



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
Recommendations for Responsible Business Conduct in a Global Context
TUAC Submission to the Working Party on Responsible Business Conduct
13 October 2014

1. Introduction

1. TUAC welcomes this opportunity to make a submission to the Working Party on Responsible Business Conduct (WPRBC). In terms of the current work programme, TUAC strongly supports the *Work Plan to Improve NCP Performance and Promote Functional Equivalence*. The plan provides an excellent basis on which to work to help NCPs fulfill their potential. TUAC continues to have reservations over the proliferation of proactive agenda projects. There is a real risk that this effort diverts political momentum and resources away from the central task of strengthening the NCPs.

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

- *Section 2*: 2015 Global Forum on Responsible Business Conduct;
- *Section 3*: Work-plan to Improve NCP Performance and Promote Functional Equivalence;
- *Section 4*: UN Guiding Principles on Business Human Rights National Action Plans and Discussion of link to NCPs;
- *Section 5*: Regional Capacity Building Workshops for NCPs: Planned workshops for MENA and Latin America;
- *Section 6*: Progress Report on Proactive Agenda Projects;
- *Section 7*: Revision of the RBC Chapter of the Policy Framework for Investment;
- *Section 8*: Review of the OECD Principles of Corporate Governance;
- *Section 9*: Outreach Activities;
- *Section 10*: Official Translations of the Guidelines;
- *Section 11*: Funding Requirements - Implementation of the Work Plan Work Plan to Improve NCP Performance and Promote Functional Equivalence;
- *Section 12*: TUAC Activities.

2. Global Forum on Responsible Business Conduct

3. TUAC welcomes the early development of plans for the 2015 Global Forum on Responsible Business Conduct, and in particular the inclusion of the following sessions:

- Policy Coherence for Advancing Responsible Business Conduct (#7);
- Transition to a Low-Carbon Economy (#7);
- Strengthening the Link between Responsible Business Conduct and Corporate Governance (#7);
- Responsible Business Conduct in International Sporting Events, including Qatar (#7);
- Responsible Business Conduct and Development: Myanmar (#7).

4. TUAC considers that the WPRBC should consider reconsider the session “*Auditing Human Rights*” (#8), which would promote an auditing standard that is being developed not by a standards organisation but by a ‘for profit’ international auditing firm.

5. TUAC is strongly opposed to the inclusion of the session on “*Evidence of the Business Case for Responsibility*” (#8). In reality it is likely that sometimes there will be a business case for RBC and sometimes there will not be. Holding a session on this issue will not change this fact. Nor will it change the expectation that businesses should comply with the OECD Guidelines for Multinational Enterprises (and the UN Guiding Principles on Business and Human Rights and the ILO MNE Declaration) regardless of the existence of a business case.

3. Work Plan to Improve NCP Performance and Promote Functional Equivalence

6. TUAC had already strongly welcomed the proposed “*Work Plan to Improve NCP Performance and Promote Functional Equivalence*” and considers that the revised document provides an excellent basis for future work, in particular:

- Peer Reviews (#10-11): the proposal to accelerate the frequency of country peer reviews (#10). TUAC congratulates those NCPs that have signed up for peer review;
- Development of a template (#12-16): the development of a template as the basis for all country peer reviews. TUAC considers that the template developed by the Norwegian NCP would be appropriate and that whatever model is developed should provide for: a central role of the Secretariat (see below); transparency of the process; stakeholder participation; and public reports with time-bound recommendations and follow-up;
- Role of the Secretariat (#17-19): assigning the Secretariat a central coordinating role. This is vital not only for ensuring consistency, but also for institutional learning. TUAC urges governments to ensure that extra-budgetary resources are made available;
- Horizontal Peer Review (#21-22): the proposal to undertake Horizontal Peer Reviews on Communication and Compliance with the Core Criteria (visibility, accessibility, transparency and accountability) and the Guiding Principles for specific instances (impartiality, predictability, equitability and compatibility with the Guidelines). TUAC notes that in its 2013 Annual Report, the Czech NCP suggested that NCPs should develop a “*common framework for promotion of the Guidelines*”¹. This could also be considered as part of the Horizontal Review on Communication.
- Mediation Fund (#28): the creation of a fund to support mediation. It could be useful to discuss this proposal at the upcoming meeting of the Advisory Group on Investment and Development (16 October 2014);
- New Adherents/NCPs (#45, #30): using the Common Reporting Framework for the Annual Reports of the NCPs as the basis of *ex ante* assessment of new NCPs (#40) and providing support to newly established NCPs through buddying, twinning or coaching (#30);

¹ Czech Republic NCP Report to the OECD, 2013, p.7.

- Fulfilling the core criteria (#33-34): the innovative proposals to involve the Chair, the Secretariat and the WPRBC in the task of assisting NCPs to fulfill the core criteria and guiding principles and in the context of individual complaints (#41);
- Annual Reports (#35-38): making better use of NCP Annual Reports as an accountability mechanism, including verifying and publishing NCP reports on the NCP web site – these should be translated and published in national languages – and using the Chair’s Annual Report to draw out issues that could be covered in future country and horizontal peer reviews;
- Regional initiatives to improve performance and increase functional equivalence.

7. In addition, TUAC recommends that NCPs make more effective use of the *Tour de Table* in order to discuss specific instances – particularly those which: *raise new issues; face obstacles to success; have extended beyond the indicative timelines without the agreement of the parties; or require cooperation between NCPs.*

8. TUAC considers that it would also be useful to undertake a stock-taking analysis of completed cases to identify the factors that contribute to success or failure in the handling of cases by NCPs, which could then form the basis of horizontal peer reviews. BIAC, TUAC and OECD Watch could make a useful contribution in this regard. Some examples of the problems of functional equivalence experienced in trade union cases are provided below.

BOX 1: NCP FUNCTIONAL EQUIVALENCE: ISSUES ARISING FROM CASES

- *Non-functioning NCPs*: solutions: buddying/ mentoring, capacity building, peer review;
 - *Improve NCP consistency/cooperation in cases*: solutions: more regular NCP meetings, case meetings, fact finding, early warning systems of problems involving the secretariat;
 - *Parties refusing to participate in the NCP process (see TABLE 1 below)*: solutions: cooperation between home and host country NCPs; strengthening the authority of the NCP; examination; consequences;
Confidentiality V transparency: solutions: workshop with trade unions, NGOs and NCPs to explain issues on all sides;
Imposing conditions on campaigning: solutions: workshop with trade unions, NGOs and NCPs to explain issues on all sides.

9. TUAC requests that in addition to Communication (#21) and Compliance with the Core Criteria (#41), **NCPs should consider the problem of companies refusing to participate in the NCP process as an item to be explored under horizontal peer review.** This is a particular problem for the US NCP, which is one of a small number of NCPs that does not conduct an examination in the event that mediation is refused or fails.

TABLE 1: TRADE UNION CASES AT THE US NCP

Date	Parties	Outcome
June 2014	International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF) and Mondelez International	<u>Accepted – company refused mediation</u> “However, absent agreement by Mondelez to consider engaging in mediation outside of the negotiations taken place under Pakistani law, the U.S. NCP has no basis upon which to offer its good offices at this time.”
May 2014	Greenpeace and Herakles Farms/Capital (Cameroon)	<u>Rejected</u>

Date	Parties	Outcome
	International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) and PepsiCo, Inc. (India)	<u>Accepted – company refused mediation</u> “PepsiCo declined the U.S. NCP’s offer of mediation. This therefore concludes the U.S. NCP’s role in this Specific Instance.”
	FFW and Janssen Pharmaceuticals a Division of Johnson & Johnson (Philippines) Inc.	<u>Rejected</u>
October 2013	U.S. NCP Public Statement: IUF and Mondelez International	<u>Accepted – company refused mediation</u> “The U.S. NCP’s Specific Instance is concluded as Mondelez was unwilling to proceed to mediation. In an email dated July 24th, IUF agreed to participate in mediation. In a letter dated August 20th, Mondelez stated that it would not participate in an information session with FMCS or any subsequent mediation offered by the U.S. NCP. The Specific Instance process – and any ensuing mediation – is voluntary, providing an opportunity for a neutral third party to assist parties to reach their own resolution of concerns only if and when all parties come to the process freely and committed to cooperative problem solving.
July 2013	U.S. NCP Final Assessment: Communications Workers of America (AFL-CIO, CWA)/ver.di and Deutsche Telekom AG	<u>Accepted – company refused mediation</u> “...On March 12, the FMCS advised the Office of the U.S. NCP that it had not received a timely response from DT/T-Mobile regarding the initial mediation meeting and referred the case back to the Office of the U.S. NCP, advising that it had made no progress moving the process forward. On March 19, 2013, the Office of the U.S. NCP informed the parties that it was preparing a final statement regarding the specific instance. Based on the circumstances and the materials before the Office of the U.S. NCP, it is determined that the U.S. NCP is no longer able to contribute to a positive resolution of this dispute and therefore withdraws its offer of good offices.”

4. Development of the National Action Plans for Business and Human Rights and the Link to the National Contact Points

10. TUAC welcomes the paper on the development of National Action Plans for Business and Human Rights and the link to the National Contact Points as a concrete step towards better exploiting the synergies between the impact of the OECD Guidelines and the UN Guiding Principles on Business and Human Rights (UNGPs) and thereby increasing their impact.

11. The paper (#2, #3) could more fully explain the linkages between the two instruments. The OECD Guidelines and the NCPs are relevant to all three pillars of the UNGPs: the *State Duty to Protect*; the *Corporate Responsibility to Respect*; and *Access to Remedy*. This would be the case even if there was no Human Rights Chapter as human rights are covered in

Chapter II, and labour and environmental rights in V and VI. The point of linkage between the two instruments is not just Chapter IV.

12. TUAC also considers that revisions should be made to paragraphs 3 and 4:

- Specific instance (#3) is the term used in the Guidelines for a ‘complaint’ or ‘case’. It is not a grievance mechanism. The mechanism is the specific instance procedure or the NCP itself;
- The text in paragraph 4 serves to confuse rather than to clarify. The Access to Remedy Pillar covers both judicial and non-judicial grievance mechanisms. Paragraph 3 has already explained that the NCPs and the specific instance procedure are an example of a non-judicial mechanism. So the first two sentences are superfluous. The next sentence on “applicable laws and internationally recognised standards” is confusing and could be deleted.

5. Regional Capacity Building Workshops for NCPs: Planned workshops for MENA and Latin America NCPs.

13. TUAC urges NCPs to work with TUAC, BIAC and OECD Watch when organising regional events and to invite external stakeholders to at least part of the event.

6. The Proactive Agenda

14. TUAC has accepted the Proactive Agenda an additional means of identifying and resolving issues relevant to the implementation of the Guidelines, so long as it does not divert resources and attention from the central task of strengthening NCPs across the board:

- At national level, the proactive agenda has significant value. The initiatives undertaken by some NCPs in the aftermath of Bangladesh illustrate the potential role of NCPs in tackling adverse impacts in other sectors or geographical reasons. TUAC considers that this proactive approach is consistent with NCPs playing a central role in promoting Responsible Business Conduct;
- At the OECD, TUAC underlines the need for adequate timescales and strong quality control in proactive agenda projects in order to ensure value and thereby continued stakeholder support. TUAC is also concerned about the governance of proactive agenda projects with regard to financing and asks the secretariat to examine whether the arrangements are consistent with OECD practice or raise any conflicts of interest.

6.1 Textiles: Outcomes of the ILO-OECD Roundtable on Responsible Supply Chains in the Textile and Garment Sector and Possible Next Steps

15. TUAC had understood that the purpose of the Roundtable was to discuss potential next steps in the form of a proactive agenda project. In fact no time was allocated in the programme for such a discussion to take place. This was a missed opportunity to have a focused debate on next steps with the gathered experts from the sector.

16. **Due Diligence Guidance (#31.1)**: TUAC supports the proposal to build on the work of the French and Italian NCPs to develop multilateral ‘OECD’ human rights due diligence guidance:

- Trade unions rights: the right to form or join a trade union and the right to collective bargaining are crucial to the mission of achieving responsible supply chains in the textile and garment sector. They must be at the heart of this human rights due diligence project;
- Living wage: this is a stand-alone priority;
- Access to remedy, including financial compensation: one of the key messages given by trade unions (and NGOs) at the OECD-ILO Roundtable at the end of September 2014 was on the need to improve access to remedy (see #16), including financial compensation. The UN has currently prioritised work on Pillar III of the UNGPs, Access to Remedy, so it would be timely for the OECD to increase policy coherence by doing the same;
- Process: TUAC considers that this work could be done outside the bureaucratic procedures of the proactive agenda, given that much of the work has already been done. Otherwise, the resources consumed in finalising the guidance are likely to be out of proportion to the additional value produced. Before the inclusion of the proactive agenda in the 2011 OECD Guidelines, the Investment Committee and its subsidiary bodies were able to develop guidance. By-passing the proactive agenda should be possible.

17. **Outreach (#31.2)**: TUAC supports the proposals made.

18. **Peer Learning Platform (31.3)**: TUAC has question marks over the peer learning platform as there are relatively few “best practices” to share – indeed it would be important not to share or replicate the many failed practices of the past (and the present). One key message from trade unions and NGOs at the Roundtable was that there is a need for fundamental change. The platform should not facilitate companies unilaterally determining what constitutes good practice. Trade unions need to be involved in and shaping and using the services of the platform. And best practices need to include measures that promote trade union rights in global supply chains, including trade union access to factories, permanent structures for social dialogue and Global Framework Agreements.

19. **Informal Task Force on Compensation (#33)**: The request from TUAC and OECD Watch was for the OECD to facilitate an informal Task Force. As the ILO and the Government of Bangladesh were present when this idea was discussed, the question mark is not over the role of the respective institutions, but the feasibility of the OECD role given the urgent timescale. The original deadline for making the final compensation payments is now passed.

6.2 Letter from the International Apparel Federation (IAF) to the SG of the OECD Requesting Collaboration on Due Diligence

20. TUAC notes the exceptionally strong letter of support from the IAF to work with the OECD to create a global common framework for addressing labour and environmental problems. This commitment is also repeated on its web site. However, TUAC considers that:

- **IAF - an industry champion for the OECD Guidelines:** Other than setting out its commitment to work with the OECD on use the UNGPs and the OECD Guidelines, there is no other information on the OECD Guidelines or the UNGPs on the IAF web site, or any links to the texts. There are basic steps that the IAF could take ahead of formally starting the proactive agenda project to start promoting the implementation of the OECD Guidelines.
- **Due diligence V regulation:** in the IAF letter to the SG of the OECD, part of the text could be understood to imply that the IAF may see **human rights due diligence as an alternative to regulation**. From a TUAC perspective, it is vital that it is made clear that this is not the case (see *BOX 2*).

BOX 2: EXCERPT FROM IFA LETTER: DUE DILIGENCE V OVER-REGULATION

“It is often a first step into industrialization and, later, a first step in the development of a more design oriented economy. However, the industry in 2014 also faces grave challenges, the greatest of which are related to labour conditions and sustainability and **the need to prevent governments from overregulating our industry**, trying to solve the industry’s challenges in fragmented, costly but ineffective ways.”

7. Revision of the RBC Chapter of the Policy Framework for Investment

21. TUAC will submit written comments on the RBC Chapter of the Policy Framework for Investment in due course. However, it does not consider the current description of Responsible Business Conduct to be sufficient as it does not explain the fundamental concept that underpins the OECD Guidelines and the UNGPs: that the responsibility of an enterprise is determined by its adverse impacts. The definition presented is not in line with the European Commission definition of Corporate Social Responsibility.

8. Review of the OECD Principles of Corporate Governance

22. TUAC has circulated a separate room document setting out its recommendations for the Review of the OECD Principles of Corporate Governance. It urges governments to grasp this opportunity to strengthen the corporate governance framework so that it delivers Responsible Business Conduct.

9. Outreach Activities

23. TUAC welcomes the range of outreach activities that have been undertaken or are planned. TUAC is keen to support such events, where possible, as well as NCP national and regional events, working with trade union partner organisations.

10. Official Translations of the Guidelines

24. TUAC also calls on the OECD to produce official OECD translations of other language versions including Spanish, Arabic and Chinese.

11. Funding Requirements - Implementation of the Work Plan Work Plan to Improve NCP Performance and Promote Functional Equivalence

25. TUAC asks for an update on the request for long-term reallocation of the Budget on the 2015-2016 Programme of Work and Budget to fund in particular the Work Plan to Improve NCP Performance and Promote Functional Equivalence.

12. TUAC 2014 Activities

26. TUAC has undertaken or planned the following activities in 2014:

Training:

- 18 March 2014: ETUI Training, Florence, Italy;
- 26 March 2014: ILO Training Centre, Turin, Italy;
- August 2014: Sectoral Trade Union Training: Manila;
- September 2014: Regional Training for Trade Unionists: Douala, Cameroon
- October 2014: *Poland, Hungary, Czech Republic, Slovak Republic*: regional training event, Katowice (organised with the Polish NCP and attended by NCPs from the Czech Republic and Hungary);
- October 2014: Madrid, Spain: organised with the national Spanish trade union confederation and attended by the Spanish NCP.

Trade Union Guide to the OECD Guidelines

- Current Languages: Burmese, English, French, German, Italian, Japanese, Korean Polish, Spanish, Swedish.
- Forthcoming (2014): Chinese and Arabic.

ANNEX 1: TUAC CHECKLIST FOR GOVERNMENTS

CHECKLIST FOR NCPS UNDER THE 2011 GUIDELINES²

STEPS	DESCRIPTION
1. PROVIDE ADEQUATE RESOURCES	Adhering governments must ensure that the resources of the NCP are adequate for undertaking the enhanced functions under the updated <i>Guidelines</i> , including mediation, capacity-building and participating in peer learning.
2. TRANSLATE THE UPDATED GUIDELINES	NCPs should translate the updated <i>Guidelines</i> and their Commentaries into all national and, as appropriate, local languages in the coming weeks, in line with the Procedural Guidance and the core criteria of accessibility.
3. SET UP AN ADVISORY, OVERSIGHT OR REVIEW BODY	NCPs should establish an advisory, oversight or review body in line with the recommendation made in the Commentary to the Procedural Guidance and in accordance with NCP best practice, thereby helping to ensure <u>impartiality</u> , <u>predictability</u> and <u>equitability</u> in the handling of specific instances.
4. CONDUCT A REVIEW OF NCP STRUCTURES	In addition to creating an advisory or oversight body, NCPs should review and revise their structure so as to provide an effective basis for implementing the <i>Guidelines</i> , assure impartiality and to be consistent with the other core criteria and the guiding principles for the handling of specific instances. They should pay particular attention to identifying, disclosing and removing conflicts of interest in line with the requirement to be impartial. <u>This review of NCP structure should be undertaken collaboratively with the social partners and other non-governmental organisations.</u>
5. CONDUCT A REVIEW OF NCP PROCEDURES	NCPS should conduct a review to ensure that their procedures are, at a minimum, consistent with the standards set in the updated <i>Guidelines</i> , including the following: introduce indicative <u>timeframes</u> ; strengthen <u>cooperation</u> between home and host country NCPs; develop best practice guidance on <u>parallel proceedings</u> in line with the updated text, using the UK procedures as a model; <u>protect the identity of the complainant</u> . <u>This review of NCP procedures should be undertaken collaboratively with the social partners and other non-governmental organisations.</u>
6. PUBLISH NCP PROCEDURES	Publish procedures on the NCP web site in local, <u>national and international languages</u> in line with the core criteria of <u>accessibility</u> . It is not sufficient to publish procedures in national languages, as this would limit the <u>accessibility</u> of the NCP to those able to work in national languages.
7. STRENGTHEN POLICY COHERENCE	Identify and meet with relevant government departments, including export credit agencies, public procurement departments and pension funds, in order to identify procedures for strengthening policy coherence. NCPs should focus in particular on the steps to be taken where an NCP issues a statement in the event of: i) no agreement being reached; ii) a

² TABLES 1 and 2 use the paragraph numbering for the Commentaries given in the version of the Commentaries that was submitted for approval to the Council in May 2011. The Commentaries of the public version of the updated Guidelines, whilst usefully following the relevant Chapter, do not contain paragraph numbers. TUAC has started working with the new text and find this highly problematic.

<i>STEPS</i>	<i>DESCRIPTION</i>
	party refusing to come to the table; iii) providing recommendations on the future implementation of the <i>Guidelines</i> ; iv) a finding that a company has breached the <i>Guidelines</i> .
8. ESTABLISH NATIONAL CONSULTATION AND REPORTING MECHANISMS	The 2000 version of the <i>Guidelines</i> already required NCPs to put in place mechanisms for consultation and reporting at national level, including reporting to national parliaments. The updated <i>Guidelines</i> further strengthen the requirement for the NCP to be accountable. NCPs should conduct regular consultations with external stakeholders and establish mechanisms for national reporting, including to Parliament, and publish all reports, including the report to the OECD on the NCP web site in national languages, as well as international languages.
9. IDENTIFY ISSUES FOR PEER LEARNING AND SIGN UP FOR VOLUNTARY PEER REVIEW	Identify <u>issues for peer learning</u> and thematic peer review through consultations at national level with external stakeholders and <u>sign up for peer review</u> .
10. DRAW UP PROMOTIONAL PLAN TO SUPPORT THE PRO-ACTIVE AGENDA	Draw up a plan for promoting the <i>Guidelines</i> and implementing the proactive agenda in collaboration with the social partners and other non-governmental organisations. The public profile of the OECD <i>Guidelines</i> is low. There is an urgent need to increase significantly the level and effectiveness of promotional activity. One means of doing so is to work collaboratively with the social partners and other non-governmental organisations, so as to harness their global networks for the purposes of promoting and implementing the <i>Guidelines</i> .