

OECD Guidelines for Multinational Enterprises: a Glass Half Full

A Liber Amicorum
for Dr. Roel Nieuwenkamp,
Chair of the OECD Working Party
on Responsible Business
Conduct 2013-2018



Kingdom of the Netherlands

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FOREWORD

This book is a gift to Roel Nieuwenkamp to pay tribute to his work on the OECD Guidelines for Multinational Enterprises. He has spent many years promoting responsible business conduct with governments, companies, non-governmental organisations and trade unions. Initially in his capacity as Director of Trade Policies at the Ministry of Economic Affairs in the Netherlands and, since 2013, as the Chair of the OECD Working Party on Responsible Business Conduct. Five years later, as he steps down from his role as Chair, this *Liber Amicorum* compiles testimonies from academics close to him engaged in efforts to promote responsible business conduct.

Submissions from contributing authors address a number of themes: progressive expansion of the scope and increasing scale of norms and practices of responsible business conduct (John Ruggie), focus on stakeholder-based governance (Mervyn King), strengthening NCP roles and functional equivalence (Christine Kaufmann, Michael Addo, Larry Catá Backer, Maartje van Putten, Martijn Scheltema/Constance Kwant, Sander van 't Foort/Tineke Lambooy), stakeholder involvement (Ola Mestad), strengthening Pillar 3: 'Access to Remedy' (Joseph Wilde-Ramsing). Further perspectives offered are country-specific views on the United States (Lance Compa), China (Liang Xiaohui), India (Bimal Arora), the desired linkage with the United Nations Sustainable Development Goals (Teresa Fogelberg/Tim Mohin, Karin Buhmann, Rob van Tulder) and the academic grounding through the OECD Academic Network on Responsible Business Conduct (Raymond Saner).

Herman Mulder and Martijn Scheltema wrote the Synthesis and further perspectives. All contributions solely represent the views of the respective authors.

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Future perspectives:
doing good but avoiding
SDG-washing
Creating relevant societal
value without causing harm

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INTRODUCTION

Since their adoption in September 2015 by the United Nations (UN) General Assembly, the Sustainable Development Goals (SDGs) have led to two main strands in the literature and practice-oriented debates. One asks how companies can contribute to implementing the SDGs as a way to contribute value to society through doing good^{1,2}. Concerned with ‘SDG-washing’, a second and more critical strand voiced by company leaders, international economic organisations such as the OECD practice-oriented experts³ and scholars^{4,5} warns that contributing to the SDGs cannot justify deviating from the ‘do-no-harm’ approach that has spurred much theory and practice on responsible business conduct (RBC). Concern has been raised that economic actors’ shift of focus *from* not doing harm *onto* SDG interventions aiming to do good may occur without adequate assessment of potential risks of adverse impacts. Concern has also been voiced that companies may engage in ‘cherry-picking’ rather than contribute to needs that are contextually relevant and salient. Recently, the CEO of the Global Compact has joined these voices, highlighting the need for companies to consider the full spectrum of their impacts and continue paying attention to the Global Compact Principles and the UN Guiding Principles (UNGPs) on Business and Human Rights.⁶ Among the various calls for a comprehensive approach to the SDGs this is perhaps the most striking. It re-introduces an emphasis on not doing harm after



the UN Global Compact Office since 2015 has focused much of its communication through its website (which is the initiative’s main communication channel) to the SDGs and the emphasis of SDGs on business opportunities for innovation and contributions to doing good.

These views indicate a need for methods and guidance for combining the moral imperative to do no harm with the ‘do good’ approach that informs the SDGs and in particular SDG 17. Whereas SDGs 1-16 concern a range of public policy objectives and are addressed to states, SDG 17 is addressed to business enterprises.⁷ It calls upon them to contribute to the implementation of SDGs 1-16 in support of governments and create value for society

through their knowledge, expertise, technology and financial resources. Target 67 under SDG 17 makes explicit reference to the UNGPs as a foundation for a dynamic and well-functioning business sector that does not cause harm. Hence, the connection between the SDGs and RBC is already present in principle. But the concerns noted above indicate that it needs to be operationalised.

Given the practice of the OECD to issue guidance for economic actors in regard to RBC in accordance with the OECD Guidelines for Multinational Enterprises (Guidelines) and the policy support its work in the field enjoys, the OECD is well placed to develop guidance for implementing the SDGs in a manner that does not cause harm. As this short piece describes, this may also offer opportunities to help companies identify SDG interventions that are contextually relevant. As outlined below, this may be done through a comprehensive approach to risk-based due diligence (DD), a practice that is prescribed by the Guidelines. The main lines of such an approach are set out in here and can be elaborated through a multi-stakeholder process towards a guidance instrument.

RISK-BASED DUE DILIGENCE AND BUSINESS CONTRIBUTIONS TO HUMAN RIGHTS AND PUBLIC GOODS

The SDGs and debates on their implementation complement two theory-currents related to RBC: business-and-human-rights (BHR) and political corporate social responsibility (PCSR). While BHR scholarship emphasises that companies should avoid causing harm, the PCSR literature takes its cue from the capacity of business to contribute to society by complementing governments in the delivery of public goods.

Originating with the 2008 UN ‘Protect, Respect and Remedy’ Framework (UN 2008, ‘Framework’), risk-based DD was elaborated by the UNGPs and adopted by the OECD through its 2011 revision of the Guidelines, extending DD beyond human rights to several other RBC issues. Motivated by a pragmatic aim of reaching a normative product likely to be adopted, the Framework and the UNGPs adopt a ‘do-no-harm’ focus and offer risk-based DD for firms to identify, prevent, mitigate, account for and remedy their adverse human rights impacts.⁸ The construction of risk-based DD is a significant contribution to recent year’s RBC literature and practical guidance.

Pre-empting the SDGs, some scholars have been arguing for increased emphasis on how business enterprises may contribute to the fulfilment of human rights^{9,10} and delivering public goods in a more general sense^{11,12}. PCSR scholars have advanced the latter argument, based on the theory’s argument that companies should help fill governance gaps in various ways. Based on an idea of companies thereby assuming roles that are technically governmental (or ‘political’), PCSR theory has, however, been argued to be lacking in practical operability for companies to identify social needs and act where governments fail^{13,14}. From this perspective, the SDGs can offer direction, especially if companies apply themselves to using their strength to help advance needs related to SDG 1-16 that arise due to lack of governmental activity or presence. However, risks remain that companies may cause or contribute to harm as they aim to do good. Studies demonstrate that businesses can contribute to human-rights-related social needs and policy objectives, such as education and health services, but the human rights relevance is rarely explicated.

Many SDGs relate to human rights of a socio-economic nature (such as food, education, health services, non-discrimination, employment, working conditions (SDGs 2-6, 8) and the provision of related public goods. Some SDGs may spur increased activities that are known for causing human rights risk (for example land and community rights in the agricultural industry for non-carbon-based energy (SDG 7)).

IDENTIFYING OPPORTUNITIES FOR DOING GOOD WHILE MANAGING RISKS OF CAUSING HARM

Human-rights impact-assessment is a core element of risk-based DD, according to the Guidelines. As explained in the following, companies can benefit from this to identify human-rights-related needs, which they can turn into action to help fulfill human rights. The risk-based DD process includes complementary actions of assessing actual and potential human rights impacts in context, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. The process should involve meaningful consultation with potentially affected groups and other relevant stakeholders, taking into account the nature and context of the operation. Interestingly, social-impact-assessment theory finds that broad stakeholder consultation helps identify adverse impact as well as potential benefits of an operation, such as local needs that can be addressed.¹⁵

Consistent with the UNGPs, the Guidelines prescribe that when a company identifies a risk of contributing to an adverse impact (for example in its supply chain), it should use its leverage (influence) to require or stimulate changed practices with business partners or governments to which the company is directly linked through its operations, product or services.

The fulfilment of human rights and provision of public goods can be affected by institutional defects. These may be addressed by training and capacity building based on systems that companies have in place, or are able to develop in innovative collaboration with local companies, authorities or experts. This applies for example to occupational health and safety (OHS) and related work-place training, or local administrative capacity to deliver and distribute socio-economic and other human rights in non-discriminatory fashions. Building OHS capacity can contribute to fulfilling rights to health, at the same time increasing up-times and production and lowering health-related expenses for the individual, the community and governments. Building administrative capacity with local authorities can contribute to individuals gaining access to public goods without discrimination, in line with the fundamental idea that human rights be enjoyed without distinction of any kind, such as race, gender, national or social origin, property, birth or other status.

To identify such opportunities, companies can extend DD with a dual focus: from a process to identify and manage potential or actual harm, into also identifying societal needs to be translated into business potential for SDG contributions. Obtaining a broad understanding of societal needs allows the company to maximise the resources it already invests in the DD process. The assessment may identify contextual problems that cause or may enhance human rights risks. Considering context and the dynamic character of societal risks can enable the company to identify governance gaps that are within its capacity to address, possibly in collaboration with experts (consistent with the Guidelines). Once potential SDG-contributions have been identified, an impact assessment of planned activities should be made to ensure that no human rights risks are caused, and to adapt the activities if required.

Consider the following examples: reacting to deficient OHS practices in the supply chain need not be limited to leverage addressing business relations. It could be turned into training programmes for extended audiences, such as sectoral clusters in the community. Assessment of risks of causing adverse health impacts through emission of product-redundancies into fresh-water sources may find local processes for rinsing water deficient, or that wells are simply lacking. These problems can raise the company's own human rights-risks because access to water is already precarious. The company can help build knowledge with communities, local companies and authorities of appropriate filter processes, complemented by capacity building for measurements and maintenance and the planning and establishments of wells.

The dually focused DD process constitutes a continuum with three connected focal points, leading to a new similar continuum: at one end are societal risks that the company may cause or contribute to. These must be addressed directly. In the middle, adverse impacts that the company is linked to through operations, services or products of its business relations. These require the company to exercise leverage with private or public actors, whether acting in economic or governance capacities. Finally, human-rights-needs non-related to the company but potentially within its capacity and contextual strength, offering potential SDG contributions. The 'do-good' element of the continuum connects back to the 'do-no-harm' element through an assessment of human-rights-risks of proposed contributions, leading to a new process assessing risks of causing or contributing; business-relations-related risks that call for leverage; and SDG-opportunities.

CONCLUSION

This short piece has shared some thoughts on how the Guidelines may help companies navigate the risk of SDG-washing by ensuring that their SDG-efforts are both meaningful to society and do not cause harm. In regard to business contributions to the SDGs, it has been argued that companies should take point of departure in institutional and governance gaps that constitute risks of adverse societal impacts, and proceed on that basis to help address the gaps. Comprehensive engagement with the Guidelines' risk-based DD approach can help companies not only identify and manage risk of adverse impacts, but also identify potential ways in which they may contribute to society and ensure that such interventions, in turn, are designed in a manner so as not to cause harm.

Developing guidance for this may provide opportunities for the OECD, in collaboration with UN human rights experts, to advance the contributions of the Guidelines in a manner that complements the SDGs while ensuring respect for other key instruments on RBC, not least the UNGPs.

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The Guidelines (Chapter V) already cover companies' contributions to local employment and capacity building. Extending guidance to include a dual DD perspective offers opportunities to further combine the Guidelines' 'do-no-harm' and 'do-good' objectives. As identifying contextual risks is already part of DD, expanding the focus to a contextual needs-assessment can help generate more value for the company as well as society. Contributing to handling governance gaps and societal needs may even help the company manage risks of adverse impacts. The brevity of this chapter does not do justice to the complexity and inter-connectedness of such actions, but future OECD guidance may do so.

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