

## **Business at OECD (BIAC) initial comments on the stocktaking of the OECD MNE Guidelines**

Business, as represented by *Business at OECD* (BIAC), has long recognized the importance of responsible business conduct in a globalized world. *Business at OECD* considers responsible business conduct, as promoted by the MNE Guidelines, to be an essential part of an open investment climate and in the best interest of business. To that end, *Business at OECD* is working closely with its member organizations and multinational enterprises in order to raise the visibility of the MNE Guidelines.

*Business at OECD* is pleased to present initial comments on the stocktaking of the OECD MNE Guidelines and stands ready to contribute as this process moves forward. The remarks presented below are grouped around the items outlined in the *Roadmap for a stocktaking of the OECD Guidelines for Multinational Enterprises* (DAF/INV/RBC(2020)28).

### **Key challenges**

- Business is confronted with a **proliferation of responsible business conduct (RBC) measures both on national and international levels**. Unilateral regulatory policy actions at the national level create considerable challenges for business operating globally, in particular if these initiatives are not aligned with or diverge from globally recognized standards such as the OECD Guidelines for Multinational Enterprises (OECD MNE Guidelines), the UN Guiding Principles on Business and Human Rights (UNGPs), and the ILO MNE Declaration.
- At the same time, **the international business environment is considerably changing**. The rules-based trade and investment system, which has critically supported growth and development of economies over the past decades and which goes hand in hand with the promotion of RBC (as is also recognized by the OECD MNE Guidelines), is increasingly challenged by geopolitical tensions, rising protectionism and new national security concerns.
- At the same time, we are witnessing a **change in global economic weights**. This is amongst others characterized by a **rising importance of state owned enterprises (SOEs)**, which are already accounting for about one fifth of the world's largest companies, while increasingly expanding into global markets. These developments merit careful consideration, especially since an OECD study (2018) found that “in almost half of the participating SOE’s (and 42% of all respondents) at least one respondent reported that corrupt and related irregular practices have materialised in their company in the last three years”<sup>1</sup>. There is a need for reinforced attention to RBC issues in SOEs, especially with a view on creating and maintaining a level playing field.

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<sup>1</sup> [OECD \(2018\) STATE-OWNED ENTERPRISES AND CORRUPTION What are the risks and what can be done?](#)

- The Covid-19 crisis has also catalysed efforts with respect to **digital transformation**. Digital technologies, including blockchain, artificial intelligence and platforms, have spurred innovation and productivity as well as new dialogues on RBC. *Business at OECD* appreciates the work the OECD has been conducting on the nexus between digital and RBC, including through the organization of a dedicated workshop and the development of targeted background notes. We welcome the approach of convening experts to discuss specific ongoing and emerging RBC challenges in a flexible manner.

## Key considerations

### Role of business

- Business constitutes the backbone of our economies, providing employment, generating innovation and fostering growth. Business recognises the importance of engaging in responsible business conduct, including the fight against corruption and the respect of human rights, and the importance of seeking to prevent and mitigate potential adverse impacts, in line with reputational considerations, ethical convictions and legal obligations.
- Companies have proven their commitment to uphold responsible business conduct in the current crisis, quickly adapting to altered conditions by making efforts to maintain jobs, facilitating distance working and implementing additional health safeguards and controls, where teleworking is not feasible.
- Over the past decade, and especially after the adoption of the UNGPs and the OECD MNE Guidelines, many businesses have fundamentally changed and improved their due diligence practice and gained considerable experience in implementing internationally recognised frameworks. This is reflected in proactive third party due diligence, increased transparency, compliance programmes, training sessions, reporting mechanisms and codes of conduct that address corruption and human rights risk. Nonetheless, this is a continuous learning process.
- However, as the UNGPs and the OECD Guidelines recognize, companies may face obstacles in performing due diligence and it may not always be possible to exercise complete oversight over all their suppliers. This is particularly true when there is a large number of suppliers involved and when expectations around performing due diligence go deep into the supply chain, where companies have limited ability to access information or exert influence. SMEs furthermore might in some instances lack resources to implement far reaching due diligence programs and lack the leverage to effectively influence their suppliers' conduct.
- Importantly, business efforts with respect to RBC also depend on complementary government action. Serious RBC issues usually have a public governance dimension. Corruption for instance can only be fought effectively, if governments also make efforts to reinforce public integrity and address the demand side of bribery. Similar challenges exist in the human rights agenda, where the UNGPs make it clear that while corporations have a

responsibility to respect human rights, States have a duty to protect human rights. Companies cannot replace the role of states.

### Role of governments

- While company efforts are critical, they cannot substitute for the key role governments must play in establishing and maintaining a sound policy framework for responsible business conduct. RBC issues, corruption and human rights violations are not a direct consequence of trade and investment per se, but they arise from an environment in which there is a lack of rule of law, weak governance and poor implementation of laws already “on the books”.
- To advance progress, all states must be encouraged to address economic, environmental and social - including human rights - challenges, in their own jurisdictions and to implement key standards both at the national and local levels. As highlighted in the OECD Policy Framework for Investment, which includes a chapter on RBC, governments “must enact and enforce the laws and regulations that protect the public interest and underpin RBC.”
- In the case of anti-corruption, governments have the duty to ensure that certain legal provisions are in place and enforced domestically, while in the case of human rights, governments have a state duty to protect against human rights infringements as recognized under international law.
- Beyond this, governments should be aware of the importance of ‘walking the talk’ by fulfilling their duty with respect to integrity and responsible business conduct in their own operations, including in the management of their SOEs in order to foster policy coherence and promote the update of RBC more broadly.

### RBC in a broader context

- Responsible business conduct should not be considered in isolation. The OECD, with its multi-stakeholder processes, its convening power and its cross-cutting research abilities, is ideally suited to address RBC issues in a coherent manner. This includes ensuring that policy approaches are eventually practicable and implementable and have the greatest impact on the ground through consultation with all relevant stakeholders. The OECD should also convey to policy makers the critical interlinkages between RBC and other policy fields, thereby stressing that RBC goes hand in hand with an open investment environment and a sound public governance framework.
- The OECD is further in a unique position to promote RBC not just in member but also in non-member countries and enable a global level playing field through outreach through regional and country programmes as well as dialogue with key partners. The issue of the global level playing field is becoming increasingly important.

## What has been achieved

- The OECD MNE Guidelines have been a ‘game changer’, which have brought about a broad-based cultural change in business. The MNE Guidelines are not only a demand on business, but they also support business. They contribute to providing a more level playing field, nationally and internationally, by setting out the standards of responsible behavior that are expected from all MNEs. In addition, the Guidelines have been developed through an extensive, global and multi-stakeholder dialogue, reflecting the views from adhering governments, which also incorporate the input of business, labor and civil society. Thus, the Guidelines also protect business from unrealistic expectations and provide flexibility, recognizing that there are differences across sectors and companies. The MNE Guidelines are deliberately not legally enforceable as they are intended to stimulate responsible behavior, not to trigger legal disputes.
- The Guidelines are underpinned by a unique implementation mechanism of National Contact Points (NCPs), promoting the instruments and providing a non-judicial grievance mechanism that can contribute to the resolution of issues that arise in relation to the implementation of the Guidelines. Business believes that the NCP system, if well implemented, can create great benefit, by offering a mediation platform for constructive dialogue with a view towards finding a future-oriented solution that is in the interest of all parties involved. The NCP process can thereby also serve as an effective dispute resolution mechanism that offers a way to potentially avoid costly and time-consuming judicial proceedings. National peer-reviews can play an important role in ensuring the efficiency of NCPs across the board.
- Building on the OECD MNE Guidelines, the OECD General Due Diligence Guidance as well as the sectoral due diligence guidance documents<sup>2</sup> have provided additional practical guidance to businesses by providing non-prescriptive, practical information on the steps of the due diligence process as well as offering concrete examples of how companies can implement the provisions as foreseen by the MNE Guidelines. Business appreciates that it is clearly recognized that not all steps apply to every situation and underlines the importance of user-friendly and practical guidance.
- Business further appreciates the outreach that has been conducted via the various regional programs, which has helped raise awareness of RBC and promote the MNE Guidelines and related due diligence guidance on a global level.
- Of great importance is also the international coherence provided by the MNE Guidelines, including though the human rights chapter, which is closely aligned with the UN Guiding Principles on Business and Human Rights (UNGPs). Together with the latter and other instruments such as the ILO MNE Declaration, the MNE Guidelines have developed into an important global reference, which have prompted significant investment in policies and procedures to drive action.

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<sup>2</sup> addressing RBC in the extractive sector, mineral supply chains, agricultural supply chains, garment supply chains and the financial sector

## What has worked less well

- *Business at OECD (BIAC)* is working together actively with national business federations and companies to raise awareness for the MNE Guidelines and the NCP system. Yet, despite the efforts, the Guidelines and NCPs still lack sufficient visibility among the business community. While major listed multinationals may be familiar with the Guidelines, this may not always be the case for SMEs and other privately-held, internationally active companies.
- As outlined in our [joint BIAC-TUAC-OECD Watch statement from 2015](#) and reiterated in our [comments on the paper on the 20th anniversary of the NCP system](#), governments should live up to their responsibility to ensure that their NCPs are adequately equipped and that NCP staff are accordingly trained in order to follow the processes and comply with the core criteria foreseen in the OECD Guidelines. This creates an unlevel playing field among NCPs, risking forum shopping, and significantly hampers the overall functioning of the NCP system.
- Another potential impediment to realizing the potential of the NCP system is a lack of trust. Businesses have in some instances expressed concerns regarding the respect of confidentiality and impartiality of the process as well as the use of aggressive campaigning, which may ultimately prevent companies from engaging in a specific instance process. The sometimes-prevailing public perception that a company involved in a specific instance has automatically ‘done something wrong’ may further serve as a disincentive to engage. There should further be a common understanding of what the NCP process is and what it is not.

## Proposed next steps

- **Great achievements have been made with respect to the promotion of RBC over the past decade.** The OECD MNE Guidelines are truly unique in scope (covering all major areas of business ethics) and implementation (NCP system, due diligence guidance documents) and, most importantly, they have brought about a broad-based cultural change in business. Companies have gained considerable experience in the implementation of due diligence, codes of conduct, training programs, reporting channels and other important components of responsible business conduct. However, further capacity building must remain high on the agenda, including for SMEs.
- **Accordingly, adhering governments should be encouraged to commit to their responsibilities** of ensuring a sound regulatory environment, fostering a conducive climate for RBC, and addressing the root causes of RBC related challenges, including in the areas of corruption and human rights abuses. In this context, it is essential that governments advance on the implementation national and international standards.
- In this context, the OECD could also consider **analyzing the practical impact of OECD guidance on the ground** in order to identify focus areas and streamline efforts with respect to the promotion of RBC going forward.

- It must also be recognized that while many companies have made significant advances on the RBC front, there are still companies which would benefit from reinforced capacity building and awareness raising. **One key element in order to ensure that the MNE Guidelines are and remain fit for purpose is therefore increased visibility** – both with a view on the business community as well as non-member countries. While there has been considerable progress, including through regional outreach programs, more can be done in order to reach practitioners on the ground.
- **In addition, stronger efforts are needed with respect to supporting the implementation of the Guidelines and leveraging the potential of the NCP system.** This could include increased promotional activity, development of targeted informational material, efforts to monitor and strengthen the resources and capacities of NCPs, ensure that NCPs are operating according to the procedural guidance set out in the MNE Guidelines and encourage all parties to engage with good faith in the process. In addition, as specific instances are becoming increasingly complex and as they tend to involve a growing number of NCPs, **there is need to reinforce cooperation** between NCPs, including through the provision of opportunities and platforms for the exchange of experiences as well as best practices.
- The recent alleged **incidents of pressure against submitters of specific instances** further threaten to undermine the functioning of the NCP system. No submitter filing a specific instance should face repercussions for calling on an NCP as stressed in our [joint Business at OECD \(BIAC\)-TUAC-OECD Watch statement from March 2020](#).
- Last but not least, **the impact of the Guidelines also depends on the degree of openness in global markets.** Efforts to safeguard an open trade and investment environment therefore go hand in hand with the scope for promoting responsible business conduct in different parts of the world.