

**The OECD Guidelines for Multinational Enterprises:
a potentially powerful multi-stakeholder tool for advancing corporate accountability**

What use are the OECD Guidelines in the fight against corruption?

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Why does the Dutch government promote corporate social responsibility (CSR)?

More than ever, globalization confronts our citizens with circumstances of production in other countries. Rightly or wrongly, there is a wide-spread perception that the business activities of our companies in developing countries, which often have weak laws and/or weak law enforcement, cause, or are likely to cause, detrimental effects, like damage to the environment, worsening labour conditions and corruption. Hence, the behaviour of our multinational enterprises abroad attracts more and more political attention and there are growing pressures on the government to undertake action in order to ensure that these enterprises “behave”.

One option to respond to such pressures is through extra-territorial legislation. In a limited number of cases extra-territorial legislation has been enacted. For instance, bribery of foreign public officials has been made a crime under Dutch law following our ratification of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Often, though, extra-territorial legislation is not an ideal solution. First of all, there are problems with enforcement. The behaviour one wants to regulate takes place in far-away countries, with customs, cultures, government systems and other circumstances that are different from our own. Often, applying Dutch law to business behaviour in such different circumstances will not produce the right results. Also, the Dutch government lacks the capacity to effectively monitor and, if necessary, prosecute Dutch companies operating abroad, except in exceptional circumstances.

Secondly, applying extra-territorial legislation to business behaviour in other countries is politically sensitive, because it can be perceived by these countries as an infringement on their sovereignty. For instance, we in Europe were not pleased when, at the end of the last century, the USA tried to force its Cuba policy on companies operating within the EU by enacting the so-called Helms Burton Act. The EU adopted a regulation to forbid European companies to comply with such extra-territorial requirements.

A third reason why extra-territorial legislation is often not the right solution is its effect on companies. The Dutch government fears that it will lead to companies adopting a minimalist approach, doing just the bare minimum that the law requires them to do. The Dutch government feels that it is much more effective to stimulate companies to make principles of ethical business conduct a core element of their own business strategy. Hence our support for CSR and hence our support for the OECD Guidelines for multinational enterprises.

What are the OECD Guidelines?

The Guidelines are a government-backed code of conduct for international business: they contain voluntary principles and high standards for responsible business conduct. Originally, the Guidelines date from 1976. They were updated and upgraded in 2000 with involvement of the business community, trade unions and NGOs.

The Guidelines have ten chapters: I concepts and principles; II general policies; III disclosure; IV employment and industrial relations; V environment; VI combating bribery; VII consumer interests; VIII science and technology; IX competition; X taxation.

The Guidelines are based on a number of international treaties and conventions that are adhered to by a wide range of OECD and non-OECD countries at different stages of economic development. Therefore, they reflect world-wide values and are definitely not ‘rich country standards’.

How do the Guidelines essentially differ from other international, national and corporate CSR standards?

1) Extensive coverage:

The Guidelines are broader in scope and have been elaborated in greater detail than other CSR instruments. The UN Global Compact, for example, only covers four subjects: human rights, environment, labour relations and corruption and is far less detailed on these subjects than the OECD Guidelines.

2) The Guidelines are government-backed:

Thirty-nine governments have committed themselves to the Guidelines. Not only OECD members, but also nine other governments, including three from Latin America: Argentina, Brazil and Chile. The adhering countries are home to most multinational enterprises and are the source of most international investment.

The adhering governments make it clear that these are the standards that they expect their multinational companies to follow in their international business activities.

The Guidelines are voluntary in the sense that they are not legally enforceable, but not in the sense that they can be ignored without any consequences.

3) Involvement of business, trade unions and NGOs:

The Guidelines have been developed in close consultation with all the relevant stakeholders.

4) The Guidelines have an implementation mechanism:

- a. National Contact Points: all adhering governments have set up a National Contact Point (NCP). NCPs have two main tasks: to promote the Guidelines and to deal with concrete cases of company behaviour which is deemed contrary to the Guidelines (see under b).
- b. The 'specific instance' procedure: stakeholders can present cases to an NCP when they have substantiated indications that a company's behaviour in a 'specific instance' is not in line with the Guidelines. Provided that certain conditions are met, the NCP will assist in finding a mutually acceptable solution that is in line with the Guidelines. At the end of each case, the NCP will issue a statement.
The NCP of the country where the alleged breach of the Guidelines takes place will deal with the case. If that country is not an adhering country (and, hence, does not have an NCP), the case will be dealt with by the NCP of the home country of the company in question. This means that the 'specific instance procedure' is also applicable to behaviour in countries that do not adhere to the Guidelines.
- c. The OECD Investment Committee, which meets in Paris three times a year, is charged with discussing questions pertaining to (the implementation of) the Guidelines (interpretation etc.).
- d. In addition to the meetings of the Investment Committee, there is an annual meeting of National Contact Points. Every NCP draws up an annual report of its activities. These reports are discussed at the annual NCP meeting in Paris. The meeting offers good opportunities for peer learning, by presentations and discussions. At the time of the annual meeting of NCPs, there are also round tables on specific aspects of (the implementation of) the Guidelines, with external participation.
- e. The Investment Committee and the annual meeting of NCPs have an institutionalized stakeholder dialogue, where discussions on (the implementation of) the Guidelines take place between the members of the OECD Investment Committee/the NCPs and representatives of the business community, trade unions and NGOs.

What has been achieved as regards the OECD Guidelines?

A growing awareness of the Guidelines

Some encouraging examples:

- In a survey, 41% of the Fortune Global 500 companies said they use the Guidelines;
- The Guidelines have been integrated in anti-corruption initiatives of several international private sector associations;
- There is a gradual integration of the Guidelines in government policies to promote trade and investment.

As regards this integration: the Dutch Export (and Investment) Promotion and Information Agency (EVD) provides information on CSR (and the OECD Guidelines) to companies that are looking for business opportunities in emerging markets. Toolkits have been (and are being) developed to make companies aware of CSR problems that they are likely to encounter in certain countries and to help them tackle these problems.

There is a CSR component in a growing number of government-led trade missions.

Companies applying for financial assistance from the Dutch government (subsidies, guarantees, export credit insurance etc.) for their export or foreign investment activities must sign a declaration stating that they are aware of the OECD Guidelines and will do their utmost to implement them.

In addition, for certain projects supported by the government, there are conditions as to environmental protection, respect of labour standards and corruption. Companies which do not meet these conditions, lose their right to government assistance.

Nevertheless, a recent survey in the Netherlands has shown that the overall awareness of the Guidelines among companies, especially SMEs, is still low (less than one third know about the Guidelines). There is no reason to expect that awareness of the Guidelines is much greater in other OECD countries. Therefore, a substantial effort will be required in the coming years in order to ensure that the great majority of our companies are aware of the OECD Guidelines and adhere to them in their business operations.

Specific instances

Since the revision of the Guidelines in 2000, 96 cases have been brought, 24 of which were brought in the period June 2005 - June 2006.

There are several examples of successful mediation by NCPs. One recent example is a case dealt with by the Australian NCP concerning a private company providing immigration detention services to the Australian government. The company was accused of several human rights violations. The procedure led to an agreement under which the company undertook to change certain practices, to improve the training of its personnel (in particular regarding the need to respect the human rights of detainees) etc. (for details, see the website of the Australian NCP: <http://www.ausncp.gov.au>).

In the Netherlands, there was a case against a company which was involved in a large offshore project off the coast of Burma. The company was accused of contributing, through its presence, to violations of human rights and core labour standards by the Burmese government. The case led to the company undertaking to withdraw from Burma after the expiry of its contractual obligations.

In addition, the company, together with the labour union that brought the case, paid a visit to the Burmese ambassador in London in order to express concern about violations of human rights and core

labour standards in Burma. (for details, see the website of the Dutch NCP: <http://www.oesorichtlijnen.nl> (> nationaal contactpunt, > verklaringen: texts available in English)).

The OECD Guidelines and corruption

Chapter VI of the Guidelines deals with corruption (for the full text: see the annex to this paper).

The scope of chapter VI is much broader than that of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In addition to bribery of foreign public officials, the Guidelines cover:

- bribery within the private sector.
- remuneration of agents;
- transparency requirements;
- promoting employee awareness and compliance;
- management control systems;
- contributions to political parties and political organisations.
- relations with subsidiaries and business partners.

How can the OECD Guidelines be used in the fight against corruption?

Enforcement of anti-corruption legislation is difficult. Convictions require legally convincing proof of facts and actions that take place in far-away countries. Often, it will not be possible to obtain the necessary evidence.

Nevertheless, if stakeholders come to an NCP with serious indications that a company has bribed a foreign public official, the NCP has no choice and must turn over this material to the public prosecutor, who then must decide whether or not to prosecute.

For that reason, there is not much that an NCP itself can do with a complaint about bribery of foreign public officials. However, as the Guidelines cover more aspects of corruption than just bribery of foreign public officials (see above), there are enough aspects that could be dealt with in a 'specific instance procedure'.

'Specific instance procedures' have one big advantage over a criminal court case. They are not legal proceedings requiring solid proof according to the standards of the law. They are forward-looking procedures where one is looking for mutually acceptable solutions which respect the Guidelines. Hence, the 'burden of proof' is far less of an impediment.

Bribery is a means to an end. Often, companies that bribe public officials will do so in order to obtain an illegal advantage. For instance, to get an exemption from a legal requirement as regards environmental protection or labour legislation. Such exemptions will often be contrary to the OECD Guidelines. Therefore, corruption issues can sometimes be tackled indirectly in a 'specific instance procedure' by directing the case not against the corruption as such, but against the 'fruits' of the corruption.

Apart from 'specific instance procedures', NCPs and governments - and indeed other stakeholders - can use the OECD Guidelines to raise the awareness of companies of the risks of corruption and to encourage them to adopt mechanisms that reduce the risk of their getting involved in corruption.

Governments and other stakeholders can assist companies that want to avoid and defend themselves against corruption by providing information about corruption risks in specific countries, by providing toolkits, best practices and other forms of practical support.

Anti-corruption NGOs like Transparency International have a special role to play in this respect, given their extensive knowledge of corruption in many different countries and their know-how in fighting corruption. For that reason, active participation by TI in the stakeholder dialogue with the Investment Committee and the NCPs on the (implementation of the) OECD Guidelines would be most useful.

Annex

Chapter VI of the OECD Guidelines: 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. Nor should enterprises be solicited or expected to render a bribe or other undue advantage. In particular, enterprises should:

1. Not offer, nor give in to demands, to pay public officials or the employees of business partners any portion of a contract payment. They should not use sub-contracts, purchase orders or consulting agreements as a means of channelling payments to public officials, to employees of business partners or to their relatives or business associates.
2. Ensure that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents employed in connection with transactions with public bodies and state-owned enterprises should be kept and made available to competent authorities.
3. Enhance the transparency of their activities in the fight against bribery and extortion. Measures could include making public comments against bribery and extortion and disclosing the management systems the company has adopted in order to honour these commitments. The enterprise should also foster openness and dialogue with the public so as to promote its awareness of and co-operation with the fight against bribery and extortion.
4. Promote employee awareness of and compliance with company policies against bribery and extortion through appropriate dissemination of these policies and through training programmes and disciplinary procedures.
5. Adopt management control systems that discourage bribery and corrupt practices, and adopt financial and tax accounting and auditing practices that prevent the establishment of “off the books” or secret accounts or the creation of documents which do not properly and fairly record the transactions to which they relate.
6. Not make illegal contributions to candidates for public office or to political parties or to other political organisations. Contributions should fully comply with public disclosure requirements and should be reported to senior management.