Facilitating adherence to the OECD Guidelines

Initial points for consideration

BIAC is pleased to provide preliminary feedback on the OECD proposal to facilitate wider adherence to the OECD Guidelines for Multinational Enterprises (MNEs) by giving non-members the additional possibility of adhering only to the Guidelines and the directly related Decisions on the Guidelines without adhering to the whole Declaration on International Investment and Multinational Enterprises. The following points are preliminary BIAC considerations, which will be complemented by additional comments as the proposal is being further discussed. We especially call upon the OECD to allow for sufficient time to thoroughly consider the pros and cons of the proposal and examine different options in sufficient detail. A decision on such a fundamental issue should not be rushed. BIAC would be pleased to contribute to these discussions.

- BIAC considers responsible business conduct as promoted by the OECD MNE Guidelines as an essential part of an open investment climate and in the best interest of business. BIAC has been a strong supporter of OECD outreach activities and close cooperation with key emerging economies which are not yet adherents to the OECD Declaration on International Investment and the MNE Guidelines. In BIAC’s view, the Guidelines are the best reference instrument for responsible business conduct to help ensure for a level playing field in global markets. With the shift of weight in the world economy, it is more important than ever to expand the geographical coverage of the Guidelines. Non-member countries should give serious consideration to endorsing the Guidelines which will also contribute to creating a favorable investment environment and increase investor trust. In practice, many issues that come up with a view to responsible business conduct are also related to deficiencies in public governance. In addition to leveling the playing field for business, expanding adherence would help develop new channels of communication between countries for individual specific instances that have arisen in those countries.

- Responsible business conduct is an essential part of an open international investment climate. Having a National Contact Point (NCP) set up in emerging economies, which are important trading partners, would create the possibility that specific instances are raised also in relation to the behavior of suppliers from those countries. On the whole, this would tend to contribute to increased observance of the MNE Guidelines, and should be a welcome step forward for MNEs based in currently adhering countries. In this context, BIAC welcomes OECD’s increased outreach activities and specifically congratulates the Organization on its efforts to actively engage with China on responsible business conduct, not only on an ad-hoc basis, but by identifying longer-term opportunities for engagement.
• However, it should always be borne in mind that the OECD Guidelines process is founded on the connection between core investment climate issues and responsible business practices and is an integral part of the OECD Declaration on International Investment and MNEs. The Declaration consists of four pillars: National Treatment, International Investment Incentives and Disincentives, Conflicting Requirements, and the MNE Guidelines. The OECD Declaration seeks to ensure that each element is respected and understood and that they complement each other. It represents an intrinsic balance between the behavior of states and behavior of investors.

• The Guidelines are thus part of a package and part of a mutual commitment. On the one hand, the Declaration commits adhering countries to improve the investment climate, by undertaking specific measures such as ensuring national treatment of MNEs and avoiding conflicting requirements on MNEs. Adhering governments commit themselves in the Declaration to promote an open and predictable investment climate. On the other hand, companies are encouraged to apply the standards of responsible business conduct as elaborated in the Guidelines.

• Bearing in mind that the Declaration was conceived as a general framework seeking to deal as comprehensively as possible with issues related to investment, BIAC’s preferred option is therefore clearly to consider the Declaration as a package and encourage additional interested non-member countries to sign up to the instrument as a whole. Should OECD members decide to further discuss the proposal outlined in the background paper, a number of questions should be carefully considered:

  • The integrity of the OECD investment instrument as a whole must be preserved, and the Guidelines must continue to be a constituent part of the Declaration. Adherence to the Guidelines only should not be possible for OECD member or accession countries, nor non-member countries that already adhered to the whole package before.

  • The ultimate objective should remain adherence to the entire instrument. Adhering to the Guidelines alone should be considered on a case-by-case only when adherence to the Declaration seems very unlikely. However, an important question to be addressed is what the criteria would be to determine if a country is unlikely to adhere to the Declaration.

  • If a country decides only to adhere to the Guidelines, this should be accompanied by additional structured dialogue to improve the investment climate. Such a review should go beyond a review based on the responsible business conduct chapter contained in the Policy Framework for Investment (PFI), as proposed, and should also effectively cover the substantive investment protection issues that are addressed in the Declaration, which remains the ultimate objective.

  • The reasons for not adhering to the whole Declaration should be clearly spelt out so that they can be analyzed. An important question is how to ensure that this would not set a precedent for other countries to delink adherence to the Guidelines from adherence to the Declaration.
Another question to be addressed is if adherence to the Guidelines alone would create an unbalanced situation in the countries in question, in the sense that additional pressure could be put on foreign investors as compared to domestic investors. Such a situation could develop in countries without a well-functioning civil society, bearing in mind that the functioning of NCPs depends to a large extent on the ability of civil society to ask the NCP to examine also the behavior of domestic investors.

In terms of process, it is important that overall oversight of the Guidelines remains with the OECD Investment Committee, and not just the Working Party on Responsible Business Conduct, recognizing that the Guidelines must remain an integral part of the Declaration.

We would like to underline that portraying the Guidelines as a stand-alone instrument would be counter-productive and would give the impression of an “imbalance” between the Investment Committee’s attention given to core investment issues and responsible business conduct. It is essential that the OECD continues to play a leading role, and is perceived as such, in the international debate on freedom of cross-border investment, which is at the core of the OECD mission. This is all the more important in the current context where we are witnessing a revival of protectionist rhetoric and where international investment agreements are subject to a heated debate in some countries.

Apart from its leading role in analysis and policy recommendations, and in the spirit of the Declaration, BIAC also sees an important function for the OECD in examining individual cases in which the freedom of investment seems to be jeopardized by policy action of Member States. The OECD should provide a forum for discussion with Member States in the Investment Committee on such cases, giving business the opportunity to contribute to these discussions.

In conclusion

The discussions on facilitating adherence to the MNE Guidelines without adherence to the OECD Declaration raise a number of strategic issues, which should be carefully discussed among countries and with stakeholders involved before a final decision is taken. We therefore call upon the OECD to allow for sufficient time to carefully weigh the pros and cons and examine different options in greater details. A decision on such a fundamental issue should not be rushed. BIAC would be pleased to constructively contribute to these discussions.