OECD Watch

Identified gap in the OECD Guidelines: standards on tax compliance

Outcome sought: Broad and comprehensive stocktaking of the OECD Guidelines for Multinational Enterprises (Guidelines) that addresses gaps in standards for tax compliance.

Problem: The OECD Guidelines do not reflect new public attitudes and the OECD's own BEPS initiative on the importance of eschewing corporate tax avoidance
Tax avoidance – the *legal* avoidance or minimization of tax payments and capital flight, not to be confused with tax evasion, which is illegal – is a serious problem costing the world exorbitantly in lost tax revenues. Corporations avoid taxes through legal means by taking advantage of policy loopholes, legislative gaps, and tax havens. The Tax Justice Network estimated in 2020 that $245 billion is lost annually as a direct result of corporate tax abuse by MNEs, and that MNEs annually shift a full $1.38 trillion from the countries in which they make their profits to tax havens.[1] Tax avoidance directly reduces the revenues of states, limiting their ability to fund critical public services such as health care, education, and infrastructure that benefit citizens as well as corporations. Tax avoidance also unduly elevates the power of corporations vis-à-vis workers and governments. Until the 2008 financial crises, tax avoidance was considered unremarkable and accepted practice of MNEs to reduce their tax liability; by using artificial business structures and transactions (e.g. internal loans to wholly-owned letterbox companies) MNEs manipulate mismatched tax laws in different legal jurisdictions to spirit profits away from taxing countries into those with little to no corporate tax rate.

The financial crisis, followed by a series of financial scandals exposing the low tax burdens of well-known MNEs such as Starbucks and Amazon, prompted policy makers and the public to re-evaluate the double standard condoning MNEs' wilful avoidance of their tax obligations. Broad public consensus now holds that tax avoidance should stop, and international and regional organizations such as the G20, OECD, United Nations, and European Union have begun developing new tax norms to protect against corporate tax avoidance. In 2015 the OECD took the lead globally in developing a package of policy measures to combat tax avoidance through the OECD/G20 Inclusive Framework on BEPS ("Base Erosion and Profit Shifting"). This ground-breaking package contains 15 actions that governments can take to combat tax avoidance, on topics ranging from taxation of the digital economy to combating harmful tax practices and increasing transparency.[2] These policy measures have been implemented by governments across the globe and represent a major step forward in the fight against tax avoidance. The Framework presents clear and detailed language on what constitutes tax avoidance (base erosion and profit shifting) and what can be considered a harmful tax practice. The OECD is greatly remiss in not including or referencing the OECD BEPS project in its own OECD Guidelines.

The OECD Guidelines – the preeminent standard for MNEs in all sectors on responsible business conduct (RBC) – should reflect current norms against tax avoidance, but its outdated provisions fall far short. The extremely brief (with just two principles) Chapter on Taxation (XI) does not mention the term tax avoidance nor set an expectation that MNEs should eschew tax avoidance. The text currently only asks MNEs to obey the letter and spirit of tax law; unhelpful, because a company present in a tax haven is obeying the letter of the national law by not paying any tax, and potentially the "spirit" as well. The Guidelines should, but do not, simply clarify that MNEs should eschew tax avoidance. The chapter asserts that corporations need not pay more than that legally required of them, without identifying manipulation of conflicting legal requirements to minimize tax liability as irresponsible business conduct. The chapter also discourages "inappropriate" shifting of profits and losses through transfer pricing, a positive step, but does not single out inappropriate shifting of profits and losses through other financial methods such as internal loans. The chapter also does not underscore the link between payment of taxes and fulfilment of other corporate responsibilities around respect for human rights. Critically, neither the Taxation chapter nor Disclosure chapter (III) specifically demands disclosure of country-by-country reporting, corporate structure, profits earned and tax payments made, and financial transactions that would facilitate identification of tax avoidance.

Impact of the problem: Lack of clear standards on tax avoidance for MNEs and limited ability for victims to seek remedy via the National Contact Point (NCP) grievance mechanisms.
The Guidelines' weak standards for MNEs on taxation and tax-related disclosure have two harmful impacts:

1) Lack of clear expectations for MNEs to eschew tax avoidance; and
2) Diminished ability of victims of tax avoidance to seek remedy by filing specific instances to NCPs.
    a. In OECD Watch's experience, it is difficult to show evidence of tax avoidance in specific instances because transparency is so poor over the relevant MNE structures and transactions. Notifiers must rely on showing only clues that suggest a systematic effort to minimize tax payments. Further, while two specific instances have been filed by NGOs and unions directly alleging tax avoidance and arguing that the avoidance violates the spirit of a relevant law, neither has been accepted. The handling of these cases suggests both that NCPs cannot easily evaluate the low evidence of avoidance, nor easily interpret the Guidelines' text as discouraging tax avoidance.[3]

Parallel laws and standards
The stocktaking on gaps in the Guidelines related to taxation and tax avoidance should consider developments on these issues in various international initiatives, including:

- The OECD's "Inclusive Framework on Base Erosion and Profit Shifting" initiative and the corporate rules and regulations laid out in the 15 BEPS Actions;
- The Global Reporting Initiative (GRI)'s "GRI 207: Tax standard"[4], a new development in voluntary sustainability reporting. The GRI standard is used by 75% of the world's 250 largest companies; and
- EU standards on tax avoidance.[5]

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.

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[1] Tax Justice Network, "$427bn lost to tax havens every year; landmark study reveals countries' losses and worst offenders," 20 November 2020, available at: https://www.taxjustice.net/2020/11/20/427bn-lost-to-tax-havens-every-year-landmark-study-reveals-countries-losses-and-worst-offenders/.
[2] OECD/G20 Base Erosion and Profit Shifting Project – 2015 Final Report, Executive Summaries. OECD. http://www.oecd.org/ctp/beps-reports-2015-executive-summaries.pdf.
[3] See *War on Want & Change to Win vs. Alliance Boots*, OECD Watch complaint database, available at: https://complaints.oecdwatch.org/cases/Case_314; and FNV vs. Chevron, available at: https://www.somo.nl/first-ever-oecd-complaint-on-tax-avoidance-filed-against-chevrons-shell-companies/.
[4] GRI (2019), First global standard for tax transparency; https://www.globalreporting.org/information/news-and-press-center/Pages/First-global-standard-for-tax-transparency.aspx
[5] EU Package contains a.o. measures to prevent aggressive tax planning and boost tax transparency https://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package_en