



Trade Union
Advisory Committee
to the OECD
*Commission
syndicale consultative
auprès de l'OCDE*

Trade Union Input to the “OECD Guidelines Stocktaking Exercise – First Draft Report”

Paris, 20 May 2021

TUAC welcomes the opportunity to comment on the First Draft for the OECD Guidelines Stocktaking Exercise. (“First Draft” or “Stocktaking Report”).

The TUAC provided preliminary input for the “Zero Draft Outline” on 2 February 2021. Since then, the TUAC completed two consultations of trade union affiliates and partners. This briefing updates and replaces the preliminary input.

At the outset, the TUAC acknowledges the quality research conducted by the OECD Secretariat. This First Draft provides a firm basis upon which the OECD can build. But it can be improved.

Following a preface with key trade union messages, the briefing is structured in three parts. The first part recalls the outcome of 2011, the second part offers general comments to the Stocktaking Report, and third part applies results from TUAC consultations to enhance preliminary input.

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Summary of Trade Union Messages, Chapters

- Trade unions identify needs for improvements in Chapters V, III and VI, and to close gaps in I, II, VII, IX, and XI.
- New concerns were attributed to Covid-19, namely widespread teleworking and extreme impacts that get more pronounced through lengthy global supply chains.
- Better articulation between Chapter V and Chapter IV is needed.
- Trade unions are unanimous in their concerns over impacts from climate and digital transitions.

Summary of Trade Union Messages, NCP

- TUAC's consultations revealed that trade unions see the NCP Procedural Guidance in need of serious attention to remain relevant. More than half of specific instances were described as unsuccessful. there is an element of ***fatigue with the NCP mechanism***.
- NCPs **lack of expertise** in the well-established practice of labour-management mediation is seen as a serious gap needing special attention.
- Other NCP Challenges relate to a **deficit in political support** within government, with priority placed on trade and investment objectives over sustainability objectives.
- **Arbitration** is seen as a missing step in the NCP process, unlike what is commonly practiced in labour-management dispute resolution.
- The **absence of consequences** at each stage in the specific instance process erodes respect and creates a disincentive for participation.
- Trade unions are unanimously in favour of **determinations** being included in final reports, especially when the MNE refuses to participate in mediation.

Outcome of the 2011 "update"

The Guidelines can provide hope for all workers – including workers in global supply chains – to defend their rights and improve their living and working conditions. In its assessment of the 2011 review process of the Guidelines, then called the "update", the TUAC noted a number of improvements compared to the then trade union priorities:

"The Update has resulted in a number of improvements in the rules that govern the functioning of the NCPs (Procedural Guidance) including: indicative timescales for the completion of cases; stronger cooperation between home and host country NCPs;

and the requirement for NCPs to participate in peer learning, including voluntary NCP peer review and capacity-building”.

The TUAC assessment, however, noted a number of caveats:

“In particular, the Update did not strengthen the determination role of NCPs – a major priority for the trade union movement – nor did it sufficiently strengthen the guidance on NCP structures so as to improve oversight and eliminate potential conflicts of interest”.

On the content and scope of the Guidelines, the TUAC welcomed the creation a new chapter on human rights and the introduction of a general due diligence principle. The assessment also noted the *“unequivocal application of the Guidelines to supply chains and other business relationships; and a new recommendation on paying wages that are adequate to meet basic needs.”*

The due diligence principle was a clear achievement

Due Diligence provisions in the 2011 update and subsequent guides (both general and sectoral) stand out as clear achievements. The TUAC took part in the drafting of the OECD standards forming the basis for eight guides on implementing RBC due diligence. TUAC more recently raised the issue of how NCPs are interpreting the concept of trade union involvement in human rights due diligence (by way of a request of clarification of the UK NCPs 2019 decision in a case brought by the IUF). To enable the NCP to promote the clarification, TUAC submitted new policy language that can be used by the NCP to verify human rights recommendations have trade union involvement.

The Guidelines influence on domestic and regional policy work continues to grow, extending to RBC covenants in financial transactions and public procurement.

Guidelines implementation and overall respect for the NCP remain the biggest challenges

Enterprise voluntary self-reporting has too often counted as “adherent” to the Guidelines. Enterprises and governments can do much more to demonstrate respect for the NCP authority and value workers’ role in credible RBC due diligence and Guidelines implementation.

General Comments to the 2021 Stocktaking First Draft Report

From a trade union perspective, the 2021 Stocktaking will be considered a success if more businesses and NCPs have demonstrated the Guidelines are capable of increasing (and not inadvertently decreasing) freedom of association and collective bargaining. What it would take to realise these impacts is well-known, tested and practiced by multinational enterprises and trade unions.

Broadening the impact assessment process beyond the NCP analysis

The First Draft assessment relies upon 36 NCP surveys. Gathering the views of the current NCPs is needed. But an NCP survey provides too limited a sample to form a sufficient assessment to steer the future of the Guidelines stocktaking report. Based on the report

27 NCPs have had fewer than 5 cases and 44 NCPs have had fewer than 20 cases. (p. 43 §204)

NCPs have also seen a high degree of personnel turnover that accelerated in 2020. The combination of turnover and lacking experience with the Guidelines impacts and experiences appears too limited to become the sole reference for a Stocktaking of the thematic chapters strengths, gaps and challenges.

Understand all the reasons for an uneven distribution of NCP cases

The draft gives excessive attention to “forum shopping” in addressing the uneven distribution of instances, which can be misleading if not unhelpful. (p. 42 §199).

More multinational enterprise activities are bound to have more impacts with the potential for specific instances at their home-country NCP. Trade union specific instances correlate to market influence and the home country of the MNE parent is essential for remedy.

Trade and FDI flows and stocks, for example, show the close links that legitimise involvement of home country NCPs. The United States, Netherlands, Germany, UK and France are consistently among the top 10 on each of these indicators and receive a large number of specific instances.

The Stocktaking should minimally take stock of the potential reasons for uneven distribution of NCP specific instance management.

Trade Unions remain interested but lack confidence in the NCP

The Draft rightly notes “trade unions’ diminishing interest in using NCPs” (p. 29 §115). Unfortunately it does not elaborate further on that point - *why* there would be a diminishing interest. The TUAC consultations and input to the Working Party and Investment Committee reflect a lack of *confidence* arising out of decidedly negative experiences. The lack of confidence is mentioned later in text (§225), but it would be better if the Draft would link both issues and work toward a better understanding of how to restore confidence, especially as it is one of the central requirements for NCP structures.

Several case examples cited did not address or clarify the Guidelines and should be removed

The TUAC report confirms only 5 trade union cases that successfully addressed and clarified Chapter V issues, while the other 22 did not. The following cases cited in the First Draft were unsuccessful in clarifying issues of industrial relations: (p. 29 §117, et seq.)

- In Drummond Ltd (Colombia) the NCP declined to address Chapter V issues.
- Kik Textilien et al. was a Chapter IV case, Chapter V issues were not raised.
- Maersk Container (Chile) and Etex (Belgium) declined to discuss Chapter V issues in mediation offered by the respective NCP.
- In Natixis (France) the NCP was successful in its contribution to the comprehensive approach by the trade union to resolve Chapter V issues. However, the NCP was unable to address the corporate behaviour on the part of the MNE named in the instance.

- BHP Billiton (Brazil) (§117) refused to discuss issues at the NCP, no solutions were produced, and there has been no known follow-up to several valuable NCP recommendations on the industrial relations issues that were raised.

The Stocktaking Report should acknowledge political challenges to NCP authority

The draft should better address the potential causalities between the NCPs' structure (single agency, inter-agency, with or without stakeholder participation etc.) as outlined p. 42 §200 and 201, and their overall performance in delivering good work. Broadly speaking, inter-agency NCP structures with balanced representation of stakeholders – social partners and NGOs - are better equipped to ensure whole-of-government approach to sustainability.

While there may be good reasons for hosting an NCP at a Trade/Economy/Investment ministry, care should be taken to prevent gaps in cross-ministerial policy development. The stocktaking report should look at the consequences in competing government objectives, between trade/investment being prioritised for being revenue positive while sustainability being seen as revenue neutral or negative.

TUAC Consultation Results: Thematic Chapters

The Guidelines' recommendations in each chapter could be improved by fine-tuning language and expectations. This is true with respect to the global transition of the digitalisation of the economy and the climate crisis, as well as corporate governance and tax accountability.

The TUAC inputs are informed by real-time experiences by national and global trade unions representing 300 million workers taking steps to implement the Guidelines every day. The TUAC conducted two consultations to take stock of thematic chapters and NCP procedures, respectively.

“Need Improvements” in Chapters V, III, IV and VI

Chapter V

Of all the Guidelines Chapters, Employment & Industrial Relations addresses the central stakeholder relationship of the Guidelines and needs to be more prominently situated to promote all other Guidelines.

The principles for implementing real employment and industrial relations impacts is well-known, tested and practiced by multinational enterprises and trade unions. The TUAC looks to the Guidelines Stocktaking to consider what it takes to implement, so that the Guidelines demonstrate they are capable of increasing (and not inadvertently decreasing) freedom of association and collective bargaining.

Chapter III

Available workforce data would be helpful in assessing progress on implementation. Workforce information recommended in the Disclosure chapter is limited, leading to minimal uptake. Additional data about employment relationship and industrial relations is available and can be disclosed.

The last ten years continued a precipitous downward trend for workers' rights impacts since the Guidelines were introduced in 1976. The First Draft identifies a global trend, "towards a weakening of labour, with a decline in trade union freedoms." (p. 10 §23) The stocktaking report should be more precise about these declining "freedoms" if it has hope of understanding these adverse trends for the Guidelines.

As a starting point, the TUAC recommends the Stocktaking include OECD labour market statistics. Collective bargaining coverage ratio declined from 35% to 32%, equating to 19 million fewer workers covered by bargaining agreements in 2018 than 2011. The TUAC would like to see these data points included in the Stocktaking.

Chapter IV

The addition of the human rights chapter in 2011 to be consistent with the UN Guiding Principles has become the international standard for human rights. Like other chapters, it could better utilise organised workplace structures to tackle negative human rights impacts across a supply chain.

The Stocktaking should add a section about articulating Guidelines obligations of Chapters IV and V. Trade unions notice the human rights chapter references, but does not meaningfully address industrial relations, exposing a gap in implementing positive impacts for both chapters.

For example, child and forced labour, are illegitimate practices that affect work, but are distractions if they can even be treated in the chapter designed to implement legitimate employment and industrial relations topics.

On the other hand, the implementation of "grievance mechanisms" is frequently a mandatory subject to be included in collective bargaining agreements, yet the Guidelines treat grievance mechanisms exclusively as part of Chapter IV, outside of industrial relations. What has been implemented are self-directed initiatives without trade unions leading to a TUAC request for clarification from the Investment Committee.¹

The potential confusion in the overlaps between human rights and industrial relations in the Guidelines is presently overlooked.

Chapters VI – Unforeseen new challenges

The Covid-19 pandemic made us acutely aware of the connections between health and safety committees (or the lack thereof) and consumer protection. Minimally, the Just Transition concept and the Paris Agreement are relevant to consider in the Guidelines.

Trade unions were unanimously concerned about continued environmental degradation and the related impacts on occupational health and safety. The Environmental section in the First Draft (p. 30 § 4.4) presently omits but ought to include paragraphs dealing with gaps and challenges.

¹ OECD (2021), Engagement with trade unions in due diligence processes conducted by industry-led or multi-stakeholder initiatives: Clarification by the OECD Investment.

<https://mneguidelines.oecd.org/engagement-with-trade-unions-in-due-diligence-processes-conducted-by-industry-led-or-multi-stakeholder-initiatives.pdf>

“Need to Close Gaps” in Chapters I, II, VII, IX and XI

Chapter I and II

The voluntary and non-binding nature of the Guidelines challenges implementation. The first chapter leans heavily on the Guidelines being without legal force, even though several of the Guidelines have in fact become legislated. Domestic law is frequently cited by business as being a maximum standard rather than a minimum.

The Concepts and Principles chapter has been unable to resolve competing views about new forms of work and the definition of an enterprise, responsibility and corporate governance. Trade unions expressed a need to protect the definition of Multinational Enterprise so that it includes investment vehicles, export credit agencies, creditors, real estate holding companies, states as market participants, and new forms of business activities.

On the definition of an MNE, for example, “Big-data” MNEs have more leverage than many enterprises and are undeniably subject to the same set of worker expectations as other types of MNEs. However, competing views on the obligations for digital firms opens the door for broader Guidelines and business impacts.

The TUAC supports mandatory forms of due diligence that can be applied in procurement, investment and financial transactions as a strategic implementation framework, including equitable economic conditions, equality and best practices for training and promotion. Covid-19 exposed a gap related to purchasing/tendering practices and the impact of cancelled orders/contracts on supply chain workers.

Chapter II

Lobbying has consequences across the Guidelines. As a recent example, several enterprises with global business activities sought a wide range of exemptions not contemplated by the Guidelines. Around US\$200 million was reportedly spent by US multinationals on a California referendum to obtain exemptions to domestic US labour regulations. The lobbying effort immediately disadvantaged businesses across multiple economic sectors.

At least one competitor has already announced it will replace union workers and reposition its business activities in ways that capitalise on the exemption. Legislative changes like “Prop 22” illustrate a “catch 22” challenge for voluntary standards, leading to consequences for Employment and Industrial Relations and possibly every other chapter of the Guidelines, including the NCP Procedural Guidance.

Trade unions note an emerging gap affecting Chapters II and VII, enabling newer enterprises to exert influence over regulatory exemptions to regulations, creating unfair advantages over enterprises who implement the Guidelines and follow the rules. When it comes to seeking labour law exemptions, such unfair competition can be catastrophic to enterprises and workers.

Chapter IX – Science and Technology

Trade unions consider the language on technology lacks modern references to the just transition principles, leading to a lack of clarity in situations that displace incumbent workers.

Chapter XI – Tax chapter is not adapted to the contemporary corporate environment

Clarity is needed for country-by-country reporting as part of tax governance and risk management systems. Discrepancies between corporate income tax accrued and corporate income tax due. Improve obligations to protect State tax revenues, such that MNEs would need to provide proof that they do not shield taxable income using tax havens.

Untapped strategic RBC leverage in investment

TUAC encourages particular focus on the untapped leverage in international investment as it relates to satisfying the purpose of the Guidelines. Opportunities can be found in most chapters to facilitate investment policy incentives for institutional investor portfolios and proxy voting policies.

TUAC Consultation Results: NCP Procedural Guidance

While the 2011 update delivered clear improvements, setting a pro-active agenda with forums for peer review and engagement, trade unions have harboured sentiments of disillusionment and fatigue with the NCP Mechanism. In the most recent decade under review, eighty-two (82) cases were filed by trade unions, reflecting a 38% decrease from the prior ten years. Cases declined despite the continuing rise in trade and investment flows leading to more complex global value chains.

Only five freedom of association cases since 2011 resulted in an agreement with the trade union. More than two million workers at the MNEs named in those cases saw the NCP confirm what they already knew, the MNE did not want trade union dialogue.

Dwindling resources and a lack of government and enterprise respect for the NCP are seen as the main barriers to NCP functioning. Trade union cases dealing with violations of freedom of association frequently fail because either the NCP (8) or the MNE (10) chose not to proceed with mediation.

On the NCPs, generating dialogue and agreements are required if the NCPs are to retain any value for trade unions. Greater respect and participation by MNEs in NCP mediation have become a matter of urgency, as are procedural improvements that give the NCP the political respect and authority to hold businesses accountable.

Trade unions identified three subjects in the procedural guidance as “undermining effectiveness” while remaining subjects were seen having “gaps needing attention.”

More than half of specific instances were described as unsuccessful. Despite citing serious reservations, trade unions would still consider using the NCP mechanism, but without change, trade unions are likely to abandon the NCP mechanism over the short to medium term.²

² At the most recent meeting of the Working Party for Responsible Business Conduct, the TUAC raised related concerns about setting a double standard on OECD RBC adherence, potentially eliminating the need for National Contact Points in future RBC policy coherence. To the extent that the OECD considers a parallel approach to domestic RBC policies, the current “Draft Recommendation on Government Policies and Policy Coherence for RBC” could prove crippling to the NCP mechanism.

The main concern identified by trade unions is NCPs generally lack capacity and expertise for conducting effective labour-management mediation. Such expertise is available and necessary. It should not be difficult to identify a pool of talent having the skills required for assisting with resolution of labour management issues.

Trade unions notice a lack of impartiality, especially related to a perceived imbalanced expectations of the parties for confidentiality, campaigning and the newest issue being businesses' specious claims of "conflicting interests" to justify recusals from NCP decision-making.

The absence of consequences at each stage in the specific instance process erodes respect and creates a disincentive for participation. Trade unions are unanimously in favour of determinations being included in final reports, especially when the MNE refuses to participate in mediation.

Trade unions also cited the need for an arbitration step to follow unsuccessful mediation process. This is an important step in the progression of labour-management dispute resolution. Both parties in labour management disagreements typically prefer to avoid the possibility of arbitration. The dynamic of keeping parties' "feet to the fire" has been known to help produce agreements.

For more about the NCP functioning, the TUAC devised a set of NCP Principles ([link](#)).