



Business and Industry Advisory Committee to the OECD

Comité Consultatif Economique et Industriel Auprès de l'OCDE

**Statement:
The Preparation of the 1998 Review of the OECD Guidelines
for Multinational Enterprises**

September 1998

Introduction

Foreign direct investment has been one of the most important motors of world prosperity over the last twenty five years. Experience shows that it has raised local standards through the transfer of technology and skills and that labour has benefited through better conditions, increased income and education. Environmental standards, social standards and wealth have also improved as a result of non-domestic investors pursuing their business interests in new markets. Outward and inward flows of investment have increased many-fold over the period and all Governments which seek to better the condition of their people now welcome such investment.

The OECD Guidelines for MNE's have supported this process. They are as much a memoranda of a common policy approach for governments as they are a tool for businesses operating internationally. As an essential component of the 1976 Declaration on International Investment and Multinational Enterprises, which was made by the Members of the OECD, the Guidelines have been successful. They complement the commitment of Governments in the Declaration to move towards an open and liberal international investment regime. In making that commitment, Governments recognised and accepted that they could not, in the short or medium term, pool their sovereignty so as to bind themselves legally in respect of all the policies affecting investment. Hence they developed guidelines together with business and unions, as a guiding statement on matters for which neither harmonisation of national legislation nor an international treaty was a feasible option. Hence it is clearly recognised in the Guidelines that they are, and must continue to be, voluntary.

Indeed, in the period of exceptional growth which the world has enjoyed in the past few decades, this voluntary nature has not proved to be a disadvantage for the Guidelines—but an aspect of their strength, helping to promote broad acceptance and inhibit emphasis on apparent inconsistencies, thus helping to promote confidence. Businesses themselves have standards within their own organisations which equal, or better, the basic requirements of the Guidelines, and which are practically adapted to the conditions of their own industries, environments, workforces and markets.

Background

Since 1976, the OECD CIME has completed a considerable amount of work on the subjects covered by the instruments. 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.

As the CIME begins another periodic review, BIAC continues to share this view. The instruments constitute a balanced framework for co-operation in matters related to international investment and companies, and, by expressing our shared goals with clarity, they continually contribute to the mutual confidence between businesses and governments. BIAC believes that the instruments have positively helped to maintain conditions favourable to transnational investment, and to maximising the positive impact of foreign companies and investments in new markets, and that, generally speaking, they continue to serve as sound principles for guiding business.

Commitment to stability and negotiated change

In response to fundamental changes in the world's trading and investing climate, the Guidelines may sometimes need to be adapted. In cases of fundamental changes in the world's legal environment, the Guidelines may need to be reviewed. Serving as they do—as general recommendations for good company conduct to which BIAC members and individual companies have lent support—the Guidelines are not easily amended. Especially because of their international and universal aims, changes to the text are not made without risks, and must be negotiated by means of comprehensive consultation to become effective based on broad backing.

BIAC recommends that all OECD governments begin the review process with a commitment to stability. Any revision should be based on a thorough review of experience with the current text. The review should study how the context for transnational trade and investment currently affects practices and outcomes, and how the Guidelines fill a need. A commitment to stability amounts to an attitude that will protect text that remains relevant and “works,” and will show the necessary care and attention, to allow the existing text to grow in force by becoming a common tradition.

This basic stability in the Guidelines is the priority for businesses because business operations, and investment markets—all depend on certainty and confidence over the medium-long term. As the Guidelines are voluntary commitments by businesses, they will function optimally if their contents remain relatively constant, because: acceptance will be undisturbed, acceptance will deepen by the sense of tradition, and the reach of acceptance can be broadened more easily.

Stability of the Guidelines is essential for their implementation. The resolution of issues depends upon proper interpretations of text, which are based upon information, stable text, and past interpretations of that text.

Maintaining the text is also extremely important as part of promoting the Guidelines. Promotion depends upon a sustained information effort based on stable texts and interpretations. If the text is stable, businesses that have not acknowledged the Guidelines as a statement of good company practices with universal application can be encouraged to do so by certainty that they understand the Guidelines essential content in the future. With a notion of stability, businesses who have previously lent their support will not find it necessary to reconsider their positions, and their un-revised acceptance will itself advertise the Guidelines. Finally, the stability of the text allows for a measurement of the implementation of the Guidelines principles.

When there is occasion for the Guidelines to be adapted, the process is one of negotiation, and those businesses that have previously lent their support to a specific text must be considered. Some businesses and BIAC members, among others, will offer suggestions. If adaptation is shown to be necessary and is well thought out, then negotiated by means of comprehensive consultations in order to reflect relevant business concerns, the result can be built on the widest possible support of businesses.

Promoting the guidelines

The Guidelines' continued value depends on maintaining their character—the content of the standards but also their voluntary quality. Maintaining their character in turn makes the Guidelines easier to publicise and promote (as well as to implement).

While protecting the freedom of management of individual companies, BIAC strongly supports promoting the Guidelines as broadly as possible. Several BIAC members, national federations of employers and industry, include a copy the Guidelines in their member-company distributions, and encourage companies to study the Guidelines in order to find their interests met in them. BIAC asks them to include the guidelines on their web sites as well.

OECD governments should be aware of possibilities for promoting the Guidelines by concerted and focused work at assuring that the standards in accounting, taxation, disclosure, and regulations generally—and government policies—allow for companies to meet standards in the Guidelines, without creating situations of contradictory advice. Predictability and consistency from the “user-perspective” are very much in the interests of both companies and governments: they help companies to fulfil the aims of the Guidelines, reinforcing a tradition, without any costs or negative consequences.

Moreover, if contradictions arise between the standards in Guidelines and government policy, they should be addressed by governments quickly. This point is essential if the effectiveness of the Guidelines is to be maintained. The Guidelines, as a statement of good company practice intended to apply to any company, should not themselves appear to ever create such conflicts.

OECD governments can also promote proper understanding of the Guidelines through the offices of the National Contact Point (NCP).

The role of the National Contact Points

BIAC believes the NCP role is very important. NCPs act as central clearinghouses, contact points, and forums for discussion between parties such as businesses and employees when an activity is disputed by a Guidelines' standard. The NCP must play the latter role effectively and efficiently because its manner determines the practical effectiveness of the Guidelines. It must continually apply itself to improving and circulating information as well, because the Guidelines are not yet so well known or accepted as they should be.

The National Contact Points (NCPs) are essential to the implementation of the Guidelines at the national level, serving to spread the correct understanding of the contents of the Guidelines. They are particularly beneficial when a need for interpretations or interventions arises. All of such activities should result in promoting the Guidelines.

The role of the NCPs is well described in the original text from 1976, the commentaries, and the Decision of the Council, amended 1991. Arguably, the NCPs could take a more active attitude in order to: contribute to better understanding of and wider support for the guidelines according to a common interpretation of the stated principles, and promote discussion of developments which may impact the Guidelines. Certain BIAC members report that they have never been contacted by their country's NCP.

Implementing the Guidelines

The Guidelines, drawn up to reflect (and so promote) good company practice, can serve well as a touchstone, to help companies review their policies practices and codes, and to help companies confronting new situations (where local laws may be silent, and likewise past company policies, practices and codes may not address the question). Broad promotion, and proper understanding, help these purposes.

The Guidelines cannot reflect what only one company is or should be doing with its policies, practices or codes, because the Guidelines attempt to guide different companies in diverse legal and market setting. Companies, differing by their purposes, personnel, structure, activities, and products, typically follow their market needs by applying high standards to all areas; however, they pursue high standards in different ways. Thus the Guidelines must remain flexible to allow companies to meet the full variety of practical circumstances.

Businesses firmly believe that a short practical text announcing high standards on essential and widely-supported points is best approach for the Guidelines: essential items should not be lost in a list of “nice to have” items.

As a statement of high standards, the Guidelines serve an important purpose. They generally do not serve as a model for company codes. The Guidelines are not apt for direct transposition into company codes of conduct. Indeed, some of the issues covered are not normally covered in company codes (e.g. taxation). Likewise, when standards in the Guidelines are repetitive of law, the standards are unlikely to be mentioned by codes.

Company practices will typically be communicated through codes of conduct but also through a range of other internal policy statements, audit procedures, or aspirational mission statements covering future behaviour. Statements of policy are also often made in shareholder meetings, management meetings, interviews and press conferences. Therefore, for individual companies it should be no surprise that the Guidelines as such are not recognised as a source of reference outside corporate headquarters.

Most company policies, practices and codes already correspond to the Guidelines without specifically acknowledging them, just as local laws correspond to them without specifically acknowledging them. In addition, where the Guidelines and local laws correspond, companies are likely to first acknowledge their source of guidance in local laws.

The Guidelines, written by governments but neither legislated nor ratified by legislating bodies, cannot have the force of laws and are not designed to replace laws (if they were to be treated as such, the commitments would have to be made more specific and limited, the procedure for resolving issues fixed precisely, with opportunity for appeals and protections as under law, and the whole document would have to be ratified and legitimised). It should always be clear that provisions of international agreements and national legislation have precedence over the Guidelines, so that the Guidelines are understood to be limited by such provisions.

The relationship between the Guidelines and other instruments

Designed as part of a package of instruments, the Guidelines are at present associated with:

- 1) the Declaration on International Investment and Multinational Enterprises, including the instrument on Investment Incentives and Disincentives;
- 2) the statement of the national treatment principle and the related procedural decision of the Council requiring notification and follow-up on national treatment exceptions (last revised 1991); and
- 3) the General Considerations and Practical Guidance on conflicting requirements imposed on multinational enterprises, together with the procedural decision of the Council regarding conflicting requirements (June 1991).

Together with the Guidelines, these instruments aim to address the development of transnational investment and company operations under a balanced approach. This balanced approach is especially helpful for generating confidence about internationalisation and liberalisation of markets. Therefore not only the Guidelines, but also the national treatment principle, the objective of reducing conflicting requirements and the declaration on international investment remain relevant to all subsequent OECD relating to the international investment and the global marketplace.

Subjects covered by the Guidelines in particular are sometimes handled in more detail in other instruments (e.g. Multilateral Environmental Agreements, ILO conventions, the OECD convention on Combating Bribery). The Guidelines concentrate on general rules but as such provide stimulus for more precise commitments elsewhere. If the other instruments are applicable law in all countries where the Guidelines apply, then reference to them in the Guidelines may be appropriate. Reducing conflict, differences in interpretation and duplication is an important goal (especially because translation into many languages aggravates the confusion caused by multiple texts).

There is a recent proposal that the Multinational Agreement on Investment (MAI) make reference to the Guidelines. The MAI promises to be an important step forward in the liberalisation of international investment for the benefit of the world economy in general, but the step has been delayed, *in part* by concerns over the effects of globalisation. In order to accord an appropriate respect to these concerns, BIAAC agrees that the Guidelines could be mentioned in the MAI as one of the favourable factors leading to its introduction. Certain objectives in the Guidelines are reiterated in the MAI, so association could indeed promote the Guidelines. Also, both instruments are more or less based on the principle of equal treatment.

To make the MAI reference work, there must be a distinction maintained between the two instruments. The voluntary nature of the Guidelines must be explicit in any reference to them; otherwise, the obligations undertaken by the MAI signatories—which are politically responsible to their electorates—could be impaired. Also, where their objectives differ, there is risk of obscuring the rights and commitments of the states and companies involved.

Furthermore, the current procedures for implementation of the Guidelines and resolution of issues, and the procedure of review, must remain flexible, and new developments not be subject to ratification procedures that are required for the investment treaty itself. By the same token, National Contact Points are not foreseen in the MAI, and non-OECD countries cannot be made to participate in the Guidelines system without having NCPs to make implementation work. The MAI reference to the Guidelines must avoid creating any obstacle to non-OECD members joining MAI.

A MAI reference, if improperly made, could also change the Guidelines by dis-associating them from their associated instruments (previously mentioned). Finally, confusion of the Guidelines with a ratified legal instrument should be explicitly avoided to preserve their nature and their current support.

Scope and application of the Guidelines

The Guidelines serve as a statement and measure of what is agreed to be good company practices by OECD governments and the many business and labour groups that have given their support. They are standards that are thought to be proper and useful for any company to follow.

Therefore, it should be possible for all national companies to subscribe to and commit themselves to the text on the same terms; otherwise, an unintentional distinction between national and foreign companies arises, threatening to undermine the principle of National Treatment to which all OECD members have committed themselves in the Declaration. At present, only the Environment chapter explicitly states its equal application to national and foreign companies (this implies that the other chapters, by their omission, do not; their potential for broader applicability should be examined).

At present, more companies than ever before are crossing borders to sell and produce their products and services. With new communications devices and the development of an infrastructure for rapid international transactions, even more companies are now capable of transnational expansion. Paragraph 9 of the introduction to the Guidelines, which suggests that the Guidelines are relevant for both multinational and domestic enterprises should be interpreted broadly.

Conclusion

In general, Business firmly supports the Guidelines system: a simple, easy-to-digest text of widely-accepted principles, interpreted in common at the OECD, implemented in specific cases by discussion and negotiation at the national level, with the co-ordinating intervention of the National Contact Point. For the review, we strongly recommend attention and care to maintain the specific existing text, because we argue there are significant benefits to maintaining stability in the system. We, and all of our members, are open to new ways for promoting the broadest possible application for the Guidelines, and we gladly accept a role in helping the OECD in its periodic reviews.

BIAC appreciates every opportunity CIME affords us to present the views of business communities in OECD countries, as a contribution to the OECD's work. We will remain in close communication with our members on these issues in order to offer our services to CIME as effective advisers during every stage of the Guidelines review process. These preliminary points prepared before the review will be supplemented in the future.