



TRADE UNION ADVISORY COMMITTEE
TO THE ORGANISATION FOR ECONOMIC
COOPERATION AND DEVELOPMENT

COMMISSION SYNDICALE CONSULTATIVE
AUPRÈS DE L'ORGANISATION DE COOPÉRATION
ET DE DÉVELOPPEMENT ÉCONOMIQUES



Raising the standard

2010 Update
of the OECD Guidelines for
Multinational Enterprises

UPDATE OF THE MNE GUIDELINES

PROGRESS: 23 MARCH 2011

TRADE UNION PRIORITIES

Status of the Guidelines

1 Non-legally binding: (Preface, Paragraph 1, I. Concepts and Principles, Paragraph 1): The description of the Guidelines as 'voluntary' is highly damaging as it sends the message that the principles and standards of the Guidelines are 'optional' and leads to the 'inference that any further step... would contravene the principle of voluntarism and transgress into the mandatory realm'¹ so impeding effectiveness. It is sufficient to say that the Guidelines are non-legally binding.

Due diligence

2 Application of risk-based due diligence (II. General Policies, Paragraph 10): Ensure that the due diligence provisions apply to all the Chapters of the Guidelines.

Supply chains and Human Rights

3 Alignment with the Guiding Principle of the UN Framework (General Policies, Paragraph

11 and Chapter IV): Ensure that the provisions on supply chains and human right reflect as high a standard as that set by the Guiding Principles for the implementation of the United Nations 'Protect, Respect, Remedy' Framework. This is the expectation of the trade union movement – there must be no reduction in standard.

4 State duty to Protect (IV Human Rights, Commentary 37): The State duty to protect should be referenced in full: 'the State duty to protect against human rights abuses by third parties, including business through appropriate, regulation and adjudication' in line with the UN Framework's Guiding Principles.

5 Corporate responsibility to respect (IV Human Rights, Commentary 38): Include a reference to the 'corporate responsibility to respect' in line with the UN Framework's Guiding Principles including that it means:

"... to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur."

1. Professor John Ruggie.



Procedural Guidance

6 Core criteria: Procedural Guidance I. (National Contact Points, Paragraph 1 and Commentary to the Procedural Guidance, Paragraph 22): Insert in the first paragraph of the Procedural Guidance the list of core criteria for non-judicial grievance mechanisms that have been proposed by Professor John Ruggie – *legitimacy, accessibility, predictability, transparency, equitability and rights-compatibility*.

“In implementing the specific instance procedure, NCPs will operate in accordance with the core criteria of accessibility and transparency, as well as legitimacy, predictability, equitability and rights-compatibility.”

In the Commentary move **Paragraph 22** that contains descriptions of the core criteria to a new **Paragraph 10**.

7 Observance of the Guidelines: (Procedural Guidance I. National Contact Points, C. Implementation in Specific Instances, Paragraph 2 and 3c and Commentary to the Procedural Guidance, Paragraph 40): Experience shows that the successful functioning of NCPs depends on their dual role: providing mediation/conciliation and making recommendations on the observance of the Guidelines on the basis of an examination of the case. It is essential that this dual function is explicitly recognised in the Update. Moreover, the drafting of new provisions should not reduce the visibility of this role, nor introduce inconsistencies between the main recommendations and the Commentary.

Paragraph 2 of the Procedural Guidance should include the following stage:

“2e) Where conciliation/mediation is refused or fails, make recommendations on the implementation of the Guidelines.”

Paragraph 3c) of the Procedural Guidance should be revised as follows:

“3c) A statement when no agreement is reached or when a party is unwilling to participate in the procedures. This statement should, at a minimum, describe the issues raised, the reasons why the NCP decided that the issues raised merited further examination and the procedures the NCP initiated in assisting the parties. The NCP should make recommendations, on the implementation of the Guidelines, which should be included in the statement. The statement may also include an assessment of whether the enterprise has acted in accordance with the Guidelines. Where appropriate, the statement could also include the reasons that agreement could not be reached.

35 If the parties involved fail to reach agreement on the issues raised or if the NCP finds that one or more of the parties to the specific instance is unwilling to engage or to participate in good faith, the NCP will issue a statement, and make recommendations as appropriate, on the implementation of the *Guidelines*. This procedure makes it clear that an NCP will issue a statement, even when it feels that a specific recommendation is not called for. The statement should identify the parties concerned, the issues involved, the date on which the issues were raised with the NCP, any recommendations by the NCP, **the steps taken by the NCP**, and any observations the NCP deems appropriate to include on the reasons why the proceedings did not produce an agreement. **The statement may also include an assessment of whether the enterprise has acted in accordance with the Guidelines.**

Paragraph 40 of the Commentary is highly problematic as it describes a 3-stage process that omits any reference to the NCP making recommendations on the implementation of



the Guidelines. Indeed it states that in circumstances where mediation fails, then the NCP should close the case. *Paragraph 40 of the Commentary is inconsistent with Paragraph 3c) of the Procedural Guidance and Paragraph 35 of the Commentary.* It also fails to the practice of many NCPs and would represent a backward step, if it were to be retained in its current form:

40. The following sets out an indicative timeframe for the specific instance procedure: *comprises three different stages*

1. *Initial assessment and decision whether to offer good offices to assist the parties:* NCPs should seek to conclude an initial assessment within three months, although additional time may be needed in order to collect information necessary for an informed decision.
2. *Assistance to the parties in their efforts to resolve the issues raised:* If an NCP decides to offer its good offices, it should strive to facilitate the resolution of the issues in a timely manner. Recognising that progress through good offices, including mediation and conciliation, ultimately depends upon the parties involved, the NCP should, after consultation with the parties, establish a reasonable timeframe for the discussion between the parties to resolve the issues raised. If they fail to reach an agreement within this timeframe, the NCP should consult with the parties on the value of continuing its assistance to the parties; if the NCP comes to the conclusion that the continuation of the procedure is not likely to be productive, it should **follow the steps outlined in paragraph 35** and then conclude the process and proceed to prepare a statement.

41. As a general principle, NCPs should strive to conclude the whole process within 12 months

from receipt of the specific instance. It is recognised that this timeframe may need to be extended if circumstances warrant it, such as when the issues arise in an adhering country, **in which case the reasons for such extension should be disclosed.**

8 Institutional arrangements: (Procedural Guidance I. National Contact Points, A. Institutional Arrangements):

Require governments to ensure that the structure and organisation of the NCP are consistent with the core criteria. Make it a requirement to create multi-stakeholder advisory or oversight boards or provide for other forms of governance. This is essential given the perception of potential or actual conflicts of interests arising from the location of NCP in government departments, without oversight, which are responsible for investment, trade or economy.

1. Will be **structured composed** and organised such that they provide an effective basis for dealing with the broad range of issues covered by the Guidelines and enable the NCP to operate in a **manner that is consistent with all the core criteria, *n, impartial manner*** while maintaining an adequate level of accountability to ***the adhering*** government.
2. Can use different forms of organisation to meet this objective, **located either within or at arm-length from government, including organisational structures comprising independent experts.** Representatives of the business community, **worker employee** organisations and other non-governmental organisations may also be **involved, including in multi-stakeholder or oversight bodies.**
3. Should be led by a **senior government or equivalent senior appointment. *or équiv-
alent senior appointement***



Commentary

1. NCP leadership should be such that it **retains** **has** the confidence of social partners and other stakeholders, and fosters the public profile of the *Guidelines*.
2. Regardless of the structure **G**overnments have chosen for their NCP, they **should** **can** also establish multi-stakeholder advisory or oversight bodies, **or other forms of governance**, to assist NCPs in their tasks.
3. NCPs, whatever their composition, are expected to develop and maintain relations with representatives of the business community, employee organisations, other non-governmental organisations, and other interested parties.

9 Peer review: Commentary to the Procedural Guidance: Paragraph 19. Support peer evaluation with published country reports that include recommendations in line with OECD best practice:

19. In addition to contributing to the Committee's work to enhance the effectiveness of the Guidelines, NCPs will engage in joint peer learning activities. In particular, they are encouraged to engage in horizontal, thematic peer reviews and **voluntary** NCP peer evaluations. Such peer learning can be carried out through meetings at the OECD or through direct cooperation between NCPs.

10 Good faith: (Commentary: Procedural Guidance for NCPs, Paragraph 21): Revise the definition of good faith by amending *Paragraph 21 of the Commentary* as follows:

21. The effectiveness of the specific instances procedure depends on good faith behaviour of all parties involved in the procedures. Good faith behaviour in this context means responding in a timely fashion, maintaining confidentiality where appropriate, refraining **from misrepresenting the process**

from **misrepresenting the outcome**, or threatening or taking reprisals against parties involved in the procedure, and genuinely engaging in the procedures with a view to finding a solution to the issues raised in accordance with the Guidelines.

11 Initial assessment: admissibility criteria: (Commentary: Procedural Guidance for NCPs, Paragraph 25): Delete the additional admissibility criterion, which has been introduced that requires NCPs to establish a 'sufficient link' between the specific instance and the activities of the enterprise. TUAC considers that its introduction creates a conflict as the issue which it seeks to address is already covered by the existing requirement to consider **"whether the issue is material and substantiated"**.

~~"whether there seems to be a sufficient link between the enterprise's activities and the issue raised in the specific instance"~~

Second-best option

As a second-best option TUAC proposes deleting the word 'sufficient':

"whether there seems to be a **suffi-cient link between the enterprise's activities and the issue raised in the specific instance"**

12 Parallel proceedings: (Commentary: Procedural Guidance for NCPs, Paragraph 26):

26. When assessing the significance for the specific instance procedure of other domestic or international proceedings addressing similar issues in parallel, NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are underway, or are available to the parties concerned, or are available to the parties concerned. NCPs should evaluate whether an offer of good offices could make a posi-



tive contribution to the resolution of the issues raised and would not create serious prejudice for either of the parties involved in these other proceedings or **result in** ~~cause a~~ **a party being in** contempt of court. ~~situation.~~ ~~In making such an evaluation,~~ ~~NCPs could take into account practice among other NCPs and, where appropriate, consult with the institutions in which the parallel proceeding is being or could be conducted.~~ Parties should also assist NCPs in their

consideration of these matters by providing relevant information on the parallel proceedings. **Any decision to suspend a specific instance should be disclosed and should be reviewed in the light of any changes to the status of the parallel proceedings.** The NCP may, however, continue to resolve those issues in the specific instance that are not covered by the parallel legal proceedings, or for which it is deemed that there is no risk of serious prejudice.