

Business and Human Rights – Recommendations and Remedy under the 2011 OECD Guidelines for Multinational Enterprises

This contribution will concisely describe the new human rights provisions of the recently updated OECD Guidelines for Multinational Enterprises and how the National Contact Points (NCPs) of the countries adhering to these Guidelines can provide remedy where adverse impacts of an enterprise’s activities occur in a specific instance.

Introduction

Since the mid seventies, the member states of the Organisation for Economic Co-operation and Development (OECD) have promoted responsible business conduct with the enterprises operating in and from their territories through the OECD Guidelines for Multinational Enterprises. These Guidelines are part of the OECD Declaration on International Investment and were created as recommendations to enterprises, next to the obligations of OECD member states that follow from the Declaration.

The Guidelines have been modified several times, most notably in June 2000 and in May this year. The publication by Professor Ruggie of his first report in 2008, setting out the Protect, Respect and Remedy framework, was one of the catalysers in the OECD community to consider an update of the Guidelines. It was viewed that the 2000 text of the Guidelines fell short in the areas of human rights and responsibility for business relationships, most notably in the supply chain. Furthermore, stakeholders were dissatisfied with the overall functioning of the NCPs. The updated text, presented by US Secretary of State Ms. Hillary Clinton during the OECD’s 50th Anniversary Ministerial Council Meeting of last May, now includes a special chapter dedicated to human rights, contains detailed recommendations regarding business relationships, and has a much more detailed procedural guidance for the NCPs.

The Human Rights Chapter

The Working Party of the OECD Investment Committee, which carried out the negotiations on the update of the Guidelines, worked very closely with the team of Professor Ruggie to ascertain that the updated Guidelines would be fully aligned with the Ruggie framework and his Guiding Principles. This was important not only in light of coherence, but also proved to be a prerequisite to keep stakeholders – business, labour unions and NGOs – on board.

The human rights chapter is relatively concise and accompanied by a more detailed commentary. After starting off with the explicit recognition that states have a duty to protect human rights in its chapeau,¹ the chapter states that enterprises should respect human rights² in all the three kinds of activities that Professor Ruggie has identified: own activities to which one can 1) cause or 2) contribute to adverse human rights impacts³, or 3) adverse human rights impacts to which one’s activities or products can be directly linked through a business relationship.⁴ Whereas these first provisions are centered around the adhering countries expectations with regards to the ‘ends’, the last three paragraphs deal more with the ‘means’. They state that enterprises need to have a policy commitment regarding human rights, carry out human rights due diligence, and provide for or co-operate in legitimate remediation

¹ OECD Guidelines for Multinational Enterprises, Chapter IV, chapeau.

² *Idem*, paragraph 1

³ *Idem*, paragraph 2

⁴ *Idem*, paragraph 3

processes.⁵ Although chapter II on ‘General Policies’ already recommends enterprises to carry out due diligence, which would also cover due diligence on human rights issues, it was recognized that human rights due diligence differs from due diligence regarding other areas of responsible business conduct, because it deals with internationally recognized rights of which infringements have a graver impact on people than the non-observance of other recommendations of the Guidelines.

The last paragraph of the Commentary on the human rights chapter, which comments on the recommendation to provide for or co-operate in legitimate remediation processes, states that enterprises can do so by having in place a company-level grievance mechanism, which should meet the seven effectiveness criteria Professor Ruggie identified for such mechanisms⁶, or by co-operating with judicial or state-based non-judicial procedures, including the NCP procedure.

The NCP Procedure

One of the main results of the 2000 revision of the Guidelines was the creation of the so-called specific instance procedure with the NCPs. The idea was that NCPs could assist enterprises and their stakeholders in the informal resolution of issues that could raise in relation to the implementation of the Guidelines by an enterprise *in a specific instance*. NCPs could offer their good offices, including mediation, but would issue a statement and make recommendations as appropriate when the parties involved could not reach agreement.

In the recent past, civil society and the labor unions have frequently aired their dissatisfaction with the overall performance of the NCP system. Also Professor Ruggie questioned the functioning of the NCPs in his 2008 report, although recognizing their potential.⁷ In conducting the update, the adhering countries⁸ have sought to address many of the issues concerning the functioning of the NCPs while not changing the voluntary and problem-solving nature of the procedure. First eye-catcher in this regard is the inclusion in the Council Decision on the Guidelines that adhering countries should provide their NCPs with necessary human and financial resources to fulfill their tasks.⁹

On the level of principles, the ‘missing’ effectiveness criteria in the already existing core NCP criteria of visibility, accessibility, transparency and accountability have been added in the NCP Procedural Guidance under the guidance for dealing with specific instances. While being predictable, equitable and rights-compatible have been included literally, legitimacy has been interpreted as impartiality. After all, the legitimacy of the existence of NCPs is uncontested, but it is their functioning that has not always been viewed as impartial, so diminishing its perceived legitimacy.

The new and already existing criteria have been given more flesh to the bone by expanding the practical guidance for NCPs on what to do in certain situations. For example, the three

⁵ Idem, paragraphs 4 to 6 respectively

⁶ Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, paragraph 31: legitimate, accessible, predictable, equitable, compatible with internationally recognized human rights, transparency, being a source for continuous learning and based on dialogue and engagement with a view to seeking agreed solutions.

⁷ 2008 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, paragraph 98, 7 April 2008

⁸ Next to the 34 OECD member states, there are eight non-member states that adhere to the OECD Declaration on International Investment: Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania.

⁹ Decision of the Council on the OECD Guidelines for Multinational Enterprises, section I, article 4

stages of the procedure – initial assessment, the NCP’s good offices, conclusion – have been more clearly specified and provided with indicative timeframes and with guidance on transparency and confidentiality, such as specifying the kind of statement NCPs should issue under which circumstances and what such statement should touch upon. In each case, NCPs will have to make public the complaint they have received and what they have done in assisting the parties, either by making a statement in which an NCP will take a position or by issuing a report on how the parties have managed to resolve their issues.

Furthermore, the Procedural Guidance and its Commentary now more clearly describe how NCPs should co-operate with one another when complaints arise in several adhering countries, and how they should deal with the occurrence of parallel procedures on (partially) the same issues, which has been identified by civil society as one of the main reasons for NCPs to quickly decide not to look into a complaint.

Conclusion

The updated OECD Guidelines for Multinational Enterprises are a broadly supported carrier for the UN Guiding Principles on Business and Human Rights. The way they were drafted is a clear sign of growing international policy coherence on responsible business conduct, an increased coherence that should also materialize with regards to the manner in which NCPs function as a grievance mechanism, given the much elaborated procedural guidance. However, while the adhering countries and the stakeholder groups have generally been satisfied with the outcome, most notably in the field of human rights, supply chain responsibility and the NCP procedures, we are all aware that the real work of promoting and implementing the Guidelines, both by enterprises and NCPs, has only just begun. The Dutch government and its NCP are looking forward to making a solid contribution to this development.

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