



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 OECD MNE GUIDELINES

PROGRESS: FEBRUARY 2011

Overview

1 The Update of the OECD MNE Guidelines has reached a crucial juncture. TUAC recognises and welcomes the improvements that have been made in the most recent draft proposals of the Chair of the Working Party. TUAC also strongly appreciates the production of consolidated texts, which will greatly facilitate the remainder of the discussions.

2 However, overall TUAC considers that insufficient progress has been made in addressing key deficits in the Procedural Guidance, in particular as regards the institutional arrangements of NCPs and the role of the NCPs in making recommendations on the basis of an examination of the specific instance.

3 Trade unions strongly support the Update of the OECD MNE Guidelines and its ambition of ensuring that the Guidelines be a “*leading international instrument for the promotion of responsible business conduct*”. TUAC urges governments to muster the necessary political to ensure the success of this Update, which will be judged according to the improvement in the effectiveness of the NCPs and the broader applicability of the Guidelines.

TRADE UNION PRIORITIES

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TUAC BRIEFING
DECEMBER 2010



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Format

1 Recommendations V commentary: Ensure that recommendations to enterprises are provided in the main text and not in the commentary, the function of which should be only explanatory. TUAC is concerned that during the Update a number of positive improvements in recommendations to enterprises have been made in the commentary rather than the main text.

2 Re-structure the Guidelines: Re-structure the text such that the commentary follows the recommendations on a chapter-by-chapter basis. The current layout, which separates the commentary and the recommendations, wrongly signals that the commentary is additional to rather than an integral part of the text.

Status

3 Non-legally binding (*I. Concepts and Principles, Paragraph 1*): delete reference to the voluntary nature of the Guidelines in line with the UN Framework, Protect, Respect and Remedy (the corporate responsibility to respect), which has been unanimously adopted by governments and endorsed by business. It is sufficient to state that the Guidelines are non-legally enforceable.

Procedures

4 Core criteria (*Procedural Guidance I. National Contact Points and Commentary to the Procedural Guidance, Paragraph 22*): Insert in paragraph 1 of the Procedural Guidance the list of core criteria for operating a non-judicial grievance mechanism that have been proposed by Professor John Ruggie – *legitimacy, accessibility, predictability, transparency, rights-compatibility and equitability* – and make it clear that these six criteria are an integral package that should underpin the specific instance procedure. In the Commentary group the descriptions of the core criteria together by placing *Paragraph 22* after *Paragraph 9*.

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

5 Institutional arrangements (*Procedural Guidance I. National Contact Points, A. Institutional Arrangements*): Revise the main text of the Procedural Guidance to require governments to ensure that the organisation and composition of the NCP are consistent with the core criteria and include a requirement to create multi-stakeholder advisory or oversight boards (currently recommended in the *Commentary to the Procedural Guidance, Paragraph 11*). So far there is no change to the text of the main recommendations on institutional arrangements. This is a major omission 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.

6 Transparency: Ensure that transparency, which is one of the core criteria, underpins all the Procedural Guidance and that provisions for confidentiality are limited, justified and require the agreement of the parties.

7 NCP cooperation (*Commentary: Procedural Guidance for NCPs, Paragraph 23*): Assign equal responsibility to the home and host NCPs in handling specific instances involving alleged violations of the Guidelines in an adhering country.

8 Mediation/conciliation and ‘good faith’: (*Commentary: Procedural Guidance for NCPs, Paragraph 22*): Strengthen mediation/conciliation by enhancing the role of the OECD in capacity-building, but recognise that parties may not wish to participate in mediation, or that mediation may fail. In this regard it is essential to amend *Paragraph 22* that defines ‘good faith’ in terms of a willingness to participate in mediation. This contradicts the core



criteria of *accessibility* by precluding parties not seeking mediation from using the NCPs. Furthermore, good faith is a widely used and well understood term. There is no need to re-define it in the context of the Guidelines. Amend *Paragraph 22 of the Commentary* as follows:

“Parties should participate in the specific instance procedure in good faith, including in mediation and conciliation.”

9 Recommendations on implementing the Guidelines (*Procedural Guidance I. National Contact Points, C. Implementation in Specific Instances, Paragraph 2 and Commentary to the Procedural Guidance, Paragraph 39*): Ten years of experience has shown that the successful functioning of NCPs depends on their dual role: providing mediation/conciliation and making recommendations on implementing the Guidelines on the basis of an examination of the case. These two roles are inter-dependent: the success of non-adversarial mediation depends on the possibility of NCPs making recommendations on the basis of an examination. 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. *Paragraphs 2 and 3c*) of the *Procedural Guidance* should be revised as follows:

“2e) Where conciliation/mediation is refused or fails, make recommendations on adherence to the Guidelines based on an examination of the facts and circumstances.”

“3c) A statement when no agreement is reached or when a party is unwilling to participate in the procedures. This statement should describe, *inter alia*, the issues raised, the reasons why the NCP decided that the issues raised merited further examination, and any recommendations on the implementation of the Guidelines in this specific instance, based on an assessment of facts and circumstances. The statement may also describe the reasons that agreement could not be reached.”

Similarly, *Paragraph 39 of the Commentary* must be re-written in order to make it clear that if mediation fails, NCPs have the option of making recommendations on the basis of an examination of cases. The current formulation describes a three-stage process and omits any reference to an examination phase. This is

misleading and does not reflect the practice of the best functioning NCPs.

10 Initial assessment: admissibility criteria: (*Commentary: Procedural Guidance for NCPs, Paragraph 25*): Delete the additional admissibility criteria requiring NCPs to establish “whether there is a sufficient link between the enterprise’s activities and the issue raised in the specific instance”. This is already covered by the existing provision for NCPs to consider “whether the issue is material and substantiated”.

11 Parallel proceedings (*Commentary: Procedural Guidance for NCPs, Paragraph 26*): Support the general principle that specific instances should not be rejected or suspended solely on the grounds of parallel proceedings in line with the core criteria of *accessibility* and the fact that parties with a grievance are, in general, not precluded from seeking redress whether in judicial or non-judicial mechanisms. Revise the paragraph so as to require a party to show that the specific instance would cause serious prejudice to the parallel proceedings, in line with NCP best practice, and require the NCP to report any such decision to its oversight or governance body:

26. When assessing the significance of other domestic or international proceedings addressing similar issues in parallel, NCPs should not decide that an examination of the issues should be suspended for the sole reason that parallel proceedings have been conducted, are underway or are available to the parties concerned. Rather the specific instance procedure should only be suspended following a representation by a party that the procedure will cause serious prejudice to existing parallel proceedings and an evaluation that upholds this position and finds that the procedure will not contribute to the resolution of the issue. Any decision to suspend a specific instance should be disclosed to the NCP’s advisory or oversight body and the OECD 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 prejudice.



12 Protect complainants: Ensure that the Guidelines explicitly state that companies should not take reprisals against those who raise cases under the Guideline and that any such reprisals should be remedied and taken into account in the Final Statement.

13 Follow-up and consequences (*Commentary: Procedural Guidance for NCPs, Paragraph 36*): Strengthen the authority of the NCP by providing for follow-up and introducing consequences for companies, including the withdrawal of public advantage, that either flout the Guidelines process, or are involved in egregious violations and at a minimum require NCPs to disseminate information on specific instances to relevant government departments.

14 Peer review: Support thematic peer review, ensuring that it involves external stakeholders, together with *mandatory* peer evaluation with published country reports that include recommendations.

Human Rights

15 State duty to protect (*Chapeau, Chapter IV Human Rights*): Move the reference to the ‘State duty to protect’ from the chapeau in the Human Right Chapter to *Commentary Paragraph 35* where it 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* (*Paragraph 11*).

16 Corporate responsibility to respect (*Commentary to Chapter IV, Paragraph 35*): Include a description of the ‘corporate responsibility to respect’ in line with the *UN Framework’s Guiding Principles* (*Paragraph 11*) including that it means:

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

17 Labour rights (*Commentary, Paragraph 36*): Include a reference to the eight ILO core Conventions in line with the Guiding Principles (*Commentary to Guiding Principles GP12*)

of Professor Ruggie, the UN Special Representative for Business and Human Rights;

18 Human rights treaties: Reference and Guidance (*Commentary, Paragraph 36*): It is essential that the Guidelines make reference to the full range of human rights treaties and declarations, as well providing sources of guidance for enterprises. Governments should support the inclusion of a Technical Annex that lists relevant standards and sources of guidance. This was a key recommendation of the expert meeting on human rights and the Update held at the OECD in January 2011.

19 Operational level grievance mechanisms (*Commentary Paragraph 42*): Amend paragraph 42 to provide that these grievance mechanisms should not substitute for grievance mechanisms provided through collective bargaining and that the existence of an operational-level grievance mechanism should not impede access to other non-judicial grievance mechanisms **including the NCPs**.

“Collective bargaining between workers and employers can be an effective means of identifying and addressing potential or actual labour-related human rights abuses. Operational-level grievance mechanisms should complement and not undermine collective bargaining or the role of legitimate trade unions, nor should such mechanisms preclude access to judicial or non-judicial grievance mechanisms, including the National Contact Points.”

Employment

20 ‘Worker’: Revise Chapter V to use the term ‘worker’ instead of ‘employee’. This is essential in order to reflect the fundamental and far-reaching changes in the employment relationship that have occurred since 1976, when the OECD Guidelines were drafted, and to bring Chapter V in line with the UN Framework Protect, Respect, Remedy, which defines the responsibilities of enterprises in terms of impact and requires enterprises to identify and address these negative adverse impacts – this responsibility is not restricted to employees.