



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

THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 2010 'UPDATE'

TUAC SUBMISSION TO THE OECD INVESTMENT COMMITTEE Paris, 7th October 2009

1. Introduction

1. TUAC welcomes decision of the 2009 OECD Ministerial Council Meeting¹ to instruct the OECD to undertake further consultation on the “updating” of the OECD MNE Guidelines.

2. On the 2nd September 2009, TUAC organised a meeting for trade unionists, held at the OECD, as a first step to formulating a trade union position.

3. The meeting identified a number of issues that impede the effectiveness of the Guidelines and discussed possible options for addressing them. Participants also agreed on the need for TUAC to undertake additional research, particularly regarding the possible implications of the work of the UN Special Representative on Business and Human Rights (SRBHR) on both the Procedural Guidance and the Content of the Guidelines and especially Chapter IV. TUAC will bring forward proposals over the coming weeks and months.

4. This submission therefore presents a *provisional* list of issues to be included in the Update based on the discussions held at the trade union meeting. These are cross-referenced with the OECD secretariat's report on '*Preparing for Consultation on an Update of OECD Guidelines for Multinational Enterprises*'.

5. The remainder of this submission is structured as follows:

- *Section 2* identifies key principles for the review process;
- *Section 3* focuses on the key issues for the procedural guidance;
- *Section 4* identifies key issues for the substantive provisions of the Guidelines.

2. Update: Process - Principles and Modalities

6. First and foremost, it is essential to ensure that the Update is an ‘Upgrade’ in all respects. There must be no weakening of existing provisions and procedures or narrowing of interpretations of the applicability of the Guidelines. The mandate from the Council clearly states that the aim is “*to increase their relevance and clarify private sector responsibilities*”.

1 OECD Annual Ministerial Council Meeting, 24-25 June 2009.

7 It is essential that the Update is conducted in a way that assures credibility, legitimacy and enhanced reputation of the Guidelines process.

8. There is also a need to place the Update in the context of the work being carried out by the UN Special Representative on Business and Human Rights (SRBHR) on the *Protect, Respect and Remedy* framework.

9. Finally, there is a need to use the Update to improve coherence between the OECD MNE Guidelines and other relevant instruments both within and outside the OECD and especially the International Labour Organisation (ILO).

10. TUAC recommends that the Investment Committee takes steps to assure the following:

a) **Upgrade not a downgrade:** Safeguards should be put in place at the outset to ensure that there is no weakening of any of the current provisions or procedures;

b) **Transparent, participatory and inclusive:** The Investment Committee must take steps to ensure that the process for the Update is transparent, participatory and inclusive at international and national level. It should also ensure that trade unions and other key stakeholders are involved throughout the whole process. TUAC recommends that the Investment Committee:

- *OECD* (see *OECD note* §22 and §23):

- . *Establish an Update/Upgrade Group*²: Beyond the regular consultations with TUAC, BIAC and OECD Watch, proposed by the OECD (see §23), TUAC recommends that the Investment Committee establishes an Update Group that involves the key institutional stakeholders, as well as outside experts, including representatives of the ILO and the UN SRBHR;

- . *Liaise with other OECD Committees*: There is a need to ensure policy coordination with other instruments and policies (see *OECD note* §17) including: the *Principles of Corporate Governance*, the *Guidelines for the Corporate Governance of State-owned Enterprises*; the *OECD Export Credit Group*; and the *OECD Anti-bribery Working Group*;

- *Non-adhering Countries*: Provide for the input of non-adhering governments involvement prioritising China, India, Indonesia, South Africa and SouthEast Asia as suggested in the *OECD note* (§22);

- *Adhering Countries*: Provide for national level consultations that involve trade unions and other relevant stakeholders.

- *International Organisations*: Use the Update to enhance cooperation with the ILO Tripartite Declaration on Multinational Enterprises and Social Policy following the joint agreement of the OECD and ILO.

² TUAC understand that the Investment Committee has established a ‘*Friends of the Guidelines*’, which is primarily composed of ‘non-institutional’ members. TUAC considers that it would be necessary to involve the institutional stakeholders in any structure established for the Update.

c) **Integrate work of the UN SRBHR:** It is essential to incorporate key developments and concepts arising from the mandate of the SRBHR in the Update. This requires in-depth study of relevant issues. TUAC recommends that the Investment Committee set up a task team for this purpose.

3. Update: Procedural Guidance

3.1 Key Obstacles

11. **Effectiveness of the NCPs:** TUAC has always contended that improving the effectiveness of the Guidelines depends above all else on improving the effectiveness of the NCPs. The Procedural Guidance sets out the framework for NCP effectiveness. Hence TUAC considers that strengthening the Procedural Guidance should be a key focus of this Update.

12. **Lack of functional equivalence** (*see OECD note §16*): The uneven performance of NCPs is uncontested. The effects of unequal access, unequal treatment of cases, lack of predictability, and thereby loss of confidence and reputation, undermine the Guidelines as a whole. The Procedural Guidance sets out four core criteria on the basis of which NCPs are supposed to achieve functional equivalence: *visibility*; *accessibility*; *transparency*; and *accountability*. These fall short of the six criteria identified by the SRBHR (*see TABLE 1*) who has assessed the NCPs to be failing to meet minimum performance criteria.

TABLE 1: UPGRADING NCP PERFORMANCE CRITERIA

NCP Core Criteria	Related Issues	NCP Core Criteria	UN Special Representative
Visibility		✓	
Legitimacy	Structure		✓
Accessibility	Confidentiality Instrument of last resort	✓	✓
Predictability	Equal performance		✓
Transparency	Confidentiality and legitimacy	✓	✓
Accountability	Legitimacy Structure	✓	
Right-compatible			✓
Equitability	Need for common approaches on parallel proceedings/investment nexus/confidentiality/		✓

13. **Inadequate institutional arrangements** (*see OECD §17*): TUAC has long argued that the structure of many NCPs is inadequate and impedes overall performance. *Section A* of the Procedural Guidance states that “*adhering countries have flexibility in their NCPs, seeking the active support of social partners...*”. Furthermore, the guidance explicitly gives governments the option of establishing NCPs in a single department, failing to address the conflicts of interest that are likely to occur if an NCP is based only in the Ministry for Economy or Trade and Investment (*see OECD §17*). Whilst the Official Commentaries state that the structure put in place should “*provide an effective basis for dealing with the broad range of issues covered by the Guidelines*”, this guidance is insufficient.

14. **Role of the NCP** (see *OECD §17*): TUAC considers that there a need for greater guidance on the role of the NCP. The Procedural Guidance clearly states that the NCP will offer a forum for discussion and facilitate access to conciliation or mediation (see *BOX 1*). Yet, trade unions report a range of practice, with some NCPs being reluctant to offer mediation, whilst others, such as the UK, considering mediation to be its key role³. Moreover, the Dutch NCP⁴ identifies a potential conflict between the role of adjudication – establishing the facts for determining compliance with the Guidelines – and mediation where the focus is on reaching agreement. *“In every SI procedure, an NCP will have to find that fine balance between mediation or offering its good offices to resolve the issue on the one hand, and determining whether the OECD Guidelines have been complied with on the other”*.

BOX 1: ROLE OF THE NCP

The Procedural Guidance sets out the role of the NCP as (*inter alia*):

- “...the NCP will offer a forum for discussion”
- NCPs will “offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial, such as conciliation or mediation, to assist in dealing with issues”
- “if the parties involved do not reach agreement on the issues raised, issue a statement and make recommendations”

15. **Confidentiality v transparency:** TUAC considers that there is a need for improved guidance to NCPs on confidentiality that provides for maximum transparency. Transparency is a core principle of the Guidelines and also one of the six performance criteria proposed by the SRBHR (see *TABLE 1*): *“[S]ince human rights are a public good, the outcomes of these grievance processes should rarely, if ever, be purely private transactions. Furthermore, grievance mechanisms grow in their perceived legitimacy and therefore their effectiveness through trust in the process they provide and the outcomes they produce. An adequate level of transparency is therefore essential to a rights compatible mechanism*. The Procedural Guidance (see *BOX 2*) offers safeguards on confidentiality, whilst providing that results should be made public. However, NCPs are adopting quite different practices on confidentiality (see *TABLE 2*) both in relation to publishing information their handling of communications between parties. The UK, for example, copies *all* parties on *all* correspondence, managing a highly transparent ‘internal’ process, whilst the Swiss NCP, for example, communicates separately with the different parties.

³ Initial Review of the Operation of the UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises – January 2009.

⁴ OECD, 2009.

BOX 2: PROVISIONS FOR CONFIDENTIALITY

The Procedural Guidance states that: “4a) *In order to facilitate resolution of the issues raised, take appropriate steps to protect sensitive business and other information. While the procedures...are underway confidentiality of the proceedings will be maintained. At the conclusion of the procedures, if the parties involved have not agreed on the resolution of the issues raised they are free to communicate about and discuss these issues. However, information and views provided during the proceedings by another party will remain confidential, unless that other party agrees to their disclosure.* 4b) *After consultation with the parties involved, make publicly available the results of these procedures unless preserving confidentiality would be in the best interests of the... implementation of the Guidelines.*”

TABLE 2: CONFIDENTIALITY: NO FUNCTIONAL EQUIVALENCE⁵

Always publish an initial statements	UK, Dutch
Never publish an initial statement	Swiss
Publication of all final statements	Dutch, UK
Publication of names of parties where a case is accepted	UK
It is also made clear to them that a breach of confidence could be treated as a breach of faith in the process and could result in either a refusal to consider a complaint further or an adverse final report.	USA
As provided by the Procedural Guidance outsiders are not, as a general rule, informed about the progress made in considering a case; this is more conducive to confidence-building between the parties more directly concerned.	USA

16. **Cooperation between NCPs:** Trade unions consider that the specific instance procedure should explicitly recognize the responsibility of the parent company and provide for the home NCP to play a role in engaging the parent company in talks with international and affected trade unions. Trade unions have reported a reluctance of the home NCP to become involved in cases involving violations of the Guidelines in adhering countries. The procedural guidance currently provides for NCPs to “2b) *consult the National Contact Point in the other county or countries concerned*”. This guidance should be strengthened.

17. **Burden of proof:** Trade unions also identified the difficulty for an NCP of discharging the burden of proof in complex cases as an obstacle to effectiveness. This clearly relates to the issue of resources, with possible solutions including the use of specialist training and fact-finding missions. The OECD reports that site visits are more the exception than the rule⁶. A number of NCPs have emphasised the value of access to funding to carry out on-site visits.

18. **Resources:** The OECD reports that several NCPs (Brazil, Belgium, Chile, France, Greece, Italy, Mexico, Poland, Romania and Spain) report increased difficulty in meeting the various demands placed on them and acknowledge that with additional resources, they could play a more active role in promoting the Guidelines. It also reports that NCPs acknowledge the need for qualified staff, particularly staff trained in mediation.

⁵ pp. 12.

⁶ pp. 11.

19. **Parallel proceedings** (see *OECD §17*): Parallel proceedings are the most frequently cited reason for turning down or delaying dealing with a specific instance⁷⁸. NCPs have adopted a range of approaches: *accepting the specific instance* regardless of the existence of parallel proceedings (Marks and Spencer, French NCP; Plaid, Dutch NCP; Bayer, German NCP; Nestlé, Swiss and Korean NCPs); providing *guidance so as not to* prejudice parallel legal proceedings (UK); and *automatic rejection* (Japan, US). In many cases an NCP's position on parallel proceedings is determined or affected by that of the employer (see *TABLE 7*). Neither the Procedural Guidance nor the Commentaries provide guidance on how to deal with parallel proceedings. TUAC considers this to be priority issue for the Update.

TABLE 3: NCP APPROACH TO PARALLEL LEGAL PROCEEDINGS

NCP	APPROACH
Brazil	The Brazilian NCP reported that it tried to offer its good office despite parallel legal proceedings, but the parties were unable to identify issues that were not covered by the parallel proceedings (Shell case).
France	The French trade unions report a division with the French NCP, with trade unions pushing the NCP to accept cases that involve parallel proceedings and the employers and the government not wishing to accept such cases.
Italy	Italy called for further guidance from the Investment Committee on this issue.
Japan	The Japanese NCP reports that parallel proceedings are a problem for the Japanese NCP as " <i>the company involved tends to avoid commitment to the operation of the NCP</i> ".
Netherlands	The Dutch NCP reports that it has been confronted with the " <i>unwillingness</i> " of the MNCs to cooperate on the basis of parallel legal procedures.
UK	The UK NCP has prepared guidance on parallel proceedings that means that it will only suspend aspects of proceedings where a party can show that a party is likely to suffer serious prejudice as a result of parallel proceedings should that aspect of the proceeding continue.

⁷ OECD 2008.

⁸ According to 2007 data, around 60 % (94/164) of all cases raised with NCPs involved issues that were also being addressed in parallel proceedings. 27 out of these 94 were concluded meaning that NCPs have accepted 29 % of cases irrespective of the fact of the issues were subject to parallel legal proceedings.

BOX 3: PARALLEL LEGAL PROCEEDINGS

TUAC's past position has been that specific instances should be accepted regardless of the existence of parallel proceedings on the basis that:

- Guidelines are non-judicial and thereby a complementary and separate process;
- Guidelines are stand-alone, not an instrument of last resort;
- the role of the NCPs is to provide mediation and conciliation and to assist the parties involved in trying to reach an agreement;
- the lack of a common approach undermines the functional equivalence of NCPs;
- rejecting or suspending specific instances on the basis of parallel proceedings directly undermines accessibility, which is one of the core criteria.

The French NGO, Sherpa,⁹ similarly argued, in its legal opinion on parallel proceedings, that specific instances should not be suspended due to legal proceedings because the Guidelines are different in their nature, grounds and (sometimes) their object. Sherpa contends that the primary role of the NCP, to provide “*a forum of discussion and mediation*”, is completely different function from the role of a court judge. Sherpa also argues that the dismissal of a specific instance on the grounds of parallel proceedings denies people access and thus violates one of the four core principles of the Guidelines. Furthermore, the object of the Guidelines may be different from that brought before national courts.

20. **National law v international standards:** TUAC considers the assertion of the SRBHR that the corporate responsibility to respect is a ‘near-universal’ social norm that exists independently of variations in national law presents a significant challenge to the Guidelines, which frame the obligations of companies in terms of national law. The SRBHR identifies freedom of association as an area where national law either contradicts or offers lower protection than international standards. The principle of using international standards is further elaborated in a paper on company-based non-judicial grievance mechanisms (see *BOX 4*)¹⁰. This needs to be addressed in the Update.

BOX 4: APPLYING INTERNATIONAL STANDARDS

“Given that the specific legal and political human rights framework will vary by country, causing often unhelpful uncertainty, and that it may fall below the standards of a company’s home state, the approach recommended here is that a company acknowledges the relevance to the grievance process of rights in all core UN human rights treaties³. This is not to say that these documents are legally binding on corporations – they are not. It is to acknowledge that they form the overarching human rights context within which companies and other non-state Actors operate.... Where domestic law is in contradiction to any of these standards, the dialogue process within the grievance mechanism will need to look carefully at options that can fulfill the spirit of the rights to the maximum extent possible without violating domestic law.”

⁹ Sherpa is a member of OECD Watch.

¹⁰ Rights-Compatible Grievance Mechanisms: A Guidance Tool for Companies and their Stakeholders, John F. Kennedy School of Government, Harvard University, January 2008.

¹⁰ p.p. 16.

21. **The lack of cooperation of companies:** The reluctance of companies to participate in the specific instance procedure is reported not only by trade unions, but also by NCPs. It manifests itself in a variety of ways ranging from the participation of junior rather than senior staff at NCP meetings, to reluctance to participate in dialogue, especially if parallel legal proceedings are underway, or refusal to comply with recommendations made by the NCP (e.g., Afrimex in the UK). It affects a host of other issues as NCPs seeks to accommodate business concerns. This is a key and cross-cutting obstacle.

3.2 *TUAC Recommendations*

22. TUAC considers it essential that the Update addresses the following:

- a) **Expand the core/performance criteria:** TUAC considers that the core criteria should be broadened in line with the recommendation of the SRBHR (see *TABLE 4*). The introductory paragraph of the Procedural Guidance should be amended accordingly. Additionally minimum standards should be included providing greater direction on what compliance with these performance standards entails;
- b) **Strengthen guidance on institutional arrangements:** Amend *Section A* of the Procedural Guidance to include minimum standards on what type of institutional arrangements should be put in place, in line with the extended core criteria. The guidance should exclude the possibility of creating a single department NCP that is based solely in a department where there might be a conflict of interest;
- c) **Introduce a mandatory Peer Review process (see OECD §20):** There is a need to go far beyond the current ‘peer learning’ between NCPs and introduce a mandatory peer review mechanism in order to secure improvements in performance across the board. The OECD peer review process is a tried and tested method of review. The peer review process should be rigorous, transparent, participatory and adequately resourced, with published country reports, setting out recommendations. The Investment Committee should further consider whether the provisions for monitoring should be incorporated into the text of the Guidelines themselves, as a specific chapter on Monitoring and Follow-up. An example is provided by the OECD Anti-bribery Convention, the provisions on monitoring for which are contained in Article 12, with a detailed description provided in the Official Commentaries;
- d) **Clarify the role of the NCP (see OECD §17):** TUAC support the proposal made by OECD Watch to amend the Procedural Guidance so as to more clearly delineate the two roles of the NCP and thereby avoid potential conflicts. The NCP should first seek resolution of the specific instance through mediation; if this fails it should then move to the adjudication stage, to give its impartial assessment of the case.
- e) **Improve transparency:** The procedural guidance should be upgraded, so as to set out minimum standards of transparency for handling confidential proceedings between parties drawing on the best practice of some NCPs. It should also set out the standards of transparency required *vis the vis* the publication of information (initial and final statements). TUAC understands that confidentiality may be necessary in the proceedings to ensure the success of mediation. However, there is no need for a case or the outcome of the case to be confidential.

- f) **Set minimum timescales:** The procedural guidance should be amended to set minimum standards on time-scales;
- g) **Support specialist training:** The Investment Committee should establish a central facility for training on core skill areas such as mediation;
- h) **Provide for fact-finding:** Fact-finding missions have been successfully used by some NCPs: e.g., the Swedish NCP. The desirability and feasibility of creating a centralised fact-finding facility was one of the options explored at a brainstorming meeting held at Chatham House in the UK in March 2009. The Investment Committee should consider the feasibility of establishing such as fund;¹¹
- i) **Extend reporting requirements:** The Procedural Guidance should be amended so as to strengthen reporting requirements such that NCPs be required to report back on the level of resources allocated to the NCP and for the provision of staff training;
- j) **Develop guidance on parallel legal proceedings**¹²: The Update should develop guidance on parallel legal proceedings that emphasises the complementary and non-judicial role of NCPs as a forum for problem-solving and mediation. The guidance should prohibit an NCP from automatically rejecting a case on the basis of parallel legal proceedings, requiring instead that it demonstrate prejudice to the proceedings. Any decision to suspend proceedings should be subject to external oversight;
- k). **NCP Cooperation:** The effectiveness of the specific instance procedure would be significantly improved by amending the Procedural Guidance to give the home NCP specific responsibility for liaising with the parent company and offering its good offices for dialogue, even when violations take place in adhering countries;
- l) **National Law v international standards:** This is an important and complex issue. TUAC will bring forward proposals on this issue, drawing on the work of the SRHRB. TUAC recommends that the Investment Committee also assesses its implications;
- m) **Lack of cooperation of employers:** The lack of cooperation of employers in some cases is of increasing concern. The SRBHR explicitly recognises the need for NCP decisions to be given more weight, pointing to the potential for linking NCP decisions to access to government procurement and export credits. The Update must strengthen the hand of the NCP in this regard. This should form part of new Procedural Guidance on follow-up and enforcement.

¹¹ March 2009 meeting held at Chatham House and supported by the Norwegian Government.

¹² TUAC is working on this issue and will elaborate its position over the coming months.

4. Update: Substantive Issues

4.1 Key Obstacles

23. **Supply chain, other business partners and the investment nexus** (see *OECD §8*): TUAC considers it essential that the Update provide clearer guidance on the application of the Guidelines to supply chains and other business partners. It is essential that the applicability of the Guidelines reflects the reality of horizontal business relationships that characterise the global economy. There is a need to remove the requirement for an investment nexus¹³ – which is the second most common reason cited by NCPs for rejecting specific instances¹³ – and which came to the fore after the OECD Investment Committee issued a statement in April 2003 concerning the scope of the Guidelines (see *ANNEX 1*). The statement, which is not a formal decision, on the one hand states that the application of the Guidelines depends on the “*presence of an investment nexus*”, and on the other hand that “*flexibility is required*” in the context of the provisions of the Guidelines (II.10) on the application of the Guidelines to business partners: II. 10 states that enterprises should “*encourage, where practicable, business partners, including suppliers and sub-contractors to apply principles of corporate conduct compatible with the Guidelines*” (see *BOX 5*). Nonetheless, it is clearly the case that many NCPs are rejecting cases due to the lack of an investment nexus (see *BOX 6*). The work of the SRBHR on the need for companies need to undertake due diligence on their human rights impacts across their business relationships (see *BOXES 5 and 7*) highlights the need for anomaly of the investment nexus to be removed.

BOX 5: SUPPLIERS AND BUSINESS PARTNERS

The Commentaries to the Guidelines concerning II.10 and the responsibilities of multinationals *vis a vis* suppliers and other business partners are framed in terms of the level of ‘influence’ companies have in their business relationships. It is worth noting that this concept of the ‘sphere of influence’ has been rejected by the SRBHR in favour of a corporate responsibility to protect and ‘do no harm’. The SRBHR contends that in order to discharge their responsibility, companies need to undertake due diligence on their human rights impacts.

BOX 6: REQUIREMENT FOR AN INVESTMENT NEXUS

GERMAN NCP

In a case concerning the UN Oil for Food Enquiry the German NCP's initial assessment found that the Inquiry related only to supply transactions and that thereby without any reference to investment, the Guidelines did not apply.

DUTCH NCP

A case raised with the Dutch NCP concerning travel agencies promoting tourism in Burma was first considered eligible to be considered under the Guidelines process. Thereafter the NCP changed its opinion on the grounds that the Guidelines were not applicable because of the investment nexus.

¹³ It reports that by the end of 2007 just under 20 % (29/164) of specific instances raised related to the “investment nexus” and involved supply chain responsibilities.

BOX 7: UK NCP - APPLYING DUE DILIGENCE

There is evidence that due diligence is already being applied. The UK NCP used the concept of due diligence in its assessment of two cases, Das Air and Afrimex. In its final statement on the activities of Afrimex in the Democratic Republic of Congo, the UK NCP focused on the level of due diligence applied to the supply chain. The final statement quotes Professor Ruggie's definition of due diligence as a "*process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it. The scope of human rights-related due diligence is determined by the context in which a company is operating its activities and the relationship associated with those activities*". The NCP found the steps taken by Afrimex *vis a vis* its supplier to be inadequate and concluded that Afrimex had violated Chapters II.1, II.2, IV 1b, IV 1c and IV 4b of the Guidelines. In its recommendations, the NCP drew the company's attention to Professor Ruggie's recommended basic human rights due diligence process, underlining the need for Afrimex to apply due diligence to the supply chain.

The UN Security Council has similarly called on member states to ensure that companies under their jurisdiction perform due diligence on their suppliers of Congolese mineral materials.

24. **Changing employment relationships and precarious work:** A key issue identified in the trade union meeting was how to use the Guidelines to address changing employment relationships and precarious work. TUAC will bring forward proposals on this issue.

4.2 Other Issues

25. **Living wage:** A further issue discussed at the trade union meeting was how to use the Guidelines to encourage the payment of a Living Wage, focusing on possible changes to Chapter IV. This is a priority for TUAC for the Update.

4.3 TUAC Recommendations

26. **Supply chains/business relationships:** Removing the requirement for an investment nexus is a priority. The Update should repeal the 2003 Statement of the Investment Committee on the scope of the Guidelines *vis a vis* the investment nexus. The Investment Committee should also examine how to incorporate the requirements for due diligence, as proposed by the SRHRB, into the Update.

ANNEX 1: INVESTMENT COMMITTEE STATEMENT: INVESTMENT NEXUS

“• *First, the Guidelines are an Annex of the OECD Declaration on International Investment and Multinational Enterprises. The fact that they are part of the Declaration and that oversight responsibility for them has been assigned by the Council to the CIME – the body charged with responsibility for the Organisation’s work on investment and multinational enterprises – indicates the investment intent of the drafters of the instrument.*

• *Second, the Guidelines are a major corporate responsibility instrument that draws on and reinforces an established body of principles dealing with responsible business conduct. These principles reflect common values that underlie a variety of international declarations and conventions as well as the laws and regulations of governments adhering to the Guidelines.*

As such, these values are relevant to the activities of multinational enterprises. Thus, as it has already done in a number of areas, the international community may continue to draw on the values underlying the Guidelines in other contexts.

• *Third, the Guidelines have been developed in the specific context of international investment by multinational enterprises and their application rests on the presence of an investment nexus.*¹⁴

*When considering the application of the Guidelines, **flexibility is required**. This is reflected in Recommendation II.10 and its commentary that deal with relations among suppliers and other business partners. These texts link the issue of scope to the practical ability of enterprises to influence the conduct of their business partners with whom they have an investment like relationship. In considering Recommendation II.10, a case-by-case approach is warranted that takes account of all factors relevant to the nature of the relationship and the degree of influence. The fact that the OECD Declaration does not provide precise definitions of international investment and multinational enterprises allows for flexibility of interpretation and adaptation to particular circumstances.’*

¹⁴ Emphasis added.