

Advocacy brief: Arguments for updating the OECD Guidelines to clarify the broad applicability of the Guidelines to non-traditional multinational enterprises

Outcome sought: Update of the OECD Guidelines for Multinational Enterprises (Guidelines) to clarify the broad scope of the definition of a multinational enterprise (MNE).

Problem: The OECD Guidelines do not adequately clarify the broad range of organisations that may constitute MNEs under the Guidelines, including states engaging in economic activity

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 failing 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.

Chapter I (Concepts and Principles) of the OECD Guidelines purposely sets no specific definition for the MNE, stating that the Guidelines do not seek to introduce differences in treatment between multinational and domestic enterprises, but reflect good practice for all, and clarifying that governments wish to encourage the widest possible observance of the Guidelines. But unfortunately, non-traditional MNEs frequently argue they are not multinational enterprises covered by the Guidelines, and NCPs have rejected several specific instances filed to NCPs against non-traditional MNEs on grounds that the entities are not MNEs covered by the Guidelines. The arguments of the entities, and the rejections by NCPs, 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 clarifying RBC expectations for all MNEs, nor 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. Relatedly, the 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 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 – such as holding companies and export credit agencies – have been rejected on grounds that the entities at issue are not covered by the OECD Guidelines.¹ 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.

Solution to the problem: Update the OECD Guidelines to clarify the broad definition of MNEs

Small additions to Chapter I would clarify the broad application of the Guidelines:

Chapter I (Concepts and Principles) should be updated to:

- Clarify that the Guidelines apply to all entities that undertake or facilitate commercial activity in the international sphere, to include non-profit organisations and multistakeholder initiatives or licensing bodies, government or government-sponsored entities when they engage in commercial activities, and other non-traditional MNEs. Language should clarify states' intent to ensure that strictly traditional understandings of what an MNE is should not be used to limit NCPs' application of the admissibility criteria in specific instances, and that broad interpretation of the definition of MNE helps states achieve the Guidelines' goals of encouraging the widest possible observance of the Guidelines, and promoting policy coherence.

Parallel principles and standards

Update of provisions of the Guidelines regarding the scope of covered entities could draw on 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;”²
- 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,³ DFID's Supply Partner Code of Conduct⁴ and USAID's Private Sector Engagement Policy;⁵ and
- Specific guidance, such as the Danish Institute for Human Rights' advocacy around protecting human rights through public procurement.⁶

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 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.

² United Nations Guiding Principles, General Principles, p. 1.

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

⁴ 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.

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

⁶ 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>.