



Using the OECD Guidelines to Tackle Corporate Corruption

The *Guidelines for Multinational Enterprises*, adopted by the Organisation for Economic Co-operation and Development (OECD), are a set of social, labour, environmental and anti-corruption standards developed for transnational companies. A total of 40 nations — 30 OECD governments and 10 non-member states — have endorsed them as a basic component of responsible corporate conduct for multinational enterprises (MNEs) that are based in or operating from their territories.

While the Guidelines are voluntary for companies, they have been useful for promoting corporate accountability. Adhering governments are bound by inter-governmental agreement to respond to complaints arising from alleged violations. Civil society has effectively used the Guidelines to draw attention to such irresponsible behaviour and trigger corrective actions.

These experiences suggest there are strong grounds for supporting the Guidelines' wider usage. There is particularly great potential for using the Guidelines to combat private sector corruption — an area that remains vastly underutilised.

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UNCAC joins the list of other legally-binding instruments that have been created to curb private sector corruption, such as the OECD Convention on Combating Bribery of Foreign Public Officials. Both conventions, once adopted into national law, make it a criminal offence for companies to pay bribes to officials in foreign countries.

Understanding the Guidelines' Anti-corruption Provisions

According to Chapter VI ('Combating Bribery') enterprises 'should not, directly or indirectly, offer, promise, give or demand a bribe or other undue advantage to obtain or retain business or other improper advantage'.

In particular, enterprises should:

1. Not pay bribes 'to public officials or the employees of business partners'. This includes not using 'subcontracts, purchase orders or consulting agreements' to channel such payments.
2. Ensure 'remuneration of agents is appropriate and for legitimate services only'.
3. Enhance the 'transparency of their activities in the fight against bribery', including fostering 'openness and dialogue with the public so as to promote its awareness of and cooperation with the fight against bribery and extortion'.
4. Promote 'employee awareness of and compliance with company policies against bribery ... through training programmes and disciplinary procedures'.
5. Adopt 'management control systems' including 'financial, tax accounting and auditing practices that prevent ... off the books or secret accounts'.
6. Eliminate the use of 'illegal contributions' to political parties or candidates for public office.

1. Introduction

There is no shortage of international instruments designed to promote corporate responsibility and clean business standards. Awareness of the economic and social damage that corrupt business practices cause has increased sharply in recent years, spurring governments, civil society organisations (CSOs), trade unions and companies to take action. The United Nations Convention against Corruption (UNCAC), the first global anti-corruption treaty that came into force in 2005, is a striking example of these efforts.

However, the Guidelines provide some advantages over UNCAC and other mechanisms. They combine non-binding, government-endorsed business standards with internationally-agreed rules to promote worldwide adherence. In addition, the Guidelines have given civil society the space to directly engage in advancing good business behaviour and advocacy groups the opportunity to monitor corporate responsibility and accountability.

2. What are the Guidelines?

The Guidelines are defined as 'recommendations on responsible business conduct'. In addition to broad human rights and sustainability provisions, specific chapters focus on different aspects of a company's operations:

- information disclosure;
- employment and industrial relations;
- the environment;
- combating bribery;
- consumer interests;
- science and technology;
- competition; and
- taxation.

Overall, the range of issues relevant to corruption covered by the Guidelines is much broader than what the OECD and UN tackle in their respective conventions against bribery and corruption. For example, the Guidelines' section on combating bribery (Chapter VI) deals with the paying of bribes between companies — an area not addressed under the OECD Convention. Furthermore, it includes recommendations that companies should 'adopt management control systems that discourage bribery and corrupt practices' (see sidebar).

As signatories to the Guidelines, governments are obliged to set up a 'National Contact Point' (NCP) whose function is to promote, publicise and monitor adherence to the standards set out in the Guidelines. Where there are allegations of company misconduct, NCPs must determine if the issues raised by the complainant fall within the scope of the Guidelines. In cases where they do, the NCP must attempt to mediate a solution between the parties, publish the results of its mediation efforts (even if no agreement is reached) and, where appropriate, make recommendations to the company on how to change its practices to comply with the Guidelines. This dispute resolution facility is important because a common weakness of voluntary codes of conduct is the absence of internal — much less external — oversight mechanisms aimed at corrective actions.

Since 2000, many of the bribery cases lodged by CSOs and trade unions have linked corruption charges to violations of other Guideline standards, including on employment, human rights and the environment. Cases in past years include:

NCP Argentina: French service company in Argentina. In 2007, a French company providing restaurant and food vouchers to businesses and governments, Accor Service, was accused of attempting to bribe an Argentine lawmaker. The lawmaker filed the complaint, stating that the company wanted him to revise legislation that would have impacted the demand for vouchers. The case has also triggered legal proceedings in Argentina against Accor.

NCP Australia: British-run detention centres in Australia. The Australian subsidiary of the British company Global Solutions Limited (GSL) ran immigration detention centres through a contract with the Australian government. In 2005 five CSOs from three countries (Australia, Switzerland and United Kingdom) jointly filed a complaint with the NCPs in Australia and Britain, stating that the company had violated international human rights conventions. The Australian NCP initiated a dialogue and the company eventually agreed to ensure a greater role for external human rights experts in staff training, monitoring and auditing.

NCP Canada: Canadian mining subsidiary in Zambia. The Zambian subsidiary of the Canadian mining company First Quantum began resettling tenants and long-term squatter communities as part of a mining project. The company refused to enter a dialogue with the citizens and threatened to evict inhabitants with the help of the Zambian army. Only after Oxfam, an international CSO, made a complaint to the Canadian NCP in 2001 did the company stop threatening force, start negotiations and initiate a resettlement programme with World Bank support.

NCP Netherlands: Dutch oil depot in the Philippines. In 2006 Dutch and Philippine CSOs accused Royal Dutch Shell of violating the Guidelines' anti-bribery, environmental and information-disclosure standards at an oil depot in a densely populated part of Manila. The Dutch NCP has held mediation meetings with Shell and the CSOs, and has organised a fact-finding mission to Manila. The Netherlands is pursuing the complaint despite a separate legal case in the Philippines involving the same depot.

NCP Norway: Norwegian engineering company at Guantanamo Bay Prison. A Norwegian CSO (ForUM) complained in 2005 that a subsidiary of Aker Kvaerner, a Norwegian engineering company, was violating the Guidelines' human rights standards by giving technical assistance to the US prison facilities at Guantanamo Bay. The Norwegian NCP expressed concern about poor human rights standards at the base. It ruled that the subsidiary's activities 'can be said, at least partly to have affected inmates in the prison' and 'strongly encouraged' the company to draw up its own ethical guidelines.

NCP United Kingdom: UK natural resource companies in the Congo. Based on the findings of a United Nations report, RAID (a British CSO) filed a complaint against six British businesses with the NCP for the United Kingdom, accusing the companies of bribe paying and illegal exploitation of natural resources in the Democratic Republic of Congo. RAID was largely excluded from the enquiry launched in 2004 but the companies were made to confront the bribery allegations. A political debate on the NCP's performance ensued, which ultimately led to improvements in the structure and operations of the British NCP.

Who Backs the Guidelines?

Since being adopted in the current form in 2000, the Guidelines have been approved by the 30 member governments that make up the OECD, including Britain, Canada, Germany, Japan and the United States.¹

Ten non-OECD members — such as Argentina, Brazil and Israel — have endorsed the Guidelines as part of a broader framework called the OECD Declaration on International Investment and Multinational Enterprises.²

The UN Oil-for-Food Programme: TI Germany's Complaint against 57 National Companies

The TI national chapter in Germany has used the OECD Guidelines to lodge various complaints to redress corrupt business practices.

In a complaint filed in 2007, the chapter argued that 57 German medical, manufacturing and transport companies had violated the Guidelines when they allegedly paid US\$ 11.9 million in kickbacks to obtain contracts as part of the UN 'Oil-for-Food' programme in Iraq. The complaint drew on substantial evidence from a UN report published in 2005 that named 2,253 companies which allegedly made a total of US \$1.8 billion in illicit payments.

TI Germany argued that the alleged illicit payments marked a clear and large-scale breach of the OECD Guidelines.

However, the German NCP rejected the case on technical grounds. It claimed that the German companies had been involved in trading with Iraq and that trade lay outside the Guidelines' remit. The NCP said it would be inappropriate to consider the case under the Guidelines, as legal proceedings regarding some of the companies involved in the UN programme were ongoing.

According to Shirley van Buiren, chairperson of TI-Germany's Corporate Accountability working group, the decision was 'far from inevitable much less mandatory'.

In a letter to the minister of economics, whose ministry houses Germany's NCP, the chapter rejected the NCP's arguments. It requested the minister to reconsider the complaint's dismissal and to have the OECD clarify the scope of the Guidelines.

3. What progress has been made?

The Guidelines have received widespread endorsements as an important corporate accountability tool. Among the groups backing the Guidelines are the group of eight leading industrialised nations (G8), international business organisations, CSOs, national parliaments, the European Union (EU) and inter-governmental organisations.

A network of NCPs in major world capitals provides a potentially powerful mechanism for stakeholders. Their global presence gives trade unions, CSOs and anti-corruption campaigners entry points for monitoring companies' adherence to the Guidelines and for lodging complaints when they fail to do so.

A growing number of CSOs, including TI, have embraced the Guidelines in order to curb corruption in the private sector. Lodging complaints with NCPs and lobbying to increase their responsiveness have proven to be practical ways for improving company conduct and raising citizen awareness on corporate accountability issues. A broad range of CSOs working on human rights, environmental and labour issues — as well as trade unions — are involved in this work around the world.

The global nature of multinational companies means there is also wide scope for cross-border co-operation among CSOs, including TI chapters. In recent years Southern-based CSOs have linked up with partners in OECD and other industrialised countries to lodge joint complaints against companies. In early 2008, for example, alleged labour abuses by a Korean company in the Philippines led CSOs and unions in both countries to join forces and file a formal complaint. Australian and Colombian CSOs also collaborated on work around alleged violations at an Australian mining project in Colombia. Among the TI movement, the national chapter in Germany has been active in promoting the Guidelines and has filed several complaints against national companies for alleged misbehaviour at home and abroad (see sidebar). The chapter also is a member of OECD Watch (www.oecdwatch.org), an international CSO network of over 75 members in 41 countries that promotes corporate accountability.

4. What challenges remain?

Despite the Guidelines' potential for positive impacts, they are not commonly used as a tool for tackling corrupt business practices. Of the 71 cases filed by CSOs, only 18 have dealt with the bribery-related provisions of the Guidelines.³

There are various reasons for the relatively limited role that the Guidelines have played in curbing corruption. Awareness of the Guidelines remains low, despite signatory governments having the explicit responsibility to publicise them. In addition, few stakeholders have the knowledge or skills to place a complaint with an NCP, although this has been changing gradually due to educational work that international CSO networks have led.

The difficulties of increasing the Guidelines' use are compounded by the complex and costly process that can be involved in accessing information on a company's international activities. Moreover, support from governments in monitoring company compliance with the Guidelines has been confined to a few countries.

According to CSOs, trade unions and other stakeholders, another significant obstacle is the generally poor performance of the NCPs in promoting responsible

corporate standards and handling complaints.⁴ The OECD's Investment Committee, although empowered with oversight responsibilities, provides only general advice to governments on what form an NCP should take. It does not explicitly address promotional activities and its guidance on how to deal with complaints has tended to be too rare and cautious to be really helpful to NCPs.

Due to these and other reasons, the overall performance of NCPs has been extremely uneven. OECD Watch has collected evidence of NCPs' inconsistent performance and has called for their 'radical overhaul'. It has argued that NCPs rarely engage with companies to promote the Guidelines and are biased towards business — such as when assessing whether complaints should be acted upon.

Recommendations for improving NCPs' effectiveness have included the creation of international standards on their institutional arrangements, promotional activities and mediation performance. Some suggestions envisage turning the NCPs into expert, quasi-legal panels similar to employment tribunals, increasing their funding and strengthening their oversight functions. Time-frame recommendations for dealing with specific stages of the complaint and mediation process also have been proposed. While the OECD has taken these changes under consideration, they are expected to face strong opposition from some countries and business organisations.

A further area of concern is what constitutes an admissible case under the Guidelines. In recent years, there have been regular battles between governments and civil society on this issue. Key splits include whether an MNE can be held responsible for the activities of its subsidiaries or suppliers, whether the Guidelines cover trade as well as investment activities, and whether an NCP should consider a case when the company under question is already facing a legal investigation on the same or related issue.


Concerns over the ways NCPs handle cases have also led national parliaments in Britain, Canada, the Netherlands and elsewhere to call for a variety of changes, which in some cases have produced important reforms of NCPs' institutional arrangements, funding and operational procedures.

5. Conclusions and recommendations

The Guidelines provide a new, relatively underutilised option for tackling corporate corruption anywhere in the world. They embody a detailed set of internationally-endorsed principles and government recommendations for responsible corporate behaviour, including anti-bribery standards. They also address a range of topics that are useful for linking up anti-corruption work in the private sector with efforts tied to the agendas on human rights, employment, the environment and other sustainable development issues.

However, there are serious problems with implementing the Guidelines. These include the relatively limited awareness by companies of their existence, the poor performance of many NCPs and confusion over their scope and applicability.

Despite these challenges, the Guidelines offer a key platform for civil society. They provide anti-corruption campaigners such as TI national chapters with the chance to engage effectively on private sector corruption and to build alliances with CSOs working in other spheres.

It is now up to the anti-corruption movement to turn these opportunities into actions. 

Resources for the Guidelines

- **OECD:** The site has information on the Guidelines and related documents, including the OECD annual reports on the Guidelines and NCP meetings. Of particular interest is the 2003 annual report on 'Enhancing the Role of Business in the Fight against Corruption'. See: www.oecd.org.

- **OECD Watch:** The most complete documentation on CSOs using the Guidelines. Information covers the activities of over 75 CSOs in 41 countries. Newsletters, educational resources and details of cases filed are available in English. Some sources are also in French, Portuguese and Spanish. Key reports include the 'Guide to the OECD Guidelines for Multinational Enterprises' Complaint Procedure: Lessons from Past NGO Complaints' (2006). See: www.oecdwatch.org.

- **TI Germany:** Information on the Guidelines and TI Germany's anti-corruption campaigning is available on their website. Complaint texts, media reports, other resources and contact details are provided in German (and some in English and French). See: www.transparency.de/corporate-accountability.1149.0.html.

- **Friends of the Earth:** This organisation published a report called 'Using the OECD Guidelines for Multinational Enterprises: A Critical Starter-kit for NGOs' in 2002. For more information, see: www.milieudefensie.nl/globalisering/publicaties/ngotoolkit/TK_ENG_DEF.PDF.

This Working Paper was prepared by Shirley van Buijen and members of TI Germany's Corporate Accountability Working Group, in collaboration with the TI Secretariat's Policy and Research Department.

For further details about TI-Germany's work on corporate accountability, please see: www.transparency.de/Corporate-Accountability-OECD.1149.0.html.

To learn about TI's efforts on combating corruption in the private sector, please visit: www.transparency.org/global_priorities/private_sector.

For more information about this working paper and others in the series, please contact Craig Fagan at the TI-Secretariat: [plres \[at\] transparency.org](mailto:plres[at]transparency.org).

References:

¹ The thirty OECD countries include: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States.

² Non-member countries are: Argentina, Brazil, Chile, Egypt, Estonia, Israel, Latvia, Lithuania, Romania and Slovenia.

³ Over 185 complaint cases have been lodged with NCPs. This figure is TI-Germany's approximation based on preliminary OECD data plus TUAC and OECDWatch statistics (as of March 2008). The total is an underestimate as according to these sources not all cases are recorded in the statistics.

⁴ John Ruggie, special representative of the UN secretary-general on human rights and transnational corporations, wrote in an April 2008 report to the UN Human Rights Council that while NCPs are a potentially important vehicle for improving corporate accountability, 'experience suggests that in practice they have too often failed to meet this potential'. See: www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf.

**TRANSPARENCY
INTERNATIONAL**

Telephone

+49-30-343820 -0

Fax

+49-30-347039 -12

International Secretariat

Alt-Moabit 96**10559 Berlin****Germany**

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