



CONSULTATION ON AN UPDATE OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

Consultation Note

**8 December 2009
14:30 -18:00**

**OECD Conference Centre
Paris, France
Room 1**

CONSULTATION NOTE ON AN UPDATE OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

I. Introduction

1. The OECD Guidelines for Multinational Enterprises are recommendations by 42 OECD and non-OECD governments¹ covering all major areas of business ethics, including corporate steps to obey the law, observe internationally-recognised standards and respond to other societal expectations.

2. Since the Review of the Guidelines in 2000, the landscape for international investment and multinational enterprises has continued to change rapidly. The world economy has witnessed new and more complex patterns of production and consumption. Non-OECD countries are attracting a larger share of world investment and multinational enterprises from non-adhering countries have grown in importance. At the same time, the financial and economic crisis and the loss of confidence in open markets, the need to address climate change and green growth, and reaffirmed international commitments to development goals have prompted renewed calls from governments and social partners for high standards of responsible business conduct.

3. Against this background, at their Annual Meeting on 16-17 June 2009, National Contact Points (NCPs) recommended that under the auspices of the OECD Investment Committee, adhering countries review the experience gained with the implementation of the Guidelines with a view to defining terms of reference for a possible update of the instrument.² Shortly thereafter, at the 24-25 June 2009 OECD Council Meeting at Ministerial level, ministers from OECD and non-member countries welcomed “further consultation on the updating of the OECD Guidelines to increase their relevance and clarify private sector responsibilities”. Periodic review of this instrument is provided for in the OECD Declaration on International Investment and Multinational Enterprises and the 2000 Council Decision on the Implementation Procedures of the Guidelines.

4. This Note has been prepared to serve as a basis for (a) a multi-stakeholder consultation on an update of the Guidelines and (b) a dedicated meeting with enhanced engagement and other interested non-adhering governments. These two meetings will be held respectively on 8 December (14:30-18:00) and 9 December (9:30 -11:00) at the OECD Conference Centre, back-to-back with the 2009 Global Forum on International Investment.

5. The Note is structured as follows. Sections II and III contain a list of issues for consultation concerning respectively the content and the procedures of the Guidelines - that have been identified since the 2000 Review, in order to assist adhering governments in determining areas deserving special attention in an update of the Guidelines. Sections IV and V document avenues for consultation prior to an updating exercise as well as the modalities for conducting an update, should it be decided by adhering governments. A list of references is annexed to the document, as a further resource for the consultation partners.

6. The Consultation Note has benefitted from a first round of discussions in the Investment Committee’s Working Party and consultation with BIAC, TUAC and OECD Watch in October 2009, written comments by TUAC and OECD Watch and preliminary inputs provided as of 23 November 2009 by OECD bodies, international organisations and other stakeholders to the Investment Committee Chair at his request.

¹ The 30 OECD member countries and 12 non-OECD countries (Argentina, Brazil, Chile, Egypt, Estonia, Israel, Latvia, Lithuania, Morocco, Peru, Romania, Slovenia).

² Report by the Chair of the 2009 Annual Meeting of the National Contact Points
www.oecd.org/daf/investment/guidelines.

7. The Consultation Note will further revised in light of further inputs gathered at the 8 and 9 December meetings to serve as a basis for developing proposed terms of reference for a possible update for the Investment Committee Working Party's consideration in March 2010 and, for approval by adhering countries at Investment Committee level subject to appropriate amendments. Adhering countries hope to be in a position of taking a decision on launching an update by the time of the OECD Ministerial Meeting at the end of May 2010.

II. Substantive provisions

8. This section compiles substantive issues identified by NCPs, the Investment Committee and its Working Party, OECD bodies, international organisations, BIAC, TUAC and OECD Watch and other non-governmental organisations, as well as those raised in the context of discussions of the OECD Secretary-General with leading business organisations and communications by John Ruggie, the UN Secretary-General's Special Representative for Business and Human Rights, on the merits of updating the Guidelines' recommendations and/or the Commentaries.

9. *Technical updates* appear to be needed to ensure that the instruments cited in the Guidelines or the Commentaries are accurate and up-to-date. Selected examples include: new United Nations instruments such as the *Convention against Corruption* which entered into force in 2003; new OECD instruments such as the *OECD Principles of Corporate Governance* revised in 2004, the 2003 *OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders* or the two 2009 *Recommendations on Tax Measures for further combating bribery of foreign officials in international business transactions*. All relevant international organisations and OECD bodies will need to continue to be consulted to ensure that the references to their instruments are appropriate.

10. *Supply chain*. Several stakeholders consider that it would be important to give clearer guidance regarding the application of the Guidelines to supply chains. 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 Ruggie³, have shifted the focus from the sphere of influence toward the concept of "due diligence" that companies are expected to perform in light of their own circumstances in order to do no harm along their supply chains. A "due diligence" approach is used in the Environment Chapter of the Guidelines and is applicable to other areas, including human rights (see below).

11. Issues of a similar nature, and where "due diligence" may have relevance, have also arisen in the context of specific instances relating to lending and investing activities of financial institutions. New instruments or tools have also emerged on responsible lending or investment by financial institutions such as the *IFC Policy and Performance Environmental and Social Standards* (last revised in 2006), the *Equator Principles* (2003, 2006), and the *UN Principles of Responsible Investment* (2005) and *OECD Guidelines for Pension Fund Governance* (2009).

12. *Human rights*. Human rights are covered in several ways throughout the Guidelines, including core international labour rights under Chapter IV on Employment and Industrial Relations. Leading business organisations and commentators, including Professor Ruggie, have considered that the reference to respecting human rights "consistent with the host government's international obligations and commitments" in Chapter II on General Policies does not appear to provide sufficient guidance to companies in the event of supposed conflicting requirements between internationally-recognised standards on human rights and host country policies, including situations where the host country has not ratified a specific human rights instrument. It has also been noted that the Guidelines could benefit from reflecting guidance on other human rights aspects provided in the 2006 OECD

³ *Clarifying the Concepts of "Sphere of Influence" and "Complicity,"* 2008, A/HRC/8/16, 15 May 2008.

Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, such as management of security forces and relationship with local communities and indigenous people. The OECD Risk Awareness provides guidance to companies based on a “due diligence” approach (equivalently referred to as “heightened care”).

13. *Disclosure.* Since the 2000 Review, disclosure standards have evolved. The disclosure provisions of the *OECD Principles of Corporate Governance* have been revised in 2004. The Global Reporting Initiative developed the so-called *G3 Guidelines*. Other initiatives have emerged in the taxation field (see paragraph 17).

14. *Anti-corruption.* In view of the 2009 Recommendation for Further Combating Bribery of Foreign Officials in International Business Transactions, a number of issues may need to be addressed, including: small facilitation payments, the use of agents or other intermediaries, bribe solicitation and extortion, reporting foreign bribery and whistleblower protection, as well as further corporate compliance issues related to Good Practice Guidance currently being developed by the OECD Working Group on Bribery.

15. *Environment.* With growing concerns over climate change and attention to green growth and eco-innovation, the question has been raised as to whether there is a need to clarify the application of the Guidelines to these issues.

16. *Consumer interests.* A number of participants at the 2009 Corporate Responsibility Roundtable and the Chair of the Committee on Consumer Policy have expressed the view that Chapter VII on Consumer Interests could usefully expand beyond health and safety to cover other concerns, including education and awareness in light of recent recommendations developed by international organisations, including the OECD Committee on Financial Markets,.

17. *Taxation.* Chapter X on Taxation contains guidance to enterprises on how they should fulfil their tax obligations and provide information to the tax authorities. The question has arisen as to whether this chapter (or Chapter III on Disclosure) should include provisions on the disclosure of taxes, royalties and other payments to host governments consistent with the guidance already provided by such initiatives as the *Extractive Industry Transparency Initiative* and the *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*.

III. Procedural Provisions and Institutional Issues

18. NCP performance, including differences in institutional arrangements, promotional activities and the operation of specific instance facilities, has been a recurrent theme at past Annual NCP Meetings but has gained prominence in the last two years as a result of growing interest both by business, trade unions and non-governmental organisations, and in the work of Professor Ruggie. NCPs have also acknowledged that more work is needed to assess the merits of the issues raised.

19. *Functional equivalence and respect of individual circumstances.* It has been argued that disparities in NCP institutional arrangements and operational modalities may not be compatible with the “functional equivalence” objective and affect the credibility and effectiveness of the Guidelines. A question is whether the Procedural Guidance would need to be clarified or supplemented by new Commentaries or other means to give greater direction to the institutional structure and functioning of NCPs while maintaining the rights of adhering countries to adopt the most appropriate NCP structure that best fits their individual circumstances. Efforts need to be pursued to raise the awareness of the Guidelines and promote their use. Guidance to business as to how to better communicate with stakeholders, notably local ones, may also be considered. In addition, thought should be given to expand the resources of the Secretariat to provide “back-office” services to NCPs and allow more frequent occasions to exchange experiences and engage in peer learning.

20. *Multi-jurisdiction instances.* Another complicated situation NCPs have been facing concerns those specific instances involving multinational enterprises from different adhering countries working in consortium or similar arrangements. Multi-jurisdiction instances may also result in forum shopping. Would there be merit in developing further guidance in the Procedural Guidance or Commentary on how NCPs should co-operatively handle multi-jurisdictional cases?

21. *Ensuring credibility and efficiency of the implementation of the "specific instance" facility.* BIAC, TUAC, OECD Watch and Professor Ruggie have, in particular, made a number of suggestions for additional performance NCP criteria, including attention to avoiding conflicts of interest which may arise from the fact that NCPs are located in ministries responsible for trade, investment or business promotion. Adhering countries have also commented that additional guidance and clarity may be needed to ensure the consensual and non-adversarial role of NCPs in conciliating and mediating specific instances as well as the principle of confidentiality during the process of mediation and conciliation are well understood by the interested parties.

22. *Dealing with parallel proceedings and other situations.* Parallel proceedings are reported to be one of the main reasons for not taking up specific instances, at the dissatisfaction of the parties bringing the instances in question. Based on work in the Working Party and by individual NCPs⁴ on this matter, would there be merit in building further guidance in the Procedural Guidance or Commentary?

23. *Peer review.* 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. Should a more structured process be considered and built in the Procedural Guidance or Commentary? Lessons in this respect as well as other matters raised in this section can be expected from the volunteer peer review of the Dutch NCP to be carried out between October 2009 and March 2010.

24. *Relationship between the Guidelines and the OECD Declaration.* Delegates at the Working Party have raised the issue of the pros and cons of allowing for the possibility of decoupling the Guidelines from the Declaration, in light of situations where non-OECD partners would declare a willingness to adhere to the Guidelines while not being ready to adhere to the other instruments of the Declaration.

IV. Consultation process until March 2010

25. The main purpose of the planned consultation process is to:

- hear the views of consultation partners on an update on the OECD Guidelines for Multinational Enterprises;
- assist in the development of terms of reference as a prelude to a decision on such an update; and
- explore the interest of non-adhering governments in being involved, and in which forms, in an update of the Guidelines.

26. Adhering countries agree that the consultation process on an update of the Guidelines should be transparent and inclusive while allowing for solicitation of inputs from targeted expert partners.

27. Consultation partners include:

⁴ In September 2009 the UK NCP issued guidance to parties to specific instances on the approach, including principles, it intends to follow for handling situations of parallel legal proceedings.

- *Non-governmental stakeholders:* BIAC, TUAC, and OECD Watch; recognised experts and specialised business and civil society groups.
- *Interested non-adhering countries,* notably China, India, Indonesia, South Africa and Southeast Asia, consistent with the OECD's Enhanced Engagement resolution. The consultation process will also involve other interested non-adhering countries taking advantage of outreach events over the coming year.
- *OECD bodies.* Judging from the 2000 Review and emerging new issues, several OECD Committees will need to be involved including the Committee for Employment, Labour and Social Affairs, the Working Group on Bribery in International Business Transactions, the Committee on Industry, Innovation and Entrepreneurship, the Competition Committee, the Environment Policy Committee, the Steering Group on Corporate Governance, the Committee on Consumer Policy, the Committee on Fiscal Affairs, the Committee on Financial Markets and the Insurance and Private Pensions Committee.
- *International organisations responsible for key instruments related to the Guidelines.* The consultations extend to the organs responsible for the international instruments referred to in the Guidelines, including the International Labour Organisation, and the Office of UN Secretary-General's Special Representative for Business and Human Rights, as well as other organisations with which the Investment Committee has developed a special relationship around the Guidelines, including the UN Global Compact, the International Finance Corporation, the UN Principles for Responsible Investment and United Nations, UNEP Finance Initiative, UN Framework Convention on Climate Change, the Global Reporting Initiative, and the International Organisation for Standardisation (in the area of social responsibility).

28. Upcoming consultation events include:

- *Public consultation* with business, labour and other civil society stakeholders and international organisations on 8 December (afternoon) 2009 back-to-back with the Global Forum on International Investment.
- *Consultation and dialogue with non-adhering countries:* A first round of consultations with high level Thai officials and private sector representatives took place in Bangkok on 4 November 2009 (Thailand is the Chair of ASEAN 2009). A dedicated discussion with Enhanced Engagement and other interested partners which have not adhered to the Guidelines will be held on 9 December 2009. The G8 and G5 countries participating in the Heiligendamm - L'Aquila Process will be kept regularly informed by the OECD Secretariat of relevant developments. A regional consultation in Latin America is planned in Spring 2010.
- *Consultations with BIAC, TUAC and OECD Watch* on the occasion of the Investment Committee-related meetings in March 2010.

V. Oversight

29. During the October 2009-March 2010 period, the Bureau on behalf of adhering governments will be responsible for supervising the process of consulting stakeholders, non-adhering countries and relevant international organisations.

30. The Working Party, in which non-OECD adhering countries have participant status, will be the main resource body to carry out the work on an update, with the assistance of the Secretariat. Non-OECD adhering countries are by right entitled to participate in discussions of the Investment Committee where decisions relating to the Guidelines are being considered.

ANNEX - RESOURCE REFERENCES IN ANNUAL REPORTS ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

also available at www.oecd.org/daf/investment/guidelines

2001

- Strategic issues facing NCPs, pp 25-27.
- TUAC Survey of the Functioning of National Contact Points, pp 37-44.
- BIAC and NGO Statements on the OECD Guidelines for Multinational Enterprises, pp 31-35 and 45-48 respectively.
- The OECD Guidelines and Other Corporate Responsibility Instruments, pp 57-75.
- Summary of the 2001 Roundtable on “Global Instruments for Corporate Responsibility – Maximizing the Contribution of the Guidelines Relative to Other Global Instruments, pp 50-56.

2002

- Section V. Progress to date and considerations for future action (functional equivalence, relation with ILO, policy coherence and linkages, promotion, the role of the specific instance facility), pp 26-27.
- TUAC Working Paper on the Functioning of National Contact Points and How to Improve the Promotion and Implementation of the OECD Guidelines for Multinational Enterprises, pp 55-62.
- Summary of the Roundtable on Responsible Supply, pp. 65-75.
- BIAC Discussion paper on Supply Management, pp 81-88.
- Discussion Paper for the Meeting of the Trade Union Experts on the Implementation of the OECD Guidelines and the Functioning of National Contact Points, pp 125-132.
- Joint OECD-GRI Document on the Global Reporting Initiative and the OECD Guidelines (published separately).

2003

- Statement by the Investment Committee on the “Investment nexus, pp 21-22.
- Sections VI-VII. Follow-up and considerations for future action (NCP procedures, relationship between the Guidelines implementation and national legal, regulatory and administrative procedures, non-adhering countries), pp 23-27.
- Submissions by BIAC, TUAC and OECD Watch, pp. 87-107.
- Background paper on the Scope of the Guidelines, pp 39-43.
- Background paper on NCP procedures, pp 45-57.
- Anti-Corruption Instruments and the OECD Guidelines for Multinational Enterprises, pp 153-180.

2004

- Sections VI-VII on Follow-up and Considerations for Future Action (NCP procedures and parallel proceedings, transparency in the handling of specific instances, BIAC request for assistance for companies dealing with solicitation, determining whether and how the Guidelines are becoming a useful tool for international business, non-adhering countries, business and human rights and the work of UN Commission on Human Rights), pp 27-33.
- Submissions by BIAC, TUAC and OECD Watch, pp 91-115.
- BIAC position on Solicitation of Bribes, pp 79-63.
- Environment and the OECD Guidelines for Multinational Enterprises: Corporate Tools and Approaches, pp 163-191.

2005

- Section VII-VIII on Follow-up and Considerations for Future Action (NCP procedures and parallel proceedings, confidentiality, peer learning, promotion, non-adhering countries, pp 32-35.
- Letter of clarification to Swiss NCP regarding the application of the Guidelines to Swiss subsidiaries, p 26.
- Submissions by BIAC, TUAC and OECD Watch, pp. 113-139.
- Joint-UN document on the UN Global Compact and the OECD Guidelines, pp 84-92.
- Summary of the Roundtable on the Guidelines and Developing Countries, pp. 145-156.
- Corporate Responsibilities and Developing Practices of Emerging Market Companies, pp 157-184.
- Multilateral influences on the OECD Guidelines for Multinational Enterprises, pp. 185-200.

2006

- Sections VI-VII. Follow-up and Considerations for Future Action (parallel proceedings, co-operation among NCPs and with stakeholders, mediation), pp 26-33.
- Summary of discussions on NCP procedures and parallel proceedings, pp. 93-98.
- Comments by BIAC, TUAC and OECD Watch on parallel proceedings and specific instances, pp 99-108.
- Contributions by TUAC and OECD Watch to consultations with the Investment Committee, pp 111-124.
- Summary of the Roundtable on Developing a Proactive Approach to the Guidelines (largely devoted to mediation), pp 129-150
- OECD Risk Awareness Tool for Multinational Enterprises (as adopted by Council in June 2006), pp 153-186.

2007

- Section VI on Considerations for Future Action (NCP performance, supporting role of the Guidelines in the financial sector, non-adhering countries), pp 29-30.
- Joint-OECD-UN PRI Document on the OECD Guidelines for Multinational Enterprises: Complementarities and Distinctive Contributions, pp 181-193.
- The OECD Guidelines for Multinational Enterprises and the Equator Principles – Similarities, Differences and Synergies, pp 193-200.
- BIAC submission on the OECD Guidelines for Multinational Enterprises and the Financial Sector, pp 212-216.
- OECD Watch submission on the Supporting Role of the OECD Guidelines in the Financial Sector, pp 200-211.

2008

- Chapter 1, section 6 on Considerations for Future Action (peer leaning, mediation and conciliation, parallel proceedings, promotion, NCP resources), pp 22-24.
- Key Note Presentation by John Ruggie, Special Representative of the UN Secretary-General for Human Rights, pp 100-104.
- Submissions by TUAC and OECD Watch, pp 105-126.
- Review of NCP Performance: Key findings, pp 81-99.

2009

- Section VI, Considerations for Future Action (NCP performance, outreach, updating the Guidelines), DAF/INV/NCP(2009)1/REV1, pp 20-21.
- Summary of Roundtable on Consumer Empowerment and Responsible Business Conduct, DAF/INV/NCP(2009)2.