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The 2011 Update of the OECD Guidelines for Multinational Enterprises

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Introduction

On May 25, 2011, on the occasion of the 50th anniversary of the Organisation for Economic Co-operation and Development (“OECD”), the OECD Ministerial Council adopted an updated version of the OECD Guidelines for Multinational Enterprises.^[1] This is the fifth time they have been updated since being adopted

in 1976.^[2] The Guidelines^[3] have been adopted by the thirty-four OECD member states as well as Argentina, Brazil, Colombia, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania. They will apply to corporations registered in OECD member states when operating not only in OECD states but also worldwide. This *Insight* describes and analyzes the 2011 Update of the OECD Guidelines for Multinational Enterprises.

Overview of the Guidelines

The Guidelines are not a binding document but are recommendations “by governments covering all major areas of business ethics, including corporate steps to obey the law, observe internationally-recognised standards and respond to other societal expectations.”^[4] Since the OECD Guidelines were last updated in 2000, it has become necessary to adapt them to the new circumstances of the globalised economy. In the meantime, globalization has taken a step in another direction, with most investment now taking place outside OECD member states. Concurrently, there have been several positive developments in this period in the fields of business and human rights, most notably the development of a tripartite framework of respect, protect, and remedy.^[5] At the 2009 OECD Council Meeting, the ministers reaffirmed their commitment to “the updating of the OECD Guidelines to increase their relevance and clarify private sector responsibilities.”^[6]

The 2011 Update

The 2011 update brings several changes to the OECD Guidelines, particularly in the area of human rights. The added chapter on human rights confirms that the Guidelines apply to corporations operating in “all sectors of the economy.”^[7] It also reaffirms that states have

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primary obligations to protect human rights, including in the horizontal relationship between private actors.

The chapter's obligations for multinational enterprises are in line with the framework developed by Professor John Ruggie, former UN Special Representative on Issue of Human Rights and Transnational Corporations and Other Business Enterprises.^[8] Thus, both states and enterprises "should" respect human rights "within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate," including domestic human rights obligations.^[9] Whereas the text of the Guidelines employs the verb *should*, the Commentary of the Guidelines suggests that enterprises have an obligation to respect human rights because "respect for human rights is the global standard of expected conduct for enterprises."^[10] The nature of obligations to respect requires "avoiding infringing on the human rights of others and should address adverse human rights impacts with which they are involved."^[11] However, enterprises should only respect human rights "within the context of their own activities."^[12] They should "avoid causing or contributing to adverse human rights impacts and address such impacts when they occur."^[13] Further, the Guidelines oblige enterprises to conduct due diligence "as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts."^[14]

Usually the obligation to prevent human rights violations falls within the ambit of state apparatus, although the Guidelines also include obligations with respect to activities of business enterprises. More specifically, business enterprises should "prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts."^[15] This provision implies that such conduct is only a recommendation and encouragement for business enterprises, not a requirement.

The Guidelines also provide for the internal human rights policy of an enterprise.^[16] Several enterprises already have policy statements.^[17] Lastly, enterprises should also strive to provide an effective remedy when human rights violations have been committed. In this respect, the Guidelines use more sophisticated language requiring enterprises to "provide for or co-operate through legitimate processes" in order to ensure effective measures to address "human rights impacts where they identify that they have caused or contributed to these impacts."^[18]

The Guidelines encourage enterprises "to promote Internet Freedom through respect of freedom of expression, assembly and association online."^[19] Enterprises should comply with "good corporate principles . . . throughout enterprise groups."^[20] More specifically, they are asked to "engage in or support" different proposals on "responsible supply chain management."^[21] Such wording is nevertheless a step in the right direction as it emphasizes the broad scope of globalized activities. Another novel development arises from the wording of Section A (10) of the chapter on general policies, which emphasizes the importance of "risk-based due diligence" to "identify, prevent and mitigate actual and potential adverse impacts."^[22]

Under the Guidelines, companies also have obligations in the supply chain. Evidence of the emerging corporate obligation to protect human rights derives from paragraph 13 of Section A of the General Policies providing that enterprises "should encourage . . . business partners . . . to apply principles of responsible business conduct." Enterprises should also "avoid causing or contributing to adverse impact . . . through their own activities and

address such impacts when they occur.”[23] The scope and nature of due diligence varies from enterprise to enterprise, depending on the size and nature of each company.

In Chapter 6 on the environment, the Guidelines note that companies should pursue the “development and provision of products or services that have no undue environmental impacts . . . ; reduce greenhouse gas emissions; are efficient in their consumption of energy and natural resources”[24] The chapter on general policies encourages companies to “engage with relevant stakeholders in order to provide meaningful opportunities . . . for projects or other activities that may significantly impact local communities.”[25] This provision, however, lacks a reference on how to obtain consent of the community in which the company operates.[26]

The Guidelines also include a new, improved procedural guide on implementation under the National Contact Points (“NCPs”). NCPs monitor compliance of business enterprises with the *Guidelines*. Under the new provisions, the NCPs are “composed and organised such that they provide an effective basis for dealing with the broad range of issues covered by the *Guidelines*” and must “enable the NCP to operate in an impartial manner while maintaining an adequate level of accountability to the adhering government.”[27] The Commentary on the procedural guidance also includes provisions on the impartiality and independence of NCPs. It notes that they should ensure both “impartiality in the resolution of specific instances”[28] and “that the parties can engage in the process on fair and equitable terms.”[29] The Commentary also encourages cooperation among the NCPs of the home and host country of a multinational enterprise when necessary. Moreover, it promotes “appropriate assistance”[30] in “a timely manner.”[31]

The Guidelines include stronger provisions on transparency,[32] emphasizing the importance of “striking a balance between transparency and confidentiality in order to build confidence in the Guidelines procedures and to promote their effective implementation.”[33] The updated Commentary also includes a new provision on the role of the international network of non-governmental organizations—OECD Watch.[34] When a NCP is not complying with procedural obligations in specific instances under the OECD Guidelines, an adhering country, an advisory body, or OECD Watch can send “a substantiated submission” that will be considered by the OECD Committee.[35] Special attention is paid to tax compliance, where a new provision requires that “transparency and tax compliance . . . be reflected in risk management systems, structures and policies.”[36]

Analysis and Conclusion

The major weakness of the OECD Guidelines is their unenforceability. The 2010 Update fails to address this issue. The OECD press release on the adoption of the Guidelines notes that “a new, tougher process for complaints and mediation has also been put in place.”[37] Despite this change, the new system does not advance the rights of victims. Similarly, the OECD Watch notes the “update’s failure to clarify the NCP’s role in making determinations on the observance of the Guidelines when mediation has failed.”[38]

Minor changes to the procedural guidance cannot overcome the deficiencies in the implementation framework of the OECD Guidelines. Furthermore, the monitoring system of the OECD Guidelines still does not require an NCP to deliver a final statement concerning every complaint made.[39] The OECD Guidelines’ protection and promotion suffers generally from a lack of effective enforcement. This explains the high number of unenforced decisions of NCPs.[40] However, until the implementation of the Guidelines remains

unreformed, a vital part of victims' access to justice will continue to be deficient.

Three main proposals can be offered with regard to bolstering the existing system of NCPs. First, the complaint mechanism under the OECD Guidelines could be transformed into a quasi-legal employment tribunal to deal with complaints. A proposal for a model NCP along these lines was submitted.^[41] The creation of an independent and impartial supervisory mechanism of the OECD Guidelines is another alternative. Another option is to establish the role of an ombudsman, who would represent the public interest by investigating and addressing complaints against the work of respective NCPs. Arguably, the implementation procedure under the Guidelines must be strengthened in order for the system of NCPs to effectively regulate multinational enterprises' activities. While the 2011 Update of the Guidelines is a step in the right direction, the OECD Guidelines, along with other international initiatives, are still a far cry from an independent forum to appropriately respond to corporate human rights abuses.

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Endnotes:

[1] 2011 Update of the OECD Guidelines for Multinational Enterprises, *available at* http://www.oecd.org/document/33/0,3746,en_2649_34889_44086753_1_1_1_1,00.html [hereinafter OECD Guidelines].

[2] The 2011 Update of the OECD Guidelines, Background to the Update, http://www.oecd.org/document/28/0,3746,en_2649_34889_2397532_1_1_1_1,00.html.

[3] The OECD Guidelines are divided into eleven chapters: Concepts and Principles; General Policies; Disclosure; Human Rights; Employment and Industrial Relations; Environment; Combating Bribery, Bribe Solicitation and Extortion; Consumer Interests; Science and Technology; Competition; and Taxation.

[4] *Id.*

[5] John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Report to the U.N. Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Protect, Respect and Remedy: A Framework for Business and Human Rights, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008), *available at* <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> [hereinafter 2008 Ruggie Report].

[6] Organisation for Economic Co-operation and Development [OECD], Annual Meeting of the National Contact Points for the OECD Guidelines for Multinational Enterprises, Report by the Chair of the 2009 Annual Meeting, ¶ 10, DAF/INV/NCP(2009)1/FINAL (Sept. 29, 2009), *available at* [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/INV/NCP\(2009\)1/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/INV/NCP(2009)1/FINAL&docLanguage=En).

[7] OECD Guidelines, *supra* note 1, at 17 (Concepts and Principles).

[8] 2008 Ruggie Report, *supra* note 5.

[9] OECD Guidelines, *supra* note 1, at 31.

[10] Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, ¶ 37 [hereinafter Commentary].

[11] OECD Guidelines, *supra* note 1, at 31 (Human Rights).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] See Business and Human Rights Resource Centre, Company Policy Statements on Human Rights, <http://www.business-humanrights.org/Documents/Policies>.

[18] OECD Guidelines, *supra* note 1, at 31.

[19] *Id.* at 20.

[20] *Id.* at 19.

[21] *Id.* at 20.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 43.

[25] *Id.* at 20.

[26] OECD Watch, OECD Watch Statement on the Update of the OECD Guidelines for MNEs, at 2 (May 25, 2011), *available at* http://oecdwatch.org/publications-en/Publication_3675/at_download/fullfile [hereinafter OECD Watch Statement].

[27] OECD Guidelines, *supra* note 1, at 71 (Procedural Guidance).

[28] Commentary, *supra* note 10, at 82, ¶ 22.

[29] *Id.*

[30] *Id.* ¶ 23.

[31] *Id.*

[32] *Id.*, at 79, ¶ 9.

[33] *Id.* ¶ 38.

[34] See OECD Watch, <http://oecdwatch.org/> (stating that “OECD Watch is an international network of 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.”).

[35] Commentary, *supra* note 10, ¶ 47.

[36] OECD Guidelines, *supra* note 1, at 60.

[37] OECD, Press Release, New OECD Guidelines to Protect Human Rights and Social Development, *available at* http://www.oecd.org/document/19/0,3746,en_21571361_44315115_48029523_1_1_1_1,00.html.

[38] OECD Watch Statement, *supra* note 26, at 4.

[39] Commentary, *supra* note 10, ¶¶ 25-37. See also OECD Watch Statement, *supra* note 26, at 4.

[40] See, e.g., Larry Catá Becker, *Rights and Accountability in Development (Raid) V Das Air (July 21, 2008) And Global Witness V Afrimex (August 28, 2008)*; *Small Steps Toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*, 10 *Melb. U.L. Rev.* 258 (2009).

[41] See Tim Steinweg & Joris Oldenziel, *By Invitation: The OECD Guidelines for Multinational Enterprises: A Modest Proposal* (Aug. 7, 2007), <http://www.ethicalcorp.com/content.asp?ContentID=5299>.