investments, particularly in emerging markets, after the alleged adverse impacts have already occurred. In our experience, an enterprise’s

willingness to engage transparently can help resolve the complaint at the initial assessment phase.

If an enterprise is considering engaging with an NCP specific instance process, consideration of the following issues may be warranted:

#### **Parallel Proceedings**

If the process is initiated in parallel to ongoing (or imminently anticipated) arbitration or litigation proceedings, or to other non-adversarial proceedings such as specific instance processes before other NCPs, it will be important for the enterprise to: (i) reserve all rights; (ii) ensure consistent factfinding across proceedings; and (iii) understand the different requirements for business conduct under the Guidelines vs. international and national applicable law.

#### **Confidentiality**

NCPs are expected to manage the specific instance process in a transparent manner, including by publishing initial and final assessments. Nevertheless, the identity of individuals at risk of retaliation, sensitive business information, and discussions during the initial assessment and good offices stages will generally be kept confidential. Agreements to keep certain information confidential may be reached by the parties and, if accepted by the NCP, may protect the confidentiality of sensitive information exchanged or produced during a specific instance process. If there are parallel proceedings, participants should consider whether the parallel confidentiality regimes are compatible, and form a position as to the permissibility and scope of document- and information-sharing across proceedings.

#### **NCP Variation**

Finally, there are slight but important differences in procedure—as well as experience with handling specific instance grievances—among the various NCPs. As each NCP retains some flexibility, it is important to consider the specific procedures and experience of the NCP in question. Engaging local counsel in this regard may help. While the 2023 Guidelines aim to increase consistency, this will take some time to implement. For example, each NCP is now required to publish its complaints handling process, but not all NCPs have yet complied with this obligation, and some provide more detail than others.

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