


DEVELOPMENTS IN THE FIELD

The 2023 Update of the OECD Guidelines sets Stronger Standards for Companies but Weak Expectations for Governments – High and Lowlights from the New Text

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Abstract

In June 2023, the OECD published ‘targeted updates’ to the newly renamed OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. This piece examines some of the most significant updates from the perspective of civil society. The majority of the updates strengthen the authoritative international standards on responsible business conduct; for example, by addressing new and important topics, such as climate change, and clarifying expectations on established due diligence concepts. Meanwhile, the revised implementation procedures suggest progressive measures for governments to strengthen their National Contact Points, but largely do not require specific improvements. This piece discusses the strengths and shortcomings of these changes and assesses the impact of the updates on international norms.

Keywords: Civil society; Climate change; Human rights and environmental due diligence; OECD Guidelines for Multinational Enterprises on Responsible Business Conduct; OECD National Contact Points

1. Introduction

In June 2023, the Organisation for Economic Co-operation and Development (OECD) released updated text for the newly renamed OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (‘Guidelines’). Given the Guidelines’ prominence as the leading international and state-backed multi-sectoral responsible business conduct (RBC) standard, plus its provision of a non-judicial grievance mechanism for complaints against companies, the release represents a significant development in the field of business and human rights.

The Guidelines are recommendations from governments to multinational enterprises on how to conduct business sustainably and responsibly. First adopted in 1976, they are recognized as the leading normative guidance on RBC across a range of issues, including human rights, labour rights, the environment, disclosure standards, bribery and corruption, and taxation. Importantly, every government adhering to the Guidelines is required to establish a non-judicial grievance mechanism, called a National Contact Point (NCP), to promote the standards to stakeholders and help resolve claims against companies alleged not to have met the Guidelines’ expectations.

‘Targeted updates’ to the most recent 2011 version of the Guidelines were considered by the OECD Investment Committee, the body that oversees implementation of the Guidelines.

Following a nearly three-year negotiation process, the 51 states that adhere to the OECD Guidelines agreed by consensus to the revisions. Throughout the formal negotiation process, the three institutional stakeholders to the Committee – OECD Watch on behalf of civil society, the Trade Union Advisory Committee (TUAC) to the OECD, and Business at OECD (BIAC) – engaged extensively to provide the OECD secretariat and states oral and written recommendations on their priorities in the text.

Given the consensus-based nature of the OECD and the process to approve the updates, the final text inevitably involves trade-offs and compromises. Nevertheless, in civil society's view, the majority of the updates strengthen this authoritative RBC instrument. This piece provides an analysis of the updated Guidelines from the perspective of civil society. [Section II](#) considers some of the most notable updates to both the standards for companies and expectations for NCPs, in the view of the civil society groups that participated in the update. [Section III](#) concludes the piece with some recommendations.

II. Key Updates to the Guidelines

The 2023 update of the Guidelines raises their profile, relevance and potential impact both as a standard for enterprises and avenue to remedy for those adversely impacted by business conduct.

Updates to the Corporate Standards

Climate Change

Arguably the most important and progressive change in the 2023 update is the addition of text referring to the Paris Agreement and calling on companies to stop, prevent and mitigate their contributions to climate change as an environmental impact. Notably, the new Guidelines require enterprises to show how their greenhouse gas (GHG) emissions align with internationally agreed global temperature goals based on the best available science and implement science-based climate change policies and transition plans. They also call on companies to adopt, monitor, report on, and regularly review emissions mitigation targets that are short-, medium- and long-term; based on the latest available science; include absolute and also, where relevant, intensity-based GHG reduction targets; and take into account scope 1, 2 and, to the extent possible based on best available information, 3 GHG emissions (the latter referring to emissions not produced by enterprises themselves, but by entities in their value chain). Importantly, the new text also encourages enterprises to prioritize eliminating or reducing sources of emissions over offsetting, compensation or neutralization measures, and use high integrity carbon credits or offsets only as a last resort.

These changes raise international norms by confirming that enterprises have a responsibility to address their impacts on climate in their value chain, and by consolidating in one instrument comprehensive and ambitious steps that should be taken by enterprises. Within the business and human rights landscape, not least in relation to the proposed EU Directive on corporate sustainability due diligence (CSDDD), there is debate on whether and in what manner enterprises should account for their role in climate change.¹ The new Guidelines clearly establish that enterprises should address climate impacts like

¹ OECD Watch, 'Achieving Alignment: Syncing EU Due Diligence Legislation with the Updated OECD Guidelines' (June 2023), <https://www.oecdwatch.org/achieving-alignment-syncing-eu-due-diligence-legislation-with-the-updated-oecd-guidelines/> (accessed 31 July 2023).

any other environmental impacts, and do so through risk-based due diligence, as for any other impacts.

Yet the changes fall short of advocates' goals in key areas. The qualifiers around addressing scope 3 emissions could let companies off the hook for the majority of the GHG emissions in their value chain. Furthermore, the text suggests setting targets in relation to development of 'industry specific transition pathways', thereby reinforcing a Global North-centric bias in development of emissions reduction targets that are much faster for energy sectors more essential to Global South economies (such as coal) than northern economies (such as oil and gas).

Due Diligence

Another of the most significant updates in the Guidelines is the strengthening of text explaining core due diligence concepts. The Guidelines now make explicit that enterprises should undertake due diligence over 'business relationships' beyond contractual, 'first tier' or immediate relationships, both upstream and downstream of the enterprise. During negotiations, civil society strongly countered submissions by business groups to limit the scope of due diligence to the 'upstream' chain (e.g., producers, suppliers). According to the new text, downstream due diligence should broadly cover entities that receive, license, buy or use products or services from the enterprise, including individual consumers. Downstream due diligence should cover known or reasonably foreseeable circumstances associated with the use *and* improper use or misuse of products or services.

The updated Guidelines also state that companies should not rely on industry or multi-stakeholder initiatives (MSIs) to carry out their own due diligence, for which they remain individually responsible, and reiterate that MSIs should be credible, transparent, and aligned with international standards, including the Guidelines. They also state that companies should engage stakeholders, including throughout the iterative due diligence process, in a way that is *meaningful* and adapted to remove barriers to marginalized or vulnerable stakeholders. Companies should also engage meaningfully with stakeholders when considering disengagement from an activity or business relationship, and they should address adverse impacts related to disengagement.

These updates bolster norms that are being questioned or at risk of being weakened in parallel policies and legislation. For example, all three positions on the draft EU CSDDD of the European Commission, the European Parliament and the EU Council significantly limit in one way or another the scope of downstream due diligence, and some threaten to narrow the concept of a 'business relationship'.² With the update of the Guidelines, the OECD has affirmed key topics under debate: that risk-based due diligence is expected to cover all business relationships across all sectors (including financial); the need for both upstream and downstream due diligence; and that enterprises should not over-rely on audits or MSIs to implement or verify their due diligence steps. Meanwhile, the various provisions on meaningful stakeholder engagement reinforce the centrality of stakeholder engagement, and the 'special attention' needed to address the intersecting risks and challenges that rights-holders, especially those experiencing marginalization or vulnerability, typically face.

However, in other areas the new language on due diligence falls short of expectations. The Guidelines now recognize practical limitations that enterprises may face not only in relation to exercising the leverage that they have, but also in building this leverage over business relationships, which may depend on, for example, the number of suppliers and

² Christopher Patz, 'The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment' (2022) 7 *Business and Human Rights Journal* 291.

other business relationships, and the structure and complexity of the supply chain. Such text potentially lets companies use the complexity of the globalized value chain – a business model intended to increase profits and lower accountability and costs – as an excuse to disclaim ability to address the impacts from that very business model.

Human Rights Defenders and Reprisals

The updated Guidelines also include important new expectations for companies to prevent harm to persons who investigate or raise concerns about business activity, and to promote safe civic space. While the old text mentioned reprisals only in the narrow context of inappropriate disciplinary action against workers, the new text makes explicit that companies should pay special attention to potential harm to vulnerable groups, including human rights defenders, and refrain from taking reprisals (including strategic lawsuits against public participation, or SLAPP suits) against any people investigating or expressing concern about their business activity. This responsibility extends to preventing reprisals by the companies' business partners, which can include states. Enterprises should also provide or contribute to remedy for harm from reprisals, as well as from the business activity itself. The Guidelines also extensively expand the expectations for NCPs to address risks of reprisals against individuals who launch a complaint before them, such as by (in consultation with those at risk) keeping identities confidential, documenting attempted reprisals, and reaching out to relevant authorities.

These changes largely mirror evolving guidance from the United Nations (UN) on the important role that companies must play in promoting a safe civic space.³ Of particular importance is the implication in the Guidelines that companies cannot sit quietly as states carry out repressive actions to enable the business activity to continue. The updates in the NCP Procedures section of the Guidelines also clarify that NCPs cannot simply avoid preventative and responsive action, but must instead seek safely and constructively to address threats.

The changes could have been stronger, however. For example, during negotiations, OECD Watch recommended that the text on reprisals explicitly urge businesses to discourage reprisals even by states that are not formal business relations. However, some governments opposed such text. Moreover, the Guidelines fall short of offering detailed guidance for companies, which has resulted in civil society calling for further guidance from the OECD on the types of steps companies should take to pre-empt harm and encourage business relations to cease reprisals.⁴

Workers' Rights

The updates have finally improved outdated text that limited application of the standards in the chapter on workers' rights to the enterprise's 'own employees' or 'own operations'. This marks an important advancement as it clarifies, in line with the human rights chapter, that companies should respect the labour rights of 'all workers' in their value chains. The updated Guidelines emphasize the importance of this change particularly in sectors where informality, short-term working arrangements, decent work deficits, and digital transformation may be more common.

³ Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 'The Guiding Principles on Business and Human Rights: Guidance on Ensuring Respect for Human Rights Defenders', A/HRC/47/39/Add.2 (23 June 2021).

⁴ OECD Watch, 'Updated OECD Guidelines Give Civil Society More Grounds to Demand Corporate Accountability' (June 2023), <https://www.oecdwatch.org/updated-oecd-guidelines-give-civil-society-more-grounds-to-demand-corporate-accountability/> (accessed 31 July 2023).

The updates could have been stronger, however. For example, the text could have set a more progressive standard on payment of a living wage; and it only implicitly, not explicitly, calls for attention to practices, such as certain purchasing practices, that cause or contribute to forced labour in supply chains.

Indigenous Peoples' Rights

The old Guidelines text did not call on companies to respect the rights of Indigenous Peoples specifically, but merely noted the potential relevance of UN instruments on the rights of Indigenous Peoples when calling on enterprises to respect human rights generally. The new text instead calls for special attention during a company's due diligence process to adverse impacts on Indigenous Peoples, among other marginalized groups. The Guidelines specifically reference the UN Declaration on the Rights of Indigenous Peoples, and also note that the OECD multi-sector due diligence guidance and due diligence guidance for the extractive and agriculture sectors provide further practical guidance, including in relation to free, prior and informed consent (FPIC).

On the whole, these additions improve the 2011 text, but they fall below international standards in a crucial way, by arguably incorrectly describing Indigenous Peoples' rights as *individual* rights held by members of groups, rather than *collective* rights held by the groups themselves. During negotiation, one state in particular objected to text explicitly acknowledging collective rights. Civil society groups are now urging the OECD to create new guidance explaining in more detailed and practical terms what enterprises need to do to operationalize respect for Indigenous Peoples' rights.

Digitalization

Other notable updates relate to the Science, Technology and Innovation chapter of the Guidelines. The Guidelines newly affirm that enterprises should conduct risk-based due diligence on actual and potential adverse impacts related to science, technology and innovation, including by undertaking due diligence over harms stemming from the development, financing, sale, licensing, trade, and use of technology, gathering and using data, and scientific research and innovation. It is now specified that due diligence should address known or reasonably foreseeable circumstances related to the proper or improper use, or misuse, of products or services. New expectations are set around responsible data governance, children's interests in relation to technology, and the importance of ensuring certain actors do not misuse civilian technology for harmful purposes.

The 2011 text was extremely outdated on these issues, explicitly excluding science and technology from the scope of due diligence and focusing almost singly on transfer of data. The Guidelines arguably now represent a leading international standard around RBC specifically for the area of digitalization. However, concerns remain. The most critical is the lack of elaboration in the new text of the range of adverse impacts not only on human rights, the environment, and democratic institutions, but also on other fundamental issues such as cognition and choice, associated with technology. This failure, paired with a still overly selective focus on just a few issues like technology transfer and data governance, and an inadequate focus on impacts of frontier technologies, have rendered the chapter unhelpfully patchy.

Updates to the Expectations for NCPs

The NCPs' ability to promote the standards and provide a path to remedy is critical for the effective implementation of the Guidelines. However, NCPs have historically underperformed.⁵ With generally inadequate resources and internal authority, as well as poor outreach practices and visibility among government counterparts and stakeholders, they have not yet succeeded in securing widespread awareness of the Guidelines, let alone alignment of company practices with their standards. More critically, the complaint process has been largely toothless, with governments and NCPs refusing to adopt both essential carrots *and* sticks to encourage meaningful engagement and outcomes. The latter would include procedural transparency, determinations or independent evaluation of corporate (non-) alignment with the Guidelines, consequences or penalties for lack of, or poor, engagement in the process, and public assessments of companies' actual implementation of recommendations, including regarding agreed remedies.

Among the positive updates to the Guidelines' implementation Procedures are the clarification that the role of NCPs includes supporting enterprises in implementing the Guidelines and addressing, where relevant, adverse impacts that may have occurred. NCPs are now also explicitly expected to use their expertise to help ensure that solutions reached through the complaint process are 'Guidelines-compatible', which should include compatibility with expectations for enterprises to respect human rights and provide or participate in remediation wherever called for. Without stating it explicitly, the implication of these changes is clearer expectation that NCPs have a role to play in helping promote access to remedy where due. The Guidelines also make clear that follow-up on complaint outcomes should almost always occur. Finally, the new text now establishes a formal process for NCPs to ask the OECD for help interpreting the Guidelines during complaint handling, which could promote more coherence across NCPs, strengthening accountability and predictability of the system overall.

The significant shortcoming in the update of the Procedures, however, is that, while the text now offers numerous strong examples of good practice for NCPs, these examples remain largely recommendations rather than requirements. Of particular concern, the text does not require or even encourage NCPs to issue determinations on companies' alignment with the Guidelines or recommend that other government ministries apply consequences for non-alignment or poor faith engagement in complaint processes. The lack of clear requirements leaves the prospect for the effectiveness of each NCP largely where it was: dependent on the political will of the government in operation. Concerns therefore remain that governments may simply ignore the improved recommendations, resulting in little meaningful change to the functioning of NCPs and the outlook for remedy for impacted people.

III. Conclusion

Other positive updates were made that are not described in this piece for sake of brevity, such as inclusion for the first time of expectations on animal welfare, and slightly improved standards on disclosure and competition as they relate to RBC issues.

On the whole, the 2023 update to the OECD Guidelines clarifies and/or strengthens RBC standards for companies. It also improves recommendations for government on how to

⁵ See, e.g., OECD Watch, 'State of Remedy 2022: Examining Outcomes of Complaints Concluded in 2022, Exploring Highlights for Remedy under the Updated OECD Guidelines' (19 July 2023), <https://www.oecdwatch.org/state-of-remedy-2022/> (accessed 31 July 2023).

strengthen NCP procedures for more effective implementation. These should be impactful developments in the fast-evolving field of business and human rights.

Future NCP complaints filed under the 2023 version of the Guidelines should be used, first and foremost, to seek remedy for business impacts on people and the planet. Complaints can also be used to explore and test, in this unique soft law arena, issues under debate in legislative processes, for example around the scope of due diligence. Where the updated text is ambiguous or incomplete, such as on Indigenous Peoples' rights, or arguably favours business interests over the interests of affected rights-holders, such as on building leverage over business relationships, complaints could also strategically push for the highest possible interpretation of these standards.

Policymakers and legislators should ensure that national, regional and international law, particularly the EU CSDDD, align with the strengthened standards for companies in the Guidelines. The OECD itself has made harmonization between the Guidelines and national and regional mandatory measures a priority in a recent Recommendation⁶ and Declaration⁷ on the role of governments in promoting RBC in the global economy.

Acknowledgements. The author acknowledges the contribution of Katharine Booth.

Competing interest. The author is employed by SOMO (The Centre for Research on Multinational Corporations), which hosts the OECD Watch network's secretariat.

⁶ OECD, *Recommendation on the Role of Government in Promoting Responsible Business Conduct* (2022), <https://mneguidelines.oecd.org/oecd-recommendation-on-the-role-of-government-in-promoting-rbc.htm> (accessed 31 July 2023).

⁷ OECD, *Declaration on Promoting and Enabling Responsible Business Conduct in the Global Economy* (2023), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0489> (accessed 31 July 2023).