



Business and Industry Advisory Committee to the OECD

Comité Consultatif Economique et Industriel Auprès de l'OCDE

**Comments on the Review
of the OECD Guidelines for Multinational Enterprises:**

**Compiled from a Survey of Businesses and Business Associations
Representing the Majority of Companies in OECD Member Countries**

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I. A Key Question

At this point in the review, a key question exists for the OECD Guidelines for Multinational Enterprises: how can they address the realities of the competitive marketplace and retain their relevance for the private sector?

Businesses have argued that the Guidelines should:

- Strike a positive tone with regard to the contributions of modern multinationals, to encourage promotion and implementation of the Guidelines by as many firms as possible;
- Set targets that are realistic for the thousands of new entities now operating globally, including medium-sized and smaller companies;
- Remain as recommendations for voluntary standards of company behaviour, recognising that one size does not fit all, and without unrealistically encouraging monitoring by NGOs;
- Be balanced with expectations that governments will treat foreign investors without discrimination, under the national treatment principle, as agreed by business and trade unions--as well as governments--when the Guidelines were developed in the 1970's. (Tripartite support is a defining feature of the Guidelines).

The importance of certain issues to the business community cannot be overstated. These issues deserve the particular attention of governments: the dangers of rejecting the fundamentally voluntary approach, the introduction of the Guidelines outside of the OECD, and risks of aggravating discriminatory treatment of foreign investors.

II. The Global Context

In general, BIAC believes that the instruments in the OECD's Declaration on International Investment and Multinational Enterprises¹ have positively helped to maintain conditions favourable to transnational investment, and to enhance the positive impact of foreign companies and investments in new markets, right up to the present. The instruments constitute a balanced framework for co-operation in matters related to international investment and companies. By expressing our shared goals with clarity, they can and will continually contribute to the mutual confidence between businesses and governments.

The stated objective of the Guidelines are to “*encourage the positive contributions that MNEs can make to economic and social progress.*” Since the time the Guidelines were originally put in place, there were maybe 200 “Multinational Enterprises”—companies with facilities in several OECD countries. This set of the very largest companies, who have grown in number, have become “global companies” that practice active good corporate citizenship as espoused in the Guidelines—it is good business for them to do so, and helps them in the face of market competition. Examples of how such results can be attained were raised by representatives of major companies in LMP seminars on environment and labour issues in the Spring (summary records are available). Corporate practices and attitudes toward business have clearly changed and positive contributions have been impressive.

Even with this improved environment, trust-building never stops. Participants in global markets are increasingly small and medium-sized companies operating in countries all over the world (OECD and non-OECD). The Guidelines are a communications instrument that can serve business, citizens, consumers and employees, by contributing to trust-building between governments, businesses, and their various constituents in open markets. It is there purpose to do so, but businesses and business organisations responding to the recent drafts say, for example:

“Overall, we get the impression that most chapters are written from a viewpoint of distrust of large companies, instead of recognising the many positive effects companies contribute to society, e.g. by responding to customers needs, creating jobs and value, investing, inventing and spreading new and efficient technologies. The phrasing used is often aggressive...one gets the impression that there must be a lot of problems with MNE's behaviour in the world and therefore stricter controls are necessary. The few cases of misbehaviour are not sufficient to justify such a tone and change in character of the Guidelines.”

Recognising the efforts aim toward resolving real problems, it must be said that sometimes developers of policy may focus on the gaps and forget the mountains. The Guidelines can help build trust in the communities in which companies operate, by highlighting the benefits of increased international linkages and the positive contributions of foreign companies. *With an enormous number of smaller companies as a potential users of the OECD Guidelines, the Guidelines will have to be flexible, clear, and positive, to be an effective communications tool for today's marketplace.*

¹ The term “instruments” is used to refer to the Guidelines and the other parts of the Declaration on International Investment and Multinational Enterprises, namely the instrument on Investment Incentives and Disincentives, the statement of the “national treatment principle” and the related procedural decision of the Council requiring notification and follow-up on national treatment exceptions, and the General Considerations and Practical Guidance on conflicting requirements imposed on multinational enterprises, together with the procedural decision of the Council regarding conflicting requirements (“conflicting requirements instruments”).

In the review process, participants are in fact trying to re-draft the advice OECD governments jointly wish to express to companies whose businesses cross borders. Where revisions to the Guidelines are justified, businesses are determined to bring their best practical recommendations to the OECD.

III. The Year 2000 Review

As early as January 1998, BIAC began surveying businesses and business associations (whose members include the majority of companies in OECD countries), to prepare for the CIME Review of the Guidelines (officially opened at the Budapest Conference of November 1998). The surveys have continued on approximately a quarterly basis, and have reached varying levels of detail.

Based on analysis of the results of these surveys, BIAC contributed a preliminary paper, a proposal for changes to the Environment chapter (DAFFE/IME/WPG/RD(99)1), a paper on International Investment and Environment, comments to early Competition chapter proposals, a paper on International Investment and Employment, a letter on monitoring of companies, comments regarding the role of National Contact Points as raised in the clarification request (DAFFE/IME/RD(99)10), comments on all OECD proposals available as of 17 September (DAFFE/IME/WPG/RD(99)5), and as of 26 October (DAFFE/IME/WPG/RD(99)10).

Reports of the two OECD-BIAC seminars on foreign investors also record business views on the Guidelines, including the important issues of maintaining environmental and labour standards in areas outside of the OECD:

- (PAC/AFF/LMP(99)5) LABOUR AND EMPLOYMENT PRACTICES IN TODAY'S GLOBAL ECONOMY: IMPLICATIONS FOR THE OECD GUIDELINES ON MULTINATIONAL ENTERPRISES
- (PAC/AFF/LMP(99)6) , MULTINATIONAL ENTERPRISES AND ENVIRONMENTAL PROTECTION: IMPLICATIONS FOR THE OECD GUIDELINES ON MULTINATIONAL ENTERPRISES

Further specific comments have been provided by BIAC representatives in formal and informal consultations with the CIME bureau and Mr. Sikkel (summaries of each session are available on request from the BIAC secretariat, April Tash tel. 01 42 30 09 60).

IV. Comments on Subjects in Review

Business voices have argued that the Guidelines should be written as guidance that is flexible, clear and positive, to help all companies to seek their own self-interest in good practices. Business advice on each of the main subjects of the review is contained in the compiled comments that follow.

Businesses see certain of the recent proposals for revisions to the Guidelines as constructive and beneficial, and therefore wish to encourage good tendencies in the review. Businesses commend efforts to introduce language such as “where appropriate to the size of the company” which acknowledges the differing abilities of smaller companies to respond to the OECD recommendations. This kind of change helps the Guidelines to be flexible.

Overall, the business community believes the Guidelines must be “user-friendly.” It should avoid vagueness and unintended overspecificity. Moreover, CIME should not lose sight of the high value of textual stability. *This means specifically:* that changes should be to update the outdated text, and fill “holes.” Revisions should be justified by changes in the marketplace and in enterprises and should not be intended to alter the balance that is the basis of tripartite support for the Guidelines. In addition, the stand-alone character of text helps to make the Guidelines clear. Commentaries and references should be eliminated. Furthermore, terms and concepts should be consistently used across chapters, so that the instrument speaks with one clear voice.

Businesses consistently recommend that suggestions for textual changes should *achieve a positive tone consistently*. The overall impression should be positive, to attract “bees with honey.” The Guidelines should emphasise the essential role of companies in putting in place good practices and then set out the elements of good practices. In this regard, George Foulkes, Member of Parliament and Parliamentary Under Secretary of State in the United Kingdom said recently to open an OECD conference²:

“Many [international investors]... now seek to apply higher standards than the host countries would wish. International investment can do good not only by carrying on business in poor countries but also by improving standards of legal compliance, corporate responsibility and governance, by sheer force of example in those countries.”

Recognising the strength in example is a key to promoting good practice both within and outside the OECD area.

1. Geographic Scope of the OECD Guidelines

For various reasons, the “geographic scope” issue has become a critical one in this year’s review of the Guidelines.

To enhance the reach and use of the Guidelines, businesses have suggested that non-OECD states be encouraged to enter the “system” of the Declaration. States should be encouraged to seek tripartite support at home, to announce support for the Declaration, to set up functioning National Contact Points, and to participate in the CIME clarification procedures. Businesses view each part of the system as important for developing trust between multinational enterprises and governments, including the principle of national treatment.³

In DAFPE/IME/WPG(99)18 it was proposed “that the Guidelines should apply to the operations of OECD-based enterprises world-wide.” Moreover, the paper refers to OECD-based MNEs, which would seem to exclude countries with observer status, notwithstanding the footnote 1 on page 2. By contrast, the OECD Committee on Competition Law and Policy refers to “MNEs based in adhering countries”. The latter formulation is more satisfactory because it implies that a country wishing to support the application of the Guidelines within its own territory should be expected to adhere to **all** aspects of the CIME “package”, including the “national treatment” and avoidance of “conflicting requirements” obligations. Such a reference would tend to support business’ view that implementation of the Guidelines should be a local issue first, focused in the territory of operation for the MNE, and respectful of the local rules and expectations.

² Keynote address, OECD conference on Foreign Direct Investment, Development and Corporate Responsibility (September 1999)

³ The national treatment instrument in the Declaration on International Investment and Multinational Enterprises.

There is always some appeal of simply calling the OECD Guidelines universal, and leaving the problems for enterprises to puzzle out. Theoretically, this may pose few problems for the largest MNEs who tend to use single world-wide policies, but the Guidelines should address all companies and recognise differences among them. Furthermore, the universalist theory may enhance expectations and set up more challenges to companies, without guiding them.

It also remains true that the OECD Guidelines are a formulation by the OECD states –one should not assume that they incorporate views of governments, businesses, labour unions and others from outside OECD. When the principles in the Guidelines come to be applied by companies outside the OECD area, they may prove to be inconsistent with local views on similar subjects (the companies should instead be encouraged to give precedence to a local practice or expectation). They may generate uncertainty and worse. Such instances will not help make the Guidelines appear relevant and useful.

Several proposed revised chapters already imply or assume expanded geographical scope for the Guidelines. An expansion of geographic scope by a theory of “universality” is problematic where there is no NCP and there may be a question to resolve between a company and its unions. The resolution of Guidelines issues may depend upon a correct interpretation of the Guidelines (normally aided by the NCP), and also may depend upon progress of concurrent domestic discussions between companies and labour unions (which may be inaccessible to a non-local observer). Moreover, tripartite support is essential for the operation of the Guidelines. Even where an NCP is operational, the business and labour communities should be informed and committed to the process. Without these elements, the Guidelines will not be serving their trust-building role.

An expansion of the scope by theory of “universality” should furthermore instigate a re-examination of each provision of the Guidelines (and how they work) in the changed context, to avoid unintended and undesired consequences. Some analysis and assessment should have been made of the consequences for enterprises and governments of each of the individual guidelines read in light of global application. Moreover, the implementation paper DAFPE/IME/WPG(99)14 will have to be amended to reflect the change.

2. Implementation

The OECD Guidelines are not rules to be “enforced.” They are guidance to companies regarding international business practices. Therefore, the three elements of a work program on the implementation of the Guidelines should be:

- Create a good text (easy to understand, possible to put into practice)
- Avoid procedures that are complex or create unnecessary risks or costs
- Disseminate the product and promote its correct understanding

These three elements are inter-dependant and inseparable. They form the core of the implementation issue, because implementation must take place at the company level.

Because implementation of good company practices takes place at the company level, and because the Guidelines intend to guide such work: 1) the text should be easy for the appropriate company manager to understand, and possible for him or her to put into practice without the need for a clarification (“create a good text”). 2) The package should not imply procedures that are complex so as to dissuade their audience, nor should it imply unnecessary risks or costs that can raise the hackles of the corporate legal counsel (“avoid procedures that are complex or create unnecessary

risks or costs”). 3) The product should be disseminated with government support, and agents (the NCPs) must play a role to spread a correct understanding of the provisions (“disseminate the product and promote its correct understanding”).

The difference between OECD Guidelines, international rules and company codes

As recommendations, there is more than a difference of degree between the OECD Guidelines and international rules for business conduct. Therefore, the implementation does not imply a need for government-sponsored “enforcement” (terms such as “ensure” “comply” or “registration” or “observance” should be replaced). As BIAC’s MNEs committee chairman has argued,

“ if you create an atmosphere of sanctions, ... experience has shown that people will focus on avoiding the punishment rather than taking advantage of the opportunity, and, importantly, open communication can break down. But when you create a positive atmosphere, people will respond and participate. Their participation is enormously helpful, if not essential.”

Many of the proposals collected in the OECD papers DAF/IME/WPG(99)14 appear to presume that the Guidelines serve a central role in company operations, or that they are useful as a company “code of conduct.” Businesses tend to see these proposals as unrealistic, and the arguments associated with them as contrary to the objectives of the Guidelines. For example, the voluntary character of the Guidelines cannot be circumscribed without damaging the interest companies will have in them as a useful tool. The objective of disseminating good practices among as many firms as possible would thus be put at risk.

An essential element of the success of the Guidelines lies in their tripartite support. For the business community, the highest priority remains on the so-called “voluntary” character of the Guidelines, while their usefulness (“create a good text”) and visibility (“disseminate the product and promote its correct understanding”) can be improved.

Usefulness and Visibility

Specific advice for the creating a good text follows. In regard to disseminating the text and promoting its correct understanding, the National Contact Point (“NCP”) is simply the most direct means available. Businesses have suggested that national contact points should be more active to disseminate the product and advance its use and correct understanding. They could also promote good practices generally. The NCPs have in most cases been under-utilised as the voice for the communications tool.

A step that could help is to assure consistency of standards of accounting, taxation, disclosure, and regulations and policies with the goals announced in the Guidelines. This work is needed at the OECD during Reviews but it is just as important in capitals of adhering governments. If contradictions arise between the standards in Guidelines and government policy, it should be addressed by the government quickly⁴. This point is essential if the effectiveness of the Guidelines is to be maintained over time.

⁴ Please note the relevance of the conflicting requirements instruments, part of the Declaration on International Investment and Multinational Enterprises.

Facilitating and encouraging good company practices

On the broader question of how to facilitate good company practices in line with the Guidelines, business generally opposes the concept of “White lists” being compiled and publicised centrally by the OECD or by national governments. With white lists, a company can only be damned by omission from the list or a target for mischief. We believe that allowing enterprises and industrial confederations the operational freedom to decide how best to show their support for the Guidelines, free from any hint of coercion, would be a more productive approach to fostering confidence and co-operation.

Secondly, the proposals for “audit” are almost certainly beyond the resources of the OECD Secretariat and most national governments. Even if the resources were available, governments, in all likelihood, would not wish to deploy the large staff necessary to sustain a continuous audit. If independent auditors are foreseen: whose standards would apply to their work, who would pay for the audit and would there be an international standard for those selling auditing services for adherence to the Guidelines, to ensure consistency of interpretation? The number of companies involved and the intrusion that auditing implies makes this proposal seem misjudged.

Finally, the National Contact Points should not be misused. They should not be expected to become a “police” authority or a tribunal. The conciliation procedure as described in DAF/IME/WPG(99)14 requires the NCPs to serve a role for which they are ill-equipped, and will antagonise companies. It should be more useful to keep the NCPs as accessible as possible—to keep them as resource institutions designed to receive and consider Guidelines-related representations from such parties as each adhering government sees fit, having regard to its commitments to other governments. It follows, therefore, that NCPs should be governmental bodies with ultimate political accountability for their actions; they should not have direct participation or membership of industry, trade unions or NGOs (except where the constitutional make-up of the country necessitates this).

3. Preface

The preface is key for setting the tone of the instrument. It could benefit from a few changes such as the following:

- (para.1) add after “the Guidelines”: “and the other instruments of the Declaration on International Investment and Multinational Enterprises”
- (para. 4) add after “can”: “and do”
- (para. 5) change to: “The activities of multinational enterprises, while bringing the benefits of the globalisation process.... These Enterprises operate in a variety... settings, a situation that can bring about perceptions that they may take illegitimate advantage ... [strike the rest of the paragraph]
- (para 7) Use of the word 'social dialogue' will create confusion. It means something different, e.g. in the Netherlands when compared to the US or Japan.

4. Concepts and Principles

In the Definitions and Principles section, the term “good practice” is the right choice and should be consistently referred to in other papers. Practices may be better but never “best.” Attention be paid to correcting, among other things:

- (para. 3) the ownership categories should be “**public, private**, state, or mixed” to use market-based terminology.
- (para.5) “administrative” should be deleted (“capacities” is sufficient and the term “administrative” is confusing and more suited to a responding to regulation) .
- (para. 7) “Governments adhering to the **Declaration...**” should be clarified and “equitable treatment” should be replaced by “non-discriminatory treatment” or “fair and equitable treatment” and the principle of avoiding conflicting obligations should be mentioned.
- (para. 8) “Governments adhering to the **Declaration...**” should be clarified.

5. General Policies

The text of the General Policies chapter should be much more clear, than as proposed in DAFPE/IME/WPG(99)9 dated 1 September. For examples:

- The duty to “take fully in to account established policies in the countries in which they operate” should be highlighted as the primary one. The rest should be ordered so as to demonstrate a relationship with company operations, and should be clear. Formulations such as “not contemplated in the regulatory framework” is not workable or clear, because justified exemptions and waivers are not always contemplated, and companies should not have to defend them. For example, where local regulations are very prescriptive, a company may need a waiver to apply the technology it uses elsewhere which may be a good alternative technology. The Guidelines should offer guidance that a manager can read and immediately understand in terms of its practical impact--not recommend to a manager to forsake justified exemptions.
- The recommendations should use terms that are understandable without commentary, and the commentary should be eliminated. This will help the text be “user-friendly.” It requires that the text be more carefully written so that terms express fully the intent of the recommendation. What does “contribute to,” “promote,” “improper” etc. mean for a company? The choice of one word here can alter the proposals elsewhere in the text, as well as leaving companies perplexed about when they have fully observed a guideline.
- Several of the proposed recommendations are too vague to be operational (i.e. What should an enterprise actually do in response to this recommendation?) “Sustainable development” should be defined with a programme, so that a business can use the recommendation to achieve a result. Similarly, “exploiting competitive advantage” and “consistent with the need for specialisation and sound commercial practice” is not clear in relation to the local capacity building message.
- Other proposed recommendations go beyond what is the responsibility of companies. For examples, 1) The text should make it absolutely clear that companies can only be expected to deal with 'human rights' within their own remit. It is evident that human rights should be respected by companies, but this recommendation should not imply a role for companies to protest where a government may have a policy or practice violating human rights. 2) Encouraging business partners to follow the OECD Guidelines is overstepping. There are evident problems in countries where the OECD Declaration and Guidelines are not accepted by

the government, but also, “domestic” companies do not clearly fall under the OECD Guidelines to date. This type of recommendation is also unclear—how much is the right amount to meet the standard of “encourage” without endangering competition and relations of trust? Chain responsibility is being introduced in too prescriptive a way. Abuse of dominance and other effects on competition should also be considered. Given that many voluntary guidelines now exist, the purpose of disseminating good company practices may be achieved in alternative ways.

- The recommendations should be sensible. For example, the newly proposed “whistleblower” recommendation here should contain some limiting words to deter unfounded accusations. This is a concern based upon real costs associated with false claims—costs that companies do face at present. Further, many companies expect employees to first report within the company for many good reasons, and Guidelines should not reject that approach as firmly as it does in this proposed language. (These issues will be further developed at a joint BIAC-TUAC-OECD seminar on 16 December. For more information, see: PAC/AFF/LMP(99)9). For another example, “where appropriate” should be added to recommendation 3 on local capacity building.

The General Policies chapter relies heavily on concepts that will arise in other chapters, and it is therefore critical to achieve consistency of terms to preserve the coherence of the whole. BIAC strongly recommends that the General Policies chapter be set aside until the other chapters’ texts have been agreed.

6. Disclosure

In general, businesses have not indicated that changes to the disclosure of information chapter are needed. Reflecting on current proposals, businesses indicate that the split of primary “disclosure” items from secondary “communications” items is important, and the chapter may will be useful in suggesting items under each categories.

In paragraph one, companies should take due regard of costs and requirements of business confidentiality, but also privacy—a concern of growing importance to consumers and the responsibility of companies. “Competitiveness concerns and the right to confidentiality” does not cover the consumer's privacy right.

In the first category (“disclosure”), certain items are clearly more important to the goals of the Guidelines than others. The name and location of the parent enterprise is a primary issue, and others of like importance should follow in a simple listing (e.g. financial and operating results, objectives, material foreseeable risk factors, material issues regarding employees and other stakeholders). Provided that there is study of each item for its relevance and value in the Guidelines context, it is foreseeable and that elements of transparency identified in the OECD Principles of Corporate Governance may now be ripe for inclusion in the Guidelines. There is no reason for this listing to imitate the Principles.

Certain companies indicate that items from the Principles will pose difficulties for them if added in the Guidelines because they are not yet integrated into the framework for corporate governance applicable to them (e.g. remuneration of key executives, major share ownership and voting rights, governance structures and policies). Businesses reject the view that the OECD Principles of Corporate Governance should be incorporated wholly, by list or reference, into the Guidelines because of the different objectives and audiences of these two sets of guidance. An instruction in the Guidelines on disclosure is intended to cover more substantive areas, and therefore each of the Principles should be reexamined in the new context. Furthermore, because the OECD Principles

of Corporate Governance are new and not universally adopted, their full inclusion may pose difficulty for companies that would try to implement the Guidelines.⁵

In the second category (“transparency”), it is unclear to whom an enterprise should “disclose.” The term “Disclose” should be replaced with “communicate” in order to further the sense that these are recommendations for developing the communications policy in the broader sense, not related to legal requirements. In these areas, the Guidelines should avoid setting goalposts for transparency ahead of reality, but can appropriately recommend communications approaches. Many businesses favour relatively open communications policies *for business reasons*. The chapter could therefore be positioned to acknowledge that every company depends on its relationships with investors, employees, consumers, suppliers, creditors, and other stakeholders, and then to indicate the key elements of company communications.

7. Employment and Industrial Relations

On the Employment and Industrial Relations chapter, BIAC’s surveys have indicated that companies *seek no changes* to the present chapter. In part these views manifest the principle that “one size does not fit all”—for example, they do not reflect the diversity of ways employees make representations to and negotiate with companies. In some countries, trade unions are the major form of employee representation, and in other countries they are not. In addition, in some cases, there are risks that the recommendations may cause conflicts with domestic labour law and regulations.

Responding to the proposed new text, businesses remain concerned by the view that ILO issues must be contained in the Guidelines. *The ILO is the forum better suited to handling the issues*. Businesses have been involved in the development of the agreements at the ILO, and support the ILO Declaration. The ILO principles cannot be transferred into the OECD Guidelines without consequences for implementation. The interpretation of the principles should remain consistent between OECD and ILO. Businesses discourage additions to the OECD Guidelines that can add confusion about the respective responsibilities of businesses and governments set out at the ILO.

Furthermore:

- The addition on child and forced labour raises a significant concern about the intended geographical scope of the Guidelines. Because these issues arise more frequently outside OECD territories, there is some implication that geographical scope will be expanded by a theory of universal application, rather than by proper procedures (e.g. including countries in CIME review debates, adherence to the Declaration, development of tripartite support for the Guidelines, establishing a national contact point). (Please see discussion above, geographical scope.)
- (para. 3) “where this accords with local law and practice” should be re-instated in the proposed text.

⁵ Companies should not be instructed to lead the charge in the field of corporate governance, as the OECD’s ad hoc Task Force on Corporate Governance clearly decided when it addressed itself to changing the “framework for corporate governance”—asking the governments to provide a framework to foster good corporate governance practices by companies. There is still work to be done by governments in developing the framework within which good corporate governance and transparent communications policies will be fostered. If companies are asked to go in advance of what governments expect, the result will be expense and likely competitive disadvantage to them, as well as a risk of conflicts (for example, with applicable expectations/rules as to privacy, labour relations, etc.).

- (para. 4b) The term “healthy” in the text is too vague. The recommendation should be reworded to use the more common usage, e.g. “occupational health.”. It could then say “take adequate steps to ensure occupational health and safety in their operations” (this formulation is now in the commentary).

In general, businesses are in favour of the approach (current Guidelines chapter, paragraph 4) that uses a comparative standard based on the practices of host country companies. This approach should be maintained, so that the Guidelines will be supple enough to fit varying on-the-ground circumstances that companies face. In this regard, the *emphasis of the Guidelines should not be to cause distinctions between foreign and local employers*. Such a result would be contrary to the overall goal of the Declaration on International Investment and Multinational Enterprises, of which the Guidelines are a part, of helping multinational companies make positive contributions.

It is notable that in practice, and particularly in the less developed countries, foreign investors tend to introduce employment practices of a higher standard than those of local companies’ practices. This should be encouraged, so that through their example and through the effect of competitive pressures, we encourage local companies to improve. To achieve this, *nothing in the Guidelines should run contrary to the goal of improving standards through the market method*. The Guidelines should not impose skepticism toward the positive contribution that foreign investors make.

In this regard, the details of the commentary are also important. *BIAC recommends eliminating commentary*, because it is largely repetitive of the text and can deter users. In the context of this chapter, it is important to note that the clarifications remain essential references (the commentary is not necessary to “clarify” them).

A few further examples of specific problems are in the proposed commentary are:

- (Chapeau) The NAFTA Labor Side Agreement uses a standard that requires the application and enforcement of pre-existing national laws. It should not therefore be used to support an argument that there are increasing supra-national levels of regulation in employment and industrial relations. Therefore, it should be removed from the commentary here.
- (Para. 4) The fact that companies use codes as tools to communicate human resources policy does not argue for specific listing of the two specific standards (see above).
- The notion that timely notice could also include “notice *prior* to the final decision being taken” is rejected as an unnecessary widening of the scope of the disclosure recommendations in this chapter.

8. Environment

Turning to the proposed text, which incorporates the many proposals of various groups including advice of BIAC (Proposal DAFPE/IME/WPG/RD(99)1), businesses offer the following considered advice to the CIME and its Working Party:

- The Guidelines must be clear and should be designed to have an impact. The current draft chapter does not meet these objectives, particularly where the text is derived from government agreements, and should be edited and reorganized for simpler presentation once the contents can be agreed.

- Throughout the text, “should” should be replaced by “are encouraged to” to make clear the status of the Guidelines as recommendations by governments, given the extent and detail of the prescriptions that follow. “international principles, objectives and standards” should be changed to “international standards, conventions, and codes of practice” to be more precise.
- The term “safety” is vague. (It is used throughout the proposal.) If it is meant to encompass Occupational Health and Safety, the term should be deleted from the Environment Chapter (to be proposed in the Employment and Industrial Relations Chapter). If not so intended, it appears redundant in the context of “environment and health” and should be deleted. These terms need to be consistently used, and easy for company managers to understand (within a context of many other instruments on environmental management intended to guide them).
- The phrase “...and in accordance with internationally-agreed principles and objectives,” should be deleted. First, the phrase conveys *no practical guidance* to companies and is so broad as to lack any real meaning. Second, the specific examples of such principles and objectives cited in the commentary include government agreements that companies must already follow where and as they are implemented nationally. Additionally, the voluntary industry standard cited in the commentary, ISO 14001, has both detailed specifications and defined processes to determine and certify conformity. This one standard is proprietary and not widely accepted, and its monitoring aspects should not be “incorporated” into the Guidelines, which aim to address a much wider audience of enterprises.
- It will help to add: “...and generally to conduct their activities in a manner consistent with sustainable **economic** development” to highlight a key role companies must play in sustainable development, readily appreciated by users.
- A phrase such as “as appropriate to the size of the company” should be added to the chapeau, to acknowledge the differing abilities of smaller and medium sized companies to respond to the recommendations. Also, the addition “having regard to local conditions” will help in the application of the recommendation.
- A recommendation on public partnerships should be added. For example:

Enterprises are encouraged to... contribute to the development of environmentally meaningful and economically efficient public policy, for example by means of partnerships or initiatives that will enhance environmental awareness and protection using risk based management principles to facilitate decision-making.

- Paragraph 3—First, paragraph 3 should be replaced by the first proposal related to former Paragraph 4 on page 14 of DAFPE/IME/WPG (99)/REV1, which conveys more practical guidance to companies on the various activities that should be considered. In the existing text, the phrase “...over their full life cycle” should be deleted. While life-cycle approaches can be used to estimate the environmental aspects of discrete processes or products, life cycle analysis of ongoing activities is neither practical nor useful. Additionally, the need for a formal “Environmental Impact Statement” (“EIS”) is set by law, and therefore is associated with certain expectations. Thus, the Guidelines should be clear in limiting its recommendation of formal “EIS” to those circumstances where there is a “competent authority” (but such terms also should not be overused, because it may not be sufficiently clear in all settings). Certain business voices also objected to the use of “foreseeable” here, as being vague.
- Paragraph 4— There is no generally accepted definition of the Precautionary Principle, and it has occasioned some difficulties in application. Therefore, the Precautionary Principle as such should not appear in the MNE Guidelines.
- Paragraph 6—replace “inter alia” with “including.” In tiret 3, a better construction of this point could read, for example: “where relevant, advise and inform customers of the safe use, transportation, storage, and disposal of products provided; apply the same considerations to the provision of services.”

- Paragraph 7-- Edit the paragraph to read: "..., as well as, where appropriate, other environmental management areas such as..." as *not all employees* are trained in the areas listed, which may in fact be more specialised than "general." .
- Paragraph 8-- This entire paragraph should be removed from the Environment Chapter and considered as a general statement against discriminatory action for reporting any unsound practice in the General Policies Chapter. Furthermore, it should be designed as a positive recommendation to enterprises to put in place legitimate reporting mechanisms and protections ("ensure" is a term that overreaches the Guidelines purpose, and incites the corporate legal department, while a positive recommendation could be useful).

Several of the recommendations raise concerns of the geographical scope (please see advice above on this issue.) With regard to the remaining proposals included in Annex 3 of DAFPE/IME/WPG (99)/REV1 (proposals on Paragraph 2 and 4 were discussed above), businesses advise the CIME and its Working Party as follows:

- The polluter pays principle should not be included in the Guidelines The "polluter pays principle" is a legal term that conveys specific obligations depending on how it is implemented in national or local legislation. Where it is included in law, companies are liable for their actions accordingly. Beyond this, the proposal does not provide any practical advice as to how companies should act.
- Remaining proposals described in Annex 3 of DAFPE/IME/WPG (99)/REV1 should not be accepted.

9. Bribery and Corruption

Bribery and corruption is handled in a straightforward and prominent way in the current Guidelines, in the General Policies chapter. The importance of these issues has not declined over time, and many business voices believe that the prominence of the issues should be maintained. Many question however whether the proposed new chapter is a strengthens or improves the current text. Simplicity and clarity may be at risk. In response to the proposal for a new chapter, business voices noted the following :

- In the current Guidelines, the text was supported because it gave equal weight to both sides of the bribery issue (solicitation and bribery) and its placement in the General Policies chapter appropriately highlighted the overarching importance of the issues involved. Given the structure of the proposal, it is now more difficult to give equal weight to solicitation and private-to-private bribery issues.⁶ Concrete recommendations of the MNE Guidelines must be devised based on consensus. However, there is a problem with the "break out" list format. The new format requires consensus on specific terms, but such governmental consensus needs to be found (on issues that are only beginning to be discussed at OECD).

⁶ While solicitation and the private-to-private issues are extremely important to businesses, representing risks, costs, and issues of competition, these issues are also important to governments (representing costs and inefficiencies in the marketplace, as well as risks of deteriorating public service).

- The proposed Guidelines rely on ICC recommendations, but alter them. ICC recommendations (an instrument familiar among businesses) address the issues in a better, more nuanced, manner, with the support of businesses. For examples:
 - **Enterprises should take measures reasonably within their power to ensure** that a) any payment made to any agent represents **no more than an appropriate remuneration** for legitimate services rendered by such agent.”).
 - Enterprises should maintain a record of the name and terms of employment of all agents who are retained by them in connection with the transactions with public bodies or state enterprises. This record should be available for inspection **by auditors and, upon specific request, by appropriate, duly authorised government authorities under conditions of confidentiality.**
- The chapeau should be revised to recommend that enterprises are encouraged to make the fight against bribery and extortion a management priority. Following it, the subjects should be re-ordered in relation to their relevance to operations, from a company manager’s perspective.
- Para. 1—“employees of business partners” is an unsatisfactory addition. The proposed text unadvisedly includes private-to-private corruption at the same level as corruption in the public sector, without analysis.
- Para. 4—This whistleblower clause already appears in General Policies. Here, it should be altered to advise setting up reporting systems, and then advise protections for whistleblowers. The words “who make valid reports” should be added in regard to the sentence advising protections for employees, so as to discourage false claims, which unfortunately represent real costs for companies and embarrassment for employees. Please see a discussion under the General Policies heading, above.
- Para. 6—Add “Legal” before “contributions should comply...” to distinguish them from illegal ones that are discouraged in the prior sentence. (This will help to clarify that sometimes contributions are legal and ethically acceptable.) Delete “fully” before “comply” because it implies that somehow the legal contributions are still illegal, and it assumes companies will not fully comply with law (see also the General Policies chapter). It is important to keep a balance with the Preface and General Policies (MNEs are subject to the law, and are encouraged to take account of established policies in host country, and to “co-operate with government authorities in the development and implementation of policies and laws that affect them”). These suggest that enterprises are already expected to fully comply with the law, and that the voice of enterprises should not be excluded from politics. In this regard, the recommendation in the General Policies chapter to “abstain from improper involvement in local political parties” should be examined, because the term “improper” is subjective.

Because of the importance of these issues at the current time, the business community remains very committing to resolving drafting issues and preserve the strength of the underlying recommendations to companies.

10. Consumer Interests

At a minimum, as in the case of the Disclosure chapter, this chapter should be positioned to acknowledge that every company depends on its relationships with investors, employees, consumers, suppliers, creditors, and other stakeholders, and then to suggest the key elements of good company practice toward consumers. Companies' relationships with consumers are all-important to their success in open markets.

To better achieve this goal:

- “fair” and “unfair” are terms that should be replaced, if possible, because they are in most cases subjective and not very instructive. It may be difficult to find replacement terms in some cases. In para. 4, “or unfair” could be replaced with “does not mislead as to the benefits derived from use of the product” (so as to be less subjective and in line with current laws in some countries). In para. 3, “...to allow for the resolution...” is a better choice (it would replace “and provide for the fair resolution...”).
- add “in sales to consumers” as a preface to each instruction, so that the proposal will address all companies—although some do not supply consumers. Information and levels of procedures will differ according to the level of a company in the supply chain. Providing information to consumers should not be recommended to non-retail companies.
- (para.1)-- “ensure that...goods and services... meet all required standards” should be deleted or changed (it assumes that companies do not comply with laws. The assumption is contrary to trust-building, and intervenes in the area of laws and law enforcement. The recommendation is also inconsistent with the assumption that companies comply at least with the applicable law, and the general policy recommendation that companies also acknowledge the policy goals of countries in which they operate).

Because of the significance of introducing a new chapter, and maintaining the quality of the whole, BIAC recommends careful attention to textual choices.

Subjectivity in the standards translates into vagueness of the recommendations to companies, which will result in uncertainty and difficulty for companies observing the Guidelines. Textual choices should not lead to unnecessary difficulties for observance of these recommendations, and pitfalls should be corrected in every case, so that the Guidelines do not themselves create obstacles to mutual trust-building between governments and multinational enterprises.

11. Science and Technology

The proposals for revision to this chapter are at present too prescriptive. In their fundamentals, they appear to be justified only by a misconception of the role of the private sector in society, as if companies were governments—whose motivation and resources can be directed to developing and implementing development aid programs (e.g. “and in a manner that contributes to the long term development prospects of the host country”, development of infrastructure, etc.). However, in all of our economies, companies exist first to create value for shareholders. They contribute to development *in a manner that is different* from government aid programs (e.g. it is too much to request enterprises to diffuse their know-how, or to call for “rapid transfer” rather than the more neutral term “diffusion” of technology). In a market economy, companies are and have to be market-driven.

The misguided premise permeates the proposals, despite qualifying words (e.g. “endeavor”, “to the fullest extent practicable”, “when appropriate,” “reasonable terms,” “where relevant to business objectives”, “encourage”). It also results in an unintended reliance on the voluntary nature of the Guidelines as an “escape clause” when the recommendation might be absurd if applied. Most dangerously, it raises false expectations. For examples, paragraphs 5 and 6 of the proposed text are entirely unrealistic for SMEs. Unrealistic recommendations cannot help the Guidelines be relevant for the private sector as a whole.

The business view is that the current text of the Guidelines should be reconsidered as a better starting point, supplemented by recommendations related to information technology and electronic commerce, noting requirements on companies to ensure confidential handling of consumer information.

12. Competition

The Guidelines can create difficulties for companies if their competition recommendations are so specific that they compete with the rules in national law, and also where (in countries that adhere to the Guidelines) there is no competition law, or poor regulatory environments. Problems are recognised in the paper of the secretariat of the Committee on Competition Law and Policy (DAFFE/CLP(99)26/REV1), including anti-competitive and discriminatory effects.

Competition laws are developing rapidly, and it is a problematic area for the Guidelines to lead the way. Concepts and principles are not as widely agreed as it may seem. For example, the proposed new text (DAFFE/CLP(99)26/REV1) relies on a concept of “effects.” This concept is to date very controversial. The term “harm” echoes an effects-based analysis.

As another example, the proposal recommends that companies should “enable” competition authorities to exchange information which may or may not be relevant to investigations. Exchange of information rules are very slowly developing in international agreements, and the terms of such exchanges have not been universally agreed, although protections for the companies always apply. Therefore, a Guideline recommending action to enable exchanges puts too much responsibility on companies, who should instead be free to protect and use rights available to them under applicable law. This recommendation is therefore contrary to the purpose of the Guidelines, because it overreaches.

The changes in competition law that provide for scrutiny of company mergers, rules on industrial property rights, and limits on competition in some cases, are currently better handled in national law than in the Guidelines. The common elements of competition law in various OECD and non-OECD countries are still being explored, at the OECD and elsewhere.

The Guidelines text could reflect changes that are widely agreed, *and should always aim to provide recommendations relevant to all companies, and in all contexts.* The voluntary nature of the Guidelines should not be treated as an “escape.” Furthermore, the Guidelines should not ask companies to abandon their legal protections and should not try to summarise or supplant a process of development in national or international law.

13. Taxation

There is no urgent need to change the taxation chapter. In general, businesses do not recommend revising the Guidelines where changes are not clearly justified.

However, businesses have shown some interest in adjustment of the text to more clearly express key messages. The basic recommendations for enterprises are: the OECD Transfer Pricing Guidelines (without an explicit textual reference) and the “letter and spirit” of applicable law. A clear statement of these two messages could read, for example:

“Enterprises should exert every effort to comply with both the letter and spirit of tax laws and regulations in all countries in which they operate, including such measures as providing to the relevant authorities the information necessary for the correct determination of taxes to be assessed in connection with their operations, and conforming transfer pricing practices to the arms’ length principle.”

The tax laws and regulations in a country include relevant international bilateral and multilateral treaties. These treaties pervade the field of international taxation, and represent the negotiated results of governments each acting according to own fiscal and economic interests, including a clear recognition of the damaging effects of double taxation. Because the OECD MNE Guidelines only touches on these technical subjects in vague terms, it should remain within a certain limit. It should not prejudice the principle, observed by all good governments, that taxes can only be gathered according to law. Overall, the tax issue might be better handled by removal of it, or a reference in the General Policies chapter.

The present draft text reads in a convoluted way, although its underlying points are relatively straightforward. Paragraph 2 is particularly difficult. It appears to be written with only a fiscal authorities’ perspective.

- (para. 1) may be asking companies to volunteer information in a manner that goes beyond the due process of law, as it is generally understood, because it asks for information necessary for the enforcement of laws. Safeguards are mentioned in passing and at some distance, implying perhaps that an enterprise are discouraged from accepting the benefit of legal safeguards (furthermore “in accordance with legal safeguards” does not imply “fully enjoying”). Is it not for government enforcers to act “in accordance with” safeguard measures?
- (para.2) The use of “applicable laws” instead of “national laws” in transfer pricing may mean that an enterprise would have to have regard for the requirements of two or more jurisdictions when setting transfer prices, although the requirements conflict. It would no longer be sufficient for the enterprise to satisfy itself that it had paid the tax due in each jurisdiction in which it operates.
- (commentary para.2) “Correct tax liability” should be replaced by “appropriate tax liability” or other term, because, for example, the transfer price agreed between a taxpayer and the tax authority could be very subjective, resulting in a tax liability that is in a sense subjectively determined.
- (Commentary para. 2) “such relationships may affect the tax liability of each of the parties.”

IV. “Getting the Message Out” by Means of an OECD Vehicle

In 1979, 1984, and 1991, the OECD Council concluded, on the basis of OECD CIME’s reports, that the 1976 instruments had demonstrated their effectiveness. The OECD’s studies, companies and their representatives have all emphasised that *measurable results* since the invention of the Guidelines are very positive. To an extent, the OECD Guidelines and other related tools must be seen collectively as a success story.

The heightened awareness about the responsibilities of companies, and, most importantly, the positive results that foreign investors have produced, could be enhanced by spreading the correct understanding of the Guidelines. The usefulness of the Guidelines, and of the Declaration, should be recognised and promoted by a new activism on the part of the signatory governments.

By thus focusing on the excellence of the text and various means to disseminate and promote the correct understanding of the Guidelines, OECD member governments will help show businesses that it is to their own advantage to follow and to further promote the OECD Guidelines. After all, it is for a company itself to institute and to maintain appropriate internal mechanisms to implement the recommendations from the governments about companies’ policies, and it is the voluntary activism of companies that should be encouraged.

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