OECD Watch

Advocacy brief: Arguments for updating the OECD Guidelines to improve business standards on taxation

Outcome sought: Update of the OECD Guidelines for Multinational Enterprises (Guidelines) to strengthen expectations for multinational enterprises (MNEs) on tax compliance.

Problem: The OECD Guidelines do not reflect new public attitudes and the OECD's own BEPS initiative on the importance for MNEs 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 by using artificial business structures and transactions (e.g. internal loans to wholly-owned letterbox companies) to manipulate mismatched tax laws in different legal jurisdictions and take advantage of tax havens to spirit profits away from taxing countries into those with little to no corporate tax rate. 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.

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 OECD, United Nations, G20, and European Union have begun developing new tax norms to discourage 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 Guidelines – the preeminent standard for MNEs in all sectors on responsible business conduct (RBC) – should reflect current norms against tax avoidance, including of the OECD BEPS initiative, 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 the term "spirit of the law" is vague and open to interpretation. At times, the spirit of the law may be to encourage tax avoidance, but the Guidelines should still clarify that *responsible* conduct entails eschewing 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 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. 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 corporate structures, tax payments, 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, the NCPs have struggled to apply the Guidelines' text to the issue of tax avoidance.[3]

Solution to the problem: Update the OECD Guidelines to set new minimum standards for corporate tax compliance.
Simple but important changes to a couple chapters in the Guidelines would bring them into alignment with the past decade's developments in public opinion and policy guidance on tax avoidance.

Chapter II (General Policies) should:

- Include a new provision identifying fair payment of taxes as a key element of RBC underpinning MNEs' fulfilment of the other expectations in the Guidelines. The provision should expect MNEs to eschew tax avoidance across their supply chains and promote transparency over all their business dealings, including payment of tax.

Chapter III (Disclosure) should call for MNEs to:

- Disclose information material to understanding their tax contributions, including all profits made and taxes paid per country and for what operations, all tax-related financial vehicles used, as well as country-by-country reporting, beneficial ownership, and corporate structure including of all holding and other letter box companies in their value chain.

Chapter XI (Taxation) should:

- In principles, call for MNEs to eschew tax avoidance across their supply chains and promote transparency over all their business dealings.
- In commentary, explain that MNEs should abandon practices designed to minimize their tax payments for profits earned, including by stopping their use of tax havens and artificial corporate structures such as letterbox companies with the aim of avoiding taxes, and their inappropriate shifting of profits and losses via various financial transaction, i.e. not only via transfer pricing but also internal loans, royalty payments for trademarks, and others.

Parallel laws and standards

An update to the Guidelines could draw on existing language on taxation in various international initiatives:

- 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 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. ***Wholescale 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] 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/ and https://www.oecdguidelines.nl/notifications/documents/publication/2021/06/22/ia-fnv-chevron.

[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