



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 Joint Meeting of the Working Party on Responsible Business
Conduct and the National Contact Points
5 December 2013

1. Introduction and Key Points

1. TUAC welcomes this opportunity to make a submission to both the Working Party on Responsible Business Conduct (WPRBC) and the National Contact Points (NCPs). It strongly commends the OECD for organising a *Joint Meeting* of the WPRBC and the NCPs, bringing together WPRBC delegates and NCPs, regardless of their institutional structure, for mutual learning with the resulting benefits for policy coherence and capacity-building. It is also an effective response to the prevailing resource constraints.

2. TUAC considers it essential to increase the number of NCP meetings in view of the need to increase cooperation on cases, build NCP capacity, and facilitate peer learning, and in line with the changes made in 2011 Guidelines, which provided for an increase in the number of NCP meetings. In addition to one *Joint Meeting* of the WPRBC and the NCPs, there should be two meetings held separately. This means that both the WPRBC and the NCPs would meet three times a year.

3. In terms of participation, it is also important that all NCPs, regardless of institutional structure, be able to participate in WPRBC meetings as observers, just as all non-NCP delegates of the WPRBC should be able to participate in NCP meeting as observers. In the limited number of cases of a request for clarification being made on issues relating to a particular specific instance, then the OECD Secretariat should ensure that all the parties concerned are invited to represent their views so that the Committee/WP is able to make an informed decision. TUAC urges the OECD secretariat to assess whether any revision to their procedures is required in this regard.

4. Turning to priorities, TUAC considers that the NCPs should be the main focus of activity under the OECD Guidelines. Yet the budgets¹ for the WPRBC presented in the document *Funding Requirements for Guidelines Work* (DAF/INV/RBC/RD(2013)20) reveal that only 13% of budgeted activities² is allocated to work on the NCPs, with 80% being allocated to the proactive agenda projects (see *TABLE 1*, paragraph 27). This means that 13% of the effort is being allocated to NCPs while 80% is focused on the proactive agenda. **TUAC calls on governments to re-focus their activities on NCPs and to re-align their resources accordingly.**

¹ There is no overall budget – TUAC has compiled a summary budget which is provided on paragraph 27.

² Outreach activities are not budgeted so far.

5. TUAC's remaining key points are the following:
- Business Relationships and Minority Shareholdings: TUAC supports the OECD's conclusion that the term "business relationships" under the OECD Guidelines cover the relationships of Financial Institutions, including minority shareholdings. It urges the WPRBC to close this discussion, in view of the interpretive guidance provided by the UN and the decisions made by the Dutch and the Norwegian NCPs;
 - Interpretation of "impact is...directly linked to their operations, products or services by a business relationship": the Working Party should issue a statement that clarifies that the concepts of "indirect impacts" or being "indirectly linked" do not exist under the OECD Guidelines. TUAC considers that it is the task of the Working Party, not a multi-stakeholder Advisory Group, to solicit and assess authoritative guidance on this issue and is opposed to Phase 1 of the project proposal on the Financial Sector in this regard (see below);
 - Sovereign Wealth Funds: TUAC supports the OECD's conclusions that the Guidelines apply to all groups of investors, whether they are operated or owned by the State or are private investors, which are *engaged in activities of a commercial nature (para. 23)*;
 - Central Banks: TUAC considers that the Working Party should not exempt, peremptorily, any organisation from the OECD Guidelines, including Central Banks. It is the role of NCPs to assess the eligibility of complaints on a case-by-case basis. Any exemption would risk irreparable damage to both the OECD Guidelines and the UN Guiding Principles as it would open the door for other sectors or business groups to seek similar exemptions;
 - Proposal for Next Phase of Financial Sector Project: TUAC is strongly opposed to the project proposal on the financial sector as currently drafted, in particular Phase 1, which it considers should be carried out by the Working Party. It is the role of governments to reach a decision on the meaning of "impact is...directly linked to their operations, products or services by a business relationship", not the role of a multi-stakeholder group.
 - *TUAC suggests that the WPRBC develops a new proposal working together with NCPs, BIAC, TUAC and OECD Watch. This approach would be in line with the principles of the proactive agenda.*
 - Proactive Agenda: TUAC urges the Working Party to stop the proliferation of projects under the proactive agenda at the OECD level in order to re-focus on the NCPs, the core activity, and to safeguard quality.
6. The remainder of the submission is structured as follows:
- *Section 2: Application of the OECD Guidelines to the Financial Sector;*
 - *Section 3. Application of the OECD Guidelines to the Textile and Garment Industry;*
 - *Section 4: Voluntary Peer Review of Norway;*
 - *Section 5: Horizontal Peer Review on Functional Equivalence: NCP Cooperation at the Initial Phase of a Specific Instance;*
 - *Section 6: Funding Requirements;*
 - *Section 7: TUAC Activities.*

2 Application of the OECD Guidelines to the Financial Sector: Scope and Application of the Business Relationships

7. TUAC welcomes the decision of the WPRBC to seek interpretive guidance from the UN Office of the Human Rights Council, the former Special Representative on Business and Human Rights and the UN Working Group on Business and Human Rights, given that the United Nations Guiding Principles (UNGPs) were the origin of the concepts under discussion. It is essential that there be “*maximum convergence and predictability*”³ in the implementation of the OECD Guidelines and the UNGPs.

2.1 Scope and Application of Business Relationships in the Financial Sector

8. TUAC supports the OECD Secretariat’s conclusion (DAF/INV/RBC(2013/2/REV1) that “*minority shareholdings are covered by the term ‘business relationships’ for the purposes of the Guidelines*” (para. 12) and that “*FIs’ activities include a multitude of types and forms of ‘business relationships’ within the meaning of the OECD Guidelines and the UNGPs*” (para.13) in view of the authoritative statements from the United Nations Office of the High Commissioner for Human Rights (OHCHR), Professor John Ruggie and the decisions made by the Dutch and the Norwegian NCPs .

9. TUAC considers that the WPRBC should issue a statement that confirms that the term “*business relationships*” under the OECD Guidelines cover the relationships of Financial Institutions, including minority shareholdings, and then close this discussion.

2.2 Scope and Application of “*Impact is...Directly Linked to Operations, Products or Services through a Business Relationship*”

10. Professor Ruggie’s response sets out the intention and the scope of the provision “*“impact is...directly linked to operations, products or services through a business relationship”*.” and how this relates to the financial sector making it clear that “*financial institutions are no different from any other kind of business enterprise in that human rights harm may be linked to their products or services through a business relationship*.”⁴

11. The OHCHR clarifies that the provision was “*not intended to create two categories of links – one “direct” and the other “indirect...”*.” Moreover, it concludes that it is a difference in terminology that is the source of the misconception on this matter. It explains that financial institutions “*seem to be distinguishing between impacts which they cause directly and impacts which their clients cause – referring to the latter as “indirect impacts”...*” (para. 18). The OHCHR states that “[T]he terminology of “*indirect impacts*” is not supported by the language of the Guiding Principles” (para. 18) and that there are “no such concepts as “*indirect linkage*” or “*indirect impacts*”” (para. 18).

12. TUAC urges the Working Party to issue a statement that clarifies that the concepts of “*indirect impacts*” or being “*indirectly linked*” do not exist under the OECD Guidelines, in line with the statement of the OHCHR that “[T]he terminology of “*indirect impacts*” is not supported by the language of the Guiding Principles” (para. 18) and that there are “no such

³ Response of Professor Ruggie.

⁴ Response from Professor Ruggie, Line 1, Page 3.

concepts as “indirect linkage” or “indirect impacts”. **TUAC is strongly opposed to this issue being referred to a multi-stakeholder Advisory Group.**

2.3. Application of the OECD Guidelines with Respect to Sovereign Wealth Funds and Central Banks

13. TUAC supports the OECD’s conclusions that the Guidelines apply to all groups of investors, whether they are operated or owned by the State or are private investors, which are engaged in *activities of a commercial nature* and that this should be decided by NCPs (“Adherents”) on a case by case basis (para. 23). This therefore includes Sovereign Wealth Funds.

14. The Working Party should not exempt, peremptorily, any organisation from the OECD Guidelines, including Central Banks. Professor Ruggie observes that “[T]he OECD has the additional advantage of **the National Contact Point System where independent judgment can be exercised...**”⁵ Even if “the Guidelines generally do not apply to Central Banks as such” (paragraphs 7 and 23, document DAF/INVRBC/(2013)/3/REV1), TUAC considers that it is the role of NCPs to assess the eligibility of complaints on a case-by-case basis.

2.4 Proposal for Next Phase of Financial Sector Proactive Agenda Project

15. TUAC has a number of concerns about the project proposal on the next phase of the Financial Sector (DAF/INV/RBC(2013/17/REV1). First, as noted above, it does not consider it appropriate for a multi-stakeholder advisory group to tackle the interpretation of “*impact is...directly linked to operations, products or services through a business relationship*”.

16. Secondly, in our October 2013 submission to the Working Party TUAC called on the Secretariat to exercise great care in its own referencing of the terminology so as not to contribute to further confusion. We note that the current proposal continues to use the shorthand of “*being directly linked to adverse impacts*”, without adding “*through a business relationship*”. This is misleading and likely to perpetuate the already considerable confusion.

BOX 1: EXCERPT FROM TUAC OCTOBER 2013 SUBMISSION

The use of short-hand references such as “**being directly linked” to adverse impacts**” can easily lead to the misinterpretation⁶ that there is a need for the company to have a direct linkage to the adverse impact in order for responsibility of the company to be engaged under the Guidelines. Such misinterpretation can have significant and long-reaching effects, particularly with regard to the correct application of the Guidelines to the financial sector. **The linkage is via a business relationship that involves the company’s products, services or operations, and does not require a direct linkage to the potential or actual human rights impact. In the case of the financial sector, the linkage is through financial products and services provided to clients who may be involved in human rights impacts. It is essential that the documents produced by the Secretariat on this issue make this clear.**

⁵ Response of Professor Ruggie, second last paragraph, Page 4.

⁶ (This misinterpretation was already the case in the report prepared for the Working Party under Phase 1 of the Financial Sector project).

17. Finally, TUAC also expressed concern over the quality of the first phase of the project on the Financial Sector. It is essential that adequate quality controls are put in place. **TUAC suggests re-drafting the project proposal with a sub-group of interested NCPs, BIAC, TUAC and OECD Watch.**

4. Application of the OECD Guidelines to the Textile and Garment Industry

18. TUAC agrees with the ILO (letter of 10 October 2013 from Sandra Polaski, Deputy Director-General of the ILO) that the OECD should not pre-judge the outcome of the roundtable (page 2) and should “*await the conclusions of the roundtable before discussing the feasibility, added value and appropriateness of any joint OECD/ILO project...*”. TUAC is surprised that funding is already allocated for a follow-up project.

19. TUAC considers that a key aim of the Forum/Roundtable should be to examine what role the OECD could potentially play, including through the NCPs, in promoting responsible business conduct in the textiles/garment sector, and that this could potentially be part of a closing plenary session. The development of any project (if any) should reflect the findings of such a discussion.

20. On the draft programme:

- **Parallel sessions**: TUAC supports the parallel sessions on fair pricing and placement of orders (suggest ‘responsible buying practices’) but proposes replacing the proposed topic on child labour with freedom of association. TUAC would also support a third (parallel) session on Burma/Myanmar;
- **The Supply Chain: Challenges and Opportunities** (Day 1: 14.45-16.30): We suggest splitting the Session on ‘Challenges’ and ‘Opportunities’ for responsible business conduct and replacing the Session on social compliance schemes (Day 2: 09.-10.30) with the panel on “Opportunities”.
- **State Duty to Protect through legislation and effective enforcement**: the State Duty to Protect extends beyond legislation and the OECD NCPs do not easily fit under this title. We suggest changing the title to the “**State Duty to Protect: Enforcing Legislation and Promoting Standards**”.

Section 4: Voluntary Peer Review of Norway

21. TUAC congratulates the Norwegian NCP for organising a rigorous, transparent and participatory peer review process. This sets a high bar for other countries to follow. TUAC considers it essential that this high standard be maintained in future reviews.

22. TUAC urges the OECD Secretariat to develop a standard methodology based on the method of approach. It also encourages the OECD secretariat to play the central coordinating role in future peer reviews, so as to ensure continuity and consistency across reviews and to build institutional capacity in this regard. TUAC further calls on the OECD to speed up the cycle of peer reviews such that a minimum of three reviews should be undertaken each year.

5. Horizontal Peer Review on Functional Equivalence: NCP Cooperation at the Initial Phase of a Specific Instance

23. TUAC welcomes the decision to conduct a horizontal peer review on NCP functional equivalence and NCP cooperation. It is a high priority for TUAC to raise the standard of performance of NCPs across the board.

24. TUAC considers that the institutional stakeholders BIAC, TUAC and OECD Watch could make a useful contribution to this horizontal peer review both in identifying problems that have arisen and in developing potential solutions. Some examples of the problems of functional equivalence experienced in trade union cases are provided in *BOX 2*.

BOX 2: 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;
 - *High threshold applied at initial assessment stage: solutions:* exchange of experience;
 - *Parties refusing to participate in the NCP process: 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.

6. Funding Requirements/Implementation of the Mandate of the Working Party on Responsible Business Conduct

25. On the 7 November 2013, TUAC wrote a letter to the OECD Secretary General requesting that funding be found to ensure that there are adequate staffing levels in 2014 and that a re-allocation of the Budget be made in the 2015-2016 Programme of Work and Budget. TUAC called for resources for the following:

- Regular meetings of National Contact Points – 3 per year (2 separate, 1 joint meeting with the Working Group on Responsible Business Conduct);
- OECD capacity-building events – 2 per year;
- Regional capacity-building events – 2 per year;
- Country peer reviews – 2 per year;
- Thematic (horizontal) peer reviews – 2 per year;
- OECD Global Forum (2014);
- Regional promotional events – 2 per year (including jointly with the UN office responsible for implementing the UN Guiding Principles on Business and Human Rights).

26. The mandate of the Working Party on Responsible Business Conduct⁷ identifies six tasks: NCP performance (13% of total budget); outreach; the proactive agenda (80% of total budget); consultations with stakeholders; and international partners; and other tasks relating to the Guidelines or responsible business conduct requested by the Investment Committee.

⁷ Document (CE(2013)5)

27 Yet the budgets for the WPRRC presented in the document *Funding Requirements for Guidelines Work* (DAF/INV/RBC/RD(2013)20) reveal that only 13% of budgeted activities⁸ is allocated to work on the NCPs, with 80% being allocated to the proactive agenda projects (see TABLE 1). This means that 13% of the effort is being allocated to NCPs while 80% is focused on the proactive agenda. **TUAC is concerned overall that the WPRBC is prioritising the work on the proactive agenda over other areas of its mandate.**

TABLE 1: NCP BUDGET AS % OF OVERALL BUDGET	
National Contact Points	570,690
Proactive Agenda	
<i>Financial Sector</i>	430,000
<i>Textiles/Garments</i>	595,000
<i>Agriculture</i>	323,502
<i>Extractive Sector</i>	395,000
<i>Conflict Minerals</i>	1675,007
Proactive Agenda Total	3,418,509
Global Forum	273,092
Outreach	
TOTAL BUDGET	4,262,291
% Overall Budget Allocated to NCPs	13.39
% Overall Budget Allocated to Proactive Agenda	80.20

28. TUAC applauds Austria and the other NCPs involved in the first regional meeting of the Central European National Contacts held in September 2013: Austria, Czech Republic, Germany, Slovenia, Switzerland and the UK. The NCPs agreed to continue dialogue and cooperation in the region and to host a second meeting. In the future NCPs could consider involving the external stakeholders in part of the activities.

29. This is an example of the type of positive cooperated that could be replicated on a geographical basis or issue basis. **TUAC calls on governments to re-focus their activities on NCPs and to re-align their resources accordingly.**

7. TUAC Activities

30. TUAC has in the past year undertaken the following activities:

Training:

- January 2013: IndustriALL/IUF Global Union Federations, Geneva,
- 29-30 July 2013: *Asia*: regional training event, Manila,
- 11-12 September: national training event, Warsaw, Poland 11-12 September 2013
 - o *This event was organised by Solidarnosc and the Polish NCP with the support of FES and TUAC. TUAC appreciates the support of the Polish NCP.*
- 13 November 2013: ILO Training Centre, Turin, Italy
- 25-26 November: national training event, Dublin, Ireland
- 29 November 2013: TUC training event, London, UK

Trade Union Guide to the OECD Guidelines:

⁸ Outreach activities are not budgeted so far.

- Current Languages: Burmese, English (5000 copies printed so far 4,500 distributed to trade union partners), French, German, Italian, Japanese, Korean Polish, Spanish, Swedish

ANNEX 1: WHY THE GUIDELINES APPLY TO SOVEREIGN WEALTH FUNDS

“It would be difficult for a state to maintain credibility in promoting the Guidelines if it exempts its own activities from them”⁹

- Responsible Business Conduct: the OECD Guidelines aim to promote ‘responsible business conduct’ in a global context. It can be assumed therefore that its intent is to cover *all* entities that ‘conduct business’ – in other words *all commercial activity*. The meaning of ‘enterprise’ therefore under the Guidelines should be understood as covering all organisations engaged in commercial activity operating in or from the territories that observe the Guidelines;
- Ownership: the Guidelines state that ownership may be private, State or mixed. They therefore establish that ownership of the enterprise is not relevant to whether the Guidelines apply¹⁰;
- Sectoral coverage: the Guidelines state that they apply to all sectors of the economy. They do not identify any exceptions. The Guidelines therefore apply to the financial sector, including investors and including minority shareholders¹¹;
- Role of investment funds: investment funds exist to generate returns – equivalent to profits – and are thus *commercial* organisations (‘enterprises’) in their own right. In addition, their core function is investing in other commercial organisations through *commercial* transactions;
- Link to adverse impacts: the negative impacts that the Guidelines seek to prevent or mitigate are linked to the investment funds through *commercial* relationships, not as a result of any administrative or other state function
- Level playing field: any decision to exclude Sovereign Wealth Funds would mean that the vast majority of investment managers would be covered by the Guidelines, while those situated in/linked to a Central Bank or similar government entity would not. This would run counter to the intention of the Guidelines, which is to require the same responsible business conduct, regardless of ownership or structure. Furthermore, to the extent that compliance with the OECD Guidelines requires up-front expenses in establishing due diligence systems this creates an uneven playing field between different types of investment organisations.
- Characteristics of the State: it is illogical as well as contrary to the responsibilities of the State to argue for an exemption on the basis of proximity to the State. Proximity to the State should facilitate compliance with the Guidelines in that governments have already made binding commitments to implement the Guidelines. Since 2000, the Guidelines have highlighted the higher level of expectation that surrounds enterprises owned by the State: *“State-owned enterprises are subject to the same recommendations*

⁹ Background Note from NCP Norway: Does Norges Bank Investment Management fall under the OECD Guidelines (DAF/INV/RD(2013)/9, p2.

¹⁰ Paragraph 4. Chapter I. Concepts and Principles.

¹¹ *Idem.*

as privately-owned enterprises, public scrutiny is often magnified when a State is the final owner".¹² This expectation was strengthened in the 2011 Guidelines, which additionally refers to the State Duty to Protect Human Rights in the chapeau of the Human Rights Chapter (IV).

¹² Commentary on Chapter II. General Policies, para.10.

ANNEX 1: WHY THE GUIDELINES APPLY TO NORGES BANKS INVESTMENT MANAGEMENT (NBIM)

“NBIM operates in a highly competitive, global market, and we will continue to foster a competitive mindset in the years to come....”

“As one of the world’s largest investment funds, we seek to recruit the best people in the industry. NBIM is looking for experienced investment professionals as well as new talent”

The investment management activities shall be organised as a separate wing of the Central Bank: Norges Bank Investment Management (NBIM). **NBIM is part of the Central Bank** and shall comply with the laws and regulations applicable to the Bank.

The Central Bank’s governance structure shall reflect the different nature and characteristics of the investment management activities that Norges Bank has been entrusted with. Norges Bank shall organize its investment management activities to reflect the recognised standards for the division of responsibilities between the board and the company’s executive officers and administration.

The Executive Board shall issue a job description for NBIMs Chief Executive Officer. **NBIMs Executive Director reports directly to Norges Bank’s Executive Board.**

NBIM Strategy 2011-2013:

- **“The owner’s stated ambition is to build financial wealth,** and the real return estimate of 4 percent forms the basis of the guidelines for economic policy.... **To achieve the owner’s real return ambition,** we intend to move our attention away from a benchmark focus in favour of the fund’s long-term real return. We will develop investment strategies across asset classes to position the fund better on an absolute return-risk relationship

“NBIM’s international offices **enable investment management across all time zones.**”

- **“NBIM operates in a highly competitive, global market,** and we will **continue to foster a competitive mindset** in the years to come. Without an all-embracing drive for results, NBIM will not be able to deliver high returns over time.”

“NBIM is committed to measure performance **according to industry practice** and to ensure this, NBIM shall adhere to Global Investment Performance Standards (GIPS). To ensure fair value, the assets shall meet relevant International Financial Reporting Standards (IFRS) and the NBIM Accounting and Valuation policy.”¹³

As one of the *world’s largest investment funds,* we seek to recruit *the best people in the industry.* NBIM is looking for experienced investment professionals as well as new talent”¹⁴

Yngve Slyngstad, CEO, NBIM

¹³ Policy on Performance Management: <http://www.nbim.no/en/About-us/governance-model/nbim-policies/performance-measurement/tp://www.nbim.no/en/About-us/governance-model/nbim-policies/performance-measurement/>

¹⁴ This is an excerpt from NBIM’s careers web page: <http://www.nbim.no/en/careers/>

“The overall compensation shall reflect the national and international framework **and business environment that NBIM operates within.**” ... **“Investment personnel in NBIM may be entitled to performance pay.** Performance pay shall only be linked to return targets for the funds’ investments in accordance with the risk profile of the funds under management.”¹⁵

¹⁵ This is an excerpt from the NBIM’s From the page on Principles for Compensation of NBIM Employees:
<http://www.nbim.no/en/About-us/governance-model/executive-board-documents/compensation/>

ANNEX III: DETERMINATION OF COMMERCIAL TRANSACTIONS: UN CONVENTION ON JURISDICTIONAL IMMUNITIES OF THE STATE ¹⁶

The *United Nations Convention on Jurisdictional Immunities of States and Their Property* on state immunity (signed and ratified by Norway) is understood to capture the latest thinking in determining if a State is involved in a commercial transaction (in the context of its ability to claim immunity from a law suit in another State). The provisions below show that the decision is based on the commercial nature of the transaction. It does not rest on the way the State has set up structures to engage in the commercial transaction. This illustrates the consistency with international standards of using activity rather than form or structure for determining whether a publicly owned or controlled organisation is engaged in *commercial* activity.

"Part II Proceedings in which State immunity cannot be invoked

Article 10

Commercial transactions

1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction."

Art 2.1(c) " is defined as:

(c) "commercial transaction" means:

- (i) any commercial contract or transaction for the sale of goods or supply of services;*
- (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;*
- (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons."*

¹⁶ Emphasis in this box is added.