

TOWARDS PRO-ACTIVE IMPLEMENTATION OF THE OECD GUIDELINES

OECD Watch submission to the 2011 Annual Meeting of the National Contact Points

Introduction

OECD Watch welcomes the recent update of the OECD Guidelines for Multinational Enterprises. This submission is a supplement to the OECD Watch May 2011 statement on the update. The earlier statement details the improvements and shortcomings of the "new" OECD Guidelines. This submission outlines OECD Watch's vision for effective implementation and enforcement of the updated Guidelines, and elaborates on recent developments among NCPs.

Updated Guidelines: The way forward

OECD Watch welcomes the changes to the OECD Guidelines that confirm and broaden the scope of the instrument to the global activities and all business relationships of MNEs. The new text introduces valuable provisions on human rights, business relationships, workers and wages, and climate change.

However, the updated procedures for the implementation of the OECD Guidelines do not provide adequate assurances, mandatory oversight and peer review mechanisms to ensure consistent, coherent and effective NCP performance. Responsibility rests firmly with individual NCPs and adhering governments to demonstrate real political will to uphold corporate accountability best practice via the state.

This update comes with an **obligation and opportunity** for the OECD and adhering countries, to strengthen the effectiveness of this unique instrument for promoting responsible business conduct in the global context.

The update provides an ambitious agenda for the OECD Investment Committee and the Secretariat, individual NCPs, enterprises and civil society organisations. As such, OECD Watch recommends active stakeholder engagement to pursue a pro-active agenda to ensure the fullest implementation of the OECD Guidelines by enterprises throughout their activities and relationships.

Pro-active agenda for the OECD Investment Committee & Secretariat

The update added a new commitment to the Implementation Procedures, requiring the Committee to pursue a pro-active agenda that promotes the effective observance by enterprises of the principles and standards contained in the Guidelines. OECD Watch urges the Committee to take into consideration the issues highlighted in the Chair's report as particularly worthy of additional work:

- **Referencing instruments and initiatives:** there is general agreement that as follow up to the updated Guidelines, a resource document be developed which provides descriptions and links to relevant corporate accountability references and initiatives. OECD Watch assumes the key stakeholders (BIAC, TUAC, OECD Watch) will be actively involved in scoping the 'reference guide' terms of reference in support of the Investment Committee, and to ensure policy coherence with international standards and principles.

- **Supply chains and due diligence.** The Working Party has agreed to do further analytical work on the added value of bringing the excluded subject matters (competition, science and technology and taxation) – back into the scope of the supply chain and due diligence provisions. OECD Watch supports the inclusion of the general principle of due diligence in the updated Guidelines. However, as stated by US Secretary of State Hillary Clinton at the Commemoration of the 50th Anniversary of the OECD, “due diligence, while not always easy, is absolutely essential”. As such, OECD Watch requests consideration be given to applying a due diligence framework to the Science and Technology, Competition and Taxation provisions. For example, considering the merits of due diligence to avoid anti-competitive practices that adversely affect suppliers and consumers; due diligence to avoid intellectual property rights that adversely affect local communities and indigenous communities; and due diligence to avoid tax evasion and transfer pricing which can adversely affect developing country revenues, thereby undermining their capacity to alleviate poverty and pursue sustainable development initiatives.
- **Relevance of the Guidelines for the financial sector.** OECD Watch is committed to progressing its work to date (e.g. the 2007 OECD Watch Briefing Paper on the OECD Guidelines and the financial sector, and its 2009 Submission ‘Effective application of the OECD Guidelines to the financial sector’) to clarify the implementation of the OECD Guidelines to the financial sector. We welcome the recommendation in the Report of the Chair of the Working Party of the Investment Committee on the Update of the Guidelines for MNEs (Chair’s report) to undertake further work in this area. Although the application of the OECD Guidelines to *all business sectors* was confirmed in the update, the treatment of this issue is limited to a short reference in the commentary on General Policies. Further consideration of the finance sector is needed to better understand “when are financial institutions **causing**, either directly or indirectly, adverse impacts, and when are they **contributing** to such impacts, and what steps should they take even if they have **not contributed** to the impact but are nonetheless **associated with abuses**”? via clients or services. To address this, financial institutions could make public all social and environmental risk assessments undertaken as part of credit check processes. OECD Watch recognises that the applicability of the OECD Guidelines to financial institutions is not without its challenges particularly with regard to the growing dominance of “new financiers” from countries such as China, Vietnam, Thailand, and others. Work to date by OECD Watch confirms that investment due diligence is challenging yet necessary. OECD Watch agrees with the Chair’s report on the need to involve relevant experts and international bodies. For example, OECD Watch members have identified the recent update of the IFC Performance Standards, which recognise the rights of Indigenous Peoples and the need for contract disclosure, as relevant to the financial sector. Similarly, global developments on contract disclosure and the Dodd-Frank Securities and Exchange Commission listing rules, are relevant to financial institutions and will assist in combating bribery and corruption.
- In addition to the proposed work on the finance sector, OECD Watch recommends the Investment Committee commence work in developing **sector-specific guidance** for the implementation of the OECD Guidelines, to help identify risks of adverse impacts associated with particular products, regions, sectors or industries. OECD Watch can confirm that human rights violations and environmental degradation often occur in the extractive sector, agribusiness (e.g. palmoil), hydropower and manufacturing industries such as garments and electronics. The sector specific guidance should be developed in consultation with stakeholders to reflect the emergence of new industries in developing countries, the speed and scale of development, and their social and environmental challenges.
- Undertake analysis and make policy recommendations for more effective observance by enterprises to the principles and standards contained in the Guidelines through **better policy coherence**. For example, by making observance to the OECD Guidelines conditional for receiving government support, such as export credits.
- Develop practical guidance for the implementation of new provisions of the OECD Guidelines. OECD Watch proposes that decent wages are an issue that needs further elaboration, given that the updated Guidelines now provide a provision to meet the basic needs of workers and their families in different

regions. The OECD could draw from existing methods for calculating living wages, and the experience within Multi-stakeholder Initiatives in addressing the challenges to meet the 'living wage' standard.¹

- Develop further guidance on **meaningful stakeholder consultations**. The Report of the Chair of the Working Party of the Investment Committee on the Update of the Guidelines for MNEs states that "Many delegations stressed during the discussions of the new recommendation on stakeholder consultations (Chapter II.A14) that consultations with Indigenous Peoples may pose special challenges and, for this reason, may require special care. Other delegations emphasised that the groups cited in paragraph 40 of the human rights commentary might also require special care in the context of consultations." Nonetheless OECD Watch considers this a critical component in progressing the responsible business agenda and in further implementing the OECD Guidelines. OECD Watch recommends the Investment Committee commit to developing further guidance on stakeholder consultation, based on existing international best practice to ensure that the consultation is indeed meaningful, inclusive and participatory.
- Start the process of the **joint peer learning and peer review** in which NCPs will engage as stipulated in the Commentary on the Implementation Procedures. OECD Watch recommends that peer learning activities include the relevant stakeholders involved (such as complainants and defendants in specific instances) to ensure lessons learned by stakeholders are taken into account. OECD Watch recommends the Investment Committee to establish and maintain a log of NCPs signing up for peer review which includes a schedule for implementation, of for example four NCP peer reviews per year.

Recommendations to adhering governments and NCPs

OECD Watch recommends that adhering governments:

- Take due account of the **changes in the procedural guidance**, and assess whether their institutional arrangements and procedures meet the updated the Guidelines. OECD Watch recommends each NCP to evaluate their operations and procedures, and share these findings. This in turn will support the efforts to enhance peer learning. In particular, paragraph one under Institutional Arrangements of the Procedural Guidance to NCPs should be taken into consideration as it stipulates that NCPs be composed and organised in such a way to ensure an effective basis for dealing with the broad range of issues covered by the Guidelines and enable the NCP to operate in an impartial manner.
- **Ensure policy coherence** by providing an inventory of relevant government programmes and policies that need to be advised of all final statements and reports by their NCPs. This will help ensure all relevant governments departments are aware of the OECD Guidelines and assist in ensuring an all-of-government approach to responsible business conduct.
- Sign up for **peer review** and share learning's with all NCPs and stakeholders.
- Ensure the NCP is **adequately resourced** and has the capacity to effectively fulfil its responsibilities for promotion, mediation, translation, examination and fact finding. Furthermore, adhering governments need to support the Programme of Work of the OECD Secretariat of the Investment Committee, to ensure the effective implementation of the strengthened commitments in the updated Guidelines including the pro-active agenda.

Recommendations to business

OECD Watch notes BIAC's call for a transition period for the implementation of the updated OECD Guidelines by enterprises. OECD Watch welcomes the pro-active approach this implies, where enterprises will assess what the new provisions of the OECD Guidelines mean for their business operations and relationships, including supply chains, and commence implementation of due diligence processes. The updated OECD Guidelines establishes that enterprises should avoid causing or contributing to adverse

¹ Many Multi-Stakeholder Initiatives (MSIs) include a provision on 'living wage' in their codes of conduct, like Social Accountability International (SAI)'s SA 8000 standard, The Ethical Trading Initiative (UK) and the Fair Wear Foundation (Netherlands).

impacts through their own activities or through business relationships, and it recommends that companies exercise due diligence to ensure they live up to their responsibilities.

OECD Watch calls on all MNEs operating in or from adhering countries to review and disclose their internal risk management systems (including social and environmental impact assessments) and ensure they align with the provisions in the OECD Guidelines regarding general due diligence and, in particular, human rights due diligence. It is critical that risk management systems not only consider the risks to the enterprise, but also, and equally, the risk to individuals, communities and the environment.

Further, OECD Watch draws the business community's attention to the general policy on stakeholder engagement. As agreed, stakeholder engagement should be meaningful, and provide real opportunity for civil society organisations and affected communities to participate and have their views taken into account. This should meet recognised standards for consultation such as equality, respect, timeliness and transparency.

Follow up by OECD Watch

OECD Watch recognises it plays a key role in progressing the pro-active agenda to assist in the implementation and effectiveness of the Guidelines. The network will continue to monitor the effectiveness of the instrument as a corporate accountability tool and build civil society capacity. To achieve this we will:

- Update our guidance and training material for civil society organisations to reflect the updated provisions and procedures.
- Undertake regional capacity building and training of civil society organisations and strengthen collaboration with southern partners.
- Maintain OECD Watch's database of specific instance filed by NGOs and seek alignment of this information with the database to be developed by the OECD Secretariat.
- Continue to contribute to the work of the OECD Investment Committee and Secretariat, in particular with regards to the pro-active agenda and the identification of risks of adverse impacts in specific sectors and regions.
- Continue to build relationships with relevant stakeholders including multilateral institutions, governments and business, in particular financial institutions and the investment community.
- Exercise, if necessary, our right to request clarification from the Investment Committee when we consider an NCP has failed to fulfil its responsibilities with regard to its handling of specific instances or when we feel the Guidelines have been incorrectly interpreted.

OECD Watch 2010-2011 review of NCPs

During the 2010-2011 implementation cycle, OECD Watch members and other civil society organisations have taken a fresh look at the functioning of "their" NCPs through the lens of the updated OECD Guidelines. From this reflection and analysis, a number of general conclusions regarding the location and structure of NCPs, the resourcing of NCPs, promotion of the Guidelines, and the handling of specific instances can be drawn.

Location and structure

Despite the updated Guidelines' commitment to impartiality, OECD Watch members continue to observe potential and real conflicts of interest related to the current housing and structures of various NCPs. NCPs being located in single ministries or institutions such as treasury, economics and investment divisions continue to cause concern.. For example, in the case of the Luxembourg NCP, which is housed in the ministry of Economics, there is a clear conflict of interest as the Minister of Economics is board member of ArcelorMittal against which a case has been filed. Also in cases filed at the German and Swiss NCPs complainants have felt that the NCP location has contributed to a bias towards business.

Handling of specific instances

Complainants have experienced ambiguity regarding the timelines and procedures followed by NCPs. Additionally, inadequate resources of NCPs have hindered progress (such as fact-finding) in various complaints pending in 2010-2011. Requests of various complainants in cases towards to NCP to undertake fact finding or even translate key documents into the language of local groups have not eventuated.

Promotion of the OECD Guidelines

OECD Watch members have participated in several national stakeholder meetings to discuss the update of the OECD Guidelines. Unfortunately, not all NCPs have actively ensured that meaningful and comprehensive input into the update process could be given. Members have also advised that the promotional function of NCPs is hardly exercised and deserve significantly more attention. OECD Watch advises that active and timely engagement with civil society is a key responsibility of NCPs and should as such receive far greater emphasis.

Improvements

Noteworthy improvements have been recognised at the UK NCP. For example, the UK NCP has concluded cases against BP and consortium partners for their involvement in the BTC pipeline running through Turkey, Georgia and Azerbaijan, and the case against BAE Rolls Royce Airbus for allegedly not adhering to the UKs Export Credit Guarantee Departments (ECGD) new anti-corruption measures. Concluding the cases took respectively 8 and 6 years and their handling varied over the years. Internal changes and new procedures have nevertheless improved the NCP's handling of cases significantly.

NCP Highlight: Restructuring of Norwegian NCP

In March 2011 a new Norwegian National Contact Point for the OECD Guidelines was established. The Ministry of Foreign Affairs and Trade and Ministry of Community selected the new head of the restructured NCP, based on recommendations of the Norwegian Confederation of Trade Unions (LO), the Confederation of Norwegian Enterprise (NHO) and the NGO Forum for Environment and Development (ForUM). Professor Hans Petter Graver, Dean of the University of Oslo, has been appointed as head of the restructured NCP. Additionally the NCP consist of three more members. The Norwegian NCP has become an independent body now it has moved out of the Ministry of Foreign Affairs and is co-located with the Council on Ethics for the Government Pension Fund Global. The NCP is still administered under the Ministry of Foreign Affairs, but has its own budget and its own secretariat with two full time staff.

OECD Watch welcomes the restructuring of the Norwegian NCP, and recognizes this as a move into the right direction. Communication and transparency with the Norwegian NCP has improved with its new structure. This is welcome. A challenge for the NCP is to revitalize interest in the OECD Guidelines, become more visible and improve the handling of OECD Guidelines complaints filed.

NCP Highlight: Reform of US NCP

After a year-long engagement process between NGOs, labor, business and government, the U.S. State Department announced in June of 2011 new procedures governing the operations of the office of the National Contact Point, as well as a new NCP. However, civil society members of OECD Watch from the U.S. are disappointed that the newly released procedures (<http://www.state.gov/e/eeb/ifd/oaia/usncp/166661.htm>) represent only slight improvements and continue to be flawed in key areas as to render the NCP mechanism of little use for impacted communities, and missing a key opportunity to demonstrate US active engagement in the Guidelines.

There remain hurdles to effective implementation in all four "core areas" recognized under the Guidelines: visibility, accessibility, transparency and accountability. A majority of provisions lack the specificity required to provide complainants or the NCP with guidance on how to access or implement the mechanism. Essential elements, such as complaint requirements, eligibility thresholds, the NCP reporting structure, and the rules and procedures for the creation of an Advisory Board, are not included. The new procedures also include troubling provisions on confidentiality, and a reference to a mediation fee that may act as to be a barrier to the filing of cases, a presumption and possible outright deterrent on final determinations on Guideline compliance, and a presumption against monitoring reports on MNE compliance and party agreements.

The few substantive improvements include new timelines consistent with the 2011 OECD Guidelines, a provision on parallel proceedings that changes the presumption against barring claims, and a verbal commitment to the creation of a multi-stakeholder Advisory Board. Civil society continues to believe the U.S. approach to its OECD NCP responsibilities represents a failure to lead on, and respond to, issues of corporate responsibility, human rights, and environmental protection.

NCP Highlight: Self-evaluation Dutch NCP

The Dutch NCP has implemented its current structure with a committee of four independent NCP members and four advisory members from different ministries since 2007. A peer review was initiated in 2009 to review the organisation and functioning of the NCP. As follow up to the peer review the Dutch NCP has conducted a self-evaluation in June 2010. In reaction to the recommendations by the peer review team, the Dutch NCP reviewed the structure of the NCP, its promotional activities and its handling of specific instances. As the experience with the independent NCP members has been positive, their mandate has been extended by another four-year term. Recommendations regarding promotional activities will be followed up and the NCP also strives to continuously improve its procedures. An appeal mechanism for stakeholders will not be put in place as the NCP feels that this will place an additional judicial burden on the process. However, if stakeholders feel the NCP is not functioning properly this can brought to the attention of the Minister of Foreign Trade. OECD Watch welcomes the current structure of the Dutch NCP.

However, the Dutch NCP is yet to resolve a case successfully through mediation, or make recommendations that have a real impact on the behaviour of Dutch MNEs. A number of recent cases filed at the Dutch NCP will provide an opportunity for the NCP to demonstrate its mediation skills, and if necessary, its teeth through robust final statements.

The issue of possibly attaching consequences to statements made by the NCP was brought forward in the Dutch parliament. Contrary to the demand of OECD Watch, the Dutch minister of Foreign Trade is not willing to attach direct consequences to NCP statements because of the non-binding nature of the Guidelines. NCP statements will, however, be used as a source of information when evaluating applications for government support for which adherence to the OECD Guidelines is requested or the participation of companies in trade missions.

OECD Watch is an international network of more than 80 civil society organisations promoting corporate accountability. The purpose of OECD Watch is to inform the wider NGO community about policies and activities of the OECD's Investment Committee and to test the effectiveness of the OECD Guidelines for Multinational Enterprises.