

CONSULTATION ON AN UPDATE OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

I. Introduction

1. The OECD Guidelines for Multinational Enterprises are recommendations by 41 OECD and non-OECD governments 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 a greater integration of 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.¹ 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 document provides a list of issues - concerning both content and 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 the context of consultations on an update of the Guidelines (Section II). In addition, the Note identifies options for consultation prior to an updating exercise as well as modalities for conducting this update, should it be decided by adhering governments (Sections III-V). A list of references is annexed to the document, as a further resource to delegations.

5. A first version of the document was discussed by the adhering countries at the meeting of the Investment Committee’s Working Party on 6 October 2009 and at a consultation on 7 October with BIAC, TUAC and OECD Watch. TUAC and OECD Watch also submitted written comments [DAF/INV/RD(2009)10]. The present document has been revised in light of these preliminary discussions.

6. Following the discussions in October, on behalf of the adhering countries, the Chair of the Investment Committee wrote to relevant OECD bodies and inter-governmental organisations such as ILO and UN, to seek their views on their possible inputs in an update of the Guidelines by 16 November 2009.

7. The list of proposed issues deserving special attention will be further revised in light of the views received under the guidance of the Bureau with the view to forming the basis of a broader consultation with stakeholders at a session back-to-back with the 2009 Global Forum on International Investment on 8 December, as well as a dedicated consultation with Enhanced Engagement partners which have not adhered to the Guidelines.

¹ Draft Report by the Chair of the 2009 Annual Meeting of the National Contact Points, DAF/INV/NCP(2009)1/FINAL

8. On the basis of the consultation document and further inputs gathered in December, a note on proposed terms of reference for a possible update could be prepared for discussion by the Working Party in March 2010 and then revised as needed for approval by adhering countries at Investment Committee level. The OECD hopes to be in a position of taking its decision on the official launch of an update at the OECD Ministerial Meeting in June 2010.

II. Substantive provisions of the Guidelines

9. This section lists issues identified in discussions within NCPs, the Investment Committee and its Working Party, during consultations with BIAC, TUAC and OECD Watch and discussions of the OECD Secretary-General with leading business organisations, as well as 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.

10. *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* adopted in 2003; the *OECD Principles of Corporate Governance* revised in 2004; or the recent *Recommendation on Tax Measures for further Combating Bribery of Foreign Officials in International Business Transactions* entered into force in 2009. Relevant international organisations and OECD bodies will be consulted to ensure that the references to their instruments are appropriate.²

11. *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).

12. 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).

13. *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

² The Inventory of Possible Policy Instruments jointly developed by the OECD and other international organisations in March 2009 as a contribution to the discussion on the Lecce Framework and a Global Charter provides an updated list of instruments contributing to the more stable and sustainable development of the global economy. <http://www.oecd.org/dataoecd/35/63/42393042.pdf>.

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

guidance on other human rights aspects provided in the 2006 OECD 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”).

14. *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*.

15. *Anti-corruption.* The Chair of the Open Study Group on Small Facilitation Payments of the OECD Working Group on Bribery has communicated an interest of the Working Group in contributing to an update of the Guidelines, in particular in the areas of small facilitation payments.

16. *Environment.* With growing concerns over climate change and attention to green growth,⁴ the question has been raised as to whether there is a need to clarify the application of the Guidelines to climate change and green growth issues.

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

18. *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 should include provisions on the disclosure of revenues to host governments consistent with 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*.⁵ This issue is also relevant to the clarification or strengthening of Chapter III on Disclosure. The Secretariat of the newly established Global Forum on Transparency and Exchange of Information has communicated an interest of Forum members in the issue in the context of an update of the Guidelines.

III. Guidelines’ Procedural Guidance and other issues

19. 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.

20. *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

⁴ September 2009 G20 Pittsburgh Summit communiqué; July 2009 L’Aquila G8-G5 Joint Declaration “Promoting the Global Agenda”; Green Growth Declaration adopted at the June 2009 OECD Ministerial Meeting [DAF/INV/RD (2009)6].

⁵ Canada, Germany, Finland, France, Italy, Japan, the Netherlands, Norway, Spain, Sweden, Switzerland, the United Kingdom and the United States subscribe to the Extractive Industry Transparency Initiative as all OECD members to the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones.

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.

21. *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?

22. *Ensuring credibility and efficiency of the implementation of the "specific instance" facility.* BIAC, TUAC, OECD Watch and Professor Ruggie have 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.

23. *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 NCPs⁶ on this matter, would there be merit in building further guidance in the Procedural Guidance or Commentary?

24. *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.

25. *Relationship between the Guidelines and the OECD Declaration.* Delegates at the Working Party at its meeting on 6 October 2009 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

26. The main purpose of the consultation process is to:

- hear the views of consultation partners on areas for priority attention in the event of an update;
- identify the need and options for specific revisions to the text of the Guidelines and Commentaries, including on implementation procedures; and
- explore the interest of non-adhering governments in being involved, and in which forms, in an update of the Guidelines.

⁶ The UK NCP issued guidance to parties to specific instances on the approach, including principles, the NCP intends to follow to handling parallel legal proceedings on 16 September 2009, which was made available to other adhering countries at the meeting of the Working Party on 6 October 2009.

27. 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.

28. Consultation partners include:

- *Non-governmental stakeholders:* BIAC, TUAC, and OECD Watch; and recognised experts and specialised business and civil society groups.
- *Interested non-adhering countries,* with priority given to China, India, Indonesia, South Africa and Southeast Asia consistent with the OECD's Enhanced Engagement resolution. The consultation process may also involve other interested non-adhering countries taking advantage of outreach events over the coming year (see also section below).
- *OECD bodies.* Judging from the 2000 Review and emerging new issues, several OECD Committees may need to be involved including ELSAC, the Working Group on Bribery in International Business Transactions, EPOC, CCP, CSTP, the Competition Committee, the Steering Group on Corporate Governance; the Committee on Fiscal Affairs, the Committee on Financial Markets, the Insurance and Private Pensions Committee.
- *International organisations responsible for key instruments related to the Guidelines.* The consultations would need to extend to the organs responsible for the international instruments referred to in the Guidelines, including ILO, 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 UNGC, UNPRI and ISO.

29. Upcoming consultation events include:

- Special consultation session with business, labour and other civil society stakeholders and international organisations in 8 December 2009 back to back with the Global Forum on International Investment.
- *Consultation and dialogue with non-adhering countries:* The possibility of arranging a dedicated discussion with Enhanced Engagement partners which have not adhered to the Guidelines also in December will be explored. (G8 and G5 countries in the Heiligendamm - L'Aquila Process could be informed and updated regularly by the OECD Secretariat on developments in an update of the Guidelines at its upcoming investment meetings). A first round of consultations with ASEAN countries co-chaired by Thailand (as host for ASEAN 2009) is planned in Bangkok on 4 November 2009, as well as possibly in early Spring in Lima with Latin American countries.
- Consultations with BIAC, TUAC and OECD Watch on the occasion of the Investment Committee-related meetings in March 2010.

V. Oversight and resources

30. Between the October meeting and the March meeting, the Bureau on behalf of the adhering countries would be responsible for supervising the process of consulting stakeholders, non-adhering countries and relevant international organisations.

31. 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 entitled to participate in discussions of the Investment Committee where decisions relating to the Guidelines are being considered [C(2001)106/REV1].

32. As this work is expected to put pressure on the Secretariat's limited resources, adhering governments have been invited to make voluntary contributions (secondment or additional funding) to facilitate the preparation and eventual conduct of an update of the Guidelines.

Appendix
**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.