

Key issues for a review of the OECD Guidelines

OECD Watch welcomes the Investment Committee's initiative to prepare for and consult stakeholders on a potential update of the OECD Guidelines.

In preparation for the review of the Guidelines and in order to provide the most thorough and constructive input possible, OECD Watch has conducted an extensive round of internal consultations among all 88 OECD Watch members as well as a number of key non-OECD Watch NGOs. Furthermore, on 4-6 November 2009 in Bangkok, Thailand, OECD Watch held an Asia-Pacific regional capacity building programme on "Corporate Accountability: Tools to Promote Responsible Business Conduct" at which the OECD Guidelines and their review were thoroughly discussed and debated. This 3-day regional event aimed to gather the perspectives of organizations and individuals in non-adhering developing countries on the Guidelines and the review, and to encourage those organizations and individuals to actively provide input for the review. The Bangkok seminar included a multi-stakeholder session in which representatives of business, unions, NGOs and governments, including several NCPs and a representative of the OECD Investment Committee, participated and exchanged ideas and views about the review of the Guidelines.

Based on these consultations, OECD Watch has compiled the following key issues that must be addressed in a review of the OECD Guidelines. The key issues fall into three categories: conditions and modalities for the review process, scope and issues related to the substantive provisions of the Guidelines, and Procedural Guidance-related issues. The list should be seen as indicative, not exhaustive.

Conditions and modalities for the review process

- A revision would need to take into account the dramatically changing global economic realities and ensure the revised Guidelines contribute significantly to the OECD's aim to build "a stronger, cleaner and fairer world economy" to address and move beyond the current financial and economic crisis, recognising that reckless and unethical business conduct has contributed to the severity of the crisis.
- The OECD must ensure that the standards, principles and scope of the Guidelines are not diluted and narrowed but strengthened and enhanced through the review process.
- The revision process must, from its conceptualisation until its completion, strive for utmost transparency, objectivity and inclusiveness. OECD Watch welcomes the Secretariat's proposal to involve all relevant stakeholders, relevant OECD committees, interested non-adhering countries, and international organizations responsible for key instruments related to the Guidelines. In particular, OECD Watch believes that the OECD Guidelines should be revised with the aim of harmonising the Guidelines with other standards for responsible corporate behaviour such as the ISO 26000 Guidance on Social Responsibility and the ILO's Declaration on Social Justice for a Fair Globalization.¹ These instruments should compliment and mutually reinforce each other.
- OECD Watch agrees with the Secretariat that the framework of UN Special Representative on business and human rights, Professor John Ruggie, should be used as a starting point for a revision to ensure specific provision for human rights. Further, an upgrade should address the shortcomings, identified by Professor Ruggie, that are preventing the Guidelines from meeting

¹ Adopted by the International Labour Conference at its Ninety-seventh Session, Geneva, 10 June 2008.

their full potential. These include: the potential conflict of interests due to NCPs' institutional set-up, the lack of resources to investigate complaints, the lack of training to provide effective mediation, unclear timeframes and the lack of transparent outcomes.

- In the context of a review of the Guidelines, the Investment Committee should consider how the environmental, labour and other standards articulated in the Guidelines can be better incorporated into bilateral, regional and international trade and investment agreements.

Scope and issues related to the substantive provisions of the Guidelines

OECD Watch supports the list of substantive issues drawn up by the IC Secretariat, but would like to reiterate the importance of the following issues:

- As SRSG Ruggie has indicated, the human rights provision of the OECD Guidelines should be revised to reflect the fact that MNEs are expected to respect all human rights wherever they operate. OECD Watch concurs with the Secretariat that the current reference to respecting human rights "consistent with the host government's obligations and commitments" contradicts Professor Ruggie's recommendation.
- The supply chain provision requires significant strengthening. This provision must be adjusted to more accurately reflect the current structure of business relationships by not being restricted to investment and investment-like relationships only, but rather should employ a more comprehensive approach such as the concepts of 'scope of responsibility' and due diligence invoked by SRSG Ruggie. This also includes issues where companies become complicit in human rights abuses committed by host states or by security forces. Reference to supply chain transparency and responsibility must also be strengthened in other chapters, such as the Disclosure and Consumer Interest provisions.
- The chapter on Combating Bribery entails many useful recommendations for preventing a considerable range of corruptive behaviour. Whilst going beyond most international conventions and business recommendations, the Guidelines usefulness for combating bribery in practice is, however, seriously undermined by some NCPs' categorical refusal to deal with corruption in trade. In view of the Guidelines reference to key international conventions including the OECD Convention against Bribery and the ICC recommendations, none of which differentiate between bribery in investment and trade activities, the contradiction between the Guidelines and the cited sources in this chapter must be examined and resolved in the review
- The Disclosure chapter should be strengthened to reflect the importance of due diligence in corporate governance and responsible business conduct. Stronger language on non-financial information and use of the GRI should be included in the chapter, as is suggested by the Secretariat.
- The Employment chapter should be strengthened through harmonisation with the ILO Decent Work Agenda and the ILO Declaration on Social Justice for a Fair Globalization. This includes reference to a decent wage that meets basic needs (i.e. a living wage). Specific attention should also be paid to outsourcing as well as the the informal sector, which is not properly covered in the current text of the Guidelines.
- There is a need for a provision that is clearer on the relationship between companies and the local population, specifically including the rights of indigenous peoples and other groups that are disadvantaged or structurally excluded or discriminated against. The Guidelines lack clarity on what demands companies should meet in engaging with local communities in relation to social

and environmental damage and hazards to health. Further detail of what constitutes adequate and timely consultation with local stakeholders should be provided on the basis of existing best practices such as pro-active consultation and the principle of free, prior and informed consent.

- The current environmental chapter needs revision to ensure the policy developments and available knowledge on climate change and environmental impact assessments (EIAs) over the last decade is better integrated into clear guidance of what is expected from individual companies.
- The principle of consumers' right to know should be included in the chapter on Consumer Interest.
- The Competition chapter should be revised to ensure that market dominance is not only interpreted from a consumer's perspective, but also takes into account abuse of market power towards suppliers and workers.
- OECD Watch agrees with the Secretariat that Chapter X on Taxation should be revised to include provisions on the disclosure of revenues to host governments in line with initiatives such as the EITI and the OECD Risk Awareness Tool for MNEs in Weak Governance Zones. A revised Chapter X should include a provision to prevent companies from abusing tax havens and avoiding taxes through practices such as thin capitalisation and tax deferral.

Procedural Guidance-related issues

OECD Watch's 2007 "Model NCP" provides many recommendations with regard to necessary improvements related to the Procedural Guidance and functioning of NCPs.² However, a number of issues merit reiteration here.

- The Procedural Guidance needs to be strengthened to give greater direction to the institutional structure and functioning of NCPs, with the aim of improving NCP performance and ensuring equal functioning. A revision of the Procedural Guidance should ensure that all NCPs meet the minimum requirements identified by Professor Ruggie for effective non-judicial mechanisms: legitimate, accessible, predictable, equitable, rights-compatible, and transparent. OECD Watch would also add to the capacity to implement and follow up upon NCP recommendations to the list of minimum requirements.
- NCPs should be given more authority by enabling them to implement sanctions and provide incentives. For example, government guarantees and credits for businesses (such as export credit insurance, participation in trade missions, etc) could be made conditional upon observance of the Guidelines and cooperation in specific instance procedures in order to encourage compliance.
- The roles and tasks of NCPs in handling specific instances must be further clarified. OECD Watch recommends that, when implementing the Guidelines in specific instances, the NCP play a dual role. Firstly, the NCP should seek resolution through mediation. Secondly, should mediation fail, the NCP should be required to undertake a fair and impartial assessment and determination of the complaint. This adjudication phase requires that NCPs have the capacity, resources, and will to undertake fact finding. Furthermore, the Procedural Guidance should stipulate the NCP's role in monitoring and follow up.

² The OECD Watch Model NCP: <http://oecdwatch.org/publications-en/Publication_2223>

- The Procedural Guidance should require NCPs to develop a clear time frame for the completion of each stage specific instance procedure and should provide NCPs with an indicative time frame; OECD Watch suggests a period of twelve months for completion of the entire process.
- The Procedural Guidance should address the issue of parallel legal proceedings. OECD Watch's position is that the existence of parallel proceedings should not automatically result in the NCP suspending the specific instance process. The NCP should only suspend the process if there is strong evidence that continuation of the NCP process may prejudice parallel proceedings.
- Clarification on the issue of cooperation between home and host NCPs is necessary. OECD Watch has long called for greater recognition of parent company responsibility for the actions of a foreign subsidiary accused of violating the OECD Guidelines, as well as the need for involvement of home country NCPs in specific instances involving both a parent company and a subsidiary. Since corporate policies and strategies are generally set at the headquarters level and passed down for subsidiaries to follow, specific instances involving a parent and a subsidiary in two different OECD or adhering countries require close cooperation between host and home country NCPs.
- The Procedural Guidance should include mechanisms to promote a 'race to the top' among NCPs or, at a minimum, ensure functional equivalency through intermittent peer reviews. Lessons and recommendations resulting from the Dutch NCP's peer review experience could provide a valuable starting point for discussion.
- Finally, the Investment Committee must strengthen its oversight role and implement a serious monitoring system to evaluate NCPs' compliance with minimum institutional and operational standards. This is imperative if the inconsistency and lack of functional equivalence in NCPs' structure, functioning and results is to be reduced.

These suggestions for improvement are provided at this point to complement and reinforce the IC Secretariat's note, and to demonstrate that a review of the Guidelines is timely and has the support of OECD Watch. They are not, at this stage, a complete inventory of suggested improvements. OECD Watch looks forward to active participation in a review.