



TRADE UNION ADVISORY COMMITTEE
TO THE ORGANISATION FOR ECONOMIC
COOPERATION AND DEVELOPMENT
COMMISSION SYNDICALE CONSULTATIVE
AUPRÈS DE L'ORGANISATION DE COOPÉRATION
ET DE DÉVELOPPEMENT ÉCONOMIQUES

**THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES
2010 'UPDATE'
TERMS OF REFERENCE**

**TUAC SUBMISSION
TO THE OECD INVESTMENT COMMITTEE
Paris, 19th March 2010**

1. Introduction

1. TUAC welcomed the decision of the 2009 OECD Ministerial Council Meeting to instruct the OECD to undertake further consultation on the “updating” of the OECD MNE Guidelines in order *to increase their relevance and clarify private sector responsibilities*.¹

2. Since this decision, TUAC has organised two internal meetings² with TUAC affiliates, the Global Union Federations (GUFs) and the International Trade Union Confederation (ITUC) in order to discuss and formulate the trade union position for the Update. TUAC is engaged in an ongoing process of consultation with affiliates and partners and will bring forward specific proposals on the text and the commentaries during the upcoming weeks and months.

2. The Terms of Reference

3. Overall, TUAC considers that the Terms of Reference (TOR) provide the necessary framework for achieving the improvements that are required to ensure that the Guidelines become more effective as an instrument for delivering responsible business conduct.

4. TUAC has always contended that improving the effectiveness of the Guidelines depends above all else on improving the performance of the NCPs. Strengthening the Procedural Guidance should be a main priority of this Update.

5. Beyond this, TUAC considers it essential that the Update provide clearer guidance on the application of the Guidelines to supply chains and other business partners. It is essential that the applicability of the Guidelines reflects the reality of horizontal business relationships, which characterise the global economy.

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

² These were held on the 2nd September 2009 and the 16th February 2010.

3. Substantive Issues: Recommended Changes

6. Technical updates (§8); TUAC suggests the following amendments to the text to ensure an inclusive and participative approach to updating the technical updates:

“The update should ensure that instruments cited 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 has not been a pre-condition for their inclusion as references in the Guidelines or the Commentaries. This technical update should be carried out in close consultation with partner international organizations, ~~and~~ OECD bodies and BIAC, TUAC and OECD Watch.”

7. **Supply chains (§9, §10)**: TUAC suggests the following amendments to the text and deletions to the footnotes in order to clarify the text and broaden the reference points:

“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 2003 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 by Professor John Ruggie, the Special Representative of the UN Secretary-General for Business and Human Rights (UNSRSG),³ have shifted the focus from the sphere of influence as the basis for determining the scope of corporate responsibility towards actual and potential impacts of activities and relationships and the use of human rights due diligence. a basis to establish corporate responsibilities toward the concept of due diligence that companies are expected to perform in light of their own circumstances along their supply chains. This approach has recently been used by the UK NCP in two specific instances.⁴ A due diligence approach is ~~already~~ used in the Environment Chapter of the Guidelines and the OECD Risk Awareness for Multinational Enterprises in Weak Governance Zones.”

8. **Disclosure (§16)**: TUAC suggests the following amendments to the text to provide for flexibility in the scope of the TOR with regard to disclosure, including the reference to other standards.

“The update should ensure that the Disclosure chapter of the Guidelines incorporates upgraded standards for disclosure that have emerged since the 2000 Revision of the Guidelines, including such as the provisions of the 2004 *OECD Principles of Corporate Governance* and the ~~The so-called G3~~ *Guidelines* of the Global Reporting Initiative (GRI). ~~are also relevant.~~ Additional disclosure provisions may be called for with respect to access to information, transparency in financial reporting, supply chains, ~~and~~ greenhouse gas emissions. These may be addressed in the ~~of which may not be~~

³ “Clarifying the Concepts of ‘Sphere of Influence’ and ‘Complicity’”, A/HRC/816, 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, April 2009.

⁴ The *Survival International – Vedanta Resources* and *Global Witness – Afrimex* specific instances at wp.nationalcontactpoint/cases/page53843.html

~~necessarily in the~~ Disclosure Chapter ~~and/or but in~~ the relevant provisions dealing with the underlying subject matters."

9. **Labour and industrial relations (§17):** TUAC suggests the following amendments in order to clarify the text:

"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 ~~at the in~~ ILO ~~including instruments such as~~ 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.⁵ The ILO has provided specific suggestions for possible revisions.⁶

10. **Anti-corruption (§18):** TUAC suggests the following amendments to the text to provide for flexibility in the scope of the TOR with regard to anti-corruption measures and an inclusive and participative approach:

"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 ~~and/or~~ measures for preventing and detecting the bribery of foreign public officials. The update ~~should also would take account of other international governmental and private sector anti-corruption standards, which have been developed since the 2000 Revision of the Guidelines, and should~~ consider possible revisions to this chapter and commentaries ~~in this light~~ in close co-operation with the WGB and in consultation with BIAC, TUAC and OECD Watch."

11. **Environment (§19):** TUAC suggests the following amendments to provide for an inclusive and participative approach:

"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 relevant OECD Committees, including the Environment Policy Committee, and relevant international organisations, and in cooperation with BIAC, TUAC and OECD Watch."

12. **Taxation (§21):** TUAC suggests the following amendments to provide for flexibility in the scope of the TOR with regard to taxation:

The update will examine whether the relevant chapter of the Guidelines should include provisions to improve transparency in financial reporting, including tax, other information on the disclosure of taxes, royalties and other and payments made to host governments, ~~consistent drawing on the work of, inter alia, the OECD Task Force on Tax and Development, 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*. As suggested in the letter of the Chair of the Committee on Fiscal Affairs (CFA), it may also investigate, in cooperation 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.

⁵ TUAC has indicated its intention to submit a number of proposals in this area.

⁶ See DAF/INV/WP/RD(2009)5/REV2.

3. Procedural Provisions and Institutional Issues: Recommended Changes

13. **Introductory paragraph (§22):** TUAC suggests the following amendments to clarify and strengthen the text so as to focus on the priority for the update, the improvement of NCP performance across the board:

“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-strengthened~~ to improve NCP performance, enhance awareness, visibility and deliver 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.”

14. **Functional equivalence and respect of individual circumstances (§24):** TUAC suggests the following amendments to broaden the scope of the ToR with regard to functional equivalence and effectiveness:

“The update should discuss how the Procedural Guidance could be clarified or supplemented by more detailed provisions or commentaries to give greater direction 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 and the possibility of extending the core criteria in line with the recommendations of the UNSRSG. Issues relating to pPotential conflict of interests, degree of inclusiveness of stakeholders, ~~—and~~ oversight of NCP performance and right of appeal, inter alia, of ~~—~~ have been ~~also~~ been identified as areas deserving special attention.”

15. **Promotion (§25):** TUAC suggests the following amendments to specify that the OECD, as well as the NCPs, should take responsibility for promoting the Guidelines and that undertaking adequate promotion means providing training and capacity-building:

Information and Promotion

“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 both the OECD and the NCPs to work to raising 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.”

16. **Implementation in specific instance (§26):** TUAC suggests the following amendments to broaden the scope of the TOR with regard implementation in specific instances:

“With a view ~~to of~~ 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 explore the possibility of NCPs undertaking fact-finding missions. It should clarify the distinction between mediation and

adjudication and discuss ways of strengthening the NCP's mediation function of NCPs, as well as their NCP's role in monitoring the implementation of recommendations contained in the final statements. ~~recommendations~~It should also explore the possible use of incentives, consequences and follow-up to strengthen the specific instance procedure.

17. **NCP Cooperation (§28):** TUAC suggests the following amendments to broaden the scope of the ToR with regard to NCP cooperation:

“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. More generally, it should also clarify the role of responsibility and role of the home NCP 's responsibility for liaising with the parent company of the enterprises that is are party ies to the such specific instances.”

18. **Peer review (§29):** TUAC suggests the following amendments in order to broaden the scope of the ToR so as examine reporting requirements, as well as the role of peer review.

Peer Review and Reporting

“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. It should also examine the possibility of extending the reporting requirements of NCPs.”

19 **Capacity-building (new paragraph):** TUAC suggests that the ToR should include an additional paragraph:

“The update should examine the possibility of the Investment Committee providing a central fund for the provision of capacity-building, training and fact-finding for NCPs.”

4. Modalities: Recommended Changes

20. **Organisational issues (§36):** TUAC suggests the following amendments to ensure that the institutional stakeholders, BIAC, TUAC and OECD Watch, have a permanent position in the advisory group.

“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 will include BIAC, TUAC and OECD Watch on a permanent basis with ~~may vary according to other organisations playing a variable role depending on~~ the contributions that adhering governments and other stakeholders are able to ~~might be able to~~ make on particular issues.”