

### Identified gap in the OECD Guidelines: definition of a multinational enterprise and scope of applicability of the Guidelines

**Outcome sought:** Broad and comprehensive stocktaking of the OECD Guidelines for Multinational Enterprises (Guidelines) that addresses gaps on the definition of a multinational enterprise (MNE) and scope of applicability of the Guidelines.

**Problem: The OECD Guidelines do not adequately clarify the broad range of types of organisations that may be MNEs and the applicability of the Guidelines to states acting as economic actors**

A growing number of entities are operating in the commercial sphere and causing, contributing to, or being directly linked to adverse impacts on human rights and the environment. These include non-profit sports federations linked to allegations of money-laundering, sex trafficking, and labour rights violations; non-profit multi-stakeholder or industry sustainability certification initiatives failing to investigate and address harmful impacts of corporations receiving their certifications; social auditing companies engaged to conduct due diligence for companies and failure to identify human rights abuses; holding companies holding shares in corporations causing various harmful impacts such as labour rights violations or tax avoidance; government pension funds investing in corporations causing environmental degradation; and states acting as economic actors supporting licensing and permitting, conducting procurement, awarding government contracts, establishing special economic zones, or providing export credits in a manner that does not consistently uphold good due diligence practice. Growing awareness of the adverse impacts caused by these entities has led to an increase of specific instances filed to OECD National Contact Points (NCPs) concerning the adverse impacts of them. This increase demonstrates both the need for clear standards on responsible business conduct for all entities operating in close and influential relation to international commerce and the lack of other avenues to remedy for victims of the harms identified.

In Chapter I (Concepts and Principles) of the OECD Guidelines, the Guidelines purposely do not set a specific definition for the MNE. They expressly state that the Guidelines do not seek to introduce differences in treatment between multinational and domestic enterprises, but reflect good practice for all. They also clarify that governments wish to encourage the widest possible observance of the Guidelines. Moreover, OECD States are increasingly interested in promoting policy coherence across the private sector and government entities. Unfortunately, a number of the specific instances filed to NCPs against non-traditional MNEs have been rejected on grounds that the entities are not MNEs. These rejections suggest that the *lack of specificity in the Guidelines* regarding the breadth of the definition of MNE, and/or *the lack of commentary urging a broad interpretation of the term* in order to facilitate promotion of the Guidelines and resolution of specific instances, is not helping governments reach their stated goal of encouraging the widest possible observance of the Guidelines and policy coherence across private and public sector economic actors. The Guidelines do not adequately clarify that they apply to all entities engaging in, pursuing, or facilitating commercial or business activity in the international or transnational sphere. Relatedly, the Guidelines' focus on "supply" chain due diligence versus "value" chain due diligence in Chapter II (General Policies), does not help in clarifying that the Guidelines' due diligence and other requirements do apply to MNEs that have no supplier relationship, but nevertheless a business relationship, that may place them in a position of causing, contributing to, or being directly linked to adverse impacts, to include financiers, lobbyists, auditors, consultants, and contractors.

**Impact of the problem: Lack of clear explanation in the Guidelines of the broad scope of covered MNEs and broad applicability of the Guidelines in the context of the state-business nexus**

The lack of clarity and guiding commentary in the Guidelines as to breadth in the range of entities that may qualify as MNEs under the Guidelines has the following impacts:

- 1) A perceived lack of expectations on RBC for a diverse range of non-traditional MNEs, creating a double standard in conduct among different actors operating together in the sphere of international commerce; and
- 2) Low accountability and remedy for the harms of such enterprises;
  - a. As mentioned, several complaints against non-traditional MNEs have been rejected on grounds that the entities at issue are not covered by the OECD Guidelines.<sup>1</sup> These rejections generate the perception that the standards in the Guidelines do not apply to these entities despite the fact that they are undertaking or facilitating commercial activities in an international setting. The rejections also leave impacted workers and communities with little or no other avenue to remedy for the harmful impacts incurred through activities associated with these entities.

### **Parallel principles and standards**

Analysis of gaps regarding the definition of MNE and the scope of applicability of the Guidelines could refer to the following:

- The United Nations Guiding Principles, which apply broadly “to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure;”<sup>2</sup>
- The OECD’s work (via the Working Party on Responsible Business Conduct and the Working Party of Leading Practitioners of Public Procurement) encouraging greater focus on RBC principles on public procurement practices;
- National, regional and international development agencies’ environmental and social governance requirements for private sector partners, demonstrating increased attention to their own impacts via their business relationships. For example, the Safeguard Policies of the World Bank,<sup>3</sup> DFID’s Supply Partner Code of Conduct<sup>4</sup> and USAID’s Private Sector Engagement Policy;<sup>5</sup> and
- Specific guidance, such as the Danish Institute for Human Rights’ advocacy around protecting human rights through public procurement.<sup>6</sup>

### **Why ensuring a comprehensive stocktaking on gaps is important**

The OECD Guidelines, originally drafted in 1976, have not been revised since 2011 and are out of date in many ways. Ten years of implementation of the current text of the Guidelines have revealed numerous gaps in the text that cause both a serious lack of clarity and coherence in international norms on key elements of responsible business conduct, and diminish victims’ chances for remedy and accountability via the NCPs. Meanwhile, recent developments in RBC standards made beyond the OECD Investment Committee are threatening to make the OECD Guidelines comparatively less useful or even obsolete. The OECD Investment Committee’s Working Party on Responsible Business Conduct (WPRBC), responsible for the OECD Guidelines, has begun a stocktaking to identify what gaps exist in the Guidelines and assess whether steps are needed to address them. A comprehensive stocktaking that addresses all the gaps identified by civil society and other stakeholders is essential to evaluate whether the Guidelines are still fit for purpose.

### **Who needs to act?**

OECD Watch urges governments to show commitment to keeping the OECD Guidelines up to date with evolving issues in the field of business and human rights – and acknowledge civil society’s concerns regarding the current limitations in the Guidelines’ standards and the NCP complaint system – by ensuring that the stocktaking studies all the issues of concern to civil society. OECD Watch also urges that states ensure the final stocktaking report responds to each concern raised by



civil society. OECD Watch welcomes the stocktaking and stands ready to support the review process and any further steps taken to address gaps identified.

### About OECD Watch

OECD Watch is a global network with over 130 member organisations in more than 50 countries. Founded in 2003, OECD Watch's primary aim is to help support CSO activities related to the OECD Guidelines and the work of the OECD's Investment Committee. Membership consists of a diverse range of civil society organisations – from human rights to environmental and development organisations, from grassroots groups to large, international NGOs – bound together by their commitment to ensuring that business activity contributes to sustainable development and poverty eradication, and that corporations are held accountable for their adverse impacts around the globe. For more information, please visit [www.oecdwatch.org](http://www.oecdwatch.org).

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<sup>1</sup> See, e.g., Responsible Business Conduct Centre, "Considering the purpose of the Guidelines and the notion of 'multinational enterprise' in the context of initial assessments," DAF/INV/NCP(2020)54, 15 October 2020.

<sup>2</sup> United Nations Guiding Principles, General Principles, p. 1.

<sup>3</sup> World Bank, Safeguard Policies, available at: <https://www.worldbank.org/en/projects-operations/environmental-and-social-policies>.

<sup>4</sup> DFID, Supply Partner Code of Conduct, available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/750988/Supply-Partner-Code-August-2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/750988/Supply-Partner-Code-August-2018.pdf).

<sup>5</sup> USAID, Private-Sector Engagement Policy, available at: <https://www.usaid.gov/work-usaid/private-sector-engagement>.

<sup>6</sup> See, e.g. The Danish Institute for Human Rights, "Driving change through public procurement: A toolkit on human rights for policy makers and public buyers," 28 February 2020, available at: <https://www.humanrights.dk/publications/driving-change-through-public-procurement>.

