



The Voice of OECD Business

Initial BIAC Comments for the Update of the OECD MNE Guidelines

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Final version

I. Introduction

BIAC welcomes the opportunity to provide our initial comments to the OECD Investment Committee on the potential update of the OECD Guidelines for Multinational Enterprises. Given the preliminary nature of the discussion to date on a potential update and our current knowledge of the forthcoming framework of any update, BIAC comments at this stage are fairly general. We look forward to taking part in additional consultations on more specific proposals.

BIAC supports the Guidelines as voluntary recommendations by OECD member governments and other adhering governments on responsible business conduct, assisting business to fulfil its obligations consistent with applicable laws.

Business continues to support and use the Guidelines as a main cornerstone in understanding OECD expectations for multinational enterprises. BIAC believes that it is entirely reasonable to consider an update of the Guidelines to ensure that they keep pace with new ideas and developments that business, labour, NGOs and governments have undertaken in a collaborative manner to advance responsible business conduct.

In this connection, the OECD should take this opportunity to look beyond an update of the text and procedures of the Guidelines only. In particular, it should consider how they can be best positioned to build partnerships to help address current challenges of responsible business conduct facing business in the context of international investment. The purpose of the update should be to strengthen the outreach, credibility, legitimacy, effectiveness and reputation of the Guidelines. We believe the outcome of any update should be clear, understandable and have practical applicability.

II. Lessons Learned from the Past Decade

In the nine years since the release of the 2000 Guidelines revision, there has been considerable innovation in corporate responsibility efforts and a significant increase in the number of corporate responsibility initiatives. At the enterprise level, many companies have developed policies on a wide range of issues related to corporate responsibility that are integrated into overall company policies and objectives.

Across sectors, companies have worked together and with key stakeholders to address common problems through collaborative approaches and common standards or codes of conduct, most notably in efforts to improve business practices of suppliers in a variety of industries, including apparel and footwear, toys, electronics, automotive, extractive industries, defence and most recently retail. Additionally, many initiatives have been developed to address particular issues or problems, including HIV/AIDS, anti-corruption and extortion, child/forced labour, diversity/inclusion, climate change, water, project financing, human rights, communication and reporting, environmental conservation, stakeholder engagement, community engagement, agriculture, product testing and tourism.

There are a number of key lessons to learn from this growing body of experience in the private sector. First, corporate responsibility policies are most successful when they are integrated into existing company policies and procedures. Second, policies must be translated into specific action plans that are implemented throughout the organisation and can be modified over time to reflect changing circumstances. Third, many – if not most – corporate responsibility issues involve broad societal problems that no single company or stakeholder group can solve on its own. These will require collaboration across stakeholder groups, including governments, to address successfully.

Since it is essential that the structures that deliver corporate responsibility are mirrored by those that frame corporate responsibility policy, we believe that company level lessons are equally valid for how the OECD manages and uses the Guidelines in order to increase their relevance. First, the OECD could further support the work of the Investment Committee and seek to integrate the Guidelines horizontally throughout the Organisation, since the Guidelines cover many policy areas. Second, the OECD could develop a work programme that includes specific action plans that can help companies to address the difficult issues they encounter. Third, the OECD could create central and national fora to foster collaboration among the various stakeholders, including non-member economies, which could encourage joint action and seek solutions to common problems that build upon the existing NCP annual meetings.

III. General Comments

Over the course of the past decade, BIAC has repeatedly emphasised the importance of certain fundamental dynamics that underpin the value of the Guidelines¹. Any changes to the Guidelines must start with a clear definition of the scope and intent of an update. BIAC still believes certain characteristics are very important and we point to the following features:

- The Guidelines are voluntary recommendations by OECD governments on responsible business conduct for companies investing abroad;
- The Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises. Proposals to change their status should in every case be

¹ See previous BIAC submissions to the OECD Investment Committee in 2001, 2003, 2004, 2006 and 2007, as indicated in the Annex of DAF/INV/WP(2009)4.

thoroughly reviewed and carefully considered to assess the potential impacts on both the Declaration and the Guidelines;

- The Guidelines should still aim at promoting dialogue by helping companies, employees and other stakeholders to avoid conflicts;
- All issues covered by the Guidelines must consist of direct investment or operations equivalent to investment where there is explicit, long-term control by the parties involved. If such control as defined by the OECD is not present, the entity is not a foreign investor and not subject to the recommendations of the Guidelines;
- The Guidelines do not replace national law and should not blur the differences between the responsibilities of governments and those of business. All companies must first and foremost comply with national law – even where enforcement is weak.

Increasing the number of adhering countries

BIAC feels that it is a top priority for the OECD to increase the number of adhering countries to the OECD Declaration on International Investment and Multinational Enterprises, and this should form an important part of the 2010 update activities.

Non-OECD countries are attracting and engaging in a growing share of international investment, and multinationals from non-adhering countries have also grown in importance, as evidenced by the increased number of Bilateral Investment Treaties they have entered into. Thus, the OECD should take significant steps to boost the visibility of the Declaration in non-adhering countries and to encourage their adherence.

This should be carried out through constructive and collaborative dialogue with these countries where all relevant stakeholders, including business, are engaged in the process of expansion. The OECD Enhanced Engagement process and broader OECD outreach programme should make this one of their key priorities. Additional direct cooperation with non-OECD states would also be an opportunity to solve the problems that are not addressed today, including local problems and challenges in the individual countries.

Developing a proactive OECD work programme

The OECD should therefore start the process by rethinking the target audience for the Guidelines, including non-MNEs in non-OECD countries, and define where the problems at present exist, so that the relevant tool can be applied to a particular problem.

The main objective should not be to promote the Guidelines for their own sake, but to use them as a way to identify the problems to be addressed and develop the best solutions possible. The experience from many corporate responsibility efforts is that the process and outcome become more important than the originating code or set of principles. Thus, any update of the text of the Guidelines and the NCP procedures should be seen as the first step in the process, with the more significant impact coming from actual implementation through a proactive work programme, including best practice discussions based on successful case studies.

Key to the value of the Guidelines is ensuring that they are sufficiently promoted and brought into actual use by stakeholders. While positive steps have already been taken to improve the

promotion of the Guidelines, there is a notable absence of practical help to increase their use by companies.

The OECD should expand its efforts on the Guidelines beyond managing the text and NCP procedures to include a fully developed work programme that is focussed on problems or challenges that require collective action to address. It would be useful to develop a fresh approach in the context of a 2010 update that would boost dialogue, help multinationals, and prevent problems from arising in the first place. BIAC believes that the development of such a proactive approach would bring stakeholders together to explore the many different areas that are covered in the Guidelines. This is key to their future success. Learning from business and other stakeholder experience of dealing with real-world problems would also contribute to improving the value and uptake of the Guidelines.

A proactive work programme would have great potential to address current priorities, and could include the following items:

- OECD engagement with non-member countries to discuss how all stakeholders can work together to improve implementation and enforcement of national laws by non-OECD governments and improve compliance by all companies in a given country;
- An international forum that could serve as a platform for stakeholders to meet and share good practices on a set of common issues. Local networking groups could also be considered;
- The development of multi-stakeholder working groups under the Guidelines to address specific high priority issues such as anti-corruption;
- Horizontal groups across OECD Directorates to work on key elements of specific chapters of the Guidelines, including the development of tools and resources to help companies integrate the issues into their policies and operations;
- Examples of such tools that BIAC has proposed in the past include a web-based tool to track bribe solicitation among government officials and a web based tool to assist small and medium size companies investing in weak governance zones.

Communicating the Guidelines

Possibilities for a new approach could also involve developing a much condensed version of the Guidelines publication for smaller multinationals that may not be aware of the Guidelines, perhaps in a reader-friendly brochure format that could be easily distributed. The brief document could contain a summary of the Guidelines, and could refer to the longer 65-page Guidelines publication. Developing such a brief separate summary document/brochure would, in our view, be more accessible to business managers, particularly in non-OECD countries.

Additionally, it could be useful to develop a fuller user-friendly web tool for the Guidelines and their implementation. This could take a similar form to the website being proposed for the OECD Risk Awareness Tool for Investment in Weak Governance Zones or build on the structure of a guiding handbook. Such a dedicated web tool for the Guidelines could provide useful information to users about the Guidelines, their implementation, and any current events concerning the Guidelines.

IV. Specific comments relating to the substantive provisions of the Guidelines

Human rights

BIAC would in principle support a new chapter on human rights if it is based upon – and is consistent with – the work of the Special Representative of UN Secretary General for Business and Human Rights, Professor John Ruggie. It could usefully provide recommendations on how multinational enterprises could fulfil their responsibility to respect human rights, focusing on the due diligence process the UN Special Representative has articulated. BIAC would be happy to take part in any further work on this area.

Supply chains

The business community has developed extensive experience on supply chain management programmes over the past 10-20 years. These programmes have undergone almost continuous revision and refinement based on lessons learned, leading to various initiatives, such as company supplier codes of conduct, monitoring/auditing of such codes, sector-based supplier codes of conduct, and looking at the systemic reasons for poor working conditions or environmental performance in suppliers.

A very good example of such efforts is the ILO-IFC Better Work programme, which tries to leverage private sector programmes to develop national institutions and infrastructure to more effectively implement and enforce national laws. It recognizes that supply chain problems are caused by a governance gap that can best be solved by directly addressing the governance needs at the national level, which in turn would be better positioned to encompass the majority of domestic firms, including exporters. BIAC believes that the OECD could play a very useful role in furthering this approach through its engagement with non-member economies and through its peer review process.

The OECD should treat the issue of supply chains with caution because of the difficult issue of companies' ability to influence in a practical manner the behaviour of each and every supplier and sub-contractor. The suggested pro-active work programme could, together with already accumulated business experience, provide effective ways to improve supply chain conditions. The nature of due diligence needs thorough investigation before any recommendations are made. Companies should only be made accountable on issues that they can control, not on issues that they are assumed to influence.

Taxation

BIAC believes that the taxation chapter remains relevant as it stands. It is an adequate description of the OECD Principles on international taxation and constitutes appropriate guidance to MNEs on tax issues. BIAC could, however, see a need for an update of the commentaries related to the Guidelines to reflect current developments. Issues such as enhanced relationship between taxpayers and authorities, dispute resolution mechanisms and the practicality of the Transfer Pricing Guidelines could be included.

Environment

Paragraph 11 of the OECD document suggests that Part V of the Guidelines should be updated to clarify guidance vis-à-vis climate change and green growth. BIAC agrees with the present guidance provided in Part V and still finds it relevant.

If additional mention is made of climate change in particular, we feel it would be premature to make comments at this stage until after the Copenhagen climate change conference. Furthermore, if climate change is given specific mention in the text, we are of the view that additional environment-related challenges should also be mentioned, such as water supply and sanitation, food security, energy security, and ecosystem and waste management.

The Guidelines should encourage MNE's to engage to develop strategies that combine long-run economic growth with environmentally sustainable policies, balancing costs and benefits of applying green measures.

Disclosure

As with supply chain management, the private sector has developed considerable experience with communication tools on environmental, social and governance issues to a variety of audiences. Experience to date reveals that the field continues to evolve across a number of factors and is by no means locked into any particular pattern. Annual company reports have received most attention but the experience has been decidedly mixed, with significantly low readership and material poorly suited for multiple target audiences. Targeted publications for different stakeholders have also been used to good effect, particularly with employees, who remain the primary target audience for most such communication.

BIAC therefore warns that careful steps must be taken in order to avoid counterproductive effects since companies already report information on internal structures. In addition, the right balance between already existing disclosure requirements from national mandatory systems and further disclosure recommendations from the Guidelines must be sought. Obligatory reporting and binding indicators would be problematic and counter-productive.

Consumer interests

BIAC would consider relevant proposals for additions that address financial education, green products or ethical sourcing.

Anti-bribery & corruption

There is one sentence in the Guidelines about extortion. Any update should take the opportunity to shine more attention on the demand side of corruption where business often faces the most pressure.

Technical updates

BIAC supports Paragraph 7 in the OECD document to ensure that the Guidelines and Commentaries are accurate and up-to-date. This should be a fundamental part of the 2010 update of the Guidelines.

Issues related to the procedural guidance to NCPs and the complaint mechanism

BIAC believes that one of the key impediments to the effective use of the complaint mechanism is the existence of *parallel proceedings* (i.e. that a case might be taken up by local courts at the same time, or that a complainant may engage in “forum shopping” to promote the cause through multiple avenues at the same time, including multiple filings to NCPs).

In the Procedural Guidance part of the Guidelines, it would therefore be useful to include clarification under “C. Implementation in Specific Instances” regarding parallel proceedings. In BIAC’s view, it should be clearly stated that entities considering resolution of an issue through the Guidelines procedures are encouraged to first address their complaint through domestic channels, even if they are also considering legal action.

Further it should be made clear that the Guidelines are not a substitute for, nor do they override, applicable law or create any conflicting requirements. Parallel proceedings should not automatically prevent NCPs from taking up specific instances, but NCPs must not override national rules or interfere with national legal or administrative procedures. NCPs can, however, offer their good offices to facilitate dialogue in cases where all parties express interest in a consensual and non-adversarial dialogue despite parallel proceedings. Finally, the procedures should require parties submitting a complaint to disclose where they are also seeking to address the same issue through other means.

Regarding *Functional Equivalence* BIAC believes it necessary to acknowledge that NCPs’ institutional arrangements (i.e. the procedures that NCPs have applied) and operational modalities differ according to their respective national cultures, and thus NCPs can be expected to develop and function differently. With respect to the application of the established core criteria of NCPs (i.e. visibility, accessibility, transparency and accountability), BIAC sees room for improvement as the implementation process of the NCPs moves forward. Dialogue based on trust between all concerned parties is critical to this process and could address evaluation of whether changes to existing arrangements would be beneficial, including issues such as timeline requirement for processing of cases, and management of expectations.

BIAC recognises the established OECD principle of peer review and supports the suggestion of introducing a voluntary *peer review mechanism*, subject to the results of the Dutch NCP. In our view, peer learning should, however, remain voluntary and unbinding due to the recognition of no ‘one-size-fits-all’.