THE DANISH INSTITUTE FOR HUMAN RIGHTS

OCTOBER 2022

PUBLIC CONSULTATION ON THE REVIEW OF THE G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE

The Danish Institute for Human Rights (the 'Institute') is grateful for the opportunity to contribute to the OECD's public consultation on revisions to the G20/OECD Principles of Corporate Governance (the 'Principles'). Below are the Institute's recommendations and overarching comments on the proposed revisions.

SUMMARY OF KEY OBSERVATIONS & RECOMMENDATIONS

1. Place emphasis on the human rights and social aspects of sustainability

- *The increased emphasis on sustainability in the Principles is a welcome change in line with recent regulatory developments. However, the Principles place a greater degree of emphasis on climate and environmental concerns while placing less emphasis on human rights and social aspects of sustainability.*
- *We recommend that the Principles define 'sustainability' to include environmental, human rights and social impacts. Doing so will ensure that the Principles address the full spectrum of sustainable corporate governance and risk management.*

2. Integrate sustainability and stakeholder interests throughout the Principles

- *We recommend that the Principles integrate stakeholder interests including human rights impacts more explicitly throughout all chapters. Chapter VI's expansion to include sustainability and resilience considerations is welcome but runs the risk of siloing stakeholder interests and segregating such considerations from other areas of corporate governance.*

3. Emphasize human rights due diligence as a key aspect of corporate governance

- *Increased attention to sustainability will require that companies put in place appropriate policies to identify their impacts on people and the environment. We recommend that the Principles encourage companies to adopt a human rights due diligence (HRDD) process in line with the UN Guiding Principles on Business and Human Rights (UNGPs) to identify,* *prevent, mitigate and account for how they address their impacts on human rights.*

4. Clarify board responsibilities relating to social impacts and human rights due diligence

- *We welcome Chapter V's increased clarity on board responsibilities. However, the Principles miss the opportunity to incorporate board responsibilities with respect to sustainability and stakeholder interests, which may appear disconnected or peripheral given their separate treatment in Chapter VI.*
- *We recommend that the Principles specifically note board and executive responsibilities to oversee HRDD as an integral aspect of their risk management and corporate strategy responsibilities.*

5. Strengthen disclosure and transparency guidance on non-financial impacts.

- *Though the revisions centre sustainability and resilience as objectives of good corporative governance policies, the Principles fail to acknowledge 'double materiality'— a concept which articulates that risks to people and planet can be material regardless of their impact on financial performance.*
- *We recommend that the Principles clearly acknowledge the concept of double materiality, encouraging corporate boards to consider material non-financial impacts, to remain in step with emerging regulations.*

OVERARCHING COMMENTS & OBSERVATIONS

As acknowledged in the Principles, well-designed corporate governance frameworks can contribute to public policy benefits and the resilience of the broader economy. The Institute welcomes the revised Principles' increased emphasis on sustainability and broader societal concerns and encourages the OECD to integrate such considerations more explicitly throughout the Principles, including by recognising that regulating for effective corporate governance undertaken in a manner which identifies and addresses business impacts on people and planet can be a means of discharging the state duty to protect human rights.

The Principles include a welcome reference to the UN Guiding Principles on Business and Human Rights (the UNGPs), the primary international instrument outlining business responsibilities to respect human rights. Our recommendations suggest areas where the Principles can better align with this foundational document.

Human rights and social aspects of sustainability

The Principles' increased emphasis on sustainability and resilience is constructive and aligns with recent corporate governance developments at both the business and regulatory levels.[1] The Institute welcomes the OECD's recognition that strong corporate governance includes attention to a business's impacts throughout its broader operating context.

However, the proposed revisions do not sufficiently acknowledge the human rights and social aspects of sustainability. The replacement of Chapter IV on stakeholders with the new Chapter VI on sustainability may inadvertently deemphasise the role of stakeholders within corporate governance more broadly. Further, the Principles' focus on climate and environment minimises the interconnections with human rights and runs the risk that businesses will take too narrow an approach to sustainability and resilience.

We recommend that the Principles explicitly define 'sustainability' to include a business's environmental, social, and human rights impacts. The Principles could add this definition in Paragraph 6 of the introductory About the Principles section, clarifying that sustainability and resilience encompass impacts on both people and planet.

We also recommend that the Principles incorporate examples of social and human rights considerations to supplement existing examples given in relation to climate and environment. The Principles could also acknowledge human rights and broader social impacts where the text currently refers only to environmental and climate-related considerations. Some non-exhaustive examples include:

- Under IV.A.8, 'sustainability risks' can refer to human rights risks in addition to 'climate-related' risks.
- Under VI.A, in addition to greenhouse gas emissions and biodiversity, examples of non-financial metrics can include human rights impacts or the conduct of human rights due diligence to identify and address impacts.
- VI.A.1 should be broadened to consider not just material sustainability information on human rights and human capital concerning a company's own workforce or workers in the value chain, but also impacts on communities and consumers or end users, including policy and strategy

[1] Examples include the European Union (EU)'s proposed Corporate Sustainability Due Diligence Directive and Corporate Sustainability Reporting Directive, which aim to standardise existing measures such as French, German, Dutch and Norwegian laws; the EU taxonomy for sustainable activities, including the Minimum Safeguards; heightened requirements for sustainable investment disclosures in countries such as the U.S.; and trends towards institutionalisation in other jurisdictions, including the development of due diligence guidance in Japan.

frameworks, metrics related to stakeholder engagement, or the existence of reported grievances/complaints.
- In addition to the example given in VI.A.5 of GHG emissions, the principle could include examples of sustainability metrics concerning human rights impacts, such as the conduct of human rights impact assessments.

Integrating sustainability and stakeholder interests

The Principles rightly emphasize shareholder interests as a key aspect of corporate governance. The revisions should maintain this focus and ensure that stakeholder interests are considered not only in relation to sustainability but rather across all aspects of corporate governance.

Chapter VI underscores the importance of sustainability and resilience but may risk siloing consideration of the role of stakeholders from other aspects of corporate governance. The Institute is concerned that merging the existing chapter on stakeholder interests with the new chapter on sustainability implies that stakeholder interests are a separate (and largely optional) consideration rather than an integral aspect of other corporate duties, such as risk management, strategy and board responsibilities.

The Institute recommends that the Principles integrate consideration of stakeholders, including with respect to human rights risks, more explicitly across all chapters to convey the links between stakeholder interests and good corporate governance.

Incorporating stakeholder considerations

The Principles can more strongly incorporate stakeholder considerations at the outset. Paragraph 1 of About the Principles can specify who ‘other stakeholders’ may comprise, and the definition in paragraph 10 can expand to include not only affected communities, customers and consumers, and suppliers but also rightsholders, workers in the value chain, civil society organisations and trade unions. The Paragraph can also remove the ‘where a jurisdiction’s legal and regulatory framework permit’ qualifier.

The Institute welcomes V.A’s addition that stakeholder engagement may help businesses ‘to attract productive employees, to be supported by the communities in which they operate, and to have more loyal customers, thus creating value for their shareholders.’ The Principles can more effectively communicate these benefits by highlighting stakeholder interests in other areas. For example:

- I.A can include impacts on stakeholders to signal the importance of such considerations when developing a corporate governance framework.
- Stakeholder interests need not be removed from V.C’s discussion of ethical standards to be applied by the board.

- V.D.5 can be revised to encompass the 'longer term interests of the company, its shareholders, and its broader stakeholders.'

Broadening stakeholders to explicitly include non-financial stakeholders

Attention to a wide range of stakeholders enables a company to recognize and respond to emerging sustainability concerns. A corporate governance framework focused narrowly on shareholders and financial stakeholders may overlook social and environmental risks. The Institute welcomes the revisions to VI.D, particularly the addition of 'affected communities' to the list of stakeholders contributing to a company's success. The Principles could similarly add brief sentences on the relevance of affected communities, rightsholders, customers and consumers, workers in the value chain, civil society organisations and trade unions.

The final two sub-sections of Chapter VI detail the rights of bondholders of publicly traded companies and creditors, respectively. The Institute recommends that the OECD consider similar sub-sections detailing the rights of non-financial stakeholders such as communities, rightsholders, customers and consumers, workers in the value chain, civil society organisations and trade unions.

Human rights and environmental due diligence as key to corporate governance

Responsible business conduct due diligence is key to the OECD Guidelines and aligned with the process of human rights due diligence outlined in the UNGPs. The Principles can strengthen their increased focus on sustainability by emphasizing the role of due diligence in identifying, preventing, mitigating and addressing businesses' impacts on human rights and the environment.

Effective due diligence processes can help businesses understand and apply the Principles' new sustainability sections, offering a concrete step companies can take to account for human rights and social impacts and build sustainability into their operations. The Principles cite the UNGPs as a relevant instrument for corporate governance. Making explicit reference to human rights due diligence and the need for governance structures to establish and oversee such processes will ensure that the Principles align with this instrument as well as emerging regulation.

The Principles have a unique opportunity to connect the importance of due diligence to effective corporate governance for both businesses and regulators. The Principles can emphasise the benefit of due diligence processes for businesses: Not only do they help a company meet its responsibilities under the UNGPs, but effective due diligence enables a company to identify sustainability risks before they become problematic for its business model. The Principles can also encourage regulators to consider mandatory human rights and environmental due diligence legislation to standardise requirements, keeping pace with global developments and ensuring that companies within their jurisdiction operate on a level playing field.

The Institute notes several specific areas where reference to due diligence would strengthen the Principles:

- The addition of due diligence processes within the discussion of risk management systems under IV.A.8 would be improved with reference to HRDD and other forms of due diligence, clarifying that such processes encompass more than, for example, due diligence in connection with a merger or acquisition but should include a rightsholder-focused due diligence process which allows a company to identify and address the impacts that it has on people and planet.
- In the introduction of Chapter V, the list of applicable laws for boards to consider can include human rights and HRDD laws.
- In V.A, HRDD is a clear way for boards to meet the additional requirement of 'taking into account the interests of stakeholders' to act on a fully informed basis.

Finally, as the following section notes, HRDD processes should be overseen at the board and executive level to ensure they are fully and effectively integrated throughout business operations.

Board responsibilities for human rights

The revised Principles offer welcome clarity on board and executive responsibilities. However, the Principles could strengthen the responsibilities of the board with respect to sustainability and stakeholder considerations, including human rights. In addition to better integrating human rights and social concerns throughout the Principles, the Institute recommends that the Principles specify board responsibilities for non-financial material risks and for establishing and overseeing HRDD as critical aspects of their risk management and corporate strategy roles.

Explicitly refer to human rights due diligence as part of Board's functions

The Institute welcomes the Principles' addition of sustainability considerations to board responsibilities, for example under II.C.5. We recommend that the Principles explicitly note the role of the board (including executives) in overseeing human rights due diligence as a necessary aspect of sustainability.

The Institute recommends that HRDD be listed explicitly among the board's key functions under V.D. The board is best positioned to oversee HRDD processes to ensure integration throughout a company's operations. Specifically,

- The revised V.D.2 can link HRDD to 'increasing resilience' and *ex ante* efforts as a means to identify adverse impacts and avoid crises before they emerge. The addition of digital security risks in the following paragraph cannot be divorced from human rights risks and therefore calls for HRDD.
- V.D.3's call for continuous board review of a company's governance structures can include sustainability matters, specifically HRDD and related disclosures.
- Examples of specialised committees under V.E.2 can include sustainability and human rights, noting that human rights considerations in particular may require outside expertise (such as the views of rightsholders, affected communities, civil society organisations, or other experts).
    - Further, the reference to temporary ad hoc committees can cite as an example when business activities cause or contribute to adverse human rights impacts and are responsible for addressing harms.
- VI.A.1 can include HRDD as another example under sustainability assessments, especially as reporting on HRDD is increasingly mandatory in various jurisdictions.

Board engagement in HRDD ensures that they act on a 'fully informed basis' when making strategic decisions for the company. HRDD would thus fit neatly alongside the addition of 'the interests of stakeholders' in V.A, as noted in the prior section. Similarly, the addition of due diligence under IV.A.8 can explicitly note the board's role in overseeing HRDD as a preview to Chapter V.

Board and executive oversight of human rights due diligence should be on par with other responsibilities, such as a company's financial performance, that influence compensation. The Institute therefore welcomes the addition of sustainability and resilience to the discussion of board and executive renumeration under IV.A.5.

Stakeholder engagement

The Principles can more strongly emphasize stakeholder engagement, a key aspect of the UNGPs, as a board responsibility. The introduction to Chapter VI in particular misses an opportunity to connect stakeholder engagement to sustainable corporate governance. We recommend rephrasing the final paragraph to acknowledge the complexity of incorporating stakeholder concerns while not dismissing the possibility. Indeed, corporate boards already balance multiple interests (such as competing areas of business or minority vs. majority shareholders). Encouraging businesses to consider stakeholder interests would acknowledge that companies are responsible for the environmental and societal challenges that they cause or contribute to, thereby aligning the Principles with the UNGPs.

The Principles can also frame stakeholder dialogue as a two-way street, via which a board shares information with a company's stakeholders and engages with their perspectives on an ongoing basis. VI.B and VI.D.4 include welcome references to dialogue with and participation of stakeholders. These sections can be strengthened by explicitly noting the importance of stakeholder consultation in areas where businesses have less familiarity, such as local human rights impacts, which is particularly relevant leading into VI.D.5's discussion of complaints mechanisms. Similarly, V.G's suggestions for employee representation on boards can emphasize training mechanisms for boards as well as employees to guide directors on working respectfully and effectively with employee representatives and other stakeholders.

Disclosure and transparency

Having strong and uniform reporting standards on sustainability, including as it relates to human rights, has the potential to significantly improve corporate reporting on these matters, drive improved implementation practices and allow external stakeholders, including affected stakeholders, to access relevant information and assess the adequacy of corporate responses to potential and actual negative human rights impacts.

Specific and granular standards are needed in order to drive companies to prioritise sustainability disclosures in the same way as they do financial reporting, and a significant step change in sustainability reporting is needed. Sustainability reporting should no longer be regarded as a communications or marketing exercise but as an element of responsible business due diligence.

What a business identifies as material shapes its strategies and actions. Disclosure requirements should standardise the way in which businesses regularly and transparently disclose how and what they have decided is material, and how the business is addressing the issues identified as material. This information is important for a range of stakeholders including shareholders, ESG investors and civil society actors focused on corporate accountability.

The addition of Paragraph 6 under About the Principles firmly centres sustainability and resilience as objectives of good corporative governance policies. However, the Principles fail to acknowledge the emergence of 'double materiality'—the concept that risks to people and planet can be material even when the impact on financial performance is unclear.

Regulatory developments such as the draft European Sustainability Reporting Standards (ESRS), which companies required to report under the forthcoming EU Corporate Sustainability Reporting Directive (CSRD) will be obliged to use, aim to develop a common set of standards for companies across the EU to report on non-financial matters. One of the big advancements of these initiatives is in the implementation of the double materiality approach, which will be key to ensuring that future reports adequately reflect risks to people and planet alongside risks to the business's financial performance.

Double materiality asks companies to consider not only how sustainability matters may impact the company, but also what impacts the business has on people and planet. This latter aspect of materiality is referred to as "impact materiality" in the CSRD and ESRS. However, Paragraph 6's reference to 'broader economic, environmental and societal challenges' is limited to those that pose financial risks or opportunities. Similarly, VI.A.1 is rooted in the idea of financial materiality, and IV.A.2 adds 'material' to qualify environmental and social matters while eliminating mention of 'human rights and other public policy commitments.'

The Institute recommends that the Principles incorporate the concept of double materiality, encouraging corporate boards to consider material non-financial impacts, to remain in step with emerging regulations.

THE DANISH
INSTITUTE FOR
HUMAN RIGHTS

ABOUT THE INSTITUTE

The Danish Institute for Human Rights is an independent National Human Rights Institution established by the Danish Parliament in accordance with the UN Paris Principles. Under its legal mandate, the DIHR's main functions are to monitor human rights in Denmark and promote human rights internationally, including through engagement with non-state actors. The DIHR's Human Rights and Business Department has been working in the area since 1999 and is an internationally recognised centre of expertise on the application of human rights norms to business actors, across all world regions and industry sectors.

CONTACTS

Sarah Tansey, Adviser, Human Rights and Business
sata@humanrights.dk

Gabrielle Holly, Senior Adviser, Human Rights and Business
gaho@humanrights.dk