



International Distribution Institute

Adapting a Compliance System to the Needs of Small or Medium  
Sized Distribution or Franchise Networks  
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The 2011 OECD Guidelines for Multinational Enterprises:  
what distributors and franchisors need to focus on

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## I. The 2011 OECD Guidelines for multinational enterprises

### Introduction

#### The OECD MNE guidelines

- most comprehensive international instrument for promoting responsible business conduct
- a political understanding on what constitutes appropriate and fair business behaviour vis-à-vis stakeholders and society in the globalised economy
- international reference document; the ‘mother of all CSR instruments’

#### 1. What are the OECD Guidelines for Multinational Enterprises?

- Recommendations from the OECD governments to their multinational enterprises (MNEs) on responsible business conduct abroad
- They address business behaviour in ten areas:

general policies (*e.g. adverse impacts, due diligence, stakeholder engagement*)

disclosure of information

human rights

employment / relations social partners

environment

combating bribery and extortion

consumer interests

science and technology

competition

taxation

- Observance is voluntary. They are deliberately not legally enforceable. They are intended to stimulate fair behaviour and not to trigger legal disputes.
- The Guidelines are not really a legal instrument, they are a CSR instrument; therefore it is not possible to really *implement* the Guidelines
- But companies are expected to fulfill the recommendations and should have a *policy that is consistent with* the Guidelines
- The Guidelines have a unique status for a CSR instrument: the OECD governments have committed to promote their implementation
- There is also a unique grievance mechanism: the National Contact Point

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Two important points:

- From the beginning (in 1976) the aim of the Guidelines was to **balance** the promotion by governments of an open and liberal investment climate with responsible conduct by business; the notion of balance is key
- Guidelines should not only be perceived as a burden for business:
  1. They are also a **protection** for enterprises against unrealistic expectations of stakeholders (Trade Unions, NGOs); expectations that go clearly beyond the Guidelines will not easily be considered justified
  2. They promote a **level playing field** (at this moment unfortunately only for MNEs from the OECD and signatory countries; some major emerging countries have not committed to respect the principles of the Guidelines)

## 2. What do the Guidelines mean by multinational enterprise?

- There is no definition of a “multinational enterprise” in the Guidelines
- They recognise how diverse international business has become
- However, the Guidelines state that MNEs will usually be enterprises that are established in several countries and coordinate their operations in various ways (not just any internationally operating company); this shows that not any enterprise incidentally involved in some international activity is considered an MNE
- The Guidelines apply to all units of a multinational enterprise, i.e. to parent companies as well as to independent business units
- The Guidelines are not exclusively addressed to large enterprises: they expressly also relate to Small and Medium-sized Enterprises which are active on a multinational scale; thus they are addressed to large MNEs and SME-MNEs
- But: they are *not* applicable to SMEs in general

## 3. The essence of the Guidelines: avoid adverse impacts

The updated Guidelines have introduced an important new recommendation: multinational enterprises should avoid adverse impacts of their own business activities on the interests covered by the Guidelines.

What does this mean?

- Enterprises should prevent that their own activities
  1. **cause** an adverse impact on matters covered by the Guidelines or
  2. **substantially contribute** to any such adverse impact

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- Their ‘own activities’ also include their own activities in the supply chain. What does this paradox mean? At any rate it implies that this provision does not see on activities purely of the supplier without a substantial link to the MNE; some meaningful involvement of the MNE is apparently required
  - MNEs should seek to avert that their immediate business partners infringe the Guidelines in direct relation to the operations, products or services of the MNE; this is probably the most opaque provision in the Guidelines text. However, the Guidelines state that this recommendation does not shift responsibility from the party that commits the infringement on to the MNE with which that party has a business relationship
  - MNEs should encourage their suppliers and subcontractors to apply the principles of the Guidelines

Thus there are 4 degrees of ‘avoiding adverse impact’:

- do not cause
- do not substantially contribute
- seek to avert that your immediate business partners infringe
- encourage your suppliers to apply

4. How should MNEs do this? Due diligence and flexibility.

- The Guidelines are clearly based on the principle that MNEs are responsible for their own behaviour and not for adverse impacts caused by others
- Therefore the Guidelines are more demanding as the enterprise is more directly or more substantially involved in the adverse impact:
  1. when the enterprise itself is causing the problem, it should simply take the necessary steps to stop or prevent the adverse impact;
  2. when the enterprise is contributing to the problem, alongside with others, it should simply stop or prevent its own contribution; and it should use its influence to reduce any remaining impacts by others, insofar as possible;
  3. when an immediate business partner is infringing upon the Guidelines, the enterprise should use its leverage on this partner to influence him to prevent or reduce it;
  4. last but not least, enterprises are in general expected to encourage their business partners to behave responsibly.

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Due diligence is another key concept in the Guidelines

- Due diligence is the instrument to avoid adverse impacts; enterprises should carry out due diligence
- This means they should introduce a process to identify, prevent, reduce, and account for how they address, actual and potential infringements of the Guidelines
- The Guidelines provide no procedural requirements or detailed description for *general* due diligence; the nature and extent of due diligence depend on the circumstances; there is no due diligence requirement for the three Guidelines chapters of Science and Technology, Competition, and Taxation
- The Guidelines do provide however more elaborate requirements for *human rights* due diligence, in line with the UN Guiding Principles on Business and Human Rights.

Flexibility is another important concept in the Guidelines. Some examples:

- the nature and extent of due diligence depend on the circumstances
- the encouragement of business partners is subject to practical limitations; these depend on the circumstances of the situation
- in case a business partner infringes on the Guidelines, it can be appropriate for an enterprise, depending on the situation:
  1. to continue the relationship while working on improvement of the problem, or
  2. to suspend the relationship temporarily, or,
  3. as a last resort, to disengage while taking into account the social and economic consequences.
- when enterprises have numerous suppliers (some have 80.000), they are encouraged to identify global areas of activity in which the risk of adverse effects is greatest, and to determine priorities for due diligence towards suppliers on the basis of this risk assessment
- it is explicitly recognised that the expectations are different for large MNEs and for SME MNEs

## 5. Further content of the Guidelines

- The content is in fact rather basic: disclose relevant information, have a decent social policy, have a decent environmental policy, do not engage in corruption, respect consumer interests, promote transfer of technology and innovation, respect competition regulations and pay your taxes.

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- The new chapter on human rights is fully consistent with the Responsibility to Respect in the UN Guiding Principles on Business and Human Rights developed by John Ruggie. The OECD Guidelines also have an added value for the UN Guiding Principles: via the Guidelines the unique grievance mechanism of the NCP is also applicable to infringements by business of the Guiding Principles, at least in the signatory countries of the Guidelines.

#### 6. What happens if national law contradicts the recommendations set out in the OECD Guidelines?

- The first duty of MNEs is to comply with applicable law of the countries where they operate
- The Guidelines do not take precedence over national laws and provisions
- Where national laws and provisions conflict with the Guidelines, enterprises should look to comply with the Guidelines to the fullest extent possible without contravening the applicable law of the country

#### II. Implementation of the Guidelines: the function of the National Contact Point and the NCP procedure.

##### 7. What is the National Contact Point?

The authorities of every signatory state of the Guidelines have committed themselves to set up a National Contact Point. The NCP has a number of tasks to further the effectiveness of the Guidelines:

- increasing awareness of the OECD Guidelines
- promoting their implementation;
- responding to questions concerning the implementation of the guidelines;
- assisting parties, as a mediation and conciliation platform, to resolve disagreements over the implementation of the Guidelines.

##### 8. The NCP procedure to resolve disagreements over the implementation of the Guidelines.

It should be stressed that normally the implementation of the Guidelines by MNEs will not give rise to disagreements

- In case a disagreement arises, 'issues' can be 'notified' by interested parties (individuals, NGOs, trade unions) to the NCP; this means that questions and complaints can be brought to the attention of the NCP

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- The NCP will apply a good faith test before accepting to examine a case: there should be a genuine problem, and there should be a genuine willingness of the notifying party that it is willing to enter into a mediation process
  - The fact that the NCP decides to examine an 'issue' does by no means imply that the NCP thinks that the MNE has infringed on the Guidelines; statistics, e.g. of the UK NCP, show that in a substantial number of cases no infringement is identified
  - When the NCP decides to examine a case, it will contact the parties involved and offers its assistance to resolve the issues.
  - The conciliatory function / mediation is the essence of the NCP procedure; it is not a semi-legal procedure, the NCP is not a kind of public prosecutor; the task of the NCP is to resolve an issue and promote business behaviour that is compatible with the Guidelines in the future, not to sentence a company; NCPs should stress this in their external communication and choose their words carefully.
  - The practice of some NCPs to conclude the procedure with a determination is not explicitly mentioned in the Guidelines.

### III. Implementation by business

#### 9. How to deal with the Guidelines, how to implement them, how to comply?

- As said before: the Guidelines are not a legal instrument; they are a set of principles, of expected behaviour; they are a benchmark, with room for interpretation and flexibility
- Therefore it is difficult to say that the Guidelines should be implemented in a legal sense
- There is no ready-made manual available on how to comply with the Guidelines
- The Guidelines are a CSR-instrument; to comply with them requires a societal dialogue with stakeholders; CSR is a dynamic concept, the views in society evolve constantly; complying with the Guidelines is an ongoing process
- Within companies the views of the legal department and the CSR department on how to comply with the Guidelines do regularly diverge
- In some legal systems certain utterances of a company in a CSR dialogue may later be used to the detriment of the company in a legal procedure; this limits the stakeholder dialogue
- There are many initiatives under way, in the OECD and at the national level, general and sector-specific, to provide business with tools to act in accordance with the Guidelines
- Business should take care that no new obligations are introduced via the backdoor of these tools.



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In a typical national situation, the debate on CSR and implementing the Guidelines may present a complex picture. Participants may be

- business, considering that CSR is a business responsibility and resisting legislation in this field, while simultaneously taking a large variety of initiatives in many fields to make business sustainable and engage in stakeholder dialogue
- the government, taking initiatives to stimulate and promote CSR and increasing awareness
- political groups in parliament, pushing for visible action and proposing legislation of various sorts
- the European Commission and the European Parliament, developing policies and legislative proposals
- trade unions and NGOs, organising campaigns and pushing for legislation and far reaching initiatives
- media, in general very critical towards business
- citizens and consumers, demanding ethical business conduct and good products, but also tempted by cheap products

Business is thus confronted with a situation of constant dialogue and pressure, within business itself, and from customers, government, NGO's, trade unions and the media. The result is that big steps have been made and that CSR is solidly on the agenda.

#### 10. Points that do demand further clarification and attention

There are a number of elements in the Guidelines that need further clarification and attention:

- how to carry out due diligence in an adequate way
- what are an MNE's 'own activities in the supply chain'
- what does it mean 'to seek to avert that [an MNE's] immediate business partners infringe the Guidelines in direct relation to the operations, products or services of the MNE'
- under what conditions is an SME also an MNE
- what are the differences between the instrument of the OECD Guidelines and the instrument of the UN Guiding Principles
- how can the mediation character of the NCP procedure be stressed by careful communication
- what should be the pro-active implementation agenda for the Guidelines

Some NCPs have created the possibility for companies to raise 'issues' before an NCP concerning the improper behaviour of trade unions or NGOs; this is a welcome counterbalance in the societal dialogue.

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Summary in simple words: what does business need to know?

- The OECD MNE Guidelines are recommendations on behaviour of business in society
- The recommendations are rather basic
- The central concept is: avoid adverse impacts
- To this end, MNEs should develop due diligence
- The Guidelines are voluntary, but governments are committed to promote implementation and MNEs are expected to act in accordance with the Guidelines
- The Guidelines contain a large degree of flexibility
- The National Contact Point, as mediation instrument can function as a societal pressure mechanism to act according to the Guidelines
- There is no ready-made manual on how to implement the Guidelines
- Implementing Guidelines is an ongoing process and demands a dialogue with stakeholders

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