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The OECD MNE Guidelines: Recent complaints on emerging issues show the need to revise standards on responsible business conduct

by
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The OECD Guidelines for Multinational Enterprise (Guidelines) should set the most comprehensive and up-to-date standards on responsible business conduct (RBC) for MNEs, but they have not been revised since 2011. New substantive issues appearing in complaints filed over the past decade before the Guidelines' system of National Contact Point (NCP) grievance mechanisms—discussed in another recent *Perspective*—reflect topics absent from, or incompletely described in, the current standards. These gaps make RBC norms for MNEs inadequate and limit the victims' chances of remedy. The following gaps—among others—are the primary reason the Guidelines should be revised in 2022.

Accountability for climate impacts. Despite the global focus on climate change, the OECD Guidelines do not use the term "climate change", nor highlight steps that MNEs should take to address their climate impacts, such as incorporating climate assessments into their due diligence, committing to and disclosing emissions targets compatible with the Paris Agreement, avoiding greenwashing, and moving toward climate adaptation. Yet complaints addressing corporate climate impacts have sharply increased since 2017: out of nine climate complaints since 2001, six have been filed since 2017. Among these, five target financial institutions, showing particular focus on seeking the financial sector's accountability for its relationship to climate change.

Accountability of the financial sector. The growing focus on financial institutions' climate impacts echoes the steady increase, since 2001, in financial sector complaints, from eight filed between 2001-2005, to 18 between 2016-2020. A critical question is whether financial institutions are merely *directly linked* to the impacts of their clients or are *contributing* to them, a relationship closer to causation that creates higher responsibility for companies to address those impacts. The OECD Due Diligence Guidance for Responsible Business Conduct explains that a company's relationship to impacts is not "static" and that a heightened level of responsibility can "depend[] upon the degree to which due diligence and steps taken to address identified risks and impacts decrease the risk of the impacts occurring" (p. 71). The question of when a company can be found to be contributing to impacts is currently being debated in a complaint against ING Bank. Debate can occur because the Guidelines do not adequately explain how companies—including financial institutions—can evolve from being merely directly linked to a business partner's known impacts, to contributing to those impacts by failing themselves to take steps to reduce or prevent them.

Accountability for gender-specific impacts. Gender-based discrimination in the workplace particularly threatens women's and LGBTQ+ people's safety. Resettlements prompted by extractive and infrastructure projects disproportionately impact women's land rights. Retaliation against human rights defenders by businesses and official institutions targets women and LGBTQ+ activists differently. Despite this, the Guidelines do not contain the word "gender" nor prioritize gender-sensitive due diligence to address such impacts. In 2020 and 2021, five complaints highlighted impacts on women, out of 15 gender-related complaints since 2001. These complaints underscore the growing need for standards to guide corporate respect for gender rights.

Accountability for impacts in the digital sphere. The Guidelines are out-of-date on technological issues. They should highlight how the increasing digitalization of business activities can exacerbate the potential of all companies to cause human rights and environmental impacts, prompting a need for digitalization-specific due diligence. The Guidelines do not address such major concerns as the commodification and commercialization of people's private data, the monopolistic market share of digital platforms and the labor rights and environmental impacts of digital companies and technology hardware supply chains. Complainants are starting to address them: 19 digitalization complaints have been filed since 2011, 13 relating to actual or potential corporate involvement in mass surveillance by repressive regimes. Varied outcomes[1] in complaint-handling by OECD governments sometimes show governments' own misunderstandings, such as regarding the due diligence for dual use technologies.[2]

Accountability for tax avoidance. Despite the OECD's own work to end corporate tax avoidance, the Guidelines are vague in setting expectations for MNEs' responsible tax policy. Between 2001 and 2021, 19 complaints have involved tax issues, while two recently accepted by the Dutch NCP specifically suggest oil companies Chevron and Pluspetrol engaged in tax avoidance in breach of the Guidelines' standards. However, complainants are constrained in their argumentation to using only the Guidelines' vague and inconclusive expectation that companies obey the "spirit" of tax law, revealing the need for a standard more obviously and plainly discouraging tax avoidance.

For now, the Guidelines remain an influential international guide for RBC. It is worth ensuring they remain so. The OECD Investment Committee is currently studying gaps in the Guidelines, including through an inclusive public consultation process on its draft gap analysis report. Its final report should identify the gaps these complaints show, as well as others identified by civil society, and propose procedural improvements for NCPs as well. Following the conclusion of the study, the Committee should commit to revise the Guidelines to update the RBC standards for MNEs and better facilitate access to remedy for victims.

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[1] For a different analysis of the same issue, compare *Privacy Int'l et al. vs. Trovicor* with *Privacy Int'l et al. vs. Gamma*.

[2] See, e.g., *FIDH, JFI and Redress vs. Italtel*.

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