The OECD Guidelines for Multinational Enterprises, Responsible Business Conduct in a Global Context

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The OECD Guidelines for Multinational Enterprises, Responsible Business Conduct in a Global Context1 (the Guidelines) is the OECD’s flagship instrument for responsible business conduct. The Guidelines contain non-binding recommendations to multinational enterprises (MNEs) drawn up and backed by governments. Updated in 2011,2 they consist of principles and standards in areas including sustainable development, governance, disclosure, human rights, employment and industrial relations, the environment, anti-corruption, consumer interests and taxation.3 MNEs head-quartered in adhering countries are expected to comply with the Guidelines and to undertake due diligence to identify, prevent and mitigate adverse impacts on matters covered by the Guidelines throughout their business relationships. The Guidelines are binding on the forty-two4 adhering governments,5 which are required to set up a National Contact Point (NCP) – a non-judicial grievance mechanism – to contribute to “the resolution of
issues that arise relating to the implementation of the Guidelines in specific instances.7 Trade unions and NGOs are able to submit specific instances (cases)8 concerning alleged breaches of the Guidelines to these government-backed NCPs.9

Trade unions have worked to support the Guidelines since 1976, in view of their potential value for addressing global governance gaps. Trade union experience of submitting cases to the NCPs, however, is mixed ranging from significant success to frustration and failure.10 At their best NCPs have: assessed cases within an appropriate timescale; acted in an impartial manner; offered their good offices for mediation; published final statements; provided for monitoring and follow-up of agreements; and, in cases where mediation has failed, made an assessment of the company’s observance of the Guidelines. At their worst NCPs have: failed to respond to cases in a timely manner or at all; rejected cases on the grounds of the absence of an investment relationship,11 or the presence of a parallel legal proceeding;12 been unable to convince companies to come to the mediation table; and, in cases where mediation has failed, been unwilling to make an assessment of the company’s observance of the Guidelines. Despite their significant potential the often poor performance of NCPs13 together with the refusal of some companies to participate in the NCP process have weakened the normative power of the Guidelines.

The 2010-2011 Update (the Update)14 delivered a number of significant, indeed landmark, improvements15 in the content of the Guidelines including the

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8 “Specific instance” is the term used for “case” or “complaint” in the Guidelines.
9 The OECD publishes the list of NCPs at: <<http://www.oecd.org/dataoecd/17/44/1900962.pdf>> url last accessed, 26 September 2011.
10 TUAC publishes the full list of trade union cases submitted under the Guidelines together with an analysis at: <http://www.tuacoednmeguidelines.org/cases2.asp/>. OECD Watch publishes the full list of NGO cases together with an analysis at <<http://oecdwatch.org/cases>>; urls last accessed 26 September 2011.
11 In the past NCPs have rejected cases on the basis that there was no ownership relationship (“investment nexus”) between the company involved in the alleged violations and the MNE headquartered in the adhering country on the basis that the Guidelines apply in the context of international investment only. Hence cases involving subsidiaries were accepted, while those involving suppliers were rejected. Under the new Guidelines, 25 May 2011, no such limited interpretation of the application of the Guidelines is possible.
12 The existence of parallel court (or administrative) proceedings in the host country has been the main reason for trade union cases being suspended or rejected.
13 TUAC recognises that a small number of NCPs are functioning well, including most notably the UK and the Dutch NCPs. In particular, in recent years trade unions have experienced success at the UK NCP.
15 TUAC’s Statement to the OECD 50th Anniversary Ministerial Council Meeting welcomed the new positive elements of the Update, underlined that the success of the Update depends on implementation, and called on adhering governments to upgrade the structures and procedures of their NCPs. The statement also reiterated the trade union movement’s commitment to supporting the implementation of the Guidelines. TUAC Statement on the Update of the OECD Guidelines for