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The OECD Guidelines for Multinational Enterprises

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Introduction

On June 21st, last year, the Council of Ministers of the Organization for Economic Cooperation and Development (the "OECD"), representing the non-Communist industrial countries of Europe, North America and Japan, adopted a Declaration on International Investment and Multinational Enterprises. All members of the OECD, including the United States and excluding only Turkey, were signatories to the Declaration.

The Declaration is actually a package of agreements consisting primarily of a set of "guidelines for Multinational Enterprises," and Declarations and Decisions on "National Treatment and Incentives and Disincentives for International Investment." Under the National Treatment Declaration, member countries recognize their obligation not to discriminate with regard to treatment of foreign-owned enterprises in their territory. With regard to Incentives and Disincentives to International Investment, member countries have agreed to act to minimize the adverse effects of various unilateral national acts constituting incentives or disincentives to international investment. The Guidelines for Multinational Enterprises establish consensus standards of good conduct for all multinational enterprises ("MNEs"), private, state-owned or mixed, which operate in OECD countries. They also apply, where relevant, to domestic countries. They cover in substantial detail major aspects of multinational enterprise activities including those relating to their general corporate policies, information disclosure, competition, financing, taxation, employment technology and improper payments.

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Background

The OECD declaration, decisions and guidelines were several years in the making. One initial catalyst was the United States reaction to the Canadian government's luring of a new French Michelin Tire Company plant with a package of extraordinary tax and investment incentives. The United States objected to the Canadian incentives as a form of subsidy which would require us to impose countervailing duties if continued.

Before the OECD had begun to focus on the issues of incentives, disincentives and discrimination, a number of developments shifted the emphasis of international interest to that of setting ground rules for multinationals. Codes of conduct for multinational companies were proposed in a number of international organizations, including, besides the OECD, the Organization of American States (the OAS) and the United Nations.

The United States opted for the negotiation of the OECD code first, rather than an OAS or a U.N. code, on the implicit assumption that the standards for corporate conduct acceptable to most or all industrialized nations of the OECD would be far more palatable than those acceptable to the less developed countries in the U.N. or the OAS. In other words, the OECD was the most favorable forum available. The OECD agreements should constitute a common bargaining position of the industrialized countries in the progress of negotiations on codes of conduct in the U.N.

Another incentive for negotiation of the guidelines in the OECD was to use these negotiations to obtain OECD recognition of the view that United States and other foreign companies operating abroad ought to be given "national treatment," and that the OECD would accept the proposition that both governments and multinationals have responsibilities to each other.

Now that we have agreed to the Guidelines, will they have any significance for individual clients or to multinational companies generally? The answer is probably affirmative. Most companies with any substantial operations abroad will almost certainly find themselves obliged to study the Guidelines, to review their corporate practices to see that they are in conformity with the Guidelines, and to justify to many foreign governments, perhaps even to the United States government, any departures from them. For these reasons, an abbreviated description of some of the more significant provisions of the Guidelines would appear to be in order.

The Guidelines' Provisions

First and of great importance, the Guidelines explicitly do not impose mandatory obligations upon companies. They are "voluntary and not legally enforceable."[1] Nevertheless, they are presented as "recommendations jointly

[1]Guidelines' Introduction ¶ 6.

addressed by member countries to multinational enterprises operating in their territories"[2] as to the standards of good conduct for all enterprises.

On improper payments, the Guidelines proscribe bribes or other direct or indirect improper benefits to any government officials, or unless legally permitted, contributions to candidates for public office or political parties. They also require abstention from "any improper involvement in local political activities."[3]

The Guidelines contain a section on Competition, prohibiting generally abuses of dominant positions and in not very clear terms imposing restrictions on intra-company pricing.[4] The Competition section also requires that a company give maximum freedom to its purchasers, distributors and licensees with regard to resales, exports, purchases and general development of their operations,[5] and that enterprises should "refrain from participating in or otherwise purposely strengthening the restrictive effects of international or domestic cartels or restrictive agreements which adversely affect or eliminate competition. . . ."[6] As originally drafted, this latter provision would have prohibited acts of cooperation with or acts which led to the strengthening of cartels, and thus, for example, might even have prohibited investments in oil production in OPEC countries to the extent that they might contribute to the strengthening of the OPEC oil cartel. For this reason, the provision was rewritten in terms of "participating in or otherwise purposely strengthening." As with the standards relating to "abuse of dominant position," however, these standards in the Competition section do not reflect the precise words or standards used in United States law, and might have a different impact from our prohibitions, such as on conspiracies in restraint of trade. It should be noted also that the Antitrust Division of the Department of Justice participated actively in the drafting of this provision, and the Competition section generally meets with its implicit approval.

With regard to Financing, the Guidelines provide that enterprises, "in managing the financial and commercial operations of their activities, and especially their liquid foreign assets and liabilities, [should] take into consideration the established objectives of the countries in which they operate regarding balance of payments and credit policies."[7] It remains to be seen whether this provision might be invoked to require companies to make uneconomic investments or funds transfers in order to contribute to a picture of a healthy balance of payments for a particular country.

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[2]*Loc. cit.*
[3]General Provisions ¶¶ 7, 8, 9.
[4]Competition ¶ 1.
[5]*Ibid.*, ¶ 2.
[6]*Ibid.*, ¶ 3.
[7]Financing.

In the Employment and Industrial Relations section of the Guidelines, discrimination in the employment of promotion of personnel with respect to nationality is prohibited except to the extent that discrimination—most likely in favor of nationals of the host country—is required by domestic law.[8] The Guidelines establish the general standard that enterprises should "respect the right of their employees to be represented by trade unions" and should "engage in constructive negotiations . . . with such employee organizations. . . ."[9] Enterprises are also required, during the course of labor negotiations, not to "threaten to utilize the capacity to transfer the whole or part of an operating unit from the company concerned in order to influence unfairly those negotiations. . . ."[10] In the context of another provision of the labor relations section by which enterprises are required to give reasonable notice of substantial or drastic changes involving layoffs or a transfer of investment from the country, it may be that an enterprise will be faced with the dilemma of violating the Guidelines if it gives labor fair warning of layoffs or a shift in investment, and violating the Guidelines if it doesn't.

The Guidelines contain a section on Science and Technology which provides rather vaguely for the "diffusion" of new technology throughout the world. It requires that "when granting licenses for the use of industrial property rights or when otherwise transferring technology [companies] do so on reasonable terms and conditions."[11] Interpretation of what is "reasonable" will obviously lead to a number of quite interesting disputes in the future.

The requirements contained in the Guidelines with respect to Disclosure of Information will have perhaps the greatest immediate impact on most companies. These disclosure requirements permeate the entire Guidelines. Under a separate Disclosure of Information section, enterprises are obliged to publish "information . . . as a *supplement* . . . to information to be disclosed under the national law of the individual countries in which they operate," including financial statements, information relating to the structure of the enterprise, . . . the identification of affiliates,[12] operating results, sales and significant new capital investment both by major lines of business and by geographic area,[13] "a statement of the sources and uses of funds by the enterprise as a whole,"[14] the average number of employees in each geographical area,[15] "research and development expenditure for the enterprise as a whole,"[16]

[8]Employment and Industrial Relations ¶ 7.
[9]*Ibid.*, ¶ 1.
[10]*Ibid.*, ¶ 8.
[11]Science and Technology ¶ 3.
[12]Disclosure of Information ¶ i.
[13]*Ibid.*, ¶¶ ii, iii and iv.
[14]*Ibid.*, ¶ v.
[15]*Ibid.*, ¶ vi.
[16]*Ibid.*, ¶ vii.

and "the policies followed in respect of intra-group pricing."[17] A major source of debate with regard to disclosure of information was the requirement of disclosure of operating results, sales, investment and employment by geographic area. A number of OECD countries such as Sweden pressed for the requirement that companies publish all financial and operating data, broken down on a country-by-country basis. In the final draft of the Guidelines, however, this requirement was modified by defining "geographical area" as either "groups of countries or individual countries as each enterprise determines it appropriate in its particular circumstances."[18]

It should be noted that these geographic areas and country-by-country disclosure requirements may be governed for United States companies by new reporting standards under consideration in the United States. You are probably aware of proposals now before the Financial Accounting Standards Board which would require a corporation to break down its financial statements not only by industry, but also with respect to its foreign operations and its foreign sales by groups of countries or individual countries in which the enterprise has significant operations.

The OECD Guidelines provide for additional obligations of disclosure in substantive sections of the code, including, among others, the requirements that they "provide to representatives of employees information which is needed for meaningful negotiations on conditions of employment,"[19] "provide to representatives of employees . . . information which enables them to obtain a true and fair view of the performance of the entity or . . . enterprise as a whole,"[20] and cooperate with and provide information to host country authorities on competition issues and investigations.[21]

Impact on Multinational Enterprises

Notwithstanding their so-called voluntary nature, the Guidelines cannot be ignored. In fact, enterprises would probably make serious mistakes if they were to act contrary to the Guidelines or not seek positively to abide by them. A number of reasons are immediately suggested.

The first is for good public and governmental relations. The Guidelines have been the subject of several years of discussion, over a year of formal negotiations and a great deal of input by the business community. Although not specifically endorsed by the private sector, it could be considered to be an act of bad faith for business to have participated in negotiations, albeit indirectly, to have many

[17]*Ibid.*, ¶ viii.
[18]*Ibid.*, ¶ ii, fn.
[19]Employment and Industrial Relations ¶ 12(b).
[20]*Ibid.*, ¶ 3.
[21]Competition ¶ 4.

of its suggestions accepted by the negotiators, and then to walk away from the result. Perhaps more important, these Guidelines have been accepted by every major Western industrial country as the embodiment of "standards of good conduct," both for private multinational enterprises and for national companies. It would hardly suit most companies to act in a manner blatantly inconsistent with what appears to be a consensus as to good corporate behavior.

Proceeding one step further, the Guidelines may transcend considerations of public and governmental relations and may be indicative of the future trend of international law. It is, of course, academic that enforceability is not necessarily the test of what constitutes international law. As the Supreme Court has recognized, sources of international law include not only treaties embodying express regulations, but also "the customs and usages of civilized nations."[22] The Guidelines, notwithstanding their voluntary nature, are proclaimed to embody standards of good conduct universally recognized among the Western industrial countries.

This is not to say that companies can be called to task by international tribunals for their failure to comply with the Guidelines. On the contrary, when questions arise with respect to the application of the Guidelines to a particular enterprise, the Guidelines specifically provide that the enterprise be given the opportunity, if it so wishes, to express its views to the OECD, but that the OECD "shall not reach conclusions on the conduct of individual enterprises."[23] Nevertheless, national tribunals or decision-makers may wish to compare individual company conduct with standards contained in the Guidelines.

For example, multinational clients should probably be advised that within the next few months or years, they may be confronted with a number of requests by foreign governments that they indicate adherence to or compliance with the Guidelines. There is certainly nothing to stop countries from making part or all of the Guidelines part of national law or regulation. Moreover, the impact of the Guidelines may be felt even in the United States. Let me suggest a few hypotheticals:

- If a lawyer's client-company is faced by what appear to be unreasonable penalties, or restrictions, or even expropriation or confiscation abroad, we normally can seek the intervention of our own government. If it appears that the client has not complied with the Guidelines in the country in which the dispute has arisen, it is predictable that the United States government might find it quite awkward to advocate the views and interests of a particular client or to intervene on its behalf.

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[22]*The Paquete Habana*, 175 U.S. 677, 700 (1900). *See also* article 38 of the statute of the International Court of Justice.

[23]Decision of the Council on Inter-governmental Consultation Procedures on the Guidelines for Multinational Enterprises ¶ 3.

• Many corporate clients also seek to protect their new investments through insurance. It would be a nice question of interpretation of insurance policies as to whether a company could lose its insurability in any country in which it has violated the provisions of the Guidelines.

• Many companies also obtain some of their financing through the Export Import Bank, the International Finance Corporation or other international financial sources. Again, it would not be at all a surprise to find these institutions extremely reluctant to lend funds to any companies which are acting in violation of the Guidelines.

The most important reason for adherence to the Guidelines is the advantage to business of a recognized standard of conduct for both multinationals and governments. As previously observed, the Guidelines are actually one component of an overall package. Much of the package imposes obligations upon governments as well as companies; and most of these obligations on governments are to the distinct advantage of international companies—advantages which they should keep in mind when they are faced with various new restrictions, impositions or other requirements which they consider to be unduly burdensome or unreasonable. For example, The Declaration on International Investment and Multinational Enterprises providing for "National Treatment" provides:

> [T]hat Member countries should . . . accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another member country . . . treatment under their laws, regulations and administrative practices, consistent with international law and no less favorable than that accorded in like situations to domestic enterprises.[24]

This National Treatment Declaration constitutes acceptance by every major free-world industrial country of the principle that foreign companies should be treated without discrimination, and in addition, that they should be treated according to international law. By this provision and by the broad definition of enterprises, even in circumstances where state-owned governmental companies are involved, foreign companies operating with the territory of that country are now proclaimed to be entitled to nondiscriminatory treatment.

In sum, the Guidelines impose some significant *de facto* obligations on companies doing business abroad. Most are fairly reasonable, some could be confusing and others could possibly become quite onerous. In the context of the broader package, however, it certainly will be more difficult for countries to build new barriers to foreign trade or investment, and provide a basis for rebuilding relations between multinational companies and the public. These possibilities, of improving the battered images of our companies and of obtaining fairer treatment abroad, should be well worth the obligations of

[24]Declaration, II.

complying with the Guidelines' standards of good conduct.

In this connection, attention should be directed not only to the Guidelines but also to the proposed resolution of the ABA International Law Section's Subcommittee on Multinational Corporations, by which the American Bar Association:

> [C]ommends the OECD Declaration to its members for their consideration as its provisions affect activities of their clients, endorses the Declaration and the Guidelines in particular as a balanced, reciprocal and voluntary statement on applicable standards of conduct which should guide the position of United States representatives in discussion of these subjects in other international fora, and expresses its approval of the open and constructive process by which the United States delegation negotiating the OECD Declaration consulted with the private sector during these negotiations.