

Advocacy brief: Arguments for updating the OECD Guidelines to improve business standards around anticorruption

Outcome sought: Update of the OECD Guidelines for Multinational Enterprises (Guidelines) to better specify expectations for multinational enterprises (MNEs) on avoiding corruption.

Problems: The OECD Guidelines do not set adequate expectations for enterprises to undertake to avoid corruption in all its forms, nor do they adequately connect the issue of corruption to other topics in the Guidelines such as human rights, disclosure, and supply chain due diligence.

Human rights violations, environmental degradation, and corruption are strongly interlinked: where corruption occurs, social, ecological, and economic damage go hand-in-hand.¹ This connection is supported by corruption indices, such as Transparency International's Corruption Perceptions Index,² that show a strong correlation between countries with high levels of corruption and those with widespread human rights abuses. Transparency International defines corruption as "the abuse of entrusted power for private gain."³ Corruption undermines the ability of people to access public goods such as education and health care, because the public budget is deprived of much needed financial resources. Corruption also results in discriminatory access to public services, perpetuating power imbalances, stymying competition, and exacerbating inequality. While it is difficult to quantify the global impact of corruption on human rights and sustainable development, the World Economic Forum estimates its annual cost at around 3.6 trillion \$USD, about 1 trillion of which is lost through bribery.⁴

MNEs are often at risk of engaging in corruption directly or being linked to it through business partners such as other businesses or states, including in their value chains. While bribery is the primary example of corruption, the abuse can take several forms, including embezzlement and fraud, graft, favouritism or clientelism, extortion, and other activities that exploit compromised state institutions. Other corrupt MNE practices that underscore a link with the business and human rights agenda include opaque and illicit lobbying and/or campaign donations by businesses to pay reduced or no corporate taxes in countries of operation, skew public procurement practices towards unqualified firms, or influence legislative and regulatory processes,⁵ and use of a "revolving door" in employment between corporations and regulators to minimize regulation over businesses. These risks have only increased during the ongoing COVID-19 pandemic as governments circumvent competitive procurement processes in the name of a timely emergency response.⁶ Preventing corruption is essential in global value chains to ensure that human rights, labour rights, and environmental and consumer standards are protected and not undermined.

The OECD Guidelines – the preeminent standard on responsible business conduct (RBC) for MNEs – should set strong expectations for MNEs to avoid corruption across their value chains, but unfortunately, they fall short in several ways. The chapter ostensibly focused on corruption in the Guidelines – Chapter VII on Combatting Bribery, Bribe Solicitation, and Extortion – focuses only on two types of corruption (bribery and extortion), presenting an overly narrow view of what corruption entails. Although greater transparency is essential to combatting corruption, the Combatting Bribery chapter seeks transparency only in terms of anti-bribery commitments and related internal control systems, instead of transparency through country-by-country reporting. Disclosing the ultimate beneficial owner of a company is also crucial for effective law enforcement and sanctions as well as ensuring justice for corruption's victims, because anonymous companies are typically vehicles for illicit practices including money laundering, bribery, and tax avoidance. Transparency International has found that only 1 out of 83 countries reviewed ensures broad and timely public access to their



beneficial ownership and control of companies and other legal persons.⁷ But neither the Combatting Bribery chapter nor the chapter on Disclosure (III) addresses disclosure of beneficial ownership. Meanwhile, the Guidelines Human Rights chapter (IV) does not highlight expectations around protecting human rights defenders, including whistle-blowers exposing corrupt activities by corporations. Nor does the Consumer Interests chapter reflect the growing preference among consumers for products from companies with more transparent and sustainable (corruption-free) value chains.

Impact of the problem: Lack of clear standards on corruption for MNEs and limited ability for victims to seek remedy via the National Contact Point (NCP) grievance mechanisms

The gaps in the OECD Guidelines on corruption have two main consequences:

- 1) A lack of clarity in norms and expectations for MNEs regarding combatting corruption, yielding a lack of understanding by MNEs of corruption's links to human rights and environmental harm; and
- 2) Diminished grounds on which victims of corruption may seek remedy via the NCP grievance mechanisms.
 - a. Only eight out of 226 complaints filed by civil society groups or communities since 2011 have made a claim under Chapter VII, with only one making a clear reference to corruption.⁸ The low number of corruption-related complaints could result from the limited provisions in the Guidelines on which to base corruption claims, warranting expansion of those provisions.

Solution to the problem: Update the OECD Guidelines to improve expectations for MNEs on avoiding corruption

Simple changes to the Guidelines would clarify its scope over all corporate acts of corruption, and corruption's relevance to other issues in the Guidelines.

Chapter II (General Policies) should:

- In a principle or commentary, call for MNEs to take measurable steps to avoid and address corruption across their value chains and promote transparency over all their business dealings;
- Within that provision and/or related commentary, acknowledge corruption as a cross-cutting issue impacting MNEs' achievement of the other standards in the OECD Guidelines, including within the science & technology, consumer interests, and competition chapters as well as those on human rights, industrial and employment relations, and the environment.

Chapter III (Disclosure) should:

- Call for transparency on beneficial ownership as well as country-by-country reporting.

Chapter IV (Human Rights) commentary should be updated to:

- Ensure respect for the rights of human rights defenders, including whistle-blowers exposing corruption.

Chapter VII (Combatting Bribery) should:

- Be retitled to address corruption explicitly and be tweaked to cover corruption broadly, to include all the forms of corruption applicable to corporations;
- Ensure guidance in commentary such as by setting an expectation for the periodic review of internal controls and ethics and compliance programmes, including tracking and incorporating lessons learned from corruption incidents; ensuring training programs are tailored to include anticorruption guidance and are targeted to staff exposed to higher risk based on their region of

work and decision-making level, etc.; and establishing senior management-level commitment to fighting corruption;

- Clarify expectations on the scope of transparency expected, in line with chapter III.

Chapter VIII (Consumer Interests) could:

- Reflect in commentary the growing preference among consumers for products (including financial products) from companies with more transparent, sustainable, and corruption-free value chains.

Parallel laws and standards

An update to the Guidelines could draw on existing language on corruption in international agreements, national laws, industry standards and initiatives, or civil society guidance, such as:

- Guidance from the OECD such as the OECD Anti-Bribery Convention,⁹ the OECD's Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (addressing the need for periodic review of anti-corruption measures, among other things),¹⁰ and other standards and guidance of the OECD Working Group on Bribery;
- Guidance from international organizations including the United Nations Convention Against Corruption,¹¹ publications of the UN Working Group on Business and Human Rights connecting human right and corruption,¹² and other guidance of the UN Global Compact¹³, IMF, World Bank, and European Council;
- National laws such as the U.S. Foreign Corrupt Practices Act;¹⁴
- Business at OECD (BIAC)'s publication "Connecting the anti-corruption and human rights agendas: A guide for business and employers' organisations;"¹⁵
- Guidance from industry associations, chambers of commerce, banks and specialized service providers; and
- Guidance from NGOs such as Transparency International.

Why address this issue now?

The OECD Guidelines, originally drafted in 1976, have not been updated 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 and laws 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 completed a comprehensive stocktaking to identify what gaps exist in the Guidelines and assess whether an update is needed to close them. The stocktaking results show broad consensus among NCPs, stakeholders, and the public that the Guidelines are not adequately clear on this and other issues. The Investment Committee is now considering whether to update the Guidelines, as it has done every decade since 2001 and before that as well. Such an update would provide an opportunity for OECD governments to address the problems OECD Watch and others have identified. **Wholesale update is not needed. Instead, smart, targeted edits to principles and/or commentary in key sections would go a long way in closing the gaps.**

Who needs to act?



OECD governments should 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 over limitations in the Guidelines' standards and complaint system, by improving the Guidelines through a textual update. Governments have a critical opportunity right now to close the gaps identified by NCPs and stakeholders. OECD Watch asks all states to support ongoing discussion on specific textual edits on the issues civil society is prioritizing and encourages those states that wish to champion various concerns of civil society to present proposals to resolve the gaps found. OECD Watch stands ready to support individual states and the Committee during the anticipated update process.

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 UN Human Rights Council, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, "Connecting the business and human rights and the anticorruption agendas," 17 June 2020, available at: https://www.ohchr.org/Documents/Issues/Business/A_HRC_44_43_AdvanceEditedVersion.pdf.

² Transparency International, Corruption Perceptions Index, available at: <https://www.transparency.org/en/cpi/2019/index/nzl>.

³ Transparency International, 'What is Corruption?' (2020) <https://www.transparency.org/what-is-corruption#define>.

⁴ World Economic Forum, "3 ways to fight corruption and restore trust in leadership," 1 December 2020, available at https://www.weforum.org/agenda/2020/12/anti-corruption-transparency-restore-trust-in-leadership/?utm_source=sfmc&utm_medium=email&utm_campaign=2737721_Agenda_weekly-4December2020&utm_term=&emailType=Newsletter.

⁵ For an example of this regulatory capture in Europe, see Mind the Gap, "CASE STUDY: The German car industry's regulatory capture," 2020, available at: www.mindthegap.ngo/harmful-strategies/utilising-state-power/avoiding-regulations-through-corporate-lobbying/example-the-german-car-industrys-regulatory-capture/.

⁶ Transparency International, 'Written evidence submitted by Transparency International UK [1CGP0018]', December 2020, available at: <https://committees.parliament.uk/writtenevidence/18733/pdf/>.

⁷ Transparency International, "Who is behind the wheel? Fixing the global standards on company ownership," 12 September 2019, available at: https://images.transparencycdn.org/images/2019_Who_is_behind_the_wheel_EN.pdf.

⁸ *CED & RELUFA vs. SG Sustainable Oils Cameroon*, OECD Watch complaint database, https://complaints.oecdwatch.org/cases/Case_430.

⁹ OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997, available at: <http://www.oecd.org/corruption-integrity/explore/oecd-standards/anti-bribery-convention/>.

¹⁰ OECD Working Group on Bribery in International Business Transactions, "Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions," 2009, available at:

<https://www.oecd.org/corruption/anti-bribery/OECD-Anti-Bribery-Recommendation-ENG.pdf>

¹¹ United Nations, Convention Against Corruption, 2004, available at: <https://www.unodc.org/unodc/en/treaties/CAC/>

¹² UN Human Rights Council, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, “Connecting the business and human rights and the anticorruption agendas,” 17 June 2020, available at: https://www.ohchr.org/Documents/Issues/Business/A_HRC_44_43_AdvanceEditedVersion.pdf.

¹³ United Nations Global Compact, “Linking Human Rights & Anti-Corruption Compliance, 21 December 2016, available at: https://www.globalcompact.de/wAssets/docs/Korruptionspraevention/Publikationen/Human_Rights_and_Anti_Corruption_Compliance.pdf.

¹⁴ U.S. Department of Justice, Foreign Corrupt Practices Act, Overview, available at: <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>.

¹⁵ BIAC and IOE, “Connecting the anti-corruption and human rights agendas: A guide for business and employers’ organisations,” September 2020, available at: <https://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=147731&token=c0fecaf2120d7faf7e4214377a1754ab8170fd88>.