

OECD Watch statement on the update of the OECD Guidelines for MNEs

Improved content and scope, but procedural shortcomings remain

Summary and key outcomes

OECD Watch welcomes the changes to the OECD Guidelines that confirm and broaden the scope of the instrument to the global activities and all business relationships of MNEs. The new text introduces valuable provisions on human rights, workers and wages, and climate change. It establishes that enterprises should avoid causing or contributing to adverse impacts through their own activities or through business relationships, and it recommends that companies exercise due diligence to ensure they live up to their responsibilities. However, despite the references to impartiality and equal treatment, the changes to the implementation procedures, which should be the cornerstone of the Guidelines, fall far short of what is needed to ensure that they are an effective and credible instrument. This update missed a once-in-a-decade opportunity to provide for a system capable of ensuring observance through investigative powers and the ability to impose some kind of sanction when the Guidelines are breached. In the absence of minimum standards to ensure that the Guidelines are consistently applied, it will be up to National Contact Points to step up to the plate and demonstrate their commitment and ability to resolve disputes and help provide remedies for those adversely affected by corporate misconduct. OECD Watch will continue to seek and advocate for instruments and mechanisms that effectively enforce corporate accountability and curb corporate abuses.

Improvements to the Guidelines

- A general principle that enterprises should always exercise due diligence in matters related to the Guidelines
- A general principle that enterprises should avoid causing or contributing to adverse impacts
- A general principle that enterprises must take steps to avoid negative impacts throughout their business relations, even when the enterprise has not caused or contributed to the harm
- Reference to the need for meaningful stakeholder engagement by enterprises
- Confirmation that the Guidelines apply to all sectors of the economy, including the financial sector
- References to the need for enterprises to reduce and report on greenhouse gas emissions
- The introduction of the principles of impartiality and equitability for NCPs dealing with complaints
- Strengthened provisions on transparency requirements for NCPs, including in final statements
- OECD Watch permission to request clarification from the Investment Committee on NCP performance and interpretation of the Guidelines

Fundamental shortcomings

- Weak language, including numerous “where appropriate” caveats and disclaimers, that provides enterprises with loopholes and gives wide discretionary power to individual NCPs
- Failure to ensure the predictability of the instrument by requiring NCPs to make a statement on the validity of a complaint and observance of the Guidelines when mediation has failed
- Lack of specification of NCP requirements to monitor and follow-up recommendations and agreements
- Failure to ensure that breaches of the Guidelines or refusal to engage in the mediation process have consequences for enterprises
- No assurance of effective NCP performance through mandatory oversight or peer review mechanisms.
- No guarantees that conflicts of interests will be avoided through the housing of NCPs
- No explicit reference to Indigenous Peoples’ right to free, prior and informed consent
- No reference to country-by-country reporting
- Lack of social and environmental disclosure requirements in line with international best practice

The update in context

At the OECD Ministerial Council Meeting on the 25th of May, 2011, the OECD is celebrating its 50th anniversary and reflecting on its various achievements. The anniversary session will include the adoption of the update of the OECD Guidelines for Multinational Enterprises. The aim of the update was to ensure the Guidelines' role as a leading international instrument for the promotion of responsible business conduct.

OECD Watch, a global network of over 80 civil society organizations, welcomes the update as a timely and necessary revision of an instrument that had failed to reach its full potential to adequately address the adverse impacts of multinational enterprises on individuals, communities and the environment. Over the past decade, OECD Watch has consistently identified shortcomings and provided constructive suggestions to improve the implementation of the OECD Guidelines.

In addition, recent developments in the field of international corporate accountability confirmed OECD Watch's assessment of the limited effectiveness of the OECD Guidelines. For example, the recent work of UN Special Representative John Ruggie identified the existence of a global governance gap with regard to corporate accountability for human rights abuses and noted that instruments like the OECD Guidelines were failing to fill this gap. It was thus clear at the start of the update process that a giant leap forward was needed if the OECD Guidelines were to remain relevant and become truly effective in resolving grievances.

The update process

OECD Watch values the opportunity provided by the OECD Investment Committee (IC) to make a contribution to the update process and take part in the Advisory Group to the Chair of the update. The Investment Committee's exemplary form of stakeholder consultation was not practiced by all other OECD bodies entrusted with the update of Guidelines' specialized chapters. Consultation processes with OECD Watch, other stakeholders and external experts should be more than a token gesture and provide for a meaningful engagement. A further concern shared by OECD Watch with various stakeholders and international organizations is that the update process was rushed and lacked public consultation. As a result, no broader public discussion on the merits of proposals could take place on highly relevant issues such as indigenous people's rights and (integrated) social and environmental reporting provisions fit for the 21st century. Due to restrictive time pressures, the intended alignment of the Guidelines with the most up to date international instruments and best practices relevant to corporate accountability (such as reference to Free, Prior and Informed Consent as in the International Finance Corporation Performance Standards) remain incomplete.

Improvements and missed opportunities in scope and content

The update has resulted in a number of significant advances in the Guidelines, in particular with regard to the **broadening of the scope of the Guidelines** to include all business relationships, not just those in which an investment relation was present. The update has confirmed and broadened the scope of the application to global activities of MNEs and their subsidiaries and business relationships and a wider group of workers within that realm.

New general policies make clear that enterprises should always **carry-out due diligence** to avoid causing or contributing to adverse impacts and address such impacts when they occur. The Guidelines further stipulate enterprises should not turn a blind eye to adverse impacts throughout their business relationships even if they have not contributed to that impact, but instead seek to prevent or mitigate those impacts.

The broad application of the principle of due diligence throughout the enterprise's own activities and **throughout their business relationships** on matters covered by the Guidelines is a major achievement. More than just to do no harm, enterprises should act and take preventative measures to avoid causing and contributing to adverse impacts. Enterprises will have to significantly increase their efforts to take their social and environmental impacts into account in their investment decisions and business relationships.

OECD Watch welcomes the addition of a paragraph on **meaningful stakeholder engagement**, which should be considered as an integral part of appropriate due diligence processes and therefore read in conjunction with those paragraphs. Meaningful stakeholder engagement involves consultation with affected and potentially affected stakeholders in decision making processes throughout the entire cycle of the enterprise's activities and implies that enterprises should provide the public and stakeholders with adequate, measureable, verifiable and timely information on the actual and potential impacts of the activities of the enterprise.

A fundamental shortcoming is the **lack of explicit reference to community consultation and consent processes**. Given the disproportionate and often irremediable harm caused by business enterprises, particularly within the extractives industry, on the rights and interests of Indigenous Peoples, a reference to international standards including the right to Free, Prior and Informed Consent should have been included.

The update **failed to significantly improve the disclosure chapter**. It is particularly disappointing that guidance on country-by-country reporting has not been included. Given the legislation on this issue in the United States and an on-going process in Europe concerning country-by-country reporting for EU-based companies, it appears that the OECD Guidelines will fall short of corporate transparency and disclosure developments, before they leave the printing press. Similarly, the update failed to include social and environmental disclosure requirements in line with international best practice.

The addition of a **separate human rights chapter** containing standards on the minimum expected conduct of enterprises with regards to human rights constitutes a major step forwards. It specifies that enterprises should respect internationally recognized rights, references corporate complicity and respect for international humanitarian law. The new text establishes that enterprises should respect human rights wherever they operate, that enterprises should avoid causing or contributing to human rights abuses. A dedicated human rights due diligence provision recognizes the need to involve rights-holders, aimed at identifying and preventing or mitigating risks posed by the enterprise to the rights of individuals and communities. The text refers, in a non-exclusive manner, to the International Bill of Human Rights and UN instruments dealing with the rights of Indigenous Peoples, persons belonging to national, ethnic, religious and linguistic minorities, women, children, persons with disabilities and migrant workers and their families.

The terminology in the **employment chapter** has been aligned with the 1977 ILO Tripartite Declaration Concerning Multinational Enterprises and Social Policy (Revised 2006) so that the **Guidelines now clearly apply to a wide group of workers**. A further positive addition is the introduction of a clause stipulating that wages should at least meet the **basic needs of workers** and their families. While not covering the notion of a living wage, this provision will be of use for addressing issues in global supply chains and in the informal sector, where low wages often lead to excessive overtime and child labour.

Minimal changes were made to the **environment chapter**, but one important improvement is the inclusion of provisions encouraging enterprises **to reduce and report on greenhouse gas emissions** in order to address climate change. These provisions should be viewed in the context of the UN Framework Convention on Climate Change and other "international environmental commitments". Another positive addition is a clause stating that enterprises should avoid negative impacts on the environment or, where unavoidable, to mitigate them. The update unfortunately missed an opportunity to bring the OECD Guidelines in line with current best practice regarding cumulative environmental impact assessments and early warning systems.

The **bribery chapter** benefited from the inclusion of key aspects of the OECD's 2009 "Recommendations of the Council on Further Combating Bribery in International Business Transactions". However, the update failed to encourage enterprises to adopt policies **prohibiting all forms of bribery and corruption** and have their leadership publicly articulate a commitment not to use or tolerate any form of bribery or corruption to obtain or retain business. By limiting the Guidelines to countering bribery and not addressing broader acts of corruption, the updated Guidelines fall short of the UN Convention against Corruption.

Increasing attention is being paid to the issue of **taxation** as an important element of responsible business conduct, and it is positive that the updated Guidelines include a new provision encouraging enterprises to treat **tax governance and tax compliance as important elements of their oversight and broader risk management systems**. It is clear that tax is an increasing area of risk for companies, and their boards should consider tax as part of their contribution to the societies in which they operate. OECD Watch also welcomes the amendment to the Guidelines taxation chapter that suggests that companies should comply with both the letter and the spirit of the law. OECD Watch calls on adhering governments to prevent enterprises from exploiting legal loopholes with a view to avoiding tax.

Procedural Guidance: few guarantees for effective implementation

OECD Watch has consistently stressed the importance of improving the procedures of the NCPs, in particular in dealing with specific instances. Positive changes to the text may not make a significant difference on the ground unless backed up by more predictable and credible procedures to ensure improved and more coherent NCP performance.

The update has resulted in a number of improvements in the Procedural Guidance including provisions for: **indicative timescales** for the completion of cases; stronger **cooperation between home and host country NCPs**; strengthened provisions on **transparency** requirements for NCPs, including in final statements, capacity-building and promotion of the Guidelines. The update confirmed that **adhering governments make a binding commitment to implement the OECD Guidelines**, and that they should make available the necessary human and financial resources to effectively fulfill those commitments.

Despite the inclusion of references to **impartiality and equal treatment** of all parties by NCPs, the update failed to prescribe procedural aspects related NCPs and the handling of complaints that would ensure that these principles are fully observed by all NCPs. This is a disappointment that casts doubt upon the future effectiveness of the Guidelines. OECD Watch contends that these principles will only be meaningful if adhering countries upgrade NCP institutional arrangements and procedures to ensure impartiality, equitability and predictability. It goes without saying that single-department NCPs housed at the finance, economics, or investment departments of governments without any oversight body do not have the perceived credibility and impartiality that is now required from NCPs.

The predictability of the instrument as a whole remains at risk due to the lack of procedures to ensure effective and coherent implementation. This is particularly the case due to the update's **failure to clarify the NCP's role in making determinations on the observance of the Guidelines** when mediation has failed. Such a determination should be based on an examination of the facts and arguments. The new Guidelines still do not ensure that NCPs will make a final statement on the validity of a complaint, a minimum requirement for any credible complaint mechanism. Similarly, the updated Guidelines remain ambiguous with regard to the **NCP's role in monitoring and following up** on their own recommendations and agreements reached between the parties. This would have effectively strengthened the instrument and promoted greater observance.

The advisory bodies, and now also OECD Watch, have the right to request clarifications from the Investment Committee on NCP performance and interpretation of the Guidelines. However, this does not compensate for the **lack of mandatory oversight or peer review mechanisms for NCPs**. Nevertheless, OECD Watch will not hesitate to exercise its right to seek clarification in order to improve the performance of individual NCPs.

Last but not least, the update failed to ensure that adhering governments' binding commitment to implement the OECD Guidelines is achieved by attaching **consequences** to breaches of the Guidelines. This would have supported the IC position on and interest in pursuing policy coherence. Regrettably, there are still no effective sanctions in case of breaches of the Guidelines, thereby compromising their effectiveness.

The way forward

OECD Watch considers that the revision process achieved some important gains, but missed an opportunity to ensure that the OECD Guidelines become the leading international instrument for promoting corporate accountability and curbing negative impacts of business decisions and operations. Consequently, civil society organizations cannot rely on this instrument for guaranteeing responsible business conduct and effective remedies. OECD Watch will continue to seek and advocate for stronger instruments and mechanisms that provide real opportunities for ensuring corporate accountability. At the same time, OECD Watch calls on individual NCPs to take concrete steps to improve their performance.

Despite fundamental procedural shortcomings, OECD Watch believes that the update comes with an obligation *and* opportunity for the OECD and adhering countries to enhance the effectiveness of this unique instrument for promoting responsible business conduct in the global context. Yet all remains dependent on the political will of adhering governments, their NCPs, and the OECD Investment Committee to promote MNEs adherence to the Guidelines. Civil society will ultimately measure the success of the update based on the Guidelines' effectiveness in helping to avoid and resolve conflicts between MNEs and communities, individuals, and workers, and in providing effective remedies for victims of corporate abuses.

OECD Watch will continue to monitor the functioning of NCPs, in particular their efforts to resolve specific instances of violations of the Guidelines, as well as their proactive efforts to ensure enterprises take all necessary steps to identify, prevent and mitigate any adverse impacts from their activities. The alignment of the updated Guidelines with the SRSG's Protect, Remedy and Respect Framework and Guiding Principles makes it appropriate that the future implementation of the Guidelines should be carefully monitored and assessed by whichever special procedure the Human Rights Council chooses to adopt as a successor to Professor Ruggie's mandate.

OECD Watch is an international network of more than 80 civil society organisations promoting corporate accountability. The purpose of OECD Watch is to inform the wider NGO community about policies and activities of the OECD's Investment Committee and to test the effectiveness of the OECD Guidelines for Multinational Enterprises.

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