



**TERMS OF REFERENCE
FOR AN UPDATE OF THE OECD GUIDELINES
FOR MULTINATIONAL ENTERPRISES**

4 May 2010

The 42 governments adhering to the Guidelines for Multinational Enterprises have agreed on the terms of reference for carrying out an update of the Guidelines. The update aims to ensure the continued role of the Guidelines as a leading international instrument for the promotion of responsible business conduct. This document was approved by adhering governments on 30 April 2010.

I. Introduction

The forty-two adhering governments to the Guidelines for Multinational Enterprises have agreed on the terms of reference for carrying out an update of the Guidelines outlined in the present document.

While the intention is not to embark in a revision of the scale of the 2000 Review of the Guidelines, the purpose of the update will be to ensure their continued role as a leading international instrument for the promotion of responsible business conduct. Since the Review of the Guidelines in 2000, the landscape for international investment and multinational enterprises has continued to change rapidly. The world economy has witnessed new and more complex patterns of production and consumption. Non-OECD countries are attracting a larger share of world investment and multinational enterprises from non-adhering countries have grown in importance. At the same time, the financial and economic crisis and the loss of confidence in open markets, the need to address climate change, and reaffirmed international commitments to development goals have prompted renewed calls from governments, the private sector and social partners for high standards of responsible business conduct.

The terms of reference were developed by the Working Party of the OECD Investment Committee at its 24 March 2010 session where non-OECD adhering governments to the Declaration have full participant status. They were approved under the written procedure on 30 April 2010 by all adhering governments at the level of the Investment Committee in enlarged session.¹ The development of the terms of reference benefitted from an extensive consultation process with stakeholders² and non-adhering countries³ and contributions from relevant OECD bodies and inter-governmental organisations.⁴

The terms of reference cover substantive, procedural and institutional issues relating to the Guidelines. The work on the update is expected to start on the occasion of the June 2010 Annual Meeting of the National Contact Points (NCPs) with the broad aim of completing the update in 2011, if at all possible, by the time of the 2011 Annual NCP Meeting.

II. Substantive Issues

Technical updates

The update should ensure that citations of the instruments referred to in the Guidelines or the Commentaries are accurate and up-to-date. Special attention should be given to UN and other universally-agreed instruments. References to new OECD and other instruments should be added after verification of their direct relevance to the Guidelines. It is recalled that during the 2000 Review, adoption by adherent countries of the instruments cited was not a pre-condition for their inclusion as references in the Guidelines

¹ Non-OECD adherents to the Declaration are entitled to participate in enlarged sessions of the Investment Committee where decisions relating to the Declaration are being considered.

² Comprehensive consultations with BIAC, TUAC, OECD Watch and other stakeholders were organised on 7 October 2009 and 8 December 2009 back-to-back with the 2009 Global Forum on International Investment [www.oecd.org/investment/gfi-8]. In addition, the Working Party held consultations with BIAC, TUAC and OECD Watch on the occasion of its meeting on 24 March 2010.

³ Consultations with non-adhering countries took place on 9 December 2009.

⁴ In addition, under its agenda item concerning responsible investment in agriculture, the Freedom of Investment Roundtable held on 26 March 2010 [www.oecd.org/daf/investment/foi] discussed the relevance of considering this issue in the context of the update of the Guidelines.

or the Commentaries. This technical update should be carried out in close consultation with partner international organizations, OECD bodies and BIAC, TUAC and OECD Watch.

Supply chains

The update should clarify or develop as appropriate further guidance on the application of the Guidelines to supply chains taking into account the following considerations.

The discussion within the Investment Committee in 2003⁵ focused on the influence of multinational enterprises on the conduct of their business partners using the presence of an investment nexus as a definition of their sphere of influence for the purpose of the Guidelines. More recent discussions, including those by Professor John Ruggie, the Special Representative of the UN Secretary-General for Business and Human Rights (UNSRSG),⁶ have focused on the due diligence that companies are expected to perform in light of their own circumstances along their supply chains.⁷ This approach has recently been used by the UK NCP in two specific instances.⁸ A due diligence approach is used in the Environment Chapter of the Guidelines and the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones. Due diligence and consideration of influence are not necessarily incompatible and could be seen as complementary.

Issues of a similar nature have also been raised in the context of specific instances relating to lending and investing activities of multinational financial institutions. The financial crisis has regulatory and several other causes but it has also heightened the importance for financial institutions to carry out their fiduciary or other responsibilities with due diligence. The update should investigate how the instruments and tools that have emerged on responsible lending or investment by financial institutions – such as the *IFC Policy and Performance Environmental and Social Standards* (last revised in 2006), the *Equator Principles* (2003, 2006), and the *UN Principles of Responsible Investment* (2005) and the *OECD Guidelines for Pension Fund Governance* (2009) – could assist in clarifying the application of the Guidelines to multinational financial institutions, including by introducing specific provisions in the Guidelines for that purpose.

Human Rights

Chapter II (General Policies) of the Guidelines has a specific provision on human rights. The update should develop more elaborated guidance on the application of the Guidelines to human rights, including if deemed appropriate, in a separate chapter of the Guidelines, drawing, in particular, on the work of the UNSRSG.

⁵ 2003 Annual Report on the OECD Guidelines for Multinational Enterprises, pages 21-22.

⁶ "Clarifying the Concepts of 'Sphere of Influence' and 'Complicity'", A/HRC/8/16 (15 May 2008). Due diligence is one of the recommended principles for operationalizing the second pillar of the SRSG "Protect, Respect and Remedy" Framework for Business and Human Rights, A/HRC/11/13 (22 April 2009).

⁷ Due diligence has been referred to as steps that an ordinarily reasonable and prudent person would take to become aware of and adequately manage existing or potential risks in order to mitigate their adverse impacts and avoid harm in a specific context (country, sector, impact and relationship with third parties). Sources: OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, (OECD, 2006) and Report of the UNSGSR "Protect, Respect and Remedy: a Framework for Business and Human Rights", A/HRC/8/5 (7 April 2008).

⁸ *Survival International – Vedanta Resources* (www.oecd.org/dataoecd/49/16/43884129.pdf) and *Global Witness – Afrimex* (www.oecd.org/dataoecd/40/29/43750590.pdf).

Such additional guidance should be developed with the aim of helping multinational enterprises identify, prevent and remedy negative human rights impacts which may result from their operations. This guidance should cover situations of supposed conflicting requirements between internationally-recognized standards on human rights and host country policies, including situations where the host country has not ratified a specific human rights instrument. Such additional guidance would also take into account due diligence recommendations under development by the UNSRSG and the guidance provided on other human rights aspects by the OECD Risk Awareness Tool, such as management of security forces and relationship with local communities and indigenous people.

Aspects of human rights are covered in other provisions throughout the Guidelines, notably core labour rights under Chapter IV on Employment and Industrial Relations. These provisions need not be deleted in the event of an addition of a dedicated chapter on Human Rights.

General Policies on due diligence

Given the broad application of due diligence to business conduct beyond supply chains, human rights or the environment and its importance for such industries as financial services, the update could also explore the merits of making due diligence one of the general operational principles of Chapter II of the Guidelines (General Policies) taking into account leading businesses' experiences.

Disclosure

The update should ensure that the Disclosure chapter of the Guidelines incorporates relevant upgraded standards for disclosure that have emerged since the 2000 Revision of the Guidelines. These include the provisions of the 2004 *OECD Principles of Corporate Governance*. Other relevant reporting initiatives will be considered.⁹ Additional disclosure provisions may be called for, notably with respect to supply chains and greenhouse gas emissions, the placement of which may not be necessarily in the Disclosure Chapter but in the relevant provisions dealing with the underlying subject matters.

Labour and industrial relations

Chapter IV (Labour and Industrial Relations) and Chapter II (General Policies) of the Guidelines and the related Commentary may need to be revised to take into account developments in the ILO including the adoption of the ILO Decent Work Agenda and the ILO Declaration on Social Justice for a Fair Globalisation, and other proposals from labour stakeholders.

Anti-corruption

Following the adoption of the 2009 *Recommendation for Further Combating Bribery of Foreign Officials in International Business Transactions* and ongoing work, the Working Group on Bribery (WGB) would support an expansion, or an elaboration, of Chapter VI (Combating Bribery) to the following issues: small facilitation payments; the use of agents or other intermediaries; bribe solicitation and extortion, reporting foreign bribery and whistleblower protection; and internal controls, ethics and compliance programmes or measures for preventing and detecting the bribery of foreign public officials. The update would consider possible revisions to this chapter and commentaries in this light in close co-operation with the WGB.

⁹ For example the G3 Guidelines of the Global Reporting Initiative (GRI).

Environment

With growing concerns over climate change and increased attention given to green growth, eco-innovation, bio-diversity and sustainability issues, the update should consider whether there is a need to clarify or provide additional guidance on the application of the Guidelines to these issues. This work should be conducted in close co-operation with the Environment Policy Committee and relevant international organisations.

Consumer interests

The update should consider whether Chapter VII on Consumer Interests needs to extend beyond health and safety to address other consumer concerns such as financial education, supply chain management and sustainability issues. This reflection should be conducted in close co-operation with the Committee on Financial Markets and the Committee on Consumer Policy.

Taxation

The update will examine whether the relevant chapter of the Guidelines should include provisions on the public disclosure of taxes, royalties and other payments made to host governments consistent with the guidance provided by such initiatives as the *Extractive Industry Transparency Initiative* and the *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones* taking into account applicable laws. As suggested in the letter of the Chair of the Committee on Fiscal Affairs (CFA), it may also investigate, in co-operation with the CFA, the desirability of addressing issues relating to tax risk management such as tax compliance by banks and the relationship between corporate tax payers and tax authorities.

III. Procedural Provisions and Institutional Issues

Mindful that the NCP mechanism is the most unique feature of the Guidelines and that procedural provisions set the frame for the implementation of the Guidelines, the update should consider how the implementation procedures adopted in 2000 could be further improved to enhance awareness, visibility and a more widespread and effective use of the Guidelines, including in non-adhering countries. This consideration should take due account of the experience, challenges and lessons learned during the past nine years of implementation of the Guidelines, proposals made by business, trade unions and NGOs, and the recommendations formulated by the UNSRSG for non-judicial redress mechanisms, including on institutional issues and the functioning of the NCP mechanism.¹⁰

This section also addresses the relationship between the Guidelines and the OECD Declaration on International Investment and Multinational Enterprises and suggests a follow-up work programme on an update.

Functional equivalence and respect of individual circumstances

The update should discuss how the Procedural Guidance could be clarified or supplemented by more detailed provisions or commentaries to give greater guidance to the institutional structure and functioning of NCPs while maintaining the rights of adhering countries to adopt the NCP structure that best fits their individual circumstances. The issues that could be examined include the provision of more detailed guidance on the core criteria of visibility, accessibility, transparency and accountability. Potential conflict

¹⁰ "Protect, Respect, and Remedy: A Framework for Business and Human Rights", A/HRC/8/5 (7 April 2008), paragraph 92 and paragraphs 96-99.

of interests, degree of inclusiveness of stakeholders, oversight of NCP performance and right of appeal on procedural grounds have also been identified as areas deserving special attention.

Information and promotion

The key to the contribution of the Guidelines is ensuring that they are sufficiently promoted and brought into actual use by companies and stakeholders. The proliferation of corporate responsibility instruments and initiatives has increased the need for the OECD, NCPs and stakeholders to work to raise the visibility of the Guidelines. Promotional activities are increasingly viewed by stakeholders as going beyond raising awareness or better communicating the unique features of the Guidelines. The update should discuss ways of strengthening the information and promotion provisions of the Procedural Guidance, including the provision of training and capacity-building.

Implementation in specific instances

With a view to enhancing the credibility and efficiency of the specific instance facility, the update should discuss the role and tasks of NCPs in considering specific instances. In particular, it could develop, in light of emerging practices, more detailed guidance on the various steps and timeframes for considering a specific instance, and clarify the standards of transparency and confidentiality to be applied in the review process, and third party involvement. It could also clarify the distinction between mediation and adjudication and discuss ways of strengthening the NCP's mediation function as well as the role of NCPs in monitoring the implementation of final statements' recommendations.

Parallel Proceedings

In view of the different approaches followed by NCPs in handling parallel proceedings, the update should develop further guidance on this issue in the Procedural Guidance or Commentary. For this purpose, the guidance issued in September 2009 by the UK NCP as well as other relevant experiences should be evaluated.

NCP co-operation

The increased complexity of multinational operations has led to a significant increase in the number of multi-jurisdiction specific instances, a trend which is most likely to continue in the future. Accordingly, the update should develop further guidance in the Procedural Guidance or Commentary on how NCPs should co-operatively handle such multi-jurisdictional cases. It could also clarify the role of a home NCP for liaising with the parent company of the enterprise that is party to a specific instance.

Peer learning and review

Peer review is a traditional and well tested working method at the OECD. A variant of peer review "peer learning" has been used in an informal and *ad hoc* way in NCP and Working Party meetings. A voluntary peer review has also been conducted in 2009 on the performance of the Dutch NCP. The update will provide the opportunity to discuss, on the basis of these experiences, the merit of adopting peer review provisions in the Procedural Guidance or Commentary, as well as OECD's future supporting role in this area.

Relationship between the OECD Declaration on International Investment and Multinational Enterprises and the Guidelines

The relationship between the Guidelines and the Declaration should be considered. In this context, the interest of adhering countries in non-adhering countries coming closer to the values, principles and standards of the instruments included in the Declaration, in particular the Guidelines, and eventually adhering to these instruments, and the pros and cons of allowing selective adherence to the Guidelines – or other individual instruments presently incorporated into the Declaration – should be discussed. It is recognized that any final decision on the question of selective adherence to individual instruments now encompassed in the Declaration requires consideration of questions beyond those related exclusively to the Guidelines. This fact will have implications for how a final decision would be made on any recommendation to alter or amend the Declaration in this respect.

Follow-up Work Programme

As in the past, the results of the envisaged update are more likely to be judged from their actual implementation than from any agreed textual changes or modified procedures. For this reason, calls have already been made, notably by business, to include in the update the elaboration of a proactive follow-up work programme on the implementation of the updated Guidelines. This work programme could include proposals for promoting and communicating good corporate practices, enhancing co-operation between public and private stakeholders, assisting small and medium-sized enterprises, including in supply chains, in making a greater use of the Guidelines as well as to further reach out to non-adherent countries. As this could also imply an expanded involvement of the adhering countries at Investment Committee and Working Party levels, consideration should also be given to ways of strengthening OECD capacities and resources in these areas. The update should discuss options for fostering capacity-building, training and fact-finding for NCPs as well as communication and co-operation among NCPs.

IV. Modalities

Consultations with stakeholders and non-adhering countries

Consultations with stakeholders and non-adhering countries, including at the initiative of individual adhering countries, will be an integral part of the update process. The consultation process should be transparent, participatory, inclusive and timely while allowing for solicitation of inputs from targeted expert partners. It should encourage constructive inputs from consultations partners and actively involve non-adhering governments. Consultation partners are expected to include:

- accredited stakeholders (BIAC, TUAC, OECD Watch) and other relevant stakeholders;
- interested non-adhering countries, with priority given to major emerging economies;
- international organizations responsible for the international instruments referred to in the Guidelines, including ILO, as well as other organizations that have an interest in the Guidelines and have worked with the Investment Committee, including the Office of the UNSRSG, the UN Global Compact, the International Finance Corporation, UNEP Finance Initiative and the International Organisation for Standardisation (ISO);
- relevant OECD committees; and
- outside experts and influential personalities on the Guidelines.

In addition, the Chair of the Working Party intends to hold bilateral consultations with non-adhering G20 governments, including China, India, Indonesia, Saudi Arabia and South Africa, in the course of the autumn or early next year.¹¹

Non-adhering governments which have expressed an interest in contributing to the update of the Guidelines will be invited to provide their views in appropriate ways, including invitation as an *ad hoc* observer to specific agenda items of the Working Party's meetings.

Written inputs by consultation partners will be shared with or made available to participating parties. Opportunities for public comment will be offered via Internet.

Organizational issues

Work on the update will be carried out by the governments of adhering countries to the Guidelines.

The Working Party of the OECD Investment Committee, in which non-OECD adhering countries have full participant status, will be responsible, with the support of the Secretariat, for the update process and the development of draft recommendations resulting from this process.

The Chair of the Working Party will be assisted by an advisory group of interested adhering governments, representatives of BIAC, TUAC and OECD Watch and experts, which he will convene as needed to help him prepare working sessions on the update in the Working Party and elaborate proposals on issues requiring special attention. The composition of the meetings of this advisory group could vary according to the contributions that adhering governments and stakeholders might be able to make on particular issues.

The final recommendations on the update will be approved by the governments of all adhering countries to the Guidelines at an enlarged session of the Investment Committee in which they will be invited to participate. Non-adhering countries having announced a considered intention to adhere to the updated Guidelines will also be invited to participate in concluding sessions or earlier in the process depending on their level of commitment.

The Investment Committee will afterwards transmit to the Council, on behalf of adhering countries, the results of the update and any proposed amendments to the June 2000 Decision of the Council on the OECD Guidelines for Multinational Enterprises that may be called for. Different ways exist to ensure that non-OECD adhering countries are associated on an equal footing with OECD adhering countries in the final decision on an update of the Guidelines.

¹¹ The Russian Federation is engaged in a process of accession to the Organisation and, for this purpose, adherence to OECD instruments, including the OECD Declaration on International Investment and Multinational Enterprises and its Guidelines for Multinational Enterprises. The general policy has been that the Russian Federation as an accession country should be invited to the same Investment Committee and Working Party meeting discussions that the other accession countries are permitted to attend in their capacity as adherents to the OECD Declaration.