Organisation for Economic Co-operation and Development

DAF/INV(2024)7/FINAL

Unclassified

English - Or. English

3 May 2024

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE

Cancels & replaces the same document of 2 May 2024

Response to OECD Watch and TUAC's request for clarification regarding interpretation of the OECD Guidelines for Multinational Enterprises with respect to their application to the business activities of export credit agencies

On 17 December 2021, OECD Watch and the Trade Union Advisory Committee to the OECD (TUAC) addressed a request for clarification to the Investment Committee based on paragraph II.2 c) of the Procedural Guidance regarding the interpretation of the OECD Guidelines for Multinational Enterprises with respect to their application to the business activities of export credit agencies (ECAs).

This document sets out a response of the Investment Committee (IC) to this request for clarification.

rbc@oecd.org

JT03542941

Response to OECD Watch and TUAC's request for clarification regarding interpretation of the OECD Guidelines for Multinational Enterprises with respect to their application to the business activities of export credit agencies

Introduction

1. This document provides a response by the Investment Committee (IC) to OECD Watch and the Trade Union Advisory Committee to the OECD (TUAC)'s "Request for Clarification regarding the correct interpretation of the application of the OECD Guidelines to export credit agencies". The request touches on interpretative issues regarding the definition of "multinational enterprises" under the Guidelines for Multinational Enterprises ("Guidelines" or "MNE Guidelines") [OECD/LEGAL/0144] and to what extent entities not traditionally considered multinational enterprises, such as government agencies or entities carrying out functions on or behalf of a government can be subject to a specific instance proceedings. Such issues have already been the subject of analysis in two previous requests for clarification,[1] and

[1] In 2013, the Norwegian Ministry of Foreign Affairs submitted a formal request for clarification to the Investment Committee on the applicability of the OECD Guidelines for Multinational Enterprises to sovereign wealth funds and central banks with financial assets in their balance sheets. In this respect a paper on application of the Guidelines to Sovereign Wealth Funds [DAF/INV/RBC(2013)3/REV2] was developed and discussed by the WPRBC but not declassified as Norway noted it was not pursuing further clarifications by the Investment Committee on the meaning of terminology in the Guidelines in the context of the financial sector. In 2003, the Investment Committee issued a response to a request for clarification submitted by Switzerland with respect to the question of whether the "specific instances" procedure should also apply to issues having no international dimension. This response is reproduced in

explored in Guidance developed for National Contact Points with respect to "*Considering the purposes of the OECD Guidelines and the notion of "multinational enterprise" in the context of initial assessments*."[2] As such, this response draws heavily from existing material on this issue.

OECD Watch and TUAC joint request for clarification

2. On 17 December 2021, OECD Watch and TUAC addressed a request for clarification to the Investment Committee regarding the interpretation of the MNE Guidelines with respect to their application to the business activities of ECAs.

3. The submission (reproduced in Annex I) argues that:

4. "ECAs fall within the broad scope of the term "multinational enterprise" as contemplated by the Guidelines for several reasons.

- *ECAs are engaged in commercial activities: they provide financial products and services that have comparable characteristics to those provided by MNEs in the financial services industry. Products include capital and debt instruments, insurance and re-insurance policies, and 4 guarantees, all of which all support international commercial activities that can and do cause adverse impacts;*
- *Many ECAs have a commercial form, often being corporate entities listed on public stock exchanges, and their purpose can also be considered commercial; and*
- *Finally, ECAs are multinational in their operations, having trans-national activities and impact far beyond their home countries."*

5. The submission further requests that the Committee take the following steps:

1. *"Confirm that ECAs' business activities are subject to the standards and relevant to the implementation of the Guidelines for MNEs under Part I;*
2. *Recommend that ECAs' impacts can appropriately be addressed through further examination in the context of an NCP specific instance process under Part II of the Guidelines; and*
3. *Invite the OECD Export Credit Group to join the Investment Committee in commencing a horizontal OECD process that is inclusive of the OECD's advisory bodies and OECD Watch to ensure the full alignment of the Common Approaches and OECD Guidelines."*

Process

6. Paragraph II.2 c)of the Procedural Guidance of the Decision on the OECD Guidelines for Multinational Enterprises [OECD/LEGAL/0307] provide that:

7. "[t]*he [Investment]* , *with the assistance of the WPRBC, will, with a view to enhance the effectiveness of the Guidelines and to foster the functional equivalence of NCPs*:

- *c) consider issuing a clarification of the interpretation of the Guidelines at the request of an Adherent, an advisory body (BIAC or TUAC) or OECD Watch. Such request may concern whether*

Section V. of the 2005 Annual Meeting of the National Contact Points Report by the Chair https://www.oecd.org/daf/inv/mne/35387363.pdf

[2] OECD (2020) "Considering the purposes of the OECD Guidelines and the notion of "multinational enterprise" in the context of initial assessments, DAF/INV/NCP(2020)54

an NCP has correctly interpreted the Guidelines in specific instances, but in such cases, the Committee will not reach conclusions on the conduct of individual enterprises;

- *d) Make recommendations, as necessary, to improve the functioning of NCPs and the effective implementation of the Guidelines[...]"*

8. The third part of the request for clarification, i.e. that the IC invite the Working Party on Export Credits and Credit Guarantees (ECG) to collaborate with it, relates neither to a clarification of the Guidelines or a Recommendation related to them. As such, it has not been considered in the present response. This is of course without prejudice to the question of the potential benefits of closer collaboration between the IC and the WPRBC and the ECG, which the IC will continue to discuss and consider moving forward.

Multinational Enterprises under the Guidelines[3]

9. The Guidelines provide that "[t]he OECD Guidelines for Multinational Enterprises are recommendations jointly addressed by governments to multinational enterprises" "operating in or from their territories." (emphasis added). (Guidelines, Chapter I, para 1)

10. The Guidelines start from the premise that a precise definition of Multinational Enterprise is not necessary and suggest that the concept should be broadly interpreted, noting that the concept of MNEs is continually evolving. When identifying which entities may be considered multinational enterprises for the purposes of the Guidelines, it is noted that 1) the international nature of an enterprise's structure or activities and 2) its commercial form, purpose, or activities are main factors to consider. (Guidelines, Chapter II, para 4). They also state that the Guidelines are not intended to introduce any difference in treatment between MNEs and domestic enterprises and underscore that governments should encourage their widest possible observance.

Commercial dimension

11. The Guidelines are explicit about the fact that they address enterprises, providing that "[t]he OECD Guidelines for Multinational Enterprises are recommendations addressed by governments *to multinational enterprises"* "operating in or from their territories." (emphasis added)

12. They do not provide a clear definition of "multinational enterprise" and they are clear about the fact that whether ownership may be private, State, or mixed and the economic sector it operates do not have relevance for whether an entity may be considered a multinational enterprise, and thus subject to a specific instance proceeding. The Guidelines are also clear about the fact that the recommendations they set are relevant to SMEs and therefore, the fact that an enterprise is an SME or micro-enterprise would thus not, in and of itself, constitute a factor for not accepting a specific instance.

13. As the Guidelines are addressed to "enterprises", the fact that an entity is legally incorporated as a commercial company could be treated as establishing a presumption that it is an enterprise within the scope of the Guidelines. The text of the Guidelines also allows for their application to "other entities",[4] however the Guidelines do not further describe these entities nor identify what traits are relevant for characterising them as enterprises under the Guidelines.

[3] In 2023 the Guidelines and accompanying Procedural Guidance were amended. Language from and references to the Guidelines throughout this response reflect the 2023 version of the Guidelines.

[4] See OECD Guidelines (2023), Chapter I para 4 "…multinational enterprises… usually comprise companies or other entities…"

14. A request for clarification was submitted to the Investment Committee by the Norwegian Ministry of Foreign Affairs in 2013 concerning whether investee companies can be considered business relationships of investors for the purposes of the Guidelines and, as an additional element, the application of the Guidelines to sovereign wealth funds, touching on the question of to what extent the Guidelines are applicable to public actors. An analysis of this issue was discussed in the WPRBC [DAF/INV/RBC(2013)3/REV2], which stated that one starting point for assessing the commercial character of a fund would be to consider whether a private entity can engage in the same activity as the fund engages in. The analysis also listed the following non-exhaustive characteristics: governance structure, management agreement, type of activities and commercial aspects of operations, whether the funds operate at arm's lengths of the Central Bank (or any other state entity governing the fund), size and source of the fund, objectives of investment, types of investment, system of internal checks and balances and level of disclosure.[5]

15. As, under this approach, the question of whether an entity should be characterised as an enterprise to which the Guidelines are applicable is very context specific, making this determination has generally been left to NCPs to consider on a case-by-case basis.

16. Since 2011 there have been at least 15 cases brought to NCPs concerning entities that could be treated as not traditionally considered "enterprises." These include charities, NGOs, government bodies, export credit agencies, sports federations, trade unions and multi-stakeholder initiatives.

17. In reaching their conclusions in these cases, NCPs have commonly considered to what extent an entity is "commercial" and whether there is an international dimension associated with an enterprise. With respect to the commercial dimension, NCPs have looked at whether entities have a commercial legal form, commercial purpose and whether they are engaged in commercial activities. This approach aligns with updates made to the 2023 version of the Guidelines which introduced text noting that "the international nature of an enterprise's structure or activities and its commercial form, purpose, or activities are main factors to consider in this regard." (Chapter 1, para 4) These elements are considered in turn below.

Does the entity have the legal form of a commercial company?

18. As an initial step in assessing whether an entity is an enterprise, NCPs have often first sought to understand whether it has legal commercial form. Where an entity is incorporated as a commercial company and/or registered in the commercial register, this can be treated as establishing a presumption that the entity is an enterprise.

19. For example, in a specific instance involving Atradius Dutch State Business (ADBS), the export credit agency of the Netherlands, the NCP of the Netherlands considered that ADSB is a multinational enterprise for the purpose of Guidelines and accepted the case for further examination. As part of its reasoning it noted that "ADSB is a 100% subsidiary of Atradius Credit Insurance NV, which is in turn majority-held by a Spanish corporation listed on the Madrid and Barcelona stock exchanges."[6]

---

[5] In 2013 Norwegian Ministry of Foreign Affairs submitted a request for clarification of the Guidelines to the Investment Committee on the applicability of the OECD Guidelines for Multinational Enterprises to sovereign wealth funds and central banks with financial assets in their balance sheets. In this respect a paper on application of the Guidelines to Sovereign Wealth Funds [DAF/INV/RBC(2013)3/REV2] was developed and discussed by the WPRBC but not declassified as Norway noted it was not pursuing further clarifications by the Investment Committee on the meaning of terminology in the Guidelines in the context of the financial sector.

[6] Initial Assessment: Both ENDS, Fórum Suape, Conectas, Colônia de Pescadores Cabo de Santo Agostinho – Atradius Dutch State Business (2015) https://www.oecdguidelines.nl/notifications/documents/publication/2015/12/17/notification-both-ends--forum-suape-atradius-dsb

20. However, in a specific instance involving UK Export Finance (UKEF), the export credit agency of the UK, the UK NCP found that "UKEF does not have a separate corporate legal personality, but rather exists as a government department having its legal personality as the Secretary of State for International Trade". In addition to a lack of corporate identity, it also noted that the UKEF does not strictly engage in commercial activity and that its primary purpose is to provide financial products that are not otherwise available on the private market. As a result, the UK NCP considered that UKEF should not be considered a multinational enterprise for the purpose of the Guidelines and decided not to accept the specific instance for further examination.[7]

Is the stated objective or mission of the entity commercial in nature?

21. In other cases, NCPs have looked to the charters, mission statements or legal registrations of an organisation to see whether commercial objectives were part of the stated purpose of an organisation. In such cases, a presumption that such organisations should be considered enterprises can be treated as having been established.

22. Importantly, while a commercial purpose or form in most cases may be treated as a criterion to determine that the entity in question should be considered an enterprise for the purposes of the Guidelines, NCPs have not interpreted a lack of such purpose or form as sufficient to a finding that an entity is not an enterprise for the purpose of the Guidelines. Rather, in these situations some have expanded their analysis to consider whether the activities in question are commercial in nature.

23. In a specific instance filed with the Swiss NCP in 2016 concerning the Federation Internationale de Football Association (FIFA), the Swiss NCP concluded "unlike other enterprises, FIFA's operations may not per se be qualified as being of commercial nature. On the contrary, large parts of FIFA's interactions strive towards fostering football as a global game without pursuing any business or profit motives whatsoever." However it went on to consider whether the activities can be considered commercial in nature. (see below)[8]

Can the activities in question be considered commercial in nature?

24. In several specific instances involving entities not traditionally considered to be MNEs, the Swiss NCP has concluded that "[t]he key question should […] be whether an entity is involved in commercial activities, independently of its legal form, its sector of activity or its purpose (profit or non-profit). Whether an entity can be considered to have commercial activities, should be decided by the competent NCP through a case-by-case analysis based on the concrete circumstances."[9]

25. Following a case-by-case approach the following types of activities have been determined to be "commercial" by an NCP in the context of an initial assessment: :

- In a case involving a government pension fund comprising two government owned sovereign wealth funds: Management of the Norwegian Government pension fund on behalf of the Norwegian Ministry of Finance, including making specific investment decisions with respect to the fund. (Specific instance regarding Norwegian Bank Investment Management (NBIM) submitted by a consortium of NGOs (2012) NCP of Norway)

[7] Initial assessment: Global Witness complaint to the UK NCP about UK Export Finance (2020) Initial assessment: Global Witness complaint to the UK NCP about UK Export Finance - GOV.UK (www.gov.uk)

[8] Initial assessment: Fédération Internationale de Football Association (FIFA) submitted by the Building and Wood Workers' International (BWI) (2015) https://mneguidelines.oecd.org/database/instances/ch0013.htm

[9] Id.

- In a case involving a non-profit sporting federation: Sole ownership of all commercial rights pertaining to International Ice Hockey Federation (IIHF) competitions including: audio-visual and radio recording, reproduction and broadcasting rights, multimedia rights, sponsorships, advertising and promotional rights and incorporeal rights such as IIHF general and event marks, rights arising under copyright law and any rights which has the potential to yield financial benefit. (Specific Instance regarding the International Ice Hockey Federation submitted by Stowarzyszenie Zawodników Hokeja na Lodzie (Polish Ice Hockey Players Association) (2019) Swiss NCP)
- In a case involving an international NGO: Income from royalties as well as from other trading activities (such as sales of collectors' albums and the panda emblem for more environmentally friendly products) which support conservation efforts and which are possible due to conservation projects. (Specific Instance regarding World Wild Fund for Nature submitted by Survival International Charitable Trust (2016) Swiss NCP)
- In a case involving a multi-stakeholder initiative: Income generated through contributions from sustainable palm oil trade, development of an ecolabel that adds value of sales products, contributing to income generation through developing a system for certification of plantation, granting of licenses for products. (Specific instance regarding the Roundtable on Sustainable Palm Oil submitted by TuK Indonesia (2018) Swiss NCP)
- In a case involving a non-profit sporting federation: Media marketing rights, finance and insurance, etc. associated with the organisation of the FIFA 2022 World Cup and in particular contractual relationship with counterparties organising the tournament, namely the member association (i.e. the Qatar Football Association), the Bid Committee and/or the Local Organising Committee. (Specific Instance regarding FIFA submitted by the Building and Wood Workers' International (BWI) (2015) Swiss NCP)
- In a case involving an export credit agency: Activities which involve doing due diligence and facilitating the provision of export credit insurance in the international marketplace even when done on behalf of and for the account of the Dutch State. (Specific instance regarding Atradius Dutch State Business (ADSB) submitted by a coalition of NGOs (2015) Dutch NCP)

26. On the other hand, the following activities were found by NCPs *not* to be commercial in nature, and hence outside the scope of the Guidelines:

- In a case involving an export credit agency: The activities of an export credit agency whose primary purpose is to provide financial products *that are not otherwise available on the private market.* (Specific instance regarding UK Export Finance submitted by Global Witness (2020) UK NCP) (emphasis added)
- In a case involving an export credit agency: Provision of a *concessional loan* for an infrastructure project classified as a non-commercial project under the OECD Ex-Ante Guidance.[10] (Specific instance regarding the Export-Import Bank of Korea (KEXIM), submitted by Jalaur River for the People's Movement and Korean Transnational Corporation Watch (KNTC Watch) (2018) Korean NCP) (emphasis added)

[10] According to the Arrangement full title, financially non-viable projects with "appropriate pricing determined on market principles" are not expected to generate sufficient cash flow to cover the project's operating costs and service the capital employed under standard export credit terms, i.e. 12 years for power generation projects and ten years for all other projects. The general characteristics of financially non-viable projects include projects whose principal output is a public good, capital-intensive projects with high per unit production costs and slow capacity uptake, and/or where the beneficiary group (normally household consumers) is deemed unable to afford the output at the appropriate market-determined price. At the same time, it is recognised that each project should be considered on a case-by-case basis in relation to its particular circumstances.
http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=td/pg(2005)20&doclanguage=en

- In a case involving non-profit sporting federation: Presidential elections relating to the internal corporate governance of an organisation. (Specific instance regarding the activities of FIFA submitted by American's for Democracy and Human Rights in Bahrain (2016) Swiss NCP)
- In a case involving public courts: The activities of public courts and judicial systems. (Specific instance concerning the activities of Latvia's legal system and public institutions submitted by JSC Norvik Bank (2016) NCP of Latvia).
- In cases involving trade unions: The activities of a trade union organisation, as they lack a commercial nature or purpose (Specific instance concerning CNV submitted by Dewan Pengurus Pusat (Konfederasi) Serikat Buruh Sejahtera Indonesia (2020) NCP of the Netherlands and Specific Instance regarding ITUC/ACV submitted by (K)SBSI (2020) Belgian NCP).

27. Importantly, in some of the above-mentioned cases, NCPs reviewed the commercial character of the specific activities that were being raised in the specific instance. This for example led the Swiss NCP to consider that FIFA qualified as an enterprise under the OECD Guidelines for some of its activities, but not for others. For example, in a 2015 specific instance submitted to the Swiss NCP concerning alleged human rights violations related to the construction of facilities for the 2022 FIFA World Cup in Qatar, the NCP assessed FIFA's activities related to the organisation of the 2022 World Cup in Qatar were commercial in nature. Conversely, in a 2016 specific instance submitted to the Swiss NCP alleging that allowing a specific individual to stand for candidacy in the FIFA presidential election without first carrying out adequate human rights due diligence violated the Guidelines, the NCP concluded that FIFA's activities related to its presidential elections were not commercial in nature.

International dimension

28. While there is no internationally agreed definition of what makes an enterprise "multinational", MNEs have been defined colloquially as "having facilities and other assets in at least one country other than its home"[11], or a corporate form which "owns or controls production of goods or services in at least one country other than its home country" or "a company or group which derives 25% or more of its revenue from out-of-home-country operations."[12]

29. The Guidelines themselves note that the concept of MNEs is evolving and that the proliferation of complex supply chains has also blurred the boundaries of an enterprise: "[m]ultinational enterprises, like their domestic counterparts, have evolved to encompass a broader range of business arrangements and organisational forms. Technological developments as well as strategic alliances and closer relations with suppliers and contractors tend to blur the boundaries of the enterprise." (Preface, para 7). This is moreover the case in current operating contexts where global supply chains are a feature of nearly every enterprise including those with legal residence and direct operations in only one country.

30. The Guidelines note that they are "not aimed at introducing differences of treatment between multinational and domestic enterprises […] multinational and domestic enterprises are subject to the same expectations in respect of their conduct *wherever the Guidelines are relevant to both*." (Chapter 1, para 5). As the Guidelines include general expectations related to responsible business conduct grounded in international standards that are equally relevant to domestic companies.

31. In 2003 the Investment Committee issued a response to a request for clarification submitted by Switzerland with respect to the question of whether the "specific instances" procedure should also apply

[11] https://www.investopedia.com/terms/m/multinationalcorporation.asp

[12] Black's Law Dictionary https://thelawdictionary.org/multinational-corporation-mnc/

to issues having no international dimension.[13] The clarification provided some principled guidance on this issue which may continue to be of use to NCPs and which is partially reproduced here:

- *"Furthering the effectiveness of the Guidelines*. NCPs approach to specific instances (including those having "no international element") should, above all, be oriented toward furthering the effectiveness of the Guidelines. All decisions as to whether or not to consider a specific instance should be evaluated in light of this consideration. The Guidelines aim 'to ensure that the operations of [multinational enterprises] are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises.' […]"
- *"The Guidelines express global principles applicable to both domestic and international operations of companies*. The Guidelines text is quite clear on this matter and there is strong agreement among delegations, NCPs and Guidelines partners on this point […] BIAC, TUAC and NGOs broadly concur that the "values the Guidelines stand for are universal in scope" (quote from BIAC letter). As pointed out in earlier Investment Committee statements, the Guidelines "reflect common values that underlie a variety of international declarations and conventions as well as the laws and regulations of governments adhering to the Guidelines.'"
- *"Boundary between international and domestic issues*. The global economy and international investment – while shaped by what might be thought of as a mosaic of national policy environments – do not always give rise to clear cut boundaries between home and host country operations or between foreign and domestic issues. It is precisely because of the difficulty of establishing crisp typologies of economic transactions that many NCPs and delegations stressed the importance of a case-by-case approach to this issue. This message is reinforced by the 2003 Statement by the Committee on Scope of the Guidelines, which notes: 'When considering the application of the Guidelines flexibility is required'."

32. In sum, the Guidelines and existing authoritative interpretations thereof indicate that assessment of the international dimension of an enterprise should be flexible, dynamic, and take into account strategic objectives such as furthering the effectiveness of the Guidelines.

[13] In its response the Investment Committee confirmed that the specific instances procedure was created to deal with issues arising in the context of international investment. This was based on guidance issued in 2003 by the Investment Committee noting that the Guidelines are targeted at issues arising in the context of international investment and that therefore an "investment nexus" was necessary to their scope of application. The requirement of an "investment nexus" was done away with in the 2011 update of the Guidelines when language was added to the Guidelines noting that business were expected to seek to prevent and mitigate adverse impacts where the impact is directly linked to their operations, products or services by a business relationship " When the Guidelines were updated in 2011 they clarified responsibilities for enterprises in their direct activities and across their operations regardless of the investment nexus and this was no longer considered a requirement to considering a specific instance relevant under the Guidelines." (See Kaufmann, BETTER POLICIES FOR BETTER LIVES –ARE WE THERE YET? https://www.oecd.org/investment/mne/OECD-Guidelines-for-MNEs-A-Glass-Half-Full.pdf The Guidelines further clarify that "The term 'business relationship' includes relationships with business partners, sub-contractors, franchisees, investee companies, clients, and joint venture partners, entities in the supply chain which supply products or services that contribute to the enterprise's own operations, products or services or which receive, license, buy or use products or services from the enterprise, and any other non-State or State entities directly linked to its operations, products or services[…] Business relationships include relationships beyond contractual, 'first tier' or immediate relationships." See Guidelines, Commentary on Chapter 2, para 17

ECAs as "multinational enterprises" under the Guidelines

33. OECD Watch and TUAC set out in their submission that:

34. "ECAs fall within the broad scope of the term "multinational enterprise" as contemplated by the Guidelines for several reasons.

1. *ECAs are engaged in commercial activities: they provide financial products and services that have comparable characteristics to those provided by MNEs in the financial services industry. Products include capital and debt instruments, insurance and re-insurance policies, and guarantees, all of which all support international commercial activities that can and do cause adverse impacts;*
2. *Many ECAs have a commercial form, often being corporate entities listed on public stock exchanges, and their purpose can also be considered commercial; and*
3. *Finally, ECAs are multinational in their operations, having trans-national activities and impact far beyond their home countries."*

Comparable characteristics and support of commercial activities

35. Under sub-point 1 OECD Watch and TUAC suggest that ECAs are engaged in commercial activities because 1) they provide products and services that have *comparable characteristics* to or "resemble" those provided in the private sector (namely capital and debt instruments, insurance and re-insurance policies, and guarantees) and 2) that these products and services *support* international commercial activities.

36. Such an interpretation would appear broader than existing guidance and the interpretations of NCPs outlined in the previous section, according to which the question of whether activity can be considered a commercial activity is contingent upon whether market actors can or do engage in the same type of activity. Mere "resemblance" to activities, products or services offered by the private sector, has not been considered sufficient to render an activity "commercial" for the purposes of the application of the Guidelines.

37. For example, a public student loan provider provides products and services that have comparable characteristics to those provided by private lenders (i.e. debt instruments). However the public student loan provider may offer such loans at nominal interest rates, in the interest of enhancing access to financing for education. Such interest rates may not be commercially viable or attractive for a private lender. Although the service resembles or have comparable characteristics to those provided in the private sector, the two services are not in a competitive relationship. Market actors do not or would not engage in the same activity because the non-commercial purpose would undermine commercial viability. Such an example may also be relevant in the context of ECAs where financial instruments are often offered under preferential terms in order to enable trade and investment for development projects overseas, often in high-risk areas, for which private financing or de-risking support are not readily available.

38. Likewise, products and services that *support* international commercial activities may not be considered as necessarily representing commercial activities themselves. For example, licensing, issuance of patents, concessions and permits, all represent administrative functions that can support, and in some cases are necessary, to enabling commercial activities. However many of these functions are not or could not be offered by commercial providers.

39. As discussed in the previous section, assessing to what extent similar products and services are or could be offered by market actors will often be a case-by-case enquiry and not always a black-or-white assessment. Taking again the example of the student loan provider, if the interest rates provided were only marginally better from those provided by commercial lenders, the other terms were comparable, and the

lender earned significant revenues from the loans, there could be a stronger argument to make that such activities are commercial.

40. As noted in the submission by OECD Watch and TUAC, ECAs provide a wide range of services and products including but not limited to: export credit insurance; export credits: export credit guarantees; advance payment guarantees/bonds; cash-in-advance; documentary collections; export credit insurance; letters of credit: open accounts; performance or contract bonds; country-specific products. The terms and conditions of these services will also vary across ECAs and transactions. Given the diversity of activities, products and services offered, categorically labelling them all as "commercial" or "business" activities would not appear in line with the previous clarifications, guidance, or the NCP practice outlined above.

41. Rather, when assessing whether market actors can or do engage in the same type of activity as an ECA, the above clarifications, guidance, and NCP practice indicates that a case-by-case analysis is required. The below factors may be relevant to such an inquiry, while not necessarily independently determinative:

- Competitiveness of the service or product: Can or does the service or product compete with similar offerings on the market?
- Degree of commercial risk associated with the service or product: Is the level of commercial risk associated with the service or product comparable to similar offerings on the market?
- Degree of profit-making potential or intention in relation to the activity: Does the service or product generate a profit and/or is it intended to?
- Source of revenues for the entity: Does the service or product represent a significant source of revenue for the entity?
- Use of revenues from activity in question: Are the revenues generated from the service or product used for business purposes?
- Existence of non-commercial objectives and degree to which non-commercial objectives affect or take superiority over commercial objectives with respect to the activity in question: Are non-commercial objectives associated with the service and product and to what extent do such objectives impact the competitiveness, potential profitability or commercial risk associated with the product or service?

Commercial form and purpose

42. Under sub-point 2, OECD Watch and TUAC submit that: *"ECAs fall within the broad scope of the term "multinational enterprise" as contemplated by the Guidelines [because they have a] commercial form, often being corporate entities listed on public stock exchanges, and their purpose can also be considered commercial."*

43. As noted above, where an entity is incorporated as a commercial company and/or registered in the commercial register this may be treated as establishing a (rebuttable) presumption that the entity is an enterprise. This would imply that ECAs listed on stock exchanges or legally established as corporations could be presumed, in the first place, to be enterprises for the purposes of the application of the Guidelines.

44. Likewise, where charters, mission statements or legal registrations of an organisation include commercial objectives as part of the stated purpose of an organisation, the above clarifications, guidance, and practice indicates that a presumption can be established that such organisations should be considered enterprises.

45. Importantly, while a commercial purpose or form has been treated in most cases as a consideration in determining whether an entity should be considered an enterprise for the purposes of the Guidelines, a lack of such purpose or form has not been treated as sufficient to find that an entity is *not* an enterprise for

the purpose of the Guidelines. Rather, in these situations some NCPs have expanded their analysis to consider whether the activities in question are commercial in nature.

Transnational activities or operations

46. As outlined above, previous requests for clarification on the Guidelines and existing authoritative interpretations have concluded that assessment of the international dimension of an enterprise should be flexible, dynamic, and take into account strategic objectives such as furthering the effectiveness of the Guidelines. Further guidance to NCPs has noted the consideration of the whether the entity has operations (subsidiaries, satellite offices, other headquarters) in other jurisdictions, trades or sells good in other jurisdiction or may be relevant in this respect.

47. Many ECAs have a presence in multiple countries and their activities are expressly transnational in nature. As such, they likely meet the test of having an international dimension.

ECAs lacking a commercial dimension

48. If an ECA is a State entity, without commercial purpose and does not have activities that are of a commercial character and hence does not fall within the scope of the Guidelines, it is in any case expected to act in accordance with its 'state duty to protect human rights' under international law. This is adopted in the Guidelines[14] and further described in the UN Guiding Principles on Business and Human Rights (UNGPs). Since states are the primary duty-bearers under international human rights law, the set of responsibilities and obligations to respect, protect and fulfil human rights and fundamental freedoms described in the UNGPs apply in full to such entities.[15]

Conclusion

49. As ECAs are organised in a variety of different forms and perform a large (and growing) portfolio of functions, the clarifications, guidance and NCP outlined above indicate that it would not be appropriate to categorically conclude that they should or should not be considered to be a "multinational enterprise" for the purpose of the Guidelines and thus subject to specific instance proceedings. Such an assessment should be made on a case by case basis and consider particularly but not exclusively the following factors:

---

[14] The Guidelines Chapter IV, chapeau; and the Guidelines Chapter IV, Commentary on Human Rights, paragraphs 41-42.

[15] Furthermore, in the UNGPs it is argued that the closer enterprises are to the State, the higher the State's rationale becomes for ensuring that the enterprise respects human rights: "States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime. Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State's own international law obligations. Moreover, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights. Where States own or control business enterprises, they have greatest means within their powers to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented. Senior management typically reports to State agencies, and associated government departments have greater scope for scrutiny and oversight, including ensuring that effective human rights due diligence is implemented. (These enterprises are also subject to the corporate responsibility to respect human rights, addressed in chapter II.)" UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect And Remedy" Framework (New York and Geneva, 2011). The Human Rights Council endorsed this in its resolution 17/4 of 16 June 2011.

1. Whether there is a sufficient commercial dimension
    a. Does the entity have a legal form that is commercial in nature?
    b. Does the entity have a commercial purpose?
    c. Are the activities in question commercial in nature? In this respect, can or do other market actors engage in the same type of activity?

50. Many ECAs have a presence in multiple countries and their purpose and core activities are expressly transnational in nature. As such, they likely meet the test of having an international dimension.

51. In sum, the clarifications, guidance and NCP outlined above indicate that the question of whether an ECA can be considered to be a “multinational enterprise” for the purpose of the Guidelines needs to be decided on a case-by-case basis taking into account the criteria outlined above.