

BIAC Secretariat note on

The outcome of the updated OECD MNE Guidelines

July 2011

About the OECD MNE Guidelines

The Guidelines are recommendations addressed by governments to multinational enterprises operating in or from adhering countries (the 34 OECD countries plus 8 non-OECD countries: Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania). They provide voluntary principles and standards for responsible business conduct, in a variety of areas including employment and industrial relations, human rights, environment, information disclosure, competition, taxation, and science and technology.

Although many business codes of conduct are now publicly available, the Guidelines are unique in the sense that they are multilaterally endorsed by Governments and commit these Governments to promote the Guidelines. The Guidelines also require that Governments to set up a national complaints mechanism responsible for encouraging observance of the Guidelines and for assisting in solving problems that may arise in this connection. These features are not shared by other internationally recognised codes of conduct. The Guidelines' recommendations express the shared values of Governments and aim to promote the positive contributions multinationals can make to economic, environmental and social progress.

Adoption of the updated OECD MNE Guidelines

At the 2011 OECD Ministerial Council Meeting, Ministers adopted the updated OECD Guidelines for Multinational Enterprises. The Guidelines were last updated in 2000 and the new Guidelines text, adopted at the OECD's 50th anniversary, brings the recommendations to business up to date on a number of points.

The text now focuses more on ensuring responsible business conduct in the supply chains of the company, and it incorporates human rights and labour standards that have been internationally agreed upon since the 2000 version of the Guidelines. Also, OECD instruments developed within the past decade, such as the OECD Corporate Governance Principles and the OECD Anti-Bribery Recommendation, have been included in the Guidelines text.

The updated Guidelines also include new recommendations on issues such as due diligence of impacts from own and business partner activities as well as a new chapter on human rights, making the Guidelines the first inter-governmental agreement in this area. In addition, new provisions on employment and taxation have been introduced.

Impacts from own and business partner activities

The updated Guidelines now make use of the concept of “due diligence” when recommending how companies should conduct responsible business operations.

Due diligence originally refers to an investigation of a business or person prior to signing a contract. A common example of due diligence is the process through which a potential acquirer evaluates a target company or its assets for acquisition.

In the Guidelines due diligence refers to a process taken by the company that can identify, prevent and mitigate negative consequences (so-called adverse impacts) of the company’s action. I.e. if a company takes a number of decisions and actions when doing business there should be a process in place that ensures that these actions do not harm employees, external stakeholders, the environment etc.

The updated Guidelines now contain a “general principle” on the need to exercise due diligence in companies’ business operations. A company is therefore expected to establish a process to identify, prevent and mitigate adverse impacts that the company cause or contribute to. So *in terms of its own activities* the company should avoid causing or contributing to adverse impacts in the areas of disclosure, employment, environment, bribery and consumer interests, also in its supply chain. The company should also account for or disclose how these impacts are addressed.

In terms of the activities of its business partners, when a company has not directly contributed to adverse impacts but is in a business relationship with the entity that is causing the adverse impacts, companies should seek to prevent or mitigate the impacts.

The concept of due diligence has been central in the discussion about the update of the Guidelines. In 2008 the UN Special Representative on Business and Human Rights developed the idea to understand due diligence as a company process to identify, prevent and mitigate adverse impacts in relation to human rights, in contrast to the original use of due diligence. Based on this idea TUAC, supported by Governments, suggested to apply the new due diligence concept to all areas of the Guidelines. It was argued that a strict due diligence approach should be a general principle of the Guidelines, and that companies should carry out strictly specified and requiring due diligence steps on all fields covered by the Guidelines.

BIAC argued that this would be practicably impossible and would make MNEs responsible for impacts made by business partners that the MNEs would have not influence over. Backed by strong arguments and examples BIAC managed to obtain a final Guidelines text which is less demanding than originally required by TUAC.

The general principle of due diligence is limited to the areas of disclosure, employment, environment, bribery and consumer interests, and does not apply to the chapters of Science and Technology, Competition and Taxation. The principle is based on a flexible approach, i.e. there is no procedural requirements which the company is expected to fulfill on these other areas, but instead an expectation that the company will define its own way on how to carry out due diligence. Due diligence is furthermore expected to be risk-based so that the company should focus its resources on the impacts that it assesses to pose the highest risks. The process can be carried out via enterprise risk management systems which companies often already have in place, provided it goes beyond simply identifying and managing material risks to the company itself.

The stricter version of due diligence, which was originally required by TUAC to cover all the Guidelines areas, has only been applied to the new Guidelines chapter on human rights. This chapter has been kept closely in line with the framework already developed by the UN Special Representative and already adopted by the UN, as described below.

With regard to the provision concerning adverse impacts caused by a business partner, including partners in the supply chain, of the company, BIAC furthermore succeeded in obtaining a more flexible and practicable solution that originally suggested by TUAC and Governments. This has resulted in that companies should 'seek to' prevent or mitigate such adverse impacts, but are not expected to apply the more rigorous due diligence process used in relation to its own activities.

Furthermore, the BIAC argument that companies have limited control over their suppliers, and that companies (MNEs as well as suppliers) should be responsible for their own activities and not for the activities of others, has been recognised in the Guidelines text. This shows that despite the expectation that companies should seek to prevent or mitigate adverse impacts caused by their business partners, the Guidelines recommendations are not explicit regarding e.g. at which tier/level of the supply chain the company should apply prevention and mitigation, as this depends on the individual company case. The Guidelines therefore seem to imply a room for manoeuvre and interpretation, which is in line with their fundamental non-prescriptive nature.

Human Rights

A new chapter on Human Rights establishes that firms should respect human rights in every country in which they operate, i.e. that companies should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. The chapter is closely aligned with the framework and guiding principles on human rights and business which have been developed by the UN Special Representative on Business and Human Rights Professor John Ruggie.

The chapter also includes expectations that appropriate human rights due diligence processes covering the company itself and its supply chain are in place to ensure that international human rights standards are respected. Such processes should be based on the

recommendations of the UN Special Representative which set out specified steps that companies should follow.

In the Guidelines discussions BIAC has argued that the updated Guidelines should be as much in line with the work of the UN Special Representative as possible. Governments and stakeholders have agreed with this approach and the final text is closely aligned with the UN provisions. During the update process BIAC pointed to the problem to companies that arises when domestic law conflicts with internationally recognised human rights. The Guidelines text deals with this problem of conflicting requirements by mentioning that enterprises should 'seek ways' to honour the international human rights to the fullest extent which does not place them in violation of domestic law. In line with the wish of business, Governments decided to provide companies with further explanation of the chapter contents via the Commentaries to the chapter. As the Guidelines text the Commentaries have also been based on the work of the UN Special Representative.

Employment and industrial relations

The chapter now includes elements from the ILO Tripartite Declaration on Multinational Enterprises and Social Policy. Most importantly, the term 'employee' has in a number of places been replaced by several variations of the term 'worker' as used by the ILO text. It also includes a reference to 'the best possible wages', that should be 'adequate to satisfy the basic needs of the workers and their families'.

Business put much effort into the discussions of this chapter. The centre of discussions among stakeholders was to what degree alignment with ILO texts was appropriate for ensuring clarity of the Guidelines. TUAC and specific Governments pushed towards full alignment with the 2006 ILO Tripartite Declaration. However, BIAC argued that the two instruments are of different nature and that references to the ILO instrument should take these differences into account. E.g. BIAC argued that introduction of the term 'employee' would broaden the scope of the Guidelines as it would introduce responsibilities to MNEs of persons who are not in a direct contractual relationship with the employer, such as workers hired by an intermediary employment agency. This would be problematic as the employer would not have direct influence over such persons and their employment conditions.

BIAC achieved that the terms was reviewed on a case by case basis and that clarification was introduced in the Guidelines Commentaries in order to make clear how the term 'employee' should be understood in the Guidelines context. BIAC has accepted the formulation of best possible wages after TUAC stated that the non-discrimination principle excludes the possibility that the same work is remunerated differently depending on the family size of a worker.

Taxation

The Guidelines introduces a provision that companies should comply with both the letter and the spirit of the law.

Governments insisted on the inclusion of this provision since Ministers had committed politically to in the 2010 Ministerial Declaration on Propriety, Integrity and Transparency, in the Conduct of International Business and Finance. BIAC argued that the language around compliance with the spirit of the law would be problematic to business, since companies cannot be expected to know the intent of national law makers with respect to introductions in which the companies operate. The discussions resulted in introduction of clarifying language in the Guidelines Commentaries that qualifies the expectations put on business and that confirms that complying with the spirit of the law cannot imply that enterprises should pay taxes in excess of the amount legally required.

Bribery

The updated Guidelines make reference to the updated 2009 OECD Anti-bribery Recommendation and thereby enlarges the scope on certain bribery issues compared to the previous version.

Companies are encouraged to develop and adopt risk-based compliance programmes for preventing and detecting bribery. They are also encouraged to prohibit or discourage the use of small facilitation payments via these internal compliance programmes.

On request of BIAC, also the ‘demand side’ of bribery, i.e. bribe solicitation by Government officials, has been introduced in the Guidelines, in order to combat the bribery problem in an effective and balanced manner.

Implementation procedures

Stronger and clearer procedural guidance on how the Guidelines should be implemented have been included. Based on BIAC’s explicit recommendations the new guidance reinforces the positive agenda for implementation so that Governments should offer active assistance and support for responsible business conduct. Contrary to what TUAC and specific Governments pushed for, the updated Guidelines do not task NCPs with issuing determinations, i.e. ‘rulings’, of the specific instances that are brought before them. The Guidelines thereby maintain their non-binding judiciary nature.

Various

The Guidelines also contain new provisions on the development of a pro-active agenda to promote enterprise behaviour in accordance with the Guidelines and to address specific issues with which companies are confronted in doing so.

The Guidelines are currently only adhered to by 8 non-OECD countries, which – besides Brazil – do not represent important emerging economies. A reason might be that major non-OECD countries do not feel ownership of the Guidelines, since these countries have not had

any influence on shaping the text and since there is no clear economic short-term rationale for them to adhere.

BIAC has stressed during the process of the update of the Guidelines that with the shift of economic weight actually taking place in the world economy, it is more important than ever to expand the geographical coverage of the Guidelines. The OECD must therefore undertake determined efforts to promote enterprise behaviour that matches the standards of the Guidelines in non-adhering countries that compete with OECD business. This will be crucial in order to maintain an international level playing field in the future.