
TUC submission (January 2010)

UK Government consultation on the Terms of Reference for an update of the OECD Guidelines for Multinational Enterprises

About the TUC

1. With member unions representing some 6.2 million working people, the TUC campaigns for a fair deal at work and for social justice at home in the UK and abroad. The TUC, together with its member trade unions are affiliated to a range of European, and international trade union bodies. Together this global trade union family places respect for human and trade union rights at the centre of its work, and in particular rights to freedom of association and collective bargaining.
2. The TUC is represented on the Steering Board of the UK National Contact Point (NCP) to the OECD Guidelines (the “Guidelines”) by Lord Jordan, with Ben Moxham, TUC policy officer, as his substitute. The TUC is also an active member of the Trade Union Advisory Committee to the OECD (TUAC) inputting into its submissions to the OECD Investment Committee. Parts of this submission are drawn from TUAC’s submission to the OECD Investment Committee of 7 October 2009.¹

Introduction

3. The TUC welcomes the opportunity to submit its views to the UK consultation on the terms of reference for an update of the OECD Guidelines for Multinational Enterprises. Since the Guidelines were updated in 2000, trade unions, and the national federations and global union federations that represent them have been the most frequent users of the OECD Guidelines complaints mechanisms.² While much of that experience feeds into this submission, trade unions have also been frustrated generally at the performance of NCPs, interpretations of the Guidelines text, and the outdated nature of the text itself. The proposed OECD review in June 2010 is therefore a welcome opportunity to address these concerns.

¹ TUAC (2009), TUAC submission to the OECD Investment Committee, Paris 7th October 2009.

² OECD (2008), Annual Report on the OECD Guidelines for Multinational Enterprises, p. 21.

4. Simply put, the TUC suggests that the terms of reference for the proposed update of the OECD Guidelines for Multinational enterprises be framed broadly enough to include the following substantive and procedural issues. This submission also suggests possibly modalities of the update.

Substantive issues related to the Guidelines

5. *Supply Chains and the investment nexus*: The key priority for the TUC in updating the Guidelines is to ensure that they clearly and sensibly apply to the supply chains of enterprises operating in or from countries adhering to the Guidelines.
6. The biggest impact that UK businesses have on human and labour rights is in the vast global supply chains that they source from. For example, the 57 member companies of the Ethical Trading Initiative (UK) reported last year that their ethical efforts covered some 8.6 million workers in 40,000 workplaces across the globe. This is only a fraction of the total supply chains producing for UK markets.
7. Yet many NCPs interpreting the current text and commentary accompanying the Guidelines find that supply chains are not covered by the Guidelines because there is no “investment nexus” between the enterprise and the countries where they source from. The Guidelines currently require enterprises to: “encourage where practicable, business partners, including suppliers and sub-contractors to apply principles of corporate conduct compatible with the Guidelines”.³ The OECD Investment Committee issued a clarifying statement in April 2003 that said that, on the one hand application of the Guidelines depends on the “presence of an investment nexus”, and on the other hand that “flexibility is required” when determining the Guidelines application to suppliers or business partners. This has created confusion over whether or not an “investment nexus” is required for the Guidelines to apply and resulted in NCPs adopting different and often conflicting interpretations.
8. Yet an enterprise can profoundly affect the rights of workers in its supply chain irrespective of the existence of an “investment nexus”. For example, a high street retailer could place a large order with a supplier on tight deadlines for very low unit costs. A predictable result of this action could be unsafe levels of overtime, breaches of the minimum wage, or the use of child and forced labour to meet the order. Unless the Guidelines addresses such situations in supply chains – like most multi-stakeholder initiatives and

³ Chapter II, Clause 10.

CSR tools now do⁴ -- they risk becoming irrelevant, as enterprises increasingly outsource activities that they previously directly invested in.

9. While the responsibility of enterprises to the human and labour rights in their supply chain can be complex, the TUC supports the inclusion of text in Guidelines which provides that: *“An enterprise must take reasonable steps to ensure that it does not harm the human rights of workers and other stakeholders in its supply chains.”*⁵
10. The TUC recognises that labour rights abuses in supply chains cannot solely be addressed through improving the text of the Guidelines and the functioning of NCPs. Companies need to make serious investments in supporting suppliers and local trade unions to drive sustainable improvement in working conditions – in cooperation with governments that are effectively implementing labour laws. Therefore the suggested text includes the phrase “reasonable steps” to ensure that corporate good practice is required, striking a balance between harder language that would be unachievable, or softer aspirational language that would place no real obligation on enterprises to address rights abuses in their supply chains.
11. *Living wage*: The TUC supports the inclusion of a requirement in the Guidelines that enterprises ensure that workers in their supply chains are paid a living wage. Decent wages paid to workers in supply chains, particularly in the garment and food sectors, are a critical source of social protection for the poorest in the developing world, particularly during the current global economic crisis. For example, decent wages paid to Cambodian garment workers have allowed them to send remittances back to their rural families, helping them to survive food shortages during the global food, fuel and economic crisis.⁶ In recognition of this, the requirement to providing a living wage is now included in credible multi-stakeholder initiatives.⁷ Critically, it has always been enshrined in Article

⁴ For example, the current draft of ISO standard 26000 on Social Responsibility – an attempt at devising a definitive global standard on CSR - addresses organisational responsibility to stakeholders in their ‘value chains’.

⁵ Such a statement is in accordance with the concept of “due diligence” as developed by Prof John Ruggie, the UN Special Representative on Business and Human Rights, which is now being taken up by a variety of organisations.

⁶ See Polaski, Sandra, (2009) “Harnessing global forces to create decent work in Cambodia”, International Labour Office pp. 11-12.

⁷ See clause 5 in the Ethical Trading Initiative Base Code available at:
http://www.ethicaltrade.org/sites/default/files/resources/ETI%20Base%20Code%20-%20English_0.pdf

23(3) of the Universal Declaration of Human Rights⁸ and was added to the Constitution of the ILO itself through the 1944 Declaration of Philadelphia.⁹

12. *Direct, permanent work*: Trade union experience shows that the more a company outsources, the greater the risk that a serious labour rights abuse will occur. This is particularly true for vulnerable workers such as migrant or women workers. The TUC supports language placing a positive obligation on enterprises to provide direct and permanent employment. See for example, provision 8.2 of the ETI Base Code:

“Obligations to employees under labour or social security laws and regulations arising from the regular employment relationship shall not be avoided through the use of labour-only contracting, subcontracting, or home-working arrangements, or through apprenticeship schemes where there is no real intent to impart skills or provide regular employment, nor shall any such obligations be avoided through the excessive use of fixed-term contracts of employment.”¹⁰

13. The TUC does not envisage a comprehensive rewrite of the Guidelines during the update, but does encourage the UK government to support terms of reference that allow for all chapters of the Guidelines to be updated. Some areas of priority for the TUC are highlighted below.
14. Sub Clause 1(d) in Chapter IV should have a more expansive list of grounds upon which discrimination can occur, including sexuality, disability, age, marital status, and union membership. Further, the clause should apply not just with respect to employment or occupation, but also to hiring, compensation, access to training, promotion, termination and retirement.
15. The TUC supports the creation of a chapter on human rights. As the ITUC Annual Survey of violations of trade union rights show – too often trade unionists are killed or attacked in carrying out their duties.¹¹ While the current Chapter IV on employment captures part of these violations, it does not capture their gravity.
16. On Chapter V – Environment: this chapter needs to be updated to ensure enterprises are obliged to take steps towards achieving a “just transition”: a

⁸Article 23(3) of the UDHR provides that: “Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.”

⁹ ILO Declaration of Philadelphia (1919), available at: <http://www.ilo.org/ilolex/english/iloconst.htm>

¹⁰ http://www.ethicaltrade.org/sites/default/files/resources/ETI%20Base%20Code%20-%20English_0.pdf

¹¹ Globally, 76 labour activists were killed in 2008. The ITUC Annual Survey is available at: <http://survey09.ituc-csi.org/survey.php?IDContinent=0&Lang=EN>.

fair and sustainable shift to a low carbon economy, a key part of which is replacing carbon intensive jobs with green ones.

17. The chapters on taxation, disclosure, consumer interest, competition and finance should all be updated, in light of recent UN or OECD treaties, and particularly efforts to strengthen global regulation in the wake of the financial crisis.

Procedural issues related to the Guidelines

18. Key reforms to the UK NCP in 2006 have resulted in a marked improvement in the timeliness, credibility, predictability and procedural fairness of the UK NCP's handling of complaints – as acknowledged by all external stakeholders on the NCP Steering Board. Yet many other NCPs have not adopted such changes, resulting in highly uneven performance, with frequent cases of NCPs failing to apply even the most basic principles of procedural fairness. For the update of the Guidelines the UK government should lobby for its own 2006 procedural improvements to be included in the core text of the Guidelines. These are discussed briefly below.
19. *Timetables*: NCPs should aim to resolve complaints within a clear time period. The UK NCP aims to resolve complaints within 12 months of receiving them, allowing three months for considering the initial complaint, six months to conduct mediation and a final three months to investigate the complaint and issue a final statement.¹² Such deadlines have resulted in tremendous improvements in the fairness and effectiveness of the NCP in handling cases.
20. *Mediation and adjudication*: NCPs need to offer both mediation and adjudication to resolve complaints effectively. Engaging the services of a professional, experienced, trusted mediator, independent from NCP staff that may 'adjudicate' or issue a final statement on the matter is essential.
21. *Ensure a representative oversight mechanism*: A steering board can provide important oversight to the work of an NCP. The UK experience suggests that such oversight greatly increases NCP performance, particularly in adhering to timetables, and also helps in developing guidance to resolve issues as they arise (see parallel proceedings guidance below). Having external members on the steering board (trade unions, business and NGOs) also increases confidence in the NCP, and raises its profile.
22. *Transparent processes*: To maintain confidence in the NCP process, it is essential that initial and final statements of the NCP be publicly available

¹² The UK NCP complaints procedure is available at <<http://www.berr.gov.uk/files/file53070.pdf>>.

and that all parties to the complaint receive communications from the NCP and each other. The requirement that mediation be kept confidential is reasonable in order to guarantee the good faith of the parties to the dispute and the integrity of the process. Worryingly, NCPs adopt widely varying practices, with some maintaining that the entire process should be confidential.¹³ Such a narrow approach is unworkable and a key reason why NCPs complaints mechanisms in many countries are largely under-utilised.

23. *Clarity on approach to parallel proceedings:* Parallel proceedings are the most frequently cited reason for turning down or delaying dealing with a complaint under the Guidelines,¹⁴ and accordingly, a key reason why many trade unions refuse to use the Guidelines. Many NCPs automatically reject complaints under the Guidelines where there is a parallel legal proceeding deciding on similar issues.¹⁵ However, many complainants use the Guidelines precisely because the parallel proceeding is ineffective, especially where the NCP process can offer helpful mediation that the parallel proceeding cannot. The UK NCP has issued sensible guidance on the issue providing that the NCP will only suspend a complaint where a party to the complaint can demonstrate that it faces a significant risk of prejudice as a result of the parallel proceeding, if the complaint continues.¹⁶
24. *A right of review:* Both complainants and enterprises should have the right to seek the review of a decision of an NCP. Members of the UK NCP Steering Board currently can currently form a review panel to fulfil such a function.¹⁷
25. *Follow-up procedures and public policy sanctions:* Given the non-binding nature of the Guidelines, enterprises often refuse to participate or cooperate with complaint procedures. This can include the refusal to participate in dialogue or mediation, provide evidence to an investigation, or to comply with the recommendations made by an NCP in its final statement. Such non-compliance severely undermines the credibility of the Guidelines and is another key reason why potential complainants do not use the Guidelines. Further, enterprises acting ethically can pay a premium for doing so when there is nothing compelling their competitors to do so.
26. Several steps can encourage enterprises to cooperate with complaints procedures. Firstly, where enterprises refuse to cooperate, final statements should issued and made public. Secondly, NCPs should follow-up with

¹³ See e.g. the practice of the Australian NCP.

¹⁴ OECD 2008.

¹⁵ See e.g. the practice of the US and Japanese NCP.

¹⁶ The UK NCP guidance on parallel proceedings is available at: <http://www.berr.gov.uk/files/file53069.pdf>.

¹⁷ The UK NCP guidance on review is available at <http://www.berr.gov.uk/files/file49813.pdf>.

enterprises to find out whether or not recommendations have been implemented. Finally, where a company is in continued non-compliance with NCP recommendations, the adhering country government should apply public policy sanctions against the company, including requiring them to report publicly on their non-compliance, and limiting their ability to seek government assistance.

27. Incorporating these procedural principles into the text of the Guidelines texts would be a remarkable success. The TUC strongly encourage the UK government to work pro-actively in convincing other adhering countries to support such a position.
28. *Introduce a mandatory peer review process:* To ensure these procedures are not only adopted, but improved over time, there should be a mandatory NCP peer review process, in line with OECD good practice. To date, there is no requirement for NCPs to undergo any sort of peer review, resulting in highly uneven and unpredictable performances. Annual reporting to the OECD Investment Committee is the only form of assessment and provides no means of holding NCPs to account for poor performance. The pilot peer review of the Dutch NCP is being undertaken on a wholly voluntary basis and primarily in response to national requirements. The provision for peer review must be mandatory, as a voluntary process would suffer from either NCPs failing to volunteer, or, as is the case with the Dutch, only the better performers doing so. A similar process of peer review could also be formalised as part of the handling of multi-country complaints, where a complaint is filed with more than one NCP. While one NCP leads, the other NCPs could provide oversight or mentoring.

Process of the Update

29. The TUC encourages the UK government to ensure that the process of updating the OECD Guidelines is as participatory, progressive and effective as possible and suggests the following steps in order to achieve this:
 - a. Put in place safeguards to ensure that this is an upgrade, not a downgrade;
 - b. Ensure the OECD meaningfully engages key non-adhering countries such as India and China;
 - c. As the UK government has a shared agenda with networks such as TUAC, draw on such networks to assist with influencing and lobbying other adhering countries;

- d. Engage the ILO and the office of the UN Special Representative on Business and Human Rights to ensure coherence with their work, and to draw on their expertise; and
- e. Ensure that any OECD working group established for the purposes of updating the Guidelines includes TUAC and other key stakeholders.