



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



## Update of the OECD Guidelines for Multinational Enterprises Key Elements 25 May 2011

### 1. Introduction

1. The OECD Guidelines for Multinational Enterprises were updated during the period June 2010-May 2011. The updated Guidelines – ‘*OECD Guidelines for Multinational Enterprises, Recommendations for Responsible Business Conduct in a Global Context*’ – were adopted on 25 May 2011 at the OECD’s 50<sup>th</sup> anniversary Ministerial Council Meeting, at a signing ceremony led by US Secretary of State, Hillary Clinton, and attended by AFL-CIO and TUAC President, Richard Trumka.

2. The new Guidelines came into effect immediately, with the old Guidelines ceasing to exist. The OECD informally recognises a six-month adjustment period during which it expects NCPs/complainants to be ‘reasonable’ in their handling/expectations of cases, in so far as they relate to new or revised provisions. Nonetheless, all cases should be submitted under the new Guidelines.

3. The format of the updated Guidelines has been changed in the Update such that each Chapter is now followed by its accompanying Commentary – in the old Guidelines the Chapters and Commentaries were presented separately. This is a positive change as the Commentaries are an integral part of the Guidelines, which should be read in conjunction with the recommendations.

4. The Trade Union Advisory Committee to the OECD (TUAC), the Business and Industry Advisory Committee to the OECD (BIAC) and OECD Watch were heavily involved in the Update process, including as participants in the Advisory Group of the Chair of the Update. TUAC’s [Statement](#) to the OECD Ministerial Council Meeting welcomed the new positive elements of the Guidelines and called on the 42 adhering governments to implement their new commitments and upgrade the functioning of their National Contact Points (NCPs).

### 2. NCP Procedures

5. The Update has resulted in a number of improvements in the rules that govern the functioning of the NCPs (Procedural Guidance) including: indicative timescales for the completion of cases; stronger cooperation between home and host country NCPs; and the requirement for NCPs to participate in peer learning, including voluntary NCP peer review and capacity-building.

6. The updated Guidelines do not, however, incorporate all trade union priorities. In particular, the Update did not strengthen the determination role of NCPs – a major priority for the trade union movement – nor did it sufficiently strengthen the guidance on NCP structures so as to improve oversight and eliminate potential conflicts of interest. *TABLE 1* sets out the key changes in the Procedural Guidance.

### 3. Content and scope of the Guidelines

7. The Update has resulted in a number of significant improvements in the content of the Guidelines, including: a new chapter on human rights; the introduction of a general due diligence principle; the unequivocal application of the Guidelines to supply chains and other business relationships; and a new recommendation on paying wages that are adequate to meet basic needs. *TABLE 2* sets out the key changes.

**TABLE 1: NCP PROCEDURES**

<i>TRADE UNION PRIORITIES</i>	<i>RESULT OF THE UPDATE</i>
<b>Core principles:</b> Expand the core criteria to include the principles for an effective non-judicial grievance mechanism identified in the UN Protect, Respect, Remedy Framework.	The UN principles for an effective grievance mechanism were partly incorporated into the main recommendations ( <i>Procedural Guidance C. Implementation in Specific Instances</i> ) and the Commentary ( <i>paragraph 22, Commentary on the Procedural Guidance</i> ). In the updated Guidelines, governments have replaced the principle of ‘legitimacy’ with ‘impartiality’ on the grounds that governments are ‘legitimate’ hosts of an NCP.
<b>Institutional arrangements:</b> 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 so as to avoid potential or actual conflicts of interests arising from the location of NCP in government departments responsible for investment/economy, without oversight.	There are limited improvements in the guidance on structure and organisation: the organisation of the NCP should “ <i>provide an effective basis for dealing with the broad range of issues covered by the Guidelines...</i> ” ( <i>paragraph A.1 of the Procedural Guidance</i> ); the incorporation of the UN Framework’s core principles ( <i>paragraph 22, Commentary on the Procedural Guidance</i> ); and recognition that NCPs ‘can’ (N.B. <u>not</u> ‘should’) set up oversight bodies ( <i>paragraph 11, Commentary on the Procedural Guidance</i> ). However, the new text does not prohibit an NCP being established in a single Ministry responsible for investment without oversight and therefore does not eliminate the possibility of conflicts of interest.
<b>Dual role of the NCP:</b> Experience shows that the successful functioning of NCPs depends on their dual role: providing mediation/conciliation <u>and</u> making recommendations on the observance of the Guidelines on the basis of an examination of the case (determination). This dual function of NCPs must be explicitly recognised.	The Updated Guidelines strengthen the role of the NCP in conducting mediation/conciliation, but provide only oblique reference to the role of determination. <u>This was the major loss of the Update.</u>

<i>TRADE UNION PRIORITIES</i>	<i>RESULT OF THE UPDATE</i>
<p><b>Timescales/stronger procedures:</b> Introduce indicative timescales for the specific instance procedure and strengthen and publicise written procedures.</p>	<p>The <i>Commentary on the Procedural Guidance</i> introduces indicative timescales for the specific instance procedure (<i>paragraph 40</i>). It also defines ‘good faith’ in the context of the Guideline as, <i>inter alia</i>, “responding in a timely fashion...”(<i>paragraph 21</i>). On publishing procedures, the <i>Commentary on the Procedural Guidance</i> requires that “NCPs should provide information on the procedures that parties should follow when raising or responding to a specific instance”, including their requirements on confidentiality and the indicative timescales to be followed by the NCP (<i>paragraph 15</i>).</p>
<p><b>Parallel proceedings:</b> Develop guidance that requires parties to show that there would be prejudice to the parallel proceedings in order for a case to be rejected or suspended and require NCPs to ensure that any such rejection or suspension be subject to external oversight.</p>	<p>The Updated Guidelines establish the principle that parallel proceedings should not be the sole reason for rejecting or suspending a specific instance, encouraging NCPs to assess whether the specific instance would “create serious prejudice for either of the parties” (<i>paragraph 26, Commentary on the Procedural Guidance</i>).</p>
<p><b>NCP cooperation:</b> Ensure that the home country NCP is required to be involved in the specific instance, alongside the host country NCP.</p>	<p>The updated text states that “the NCP of the host country should consult with the NCP of the home country...” (<i>paragraph 23, Commentary on the Procedural Guidance</i>).</p>
<p><b>Follow-up:</b> Strengthen the effectiveness of the NCP procedure.</p>	<p>On follow-up, the new Guidelines provide that “[T]he parties may also agree to seek the assistance of the NCP in following-up on the implementation of the agreement and the NCP may do so on terms agreed between the parties and the NCP.” (<i>paragraph 34, Commentary on the Procedural Guidance</i>).</p>
<p><b>Consequences/sanctions:</b> strengthen the authority of the NCP by introducing consequences for enterprises, including the withdrawal of public advantage.</p>	<p>The text contains extremely weak language on consequences: “[I]n order to foster policy coherence NCPs are encouraged to inform these government agencies of their statements and reports when they are known by the NCP to be relevant to a specific agency’s policies and programmes” (<i>paragraph 37, Commentary on the Procedural Guidance</i>).</p>
<p><b>Mandatory peer review:</b> Provide for mandatory peer review, in line with the core principle of predictability, with published country reports that include recommendations in accordance with OECD best practice.</p>	<p>The text stipulates that NCPs will participate in joint peer learning activities including ‘voluntary’ NCP peer evaluations’ (<i>paragraph 19</i>). This was also a key loss, as mandatory peer review is used to monitor other OECD instruments.</p>
<p><b>Protection of complainants</b></p>	<p>The <i>Commentary on the Procedural Guidance</i> provides limited protection in terms of allowing</p>

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	NCPs to “withhold the identity of a party or parties from the enterprise” (paragraph 30) and “[E]qually other information such as the identity of individuals involved in the procedures should be kept confidential...” (paragraph 38).
<b>Enhanced role for the OECD Secretariat</b>	<p>The new Guidelines provide for the enhanced role of the OECD secretariat, including:</p> <ul style="list-style-type: none"> <li>- developing and maintaining a database of cases;</li> <li>- supporting peer learning, including peer reviews, capacity-building and training;</li> <li>- promoting the Guidelines.</li> </ul>
<i>OTHER ISSUES</i>	<i>RESULT OF THE UPDATE</i>
<p><b>Proactive agenda:</b> This was primarily a priority of the business community. Whilst TUAC recognises the potentially positive role to be played by NCPs in this regard, the proactive agenda must not be used as a diversion from the main task of strengthening the effectiveness and authority of NCPs in the specific instance procedure.</p>	<p>The Decision of the Council on Implementation Procedures (<i>II. The Investment Committee</i>) provides that the Investment Committee shall “pursue a proactive agenda” to promote the Guidelines and shall “seek opportunities to collaborate” with TUAC, BIAC, OECD Watch and others so as to “encourage the positive contributions that multinational enterprises can make, in the context of the Guidelines, to economic, environmental and social progress...”. The Commentary on the Procedural Guidance provides that NCPs “should maintain regular contact, including meetings, with social partners... in order...to support the positive contributions enterprises can make to economic, social and environmental progress;” (paragraph 18, <i>Commentary on the Procedural Guidance</i>).</p>

**TABLE 2: CONTENT AND SCOPE**

TRADE UNION PRIORITIES	RESULT
<b><i>Introduction of a general due diligence principle</i></b>	<p>The Updated text introduces a general due diligence principle, which requires enterprises to undertake due diligence “<i>to identify, prevent and mitigate actual and potential adverse impacts...and account for how these impacts are addressed.</i>” (paragraph A.10, Chapter II). The OECD borrowed heavily from the pioneering work of Professor Ruggie and the UN Framework, Protect, Respect, Remedy in its formulation of the due diligence principle. But whereas under the UN Framework due diligence is limited to human rights, in the Guidelines due diligence applies more widely to human rights, employment and industrial relations, anti-corruption, environment and consumer affairs. However, three chapters of the Guidelines are not covered by the due diligence principle: Competition; Science and Technology; and Tax.</p> <p>The <i>Commentary on Chapter II</i> explains that “<i>due diligence is understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts... [P]otential impacts are to be addressed through prevention or mitigation whilst actual impacts are to be addressed through remediation.</i>” (paragraph 14).</p> <p>Three different level of responsibility are identified “<i>...those adverse impacts that are either <u>caused or contributed</u> to by the enterprise, or are <u>directly linked</u> to their operations, products or services by a <u>business relationship</u>...</i>” (paragraph 14).</p> <p>Where an enterprise ‘contributes’ to an adverse impact, the Commentary clarifies that this: “<i>...should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions.</i>” (paragraph 14).</p> <p>Where an enterprise is linked to an adverse impact, not by cause or contribution but through its business relationships, then the Commentary explains that the term ‘business relationships’ refers to “<i>...relationships with business partners, entities in the supply chain and other non-State or State entities directly linked to its business operations, products or services.</i>”</p>
<b><i>Application of the Guidelines to supply chains and other business relationships</i></b>	<p>The Update has made it clear that the Guidelines apply to suppliers and other business relationships. The new Guidelines require enterprises to “[A]void causing or contributing to adverse impacts through their own activities and address such impacts when they occur” (paragraph A.11, Chapter II).</p> <p>The Commentary clarifies that “<i>...‘through their own activities’ ‘includes their activities in the supply chain’ and that ‘the supply chain can take a variety of forms, including, for example,</i></p>

TRADE UNION PRIORITIES	RESULT
	<p><i>franchising, licensing or sub-contracting” (paragraph 17, Commentary on General Policies).</i></p> <p>It also explains that where an enterprise identifies risks of adverse impacts in the context of its supply chains it should “<i>take the necessary steps to cease or prevent that impact” (paragraph 17, Commentary on General Policies).</i></p> <p>Enterprises are additionally required to “[S]eek to prevent or mitigate an adverse impact when they have <u>not contributed</u><sup>1</sup> to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship” (paragraph A.12, Chapter II).</p>
<b>Human rights</b>	<p>The new Guidelines include a new Chapter on Human Rights (Chapter IV), which requires enterprises to respect human rights, meaning to “<i>avoid infringing on the human rights of others” and to “address human rights impacts with which they are involved” (paragraph 1). Enterprises should “[H]ave a policy commitment to respect human rights” (paragraph 4) and to “[C]arry out human rights due diligence...</i>” (paragraph 5). Chapter IV, Human Rights is in principle aligned with the Guiding Principles for Implementing the UN Framework, Protect, Respect, Remedy.</p>
<b>Application of the Guidelines to ‘workers’ not just ‘employees’</b>	<p>In Chapter V <i>Employment and Industrial Relations</i>, the term ‘employee’ has been changed to ‘worker’, such that the Chapter is “<i>consistent with...the ILO MNE Declaration’ (paragraph 3, Commentary on Chapter V):</i></p> <ul style="list-style-type: none"> <li>- ‘workers’: paragraphs 1e), 2a), 2b), 2c) 3. 4b), 5. 7.;</li> <li>- ‘workers employed by the multinational enterprise’: paragraphs 1a) and 1b);</li> <li>- ‘workers in their employment’: paragraphs 6. and 8.</li> </ul> <p>The Commentary states that the use of the terms “<i>workers employed by the multinational enterprises” and “workers in their employment” is “intended to have the same meaning as in the ILO MNE Declaration”.</i> It explains that the terms refer to workers who are “<i>in an employment relationship” and refers enterprises to ILO Recommendation 198, criteria 13a) and 13b) to establish the existence of an employment relationship for the purposes of the Guidelines (paragraph 3, Commentary on Chapter V). The Commentary further explains that “in the absence of an employment relationship, enterprises are nevertheless expected to act in accordance with the risk-based due diligence and supply chain recommendations in paragraphs A.10 to A13 of Chapter on General Policies.” (paragraph 4).</i></p> <p>Additionally, all workers are covered by the provisions of Chapter IV, <i>Human Rights</i>, which cover all rights, including labour rights.</p>

<sup>1</sup> Emphasis added.

<i>TRADE UNION PRIORITIES</i>	<i>RESULT</i>
<b><i>Wages to meet basic needs of workers and their families</i></b>	<i>Chapter V Employment and Industrial Relations</i> includes a new provision on providing the best possible wages or “ <i>at least adequate to satisfy the basic needs of the workers and their families.</i> ” ( <i>paragraph 4.b, Chapter V</i> ).
<b><i>Precarious work</i></b>	Precarious work is not addressed directly in the updated text. However, the inclusion of a <i>Human Rights Chapter</i> provides new opportunities. Furthermore, the <i>Commentary on Chapter V, Employment and Industrial Relations</i> , makes it clear that Chapter V applies to temporary/ casual/indirect employment. The due diligence and supply chain provisions in Chapter II on avoiding and mitigating adverse impacts also potentially provide a means to address issues arising in the context of precarious work.