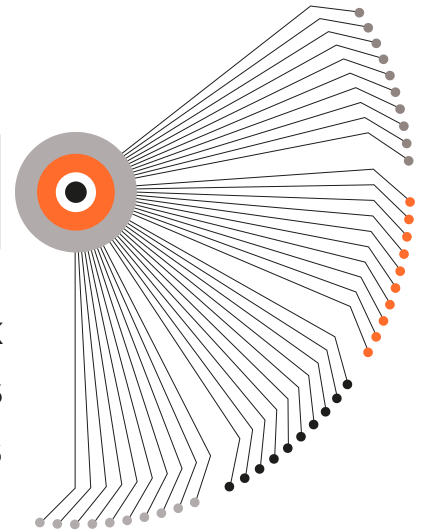


# EFFECTIVE NCPs NOW! | REMEDY IS THE REASON

## 4 x 10



A “4x10” plan for **why and how to unlock the potential of the OECD Guidelines** through effective National Contact Points

**A briefing for policymakers** | November 2017

The OECD Guidelines for Multinational Enterprises (“the Guidelines”) – is the OECD’s flagship instrument on responsible business conduct (RBC). Since 1976, economics has 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 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 effective National Contact Points (NCPs) to handle cases of corporate non-compliance with the Guidelines, many governments are not honouring this commitment. Poor NCP functioning has significantly limited uptake of, and respect for, the Guidelines by businesses. This

has constrained the overall impact and effectiveness of the instrument, and left countless victims of corporate abuse without remedy for harms done. Recognizing the gap between the Guidelines’ potential and their current impact, in 2015 G7 leaders pledged to “strengthen mechanisms for providing access to remedies, including the NCPs,” and in 2017 38 OECD ministers highlighted the necessity to have “fully functioning and adequately resourced” NCPs and committed to having all countries peer reviewed by 2023.<sup>2</sup>

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. Governments must honour their commitment to setting up effective NCPs that provide access to remedy for victims of corporate misconduct. This briefing provides a “4 x 10” bullet-point plan highlighting four key features that give the Guidelines the potential to ensure businesses behave responsibly. It also includes ten actions that governments must take to unlock that potential and to meet their legally-binding commitment 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, the UN Guiding Principles on Business and 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 Guidelines to:

- 1 Structure the NCP to operate effectively and impartially.** Adhering governments are legally obliged to 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 Guidelines.<sup>9</sup> For example, between 2000 and 2015, 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 Ensure functional equivalence for all NCPs.** The rules that govern the work of all NCPs are contained within the Guidelines' Procedural Guidance. While NCPs are accorded flexibility in terms of how they organise themselves, all NCPs are meant to be 'functionally equivalent.' Yet large differences between NCPs remain, and 'functional equivalence' currently does not exist. Many NCPs do not meet the core criteria set for all NCPs – visibility, accessibility, transparency and accountability – nor do they respect the principles that all NCPs are supposed to follow in handling complaints – impartiality, predictability, equitability and compatibility with the Guidelines. All adhering governments must honour their commitment to have effective NCPs. Moreover they must insist that governments that do not have effective NCPs make the necessary changes. The OECD should revoke their status as adherent to the Guidelines if they fail to do so.

**10 Remember, Remedy is the Reason!** While it is widely recognized by many that the NCP system is a grievance mechanism and access to remedy is a key reason why organisations and communities file NCP complaints in the first place, the NCP system has largely failed to provide effective access to remedy for most victims to human rights violations. OECD Watch's research found that of the 250 complaints filed between 2000 and 2015, only 14% had any beneficial results that provided some measure of remedy.<sup>14</sup> In order for the NCP system to make the contribution to global governance that many hoped for, governments must be more explicit in recognizing that providing effective access to remedy is the main purpose of complaints and the reason why the Guidelines are considered to have great potential.

**By taking these proposed actions, adhering governments can demonstrate renewed leadership and commitment. Doing so will ensure that the Guidelines live up to their potential as an authoritative instrument for promoting responsible business conduct, and that NCPs provide effective access to remedy for victims of 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) and [www.oecdwatch.org/remedy-campaign](http://www.oecdwatch.org/remedy-campaign).



## Notes:

- 1 OECD Council, Decision of the Council on the OECD Guidelines for Multinational Enterprises, 25 May 2011.
- 2 G7 Leaders, Leaders' Declaration, 8 June 2015; OECD Ministerial Council Statement, 7-8 June 2017.
- 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 OECD Watch, Remedy Remains Rare, 2015, p.19.