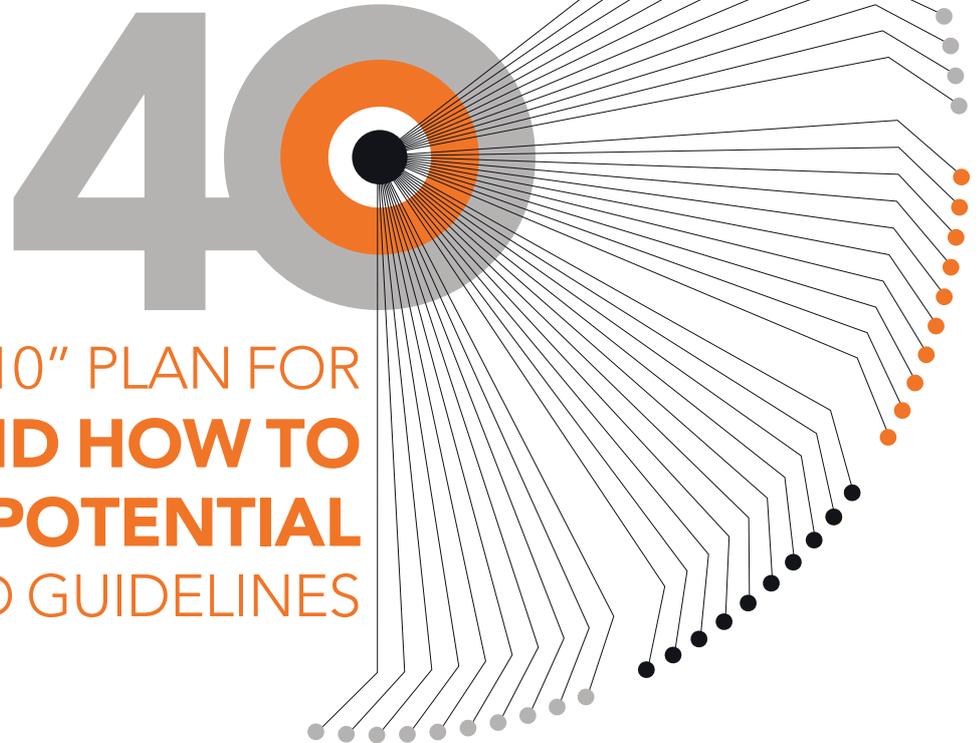


Marking **40 YEARS** of the OECD Guidelines  
for Multinational Enterprises



# A "4X10" PLAN FOR WHY AND HOW TO UNLOCK THE POTENTIAL OF THE OECD GUIDELINES

**A briefing for policymakers** | June 2016

In June 2016, the OECD Guidelines for Multinational Enterprises ("the Guidelines") – the OECD's flagship instrument on responsible business conduct (RBC) – will celebrate its 40th anniversary. Since 1976, economics have globalized, and the impact of business on people and the planet has expanded. While OECD Watch members remain adamant about the need for international binding rules to regulate the activities of corporations, the OECD Guidelines can supplement such a binding framework and help strengthen the global system of governance of corporate activity. Periodic updates to the Guidelines have sought to keep them relevant and in step with changing times. The most recent update in 2011 extended the scope of the Guidelines and achieved improvements in the areas of human rights, due diligence, and value chain responsibility. Although governments adhering to the Guidelines have made a legally-binding commitment<sup>1</sup> to set up National Contact Points (NCPs) to further their effectiveness, implementation remains patchy at best. Poor promotion and enforcement of the Guidelines by governments has significantly limited uptake of, and respect for, the Guidelines by businesses. This has constrained the overall impact and effectiveness of the instrument. Recognizing the gap between the Guidelines' potential and their current impact, last year G7 leaders pledged to "strengthen mechanisms for providing access to remedies, including the NCPs," and at the OECD, 38 ministers highlighted the necessity to "further strengthen the performance" of NCPs.<sup>2</sup>

The current political momentum around the OECD Guidelines provides a long overdue opportunity to unlock their full potential. Immediate action is needed by governments to strengthen the effectiveness of the Guidelines as a force for ensuring that companies behave responsibly in their operations and business relationships around the world. On the occasion of this milestone anniversary, governments must demonstrate their commitment to making the Guidelines a relevant tool for governing today's global economy. This briefing provides a "4 x 10" bullet-point plan highlighting four key features that give the Guidelines the potential to help ensure businesses behave responsibly. It also includes ten actions that governments must take to unlock that potential and to advance their legally binding obligations to further the effectiveness of the Guidelines.



## THE WHY: Four reasons the Guidelines have the potential to play a positive role in ensuring RBC

*Four key features give the Guidelines the potential to be a unique global instrument for encouraging RBC and providing access to remedy for the victims of corporate abuse.*

- **They are state-backed.** Adhering governments have made a commitment to promote observance of the Guidelines by companies operating in or from their territories.
- **They express expectations of business on a wide range of RBC issues** – including human and labour rights, environment, bribery, disclosure, consumer interests, competition, science and technology, and taxation – that are derived from other international instruments such as the Universal Declaration of Human Rights, ILO Conventions, and the Rio Declaration.
- **They are clear that business responsibilities do not stop at the border.** Companies have a responsibility to identify and address adverse impacts throughout the value chain – upstream and downstream – wherever they occur.
- **They contain a state-based non-judicial grievance mechanism** that, while it largely has failed to do so thus far, has the potential to supplement judicial systems in order to help resolve disputes and facilitate access to remedy for victims of corporate abuse.



## THE HOW: Ten actions governments must take to further the effectiveness of the OECD Guidelines

*In order to effectively implement the Guidelines, ensure that they remain a relevant instrument for promoting responsible business conduct, as well as avoid and remedy adverse impacts, OECD Watch is calling on **governments adhering to the OECD Guidelines** to:*

- 1 **Structure the NCP to operate effectively and impartially.** Adhering governments should set up an NCP that is impartial and that has the confidence of all stakeholders.<sup>3</sup> Comparative research indicates that some institutional structures are more conducive to this than others.<sup>4</sup> An assessment of 15 years of complaints found that over three-quarters of those resolved positively were achieved by NCPs that have one of three organizational structures: 1) a board of independent experts with decision-making authority, 2) a structure that formally integrates stakeholders into NCP governance (e.g. a tripartite or quadripartite structure), or 3) a steering board charged with oversight.<sup>5</sup> Academic research and peer reviews of the Norwegian, Dutch, and Danish NCPs have highlighted broad stakeholder support for these organizational structures.<sup>6</sup> In addition, a “whole of government” approach involving representatives from various ministries such as labour, environment, foreign affairs, economic affairs and development in the NCP is recommended.
- 2 **Provide the NCP with adequate resources.** Adhering governments are legally obliged to provide the NCP with the human and financial resources necessary for the NCP to effectively fulfill its responsibilities.<sup>7</sup> This includes employing dedicated staff, providing financial resources for independent fact-finding, and hiring independent professional mediators. Further, governments should provide for translation, travel, case follow up, outreach to stakeholders and peer reviews.
- 3 **Attach consequences to ensure that the Guidelines are taken seriously.** When a company refuses to engage fully in the NCP process or fails to implement the NCP’s recommendations, material consequences should result. Options include exclusion from privileges such as public procurement contracts, export credit guarantees, private sector development aid, international trade, and investment services.<sup>8</sup> This would not change the legal nature of the Guidelines – it is a question of policy coherence. Attaching material consequences to respect for the Guidelines will create a level playing field for business, and will ensure that companies failing to respect the Guidelines do not gain a competitive advantage over those upholding the standards.

- 4 **Increase the accessibility of the NCP to victims of corporate abuse seeking remedy.** NCPs are required to be accessible to victims of corporate abuse who are seeking remedy. Yet research shows that victims face practical, financial and procedural barriers that contradict the spirit and the letter of the OECD Guidelines.<sup>9</sup> For example, over the past 16 years, NCPs have rejected 44% of all complaints, often because the complaints could not meet an unreasonably heavy burden of proof applied unilaterally by the NCP.<sup>10</sup> This runs counter to a clarification from the Chair of the OECD Working Party on Responsible Business Conduct that the 2011 update of the Guidelines intended for NCPs to accept cases that present plausible evidence and only to reject clearly frivolous complaints. To achieve maximum accessibility, each adhering government should mandate its NCP to accept all plausible cases, including cases seeking remediation of past harms as well as those aimed at preventing abuses before they happen.
- 5 **Protect the activists using the NCP system.** Human rights defenders and other community and labour leaders seeking to address corporate abuse have reported facing threats and harassment for filing NCP complaints. Adhering governments should insist that the NCP develop a safety protocol containing essential information, tools, guidance, and (emergency) contacts for prevention and mitigation of security risks faced by users of the NCP system.
- 6 **Instruct NCPs to make determinations of (non-)compliance if mediations fail.** Evidence from numerous sources<sup>11</sup> indicates that an NCP's willingness to issue determinations of non-compliance with the Guidelines in final statements makes dispute resolution more likely. One NCP peer review showed that it provided leverage to encourage parties to engage in dialogue.<sup>12</sup> Businesses have also indicated that the prospect of a determination makes them more inclined to resolve disputes through mediation.<sup>13</sup> In cases where mediation fails or is not possible, NCPs should be mandated to make compliance determinations based on independent and transparent investigations.
- 7 **Maximize transparency of the NCP.** Transparency is a core criterion for an effective NCP, yet many NCPs fail to publish initial assessments on cases, or base decisions on company information that is kept secret from complainants. This practice seriously diminishes public confidence in NCPs, and their effectiveness in resolving disputes. NCPs should strive for a high degree of transparency and information disclosure, and adhering governments should instruct them to restrict confidentiality to limited and well-defined circumstances such as on the basis of security concerns or when all parties agree that it is absolutely necessary. NCPs should also be told to refrain from basing initial assessments and final statements on information that is not available to both parties.
- 8 **Instruct the NCP to follow up on case outcomes.** Monitoring the outcomes of cases is crucial to ensuring that the NCP process is effective and sustainable. Although the Guidelines' Procedural Guidance encourages NCPs to follow up on the implementation of mediated agreements and NCP recommendations, they rarely do so. Adhering governments should instruct NCPs to do proper follow up, and provide them with the resources needed to do so.
- 9 **Advocate for a revision of the Procedural Guidance for NCPs.** The rules that govern the work of all NCPs are contained within the Guidelines' Procedural Guidance. While the 2011 update improved the content and scope of the Guidelines, it left far too many gaps in the procedural instructions for NCPs, which has resulted in underperformance and ineffectiveness. Improving and strengthening the Procedural Guidance will ensure that the NCP system as a whole maximizes implementation of the Guidelines and provides a high, but level, playing field across all adhering countries.
- 10 **Accelerate the number of NCP peer reviews.** Although NCP peer reviews reveal valuable lessons, they are currently voluntary, and only five NCPs have undergone them over the past 16 years.<sup>14</sup> While the OECD secretariat recently has encouraged more NCPs to volunteer, at the current rate it will still take decades for all NCPs to undergo a single peer review. Adhering governments should advocate for a system of mandatory peer reviews that would see each NCP reviewed every five years, as is standard practice in many other OECD departments.<sup>15</sup>

**By taking these proposed actions, adhering governments can demonstrate renewed leadership and commitment. Doing so will ensure that the OECD Guidelines live up to their potential as an authoritative tool for promoting responsible business conduct, and a means of recourse for those harmed by corporate abuse.**



## About OECD Watch

OECD Watch is a global network with over 100 member organisations in more than 50 countries. Membership consists of a diverse range of civil society organisations bound together by their commitment to ensuring that business activity contributes to sustainable development and poverty eradication, and that corporations are held accountable for their actions around the globe. For more information, visit [www.oecdwatch.org](http://www.oecdwatch.org)

This briefing is explicitly endorsed by:



### Notes:

- 1 OECD Council, Decision of the Council on the OECD Guidelines for Multinational Enterprises, 25 May 2011.
- 2 Leaders' Declaration, 8 June 2015; OECD Ministerial Council Statement, 4 June 2015.
- 3 OECD Council, Decision of the Council on the OECD Guidelines for Multinational Enterprises, 25 May 2011.
- 4 For example, van 't Foort and Wilde-Ramsing, "A comparative analysis of the Dutch specific instance procedure," *Journal for Mediation and Conflict Management*, 4 (2016).
- 5 OECD Watch, *Remedy Remains Rare*, 2015.
- 6 In addition to the 3 peer reviews, see van 't Foort and Palm (2015), *The functioning of the Dutch National Contact Point during the specific instance procedure.*, ARACÉ, *Direitos Humanos em Revista*, Special edition with the Business and Human Rights Centre, Vol.2, No.3
- 7 Decision of the Council on the OECD Guidelines for Multinational Enterprises, 25 May 2011.
- 8 The government of Canada recently took an initial step in this direction by making a policy commitment to withdraw "economic diplomacy" from companies that refuse NCP-led dispute resolution processes.
- 9 Amnesty International UK, *Obstacle Course*, 2016.
- 10 OECD Watch, *Remedy Remains Rare*, 2015.
- 11 For example, van 't Foort and Wilde-Ramsing, "A comparative analysis of the Dutch specific instance procedure," *Journal for Mediation and Conflict Management*, 4(2016); and OECD Watch, *Remedy Remains Rare*, 2015.
- 12 Norwegian Peer Review Final Report, 2012, p.26.
- 13 OECD Watch, *Remedy Remains Rare*, 2015, p.44.
- 14 As of June 2016, the Dutch, Norwegian, Japanese, Danish, and Belgian NCPs have undergone peer review.
- 15 For example, the Development Assistance Committee and the Anti-Corruption Division.