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Human Rights Risks for the Financial Sector: Lessons from Ten Years of the OECD Guidelines for Multinational Enterprises

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I. Introduction

In 2011, following the adoption of the United Nations Guiding Principles, the OECD Guidelines for Multinational Enterprises (the “Guidelines”)—the only existing intergovernmental guidance to businesses—introduced a new chapter on Human Rights. In December 2022, we released a first-of-its-kind report on the Guidelines, focusing in particular on complaints alleging human rights violations under Chapter IV. The report (Analysis of OECD Guidelines: Ch. IV Human Rights Cases; or “Analysis”), including a summary of the Guidelines, is available [here](#).

Since 2011, pension funds, banks, and other financial sector actors have been the target of numerous complaints and this trend is likely to increase.

In this Part I of a series of articles, we discuss the trends in financial sector cases brought under the OECD Guidelines, drawing on data we gathered in preparing our Analysis. In brief, the data reveal that banks, sovereign wealth funds, and other investors are increasingly at risk for the activities of investees. In subsequent articles, we will address the increased risks that arise from recently proposed changes to the Guidelines, and suggest high-level actions that companies may need to implement in order to mitigate the risks presented by the amendments, as well as increasingly abundant national and international regulations.

On February 10, 2023, the OECD closed its most recent public consultation on proposed amendments to the Guidelines.¹ The changes will be the first revision to the Guidelines since 2011 when the human rights chapter was introduced. The changes in the 2023 OECD Guidelines Consultation Draft (the “Consultation Draft”) were based on a 2021-2022 stock-taking exercise and include updates to all sections of the Guidelines, including the enforcement mechanism of the Guidelines: the National Contact Point (“NCP”) system. The OECD plans to release its update to the Guidelines in June of this year.

Among the proposed changes to the Guidelines, we consider the renewed emphasis on due diligence to be of particular importance for financial sector actors. As the changes note, “[g]overnments are increasingly adopting policies aimed at promoting responsible business practices, including by using OECD standards on responsible business conduct to support comprehensive and common approaches for due diligence”.² While discussions about whether and to what extent the financial sector will be

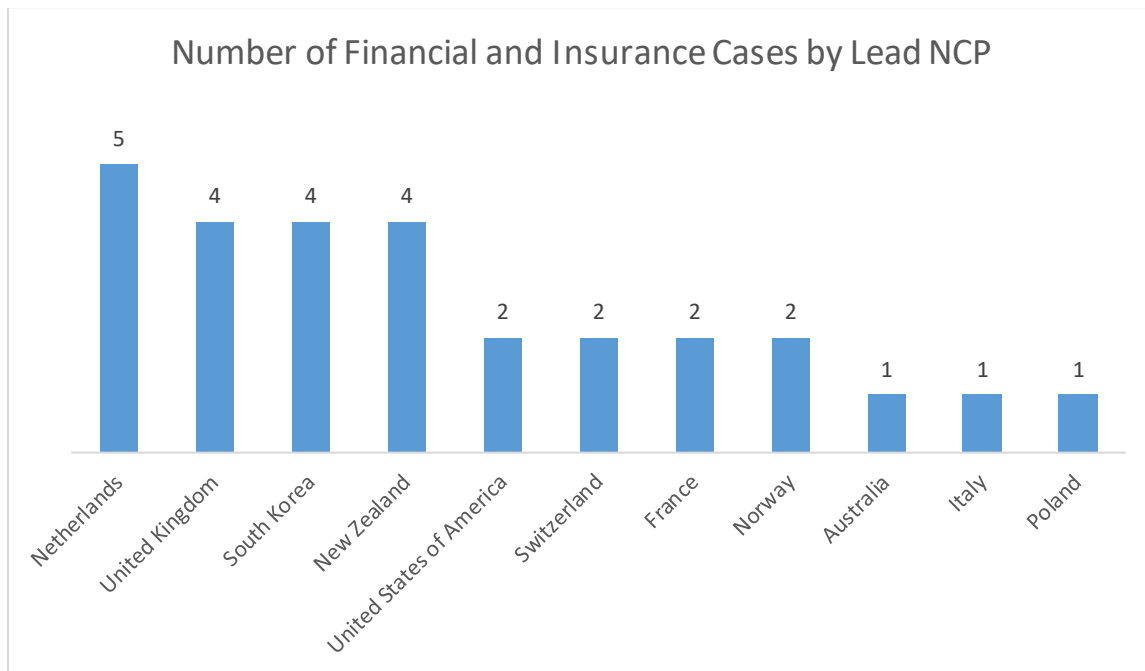
bound by the EU’s Corporate Sustainability Due Diligence Directive are ongoing,³ the OECD Guidelines are poised to provide civil society, businesses, and others with an alternative means of pursuing investors for their financing of perceived human rights and other violations.

II. Financial Sector Actors Are Not Immune

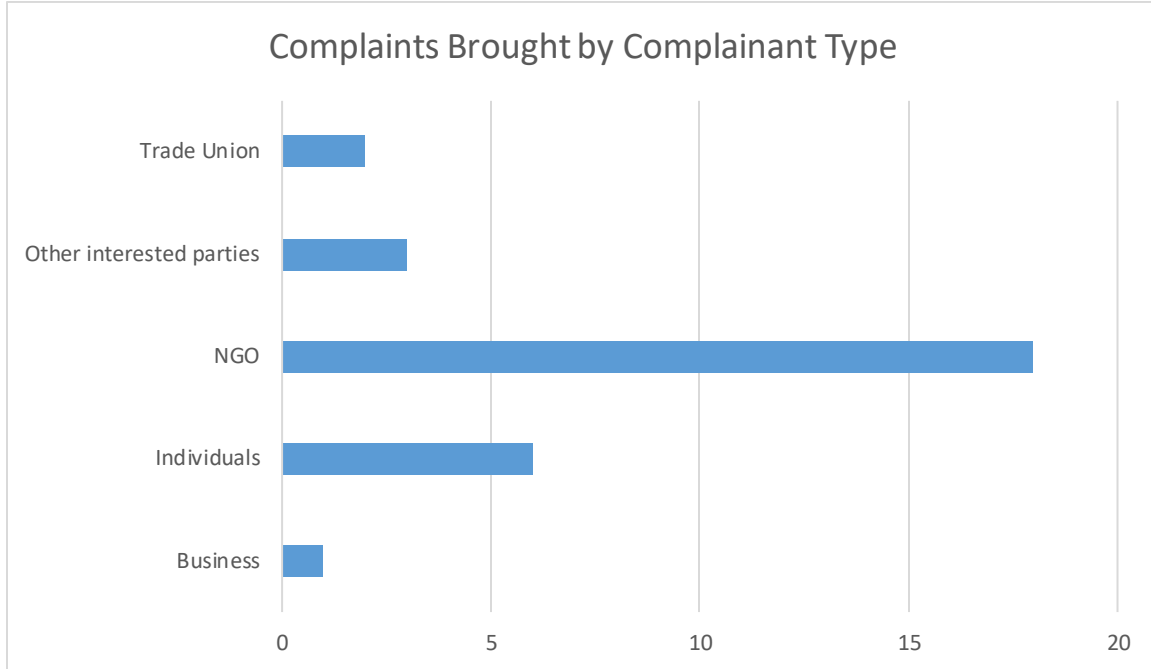
In our 2022 Analysis, we examined all of the complaints brought under Chapter IV—Human Rights—of the Guidelines since its inception. Of the 207 complaints, 28 (13.5%) implicated one or more entity in the “Financial and Insurance Activities” sector. Overall, the financial sector was the third most targeted sector by complainants, after manufacturing and mining. From our analysis, we highlight three key takeaways for entities in the financial sector:

1. Direct access to business and human rights compliance mechanisms means that investors are increasingly at risk of facing compliance enforcement proceedings launched by non-governmental and non-traditional complainants, and in novel venues.

Although the 28 complaints referencing Financial and Insurance Activities were brought before the NCPs of 11 countries, harm was alleged to have taken place in 21 countries (“Host Countries”),⁴ indicating that complainants filed in countries that adhere to the Guidelines even when harm was alleged to have taken place elsewhere.



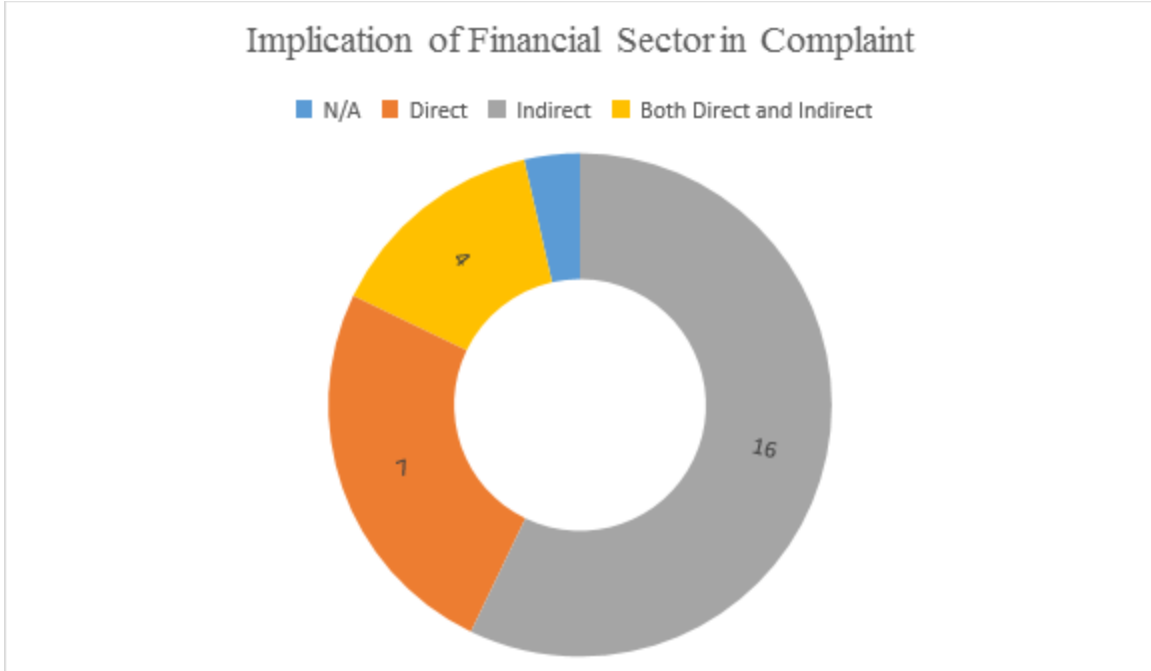
We note that the majority of complainants were NGOs, but this was not exclusively the case. A number of complaints were also filed by individuals and trade unions. One Financial and Insurance Activities case was even brought by a private company. Although the entities that file complaints under the Guidelines are numerous, our review indicates that almost all complainants are sophisticated entities and/or partner with sophisticated co-complainants.



We identified five broad categories of entities that were named as respondents in the 28 complaints. Banks were the most common (15 of 28 complaints), followed by the catch-all “Other Corporate Entity” category (13 of 28 complaints), which includes private corporations, auditors, and financial service providers. Pension funds, fund managers, and asset managers comprised the next tranche of respondents (11 of 28 complaints), followed by insurance agencies (8 of 28), and government agencies (1 of 28).⁵

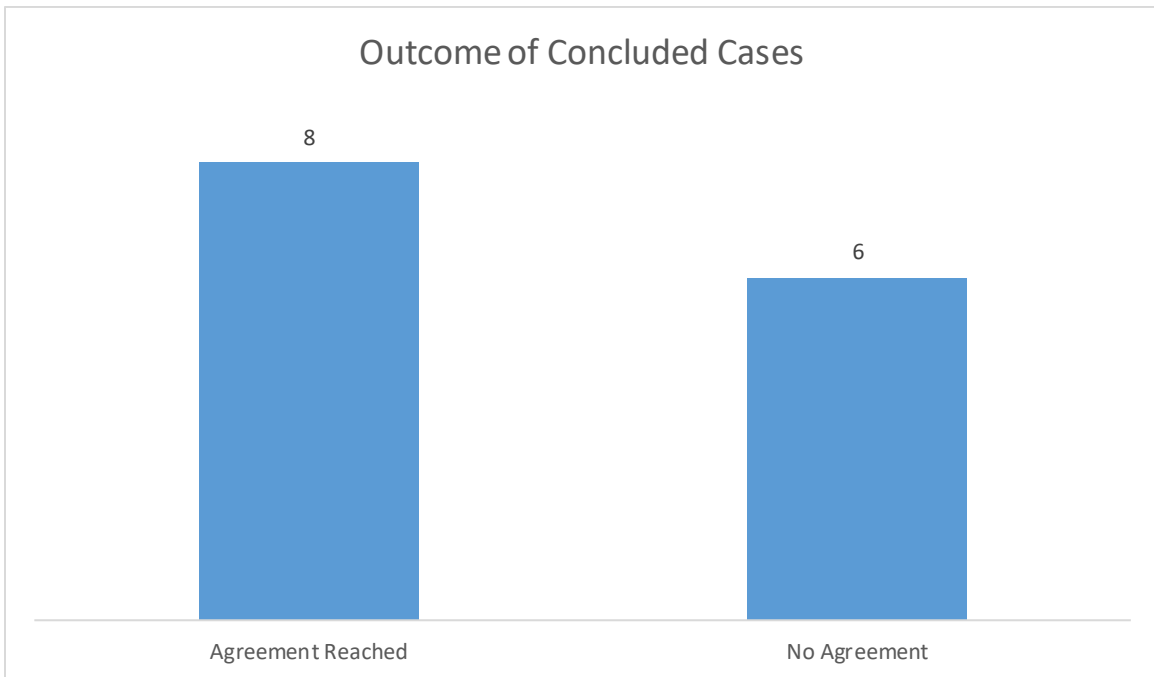
2. Indirect facilitation of human rights abuses through investment or lending does not insulate financial backers; instead, investors may be exposed to the same type of risk from their borrowers as other entities face from their supply chains.

In the majority (20 of 28) of these cases, the complainant(s) alleged indirect involvement by the respondent in causing the alleged harm. The most common way this manifested was through allegations that an investor failed to exercise sufficient due diligence or failed to leverage their influence on an entity that was accused of committing human rights and/or other harms. In the four complaints that included allegations of both direct and indirect harm, the complaint generally included both a company and its investors as the respondents, and alleged that the investors were indirectly responsible for the direct adverse impacts caused by the company.



- Informed navigation of the OECD process can lead to successful outcomes that limit reputational harm, reduce exposure to risk, and improve conditions on the ground.

Among the 14 concluded cases, the majority (8 of 14) resulted in an agreement being reached between the parties in the course of the NCP process. In a minority of the concluded cases, agreement (6 of 14), no agreement was reached.



The reputational costs of failing to reach an agreement are difficult to assess, but it should be noted that complaints concerning financial sector actors were more likely than complaints concerning other industries to allege harm to the public, rather than to specific communities or groups.⁶

III. Proposed Changes to the OECD Guidelines

The Consultation Draft includes proposed changes throughout, addressing everything from grammatical errors, to definitions, to substantive modifications. Below, based on the findings of our 2022 Analysis, as well as our professional expertise, we highlight a small but impactful selection of proposed changes with significant implications for financial sector actors.

Chapter II, paragraph A.15 of the Consultation Draft includes a small but significant change for Financial Sector actors. Currently, the paragraph provides that enterprises should encourage “business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct.” The Consultation Draft expands this to include “entities with which an enterprise has a business relationship, including suppliers and sub-contractors, *investee companies*, clients, buyers, and joint venture partners”.⁷ As noted above, our Analysis describes the multiple cases where an investor was brought as a respondent on the basis of an investee's actions or inaction. However, by codifying this change in the Guidelines, it would be even easier for complainants to target investors for the alleged misconduct of investees.

Chapter II, paragraph A.14 is a proposed new paragraph stating that enterprises should: “Provide for or co-operate through legitimate processes in the remediation of adverse impacts where an enterprise has caused or contributed to these impacts.” As drafted, this paragraph appears to suggest that remediation is appropriate for any adverse impact, even where a respondent is not directly responsible for harm. In the case of financial services entities, the change presents an increased risk of being held responsible for remediating the harm caused by an investee.

Procedures, I.C.4(c) in the Consultation Draft adds a new provision stating: “If allowed by applicable law and the NCP’s case-handling procedures, the NCP may, at its own discretion, set out its views in its final statement on whether the enterprise observed the Guidelines” even where a party is unwilling to participate.⁸ This change would mean that, although participation in the NCP process is voluntary, refusal to participate would not preclude an NCP from publishing an unfavorable decision. As such, corporate entities may face a greater incentive to participate in the process, securing the assistance of well-informed counsel, or risk complainants attempting to leverage uncontested negative decisions based on the OECD Guidelines in other fora.

IV. How to Prepare for Business and Human Rights Regulation and Dispute Settlement

As shown above, financial sector actors are increasingly exposed to traditional litigation as well as less conventional sources of liability, such as the OECD Guidelines, based on the activities of their investees. The proposed amendments to the Guidelines—among other developments—demonstrate the ongoing trend toward increasing the scope of regulation in the financial sector, both at home and abroad. In our next article in this series, we will suggest how financial sector actors may begin to prepare for these changes, and address obligations that are already taking effect.



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- ¹ OECD, "Online public consultation: Targeted update of the OECD Guidelines for Multinational Enterprises" (Jan. 13, 2023): <https://mneguidelines.oecd.org/public-consultation-targeted-update-of-the-oecd-guidelines-for-multinational-enterprises.htm>.
 - ² OECD Centre for Responsible Business Conduct, "OECD Guidelines Consultation Draft", p. 4 (Jan. 13, 2023): <https://mneguidelines.oecd.org/consultation-draft-public-consultation-targeted-update-of-the-oecd-guidelines-for-multinational-enterprises.pdf>.
 - ³ Olivia Adam, "Primer: Corporate Sustainability Due Diligence Directive", International Financial Law Review (Feb. 2, 2023): <https://www.iflr.com/article/2b89zidt98d21a1iq6sxs/primer-corporate-sustainability-due-diligence-directive>; Silvia Ellena, "EU due diligence rules should include finance, Commissioner says", Euractiv (Jan. 30, 2023): <https://www.euractiv.com/section/economy-jobs/news/eu-due-diligence-rules-should-include-finance-commissioner-says/>.
 - ⁴ A complaint may list more than one host country. These are most often the location of the alleged harm, the location of the respondent, the location of an entity with which the respondent has a business relationship, or the location of the complainant.
 - ⁵ Certain respondents were named in more than one complaint.
 - ⁶ Paul Hastings, "Analysis of OECD Guidelines: Ch. IV Human Rights Cases", p.28 (Dec. 9, 2022): <https://www.paulhastings.com/insights/client-alerts/analysis-of-oecd-guidelines-ch-iv-human-rights-cases>.
 - ⁷ OECD Guidelines Consultation Draft, p. 11 (emphasis added).
 - ⁸ OECD Guidelines Consultation Draft, p. 59.

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