



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
4 December 2014

1. Introduction

1. TUAC welcomes this opportunity to make a submission to the Working Party on Responsible Business Conduct (WPRBC).

2. TUAC strongly supported the publication of the draft *Work Plan to Improve NCP Performance and Promote Functional Equivalence*, but is concerned that the scope of the final Work Plan has been significantly reduced. *Section V on the Role of the Working Party* described a range of actions to be undertaken by the WPRBC to improve NCP effectiveness. This whole section has been completely removed from the final version.

3. The credibility and relevance of the OECD Guidelines depends on the credibility and relevance of the NCPs. The spotlight will be increasingly turned on NCP effectiveness, as adhering countries draw up their National Action Plans (NAPs) under the UN Guiding Principles on Business and Human Rights (UNGPs). In many countries, NCPs will need to step up their performance if they are to stay relevant. The WPRBC has a unique role to play in improving NCP effectiveness. The secretariat should prepare a second paper further developing the ideas already presented on the role of the WPRBC for discussion at the March 2015 meeting.

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

- *Section 2: Reduced Scope of the Work-plan to Improve NCP Performance and Promote Functional Equivalence;*
- *Section 3: Template for Voluntary Peer reviews of National Contact Points;*
- *Section 4: Update on Planned Peer Reviews;*
- *Section 5: Proposed Themes for Horizontal Peer Reviews*
- *Section 6: Proposed changes to the Annual Report of the Guidelines for Multinational Enterprises;*
- *Section 7: The Proactive Agenda;*
- *Section 8: Compensating the Victims of Rana Plaza*
- *Section 9: Regional Capacity Building Workshops for NCPs: MENA and Latin America;*
- *Section 10: 2015 Global Forum on Responsible Business Conduct;*
- *Section 11: Outreach: China*
- *Section 12: Revision of the Responsible Business Conduct Chapter of the Policy Framework for Investment;*
- *Section 13: Funding Requirements;*
- *Section 14: TUAC Activities.*

2. Reduced Scope of the Work Plan to Improve NCP Performance and Promote Functional Equivalence

5. TUAC strongly welcomed the draft “*Work Plan to Improve NCP Performance and Promote Functional Equivalence*” and is concerned that Section V ‘*The Role of the Working Party*’ has been deleted from the final version of the Work Plan. As explained, by the secretariat (paragraph 31, DAF/INV/RBC/RD(2014)9/REV3) “*the WPRBC has an oversight role on the activities of NCPs, under the supervision of the Investment Committee*”. The deleted measures would be an appropriate and effective means of the Working Party fulfilling this mandate.

- **Recommendation:** a draft paper developing these measures should be prepared for discussion at the next meeting of the WPRBC in March 2015.

TABLE 1: DELETED SECTION V OF THE WORKPLAN ON NCP PERFORMANCE

AREA	PARAGRAPHS ¹
a) <u>Fulfilling the core criteria</u> (#32-34):	1. In these situations, the following range of responses could be employed, as appropriate: discussions between the NCP and the Secretariat and/or the Chair on the request of the WPRBC; discussion of the issue(s) at NCP meetings and/or between a smaller group of NCPs; an invitation by the WPRBC to submit a written report on measures taken; a letter from the Chair on behalf of the WPRBC requesting specific action by the NCP, if appropriate within a specified timeframe and short of any response, bringing the issue to the attention of the Council of the OECD via the Investment Committee. The WPRBC would inform the Investment Committee of the situation and report regularly on developments. Discussions should take place to find out in what way other NCPs or the Secretariat could help the NCP concerned to improve its performance or build its capacity to take action
b) <u>Making Better Use of Annual Reports</u> (#35-38):	2. These reports are not systematically published by all NCPs and the information they contain are not normally subject to independent verification or analysis. NCPs could, for example, invite national stakeholders to provide comments on these reports before they are submitted to the OECD as a form of quality check. They may also consider publishing them on their websites in order to enhance accountability.
	3. The <i>Annual Report by the Chair of National Contact Points</i> also appears to be under-utilized. It provides a summary of the main activities undertaken by NCPs and the main challenges they have encountered. However, the gaps in these activities have not been analysed in a systematic manner, nor have specific recommendations been provided on how such shortcomings should be addressed. Furthermore, the role of the Committee has been quite limited, as Annual Reports have always been approved under the written procedure.
	4. This situation could be improved in a number of ways. For example, future Chair reports could present NCP responses to selected key questions in the Common Reporting Framework in a tabular form. By showing what has or has not been done , these tables could help identify the priority issues for discussion at meetings of the NCPs and the WPRBC as well as those that could be covered by voluntary country or horizontal thematic peer reviews. ² Recommendations could also be addressed to individual NCPs in the <i>Annual Report to Council on the Implementation of the Guidelines</i> prepared by the WPRBC. The WPRBC would need to further discuss the types of situations in which such

¹ (DAF/INV/RBC/RD(2014)9/REV3)

AREA	PARAGRAPHS ¹
	recommendations would be made, and the possible organisation and content of the recommendations.
<u>c) Responses to individual complaints on the handling of specific instances</u>	<p>39. Many of the criticisms about NCPs relate to their handling of specific instances. Recurrent issues include: non-accessibility of the NCP; high threshold for accepting cases; refusal to accept cases because of parallel proceedings; lack of NCP cooperation and coordination; and non-observance of indicative time limits.</p> <p>5. In a few instances, the Chairs of the Investment Committee and the WPRBC or the Secretariat have been contacted directly by the complainants regarding the performance of an NCP. In such events, the Chair of the WPRBC and the Secretariat have taken the following actions: informing the NCPs; organising phone calls or bilateral meetings on the occasion of NCPs meetings; and explaining the NCP procedures.</p> <p>6. As a matter of general policy, the Chair of the WPRBC could provide assistance to NCPs in the context of individual complaints on the handling of specific instances, as deemed necessary by the concerned NCPs. The Chair could be assisted by the Vice-Chair, the Bureau, and the Secretariat. The Chair would report regularly on these activities to the WPRBC.</p>
<u>(d) Stakeholders Substantiated Submissions to the Investment Committee</u>	<p>7. Section II.2b) of the Procedural Guidance provides that “the Investment Committee will, with a view to enhancing the effectiveness of the Guidelines and fostering the functional equivalence of NCPs, consider a substantiated submission of an adhering country, BIAC, TUAC and OECD Watch on whether an NCP is fulfilling its responsibilities with regard to the handling of specific instances.” While this provision has never been used, it might soon be tested due to the growing complexity of the complaints and the critical role of the NCP mechanism, notably for the remediation of human rights violations.</p> <p>8. The WPRBC may wish to explore further how such requests could be addressed on a case-by-case basis. This could involve a multistage-process governed by the WPRBC where the Chair may first be given the opportunity to try to “mediate” a solution between the author(s) of the submission and the NCP(s) concerned. Should this not be possible, the matter could then be referred to a peer evaluation team composed of two or three delegates to the WPRBC which would be invited to draft recommendations for the WPRBC.</p> <p>9. Should the issues raise broader interpretation issues on the application of the Guidelines e.g. requiring a formal clarification, the matter could then be formally considered by the WPRBC on the basis of a Note prepared by the Secretariat under the direction of the Chair. The WPRBC would submit its recommendations to the Investment Committee on the basis of this discussion.</p>

3. Template for Country Peer Reviews of National Contact Points

6. TUAC strongly welcomes the proposed template for country peer reviews and supports many elements, including the:

- Country site visit (#13-18);
- Commitment to involve relevant stakeholders, including parties to specific instances handled by the reviewed NCP (#14);
- Commitment to publish the summary of the assessment and recommendations in the Annual Report to the OECD Council (#20);
- Expectation that the costs of participation of stakeholders should be covered.

7. TUAC would additionally propose the following:

- *Assign the Secretariat a central organising role:* TUAC is opposed to the proposal that the peer reviews will be organised by an external facilitator (#10). Country peer reviews undertaken by the OECD Working Group on Bribery – the gold standard – are organised and coordinated by the OECD Secretariat. The same should be the case for the OECD Guidelines. The Secretariat should play a central role in organising all country peer reviews. This is vital not only for ensuring consistency and a high standard, but also for institutional learning;
- *Follow-up:* all NCPs should be required to report back on time-bound recommendations within one year from the publication of the peer review report. This is good practice adopted by the country peer reviews of the OECD Anti-bribery Convention;
- *Transparency of the process:* the peer review report, the recommendations and follow-up report should all be made public and translated into national languages so as to improve national accountability.

4. Update on Planned Peer Review

8. TUAC congratulates Denmark, Belgium and Switzerland for signing up to be peer reviewed in 2015. TUAC urges governments to ensure that extra-budgetary resources are made available to support the proposed schedule.

5. Proposed Themes for Horizontal Peer Reviews

9. TUAC supports the proposals for undertaking Horizontal Peer Reviews. However, it is not clear to TUAC how the report of the Horizontal Peer Review on Initial Assessment helps resolve the issues involved. The report is largely descriptive and does not provide any recommendations or next steps.

- **Recommendation:** TUAC considers that the WPRBC should reflect on the value of this report and discuss what improvements should be made in order that these thematic peer reviews provide a tool for improving NCP practice and functional equivalence.

10. On additional Horizontal Peer Reviews, TUAC supports the proposals for these to address the themes of: *Communication* (#21); and *Compliance with the Core Criteria* (#22) (visibility, accessibility, transparency and accountability) and the Guiding Principles for specific instances (impartiality, predictability, equitability, compatibility with the Guidelines). In relation to the first, *Communication*, TUAC notes that in its 2013 Annual Report, the Czech NCP suggested that NCPs should develop a “common framework for promotion of the Guidelines”³. This could also be considered as part of the Horizontal Review.

11. 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:

³ Czech Republic NCP Report to the OECD, 2013, p.7.

- *High threshold for accepting cases* (this issue has been addressed in the first thematic peer review but apparently not resolved);
- *Partial decision-making* – not respecting impartiality;
- *Lack of NCP cooperation in cases*;
- *Parties refusing to participate in the NCP process and the needs for incentives (determination) and consequences*;
- *Confidentiality V transparency/Role of Campaigns* (this was identified as an issue on which the Latin American NCPs require assistance in the summary of the Workshop of Latin American NCPs (13-14 November) (#9))

12. TUAC requests that in addition to Communication (#21) and Compliance with the Core Criteria (#22), **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 has been a particular problem for the US NCP – one of a small number of NCPs that does not conduct an examination (determination) in the event that mediation is refused or fails.

6. Proposed changes to the Annual Report of the Guidelines for Multinational Enterprises

13. TUAC supports the current proposal to expand the purpose of the Annual Report of the Guidelines beyond record-keeping, so long as the record-keeping function of both the OECD and the NCP Annual Reports is maintained. The emphasis on record-keeping is necessary if the NCP Annual Reports and the OECD Annual Report are to be a vehicle for accountability. So while the NCP questionnaire could be expanded (#9), questions aimed at collating objective facts that are relevant to the functioning of the NCP should not be replaced by open-ended questions. This would undermine both accountability and comparability.

7. 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 the capacity and effectiveness of NCPs.

15. *Development of Due Diligence Guidance for the textile and garment sector (#8-9):* No reference is made to the work that has already been completed by the French and the Italian NCPs. This would be a good starting point for developing the guidance. TUAC considers that the human rights due diligence guidance should cover the following:

- o 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.
- o Living wage: this is a stand-alone priority;
- o Access to remedy, including financial compensation: one of the key messages given by trade unions (and NGOs) at the OECD-ILO Roundtable (September 2014) was on the need to improve access to remedy including to financial compensation.

16. *Implementation Platform (#10-13):* TUAC recognises that the current description of the Implementation Platform has taken on board previous comments. However, it is still unclear exactly what activities this platform will undertake and how this will be decided. TUAC

agrees that this should be discussed and agreed by the Advisory Group. In addition to the issues listed, the following should be added:

- 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.

17. *Involvement of the International Apparel Federation (IAF)*: For the October meeting of the WPRBC, the OECD circulated a letter of support from the International Apparel Federation (IAF), which stated its commitment to work with the OECD to create a global common framework for addressing labour and environmental problems. This commitment was also repeated on its web site.

- **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 right from the beginning of the work of the Advisory Group that this is not the case (see *BOX 1*).

BOX 1: EXCERPT FROM IAF 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.”

8. Compensating the Victims of Rana Plaza

18. TUAC and OECD Watch have held two side events, attended by a number of NCPs, at the OECD Global Forum on Responsible Business Conduct (June 2014) and the ILO-OECD Roundtable on Responsible Supply Chains in the Textiles and Garment Sector (September 2014) respectively. They also prepared a joint TUAC/OECD Watch publication: ‘*Compensating the Victims of Rana Plaza – How to Resolve the Funding Crisis*’. As the original deadline (October 2014) for making the final compensation payments to the victims of Rana Plaza has now passed, TUAC and OECD Watch are calling on governments from the home countries of the brands that source from Bangladesh to work together in finding a solution, including by participating in an informal Task Force along with trade unions and NGOs.

9. Regional Capacity Building Workshops for NCPs: MENA and Latin America

19. TUAC congratulates NCPs for holding the regional capacity building events in Latin America (Chile) and the MENA (Rabat) regions:

- *Sessions 4 and 5 – Information about and Promotion of the Guidelines*: in the report of the plenary discussion on key audiences (page 2) there is no reference to trade unions. This may be a mistake in the report rather than an omission in the training, but trade unions should always be included as a key audience in any training on the OECD Guidelines;

- *Promotion*: given the concern expressed by MENA NCPs over the resources involved in promotion, TUAC urges NCPs to:
 - Work together to develop regional promotional plans so as to share the costs of developing and translating common tools;
 -
 - Make use of the ready-made networks available to them through the national-level counterparts of the institutional stakeholders – TUAC, BIAC and OECD Watch.
- *Follow-up*: TUAC considers it important to maintain regular dialogue between NCPs through regular (annual) events, in addition to electronic means;
- *Involve TUAC, BIAC and OECD Watch*: in the future NCPs could work with TUAC, BIAC and OECD Watch when organising regional events and invite external stakeholders to participate in an part of the event.
- *Make training tools available*: TUAC notes that the training sessions involved role plays and other training techniques. It urges the secretariat to collate, translate and publish all these training materials so that other NCPs can use and adapt these for country or regional purposes.

10. 2015 Global Forum on Responsible Business Conduct

20. TUAC welcomes the early drafting of an outline programme for the 2015 Global Forum. It considers that:

- *Moderators/Chairs*: all chairs/moderators should be engaged in/knowledgeable of the current policy agenda of all the relevant institutions (OECD, UN, EC) so that they are able to steer the discussion in a useful direction;
- *Non-judicial grievance mechanisms*: the programme should include a session on non-judicial grievance mechanisms that includes a discussion of NCP cases as well as the role of NCPs in the NAPs being developed under the UNGPs.

21. In relation to the suggestions made:

- *Responsible Business through the Lens of Governments*:⁴ this session should include presentations on policy coherence with regard to public procurement and export credits;
- *China's Approach to Responsible Business*: this session should include speakers from trade unions, business and NGOs;
- *Conversation with the Chair: Responsibility in International Sporting Events*: TUAC questions the signal sent by making this an informal session;
- *Responsible Business Conduct in the Extractive Sector*: TUAC questions whether this would command sufficient interest to be a plenary session?

⁴ TUAC does not consider 'through the lens' to be an appropriate title as it does not capture the fact that governments have a State Duty to Protect... Similarly the financial sector - if part of the public sector, financial institutions have a Duty to Protect and if part of the private sector, a Responsibility to Respect human rights.

11. Outreach – China

22. The document “Engaging with China on Responsible Business Conduct”, together with the five-year OECD/China Long-term Engagement on Responsible Business Conduct programme raises a number of issues for TUAC. TUAC intends to respond to these at a later date once it has consulted with its affiliates and trade union partners. These include the following concerns:

- *OECD’s institutional stakeholder approach*: there was no consultation with TUAC on the development of the five year programme, whereas a Memorandum of Understanding has been signed with the Chamber of Commerce of Metals, Minerals and Chemicals. There is some reference to engaging “other stakeholders” (#5, #6, #10). TUAC is interested to know:
 - whether the signing of a MoU with an employers’ federation is a precedent or if there are examples from other parts of the OECD?
 - who these other stakeholders are likely to be.
- *Role of the focal point on the Guidelines*: how would a focal point in China promote the OECD Guidelines, when there is a conflict between national law and the internationally-recognised standards relating to trade union rights set out in Chapters II, IV and V of the OECD Guidelines?

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

23. TUAC will make a separate submission on the Policy Framework for Investment, including on the Chapter on Responsible Business Conduct. As regards the latter it does not consider the current draft chapter to be in line with the UNGPs and the OECD Guidelines on a number of counts, including:

- *Description of Responsible Business Conduct* (#1). According to the UNGPs, the OECD Guidelines, and the CSR strategy of the European Commission, the responsibility of an enterprise is determined by its adverse impacts. The proposition in this Chapter that RBC is equally about the positive contribution that enterprises can make and avoiding adverse impacts is out of line with the authoritative international instruments. The paragraph should clearly state that companies have a responsibility to avoid and address their adverse impacts, including in their supply chain and other business relationships.
- *Obligations and Duties of States* (#3): This paragraph fails to capture the fact that for most areas of RBC, States have binding obligations. Forty-six governments have made a binding commitment to implement the OECD Guidelines and under the UNGPs, all States have a State Duty to Protect against human rights abuse by third parties, including business enterprises. This State Duty is not captured at all by the current wording of the draft Chapter on “a role in promoting and enabling”.
- *The Law and Minimum Standards* (#4): the statement that RBC is about complying with the country’s laws and going beyond minimum legal standards appears to be a now discredited definition of CSR as “going beyond the law”. This should be revised.

13. Funding Requirements

24. *Implementation of the Work Plan Work Plan to Improve NCP Performance and Promote Functional Equivalence:* TUAC requests 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.

- Specifically developments are there in relation to funding for *capacity-building for NCPs* and the idea presented in the Work Plan (#28) to support multi-NCP mediation through a special fund (supported by development agencies)?

14. TUAC 2014 Activities

25. TUAC has undertaken the following activities in 2014:

Training

- March 2014: ETUI Training, Florence, Italy;
- March 2014: ILO Training Centre, Turin, Italy;
- August 2014: Sectoral Trade Union Training: Manila;
- September 2014: Regional Training for Trade Unionists: Douala, Cameroon (representatives from Benin, Cameroon, Central African Republic, Chad, DRC, Gabon, Republic of Congo).
 - Since the training workshop, participants have established a sub-regional network on the OECD Guidelines – **Justice Sociale et Principes de l'OCDE** – which comprises trade unionists from the above countries plus Niger;
- October 2014: *Poland, Hungary, Czech Republic, Slovak Republic:* regional training event, Katowice:
 - This was largely organised by the Polish NCP, working with TUAC and FES, and was attended by NCPs from the Czech Republic and Hungary together with trade unionists from each of the participating countries. The NCP from the Slovak Republic was invited but unable to attend).

Trade Union Guide to the OECD Guidelines for Multinational Enterprises

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