

BIAC statement on the update of the OECD MNE Guidelines

18 February 2011

BIAC is pleased to convey its latest comments on the update of the OECD MNE Guidelines. This statement highlights some general areas of concern to BIAC at this critical stage of the update process, as well as the most important current issues in each chapter of the Guidelines. It serves in addition to the detailed written comments on the consolidated text that BIAC has already submitted to the OECD. BIAC is committed to continue the dialogue in order to reach agreement on these important issues.

General comments

BIAC would like to stress that the Guidelines are subject to an *update*, not a revision. The aim of the update is to ensure alignment of the Guidelines with internationally agreed and broadly supported instruments established since the last full revision in 2000. The update should stick closely to the Terms of Reference by securing codification of such new instruments. It should refrain from including new concepts and fundamental changes that go beyond the scope of an update. This is even more important due to the very tight timeframe.

The OECD technical committees have proposed some far-reaching and fundamental changes. In addition, drafted text has included contributions from different technical OECD committees on the same Guidelines chapters which have not been aligned with each other. When developing the final text, the OECD Investment Committee should take great care to **closely examine the proposed changes and guarantee consistency** in the text.

Specific comments on key Chapters

Preface

The word “*voluntary*” truly reflects the nature of the recommendations to MNEs and should not be removed. Furthermore, the Guidelines should address more explicitly the issue of safeguarding a *level playing field*; this is needed to avoid unnecessary burdens on business and to promote outreach to non-adhering countries.

Concepts and Principles

When there is a *conflicting requirement* between local laws and the MNE Guidelines, companies are asked to honour the Guidelines; however, it needs to be clarified that this can only be within a framework of respecting local laws and regulations.

General policies

Due diligence should be linked to the four *fields* of human rights, core labour standards, anti-bribery and the environment, instead of the four *chapters*.

The Guidelines should distinguish between the *demands on the supply chain* linked to due diligence and those linked to general supply chain responsibility – the second category being clearly less demanding. Consistent use of supply chain wording is needed throughout the Guidelines.

The general provision on *stakeholder engagement* as currently formulated would cover essentially all business activity and is unworkable; moreover, stakeholder engagement is already adequately addressed in specific chapters when relevant (e.g. human rights and the environment).

Disclosure

The wording that enterprises are “encouraged” to apply (not “should apply”) high quality standards for *non-financial disclosure* should be retained, as the proposed change is very controversial and not based on an applicable international standard. Furthermore, it needs to be clarified whether this chapter applies to *non-listed companies*. If it does, this has to be clearly within the limits of national law. The actual proposals also *go beyond existing requirements* for listed companies. This chapter needs careful review.

Human rights

BIAC considers it necessary to wait until the final version of the UN Guiding Principles is available (by early March 2011) before a full discussion can take place on the text concerning human rights, due diligence and the supply chain. It will be important to clearly distinguish between the role of states and the role of MNEs. Third party responsibility, conflicting requirements, and defining humanitarian law will all warrant particular scrutiny.

Employment and Industrial Relations

BIAC opposes the *introduction of the word ‘worker’* instead of ‘employee’. The Terms of Reference do not imply the large-scale extraction of language from the ILO Tripartite Declaration into the OECD MNE Guidelines. The two instruments and the two organisations have very different contexts. As the majority of NCP procedures deal with the employment chapter, precise language on this point is essential for BIAC. While the word “worker” may be suitable in the ILO context, introducing it into the Guidelines broadens the scope beyond a contractual relationship, which in many parts of the document would be inappropriate or even illegal in certain jurisdictions.

Environment

BIAC has several concerns including the *restrictive listing of measures* that companies should take and the implications of wording on the *mitigation of foreseeable impacts*.

Anti-Bribery

BIAC recognises progress regarding coherence with the OECD Anti-Bribery Convention; however, the text additions on bribe *solicitation and extortion* seem to place the responsibility almost exclusively onto enterprises. The adoption of internal controls needs to reflect the size of the individual MNE, and the Guidelines should take care not to conflict with national legislation.

Consumer Interests

The proposed text on this chapter warrants *extensive review*. In particular, BIAC is concerned about the implications of language on the comparability of products and prices, “verifiable” information, product reliability, sustainable consumption and financial risk. Environmental “impact” is too subjective, and the OECD Consumer Policy Committee recommendation of “attributes” should be used instead. Furthermore, the commentary has become extremely long and overly detailed.

Competition

BIAC accepts the duty to co-operate, but an expectation that enterprises “should” waive confidentiality is inappropriate and undermines legitimate rights of defence.

Tax

It must be clarified that complying with the “spirit” of the law does not imply paying taxes that are not compulsory under the law. Much greater clarity on this issue is needed.

Procedural issues

BIAC is committed to the effective functioning of the NCP. However, the character of the NCP procedure should be one of mediation, not adjudication. Recommendations must be constructive and future-oriented. NCP decisions cannot be the formal basis for administrative sanctions; oversight bodies should not deal with specific instances in order to avoid any form of appeal procedure; and there should be room for governments to establish NCPs according to national preferences using flexible timeframes to deal with specific instances. All these points are consistent with the Terms of Reference and are critical in the uptake of the MNE Guidelines.