

OECD Watch submission to the 2017 Peer Review of the German NCP 17 May 2017

Introduction

OECD Watch welcomes the opportunity to provide feedback into the peer review process of the German National Contact Point (NCP). The intention of our submission is to help the German NCP identify ways in which it can further advance the effectiveness of the OECD Guidelines for Multinational Enterprises (the Guidelines) and serve as a forum for accessing remedy for complaints related to corporate abuses. Our feedback is primarily based on consultations with our members and our own observations of the German NCP's performance and operations in the core criteria of visibility, accessibility, transparency, and accountability.

Firstly, we would like to first acknowledge and congratulate the German NCP on the positive changes that have been made over the past year in terms of institutionally restructuring the NCP so that it is now housed in a distinct body within the Federal Ministry for Economic Affairs and Energy, while also increasing the capacity of the NCP to now have four staff members. Additionally, in an improvement from last year in which the NCP had to request budget to carry out its activities on an ad hoc manner, the NCP now also has a dedicated budget and has stated that it aims to make use of its new capacities by ensuring increased engagement in promotional activities.

While these are positive steps aimed at improving the NCP, we note that there remains room for improvement, and would encourage the NCP to make further changes aimed at improving the accessibility (both improving transparency in how decisions are made and refraining from demanding excessively high standards of proof and confidentiality/campaigning restrictions) and the structure of the NCP (developing an independent multi-stakeholder oversight body), while also delivering more meaningful outcomes for victims of corporate non-compliance (make determinations and attach material consequences for breaches of the OECD Guidelines).

German NCP's performance on core criteria

Visibility and accessibility

The German NCP has a website in German, English, and French languages that contains general information about the OECD Guidelines and the due diligence guidance that has been developed for various sectors, along with the [Procedural Notes](#) of the NCP, Final Statements on specific instances, and annual reports to both the OECD Investment Committee and the German parliament. The Procedural Notes for Specific Instances provides an overview of how the German NCP handles complaints. However, while this document provides some good basic information on the stages of the procedures with an indicative timeline, as well as general facts and questions, it is written in a very fluid, unstructured and non-detailed manner, which runs contrary to a clear procedure.

When handling complaints, the NCP restricts its services only to the German, English, and French languages, and where possible states they offer complainants translation or interpretation services available in these languages if needed. It is unclear if translation services are also available for complaints submitted in other languages.

Recommendation: Develop rules or by-laws that provide more detailed and binding rules for how the NCP will handle the complaint procedure and how it will involve its advisory bodies in decision-making processes.

Recommendation: In order to improve accessibility, the NCP should make provisions that enable complainants to participate in specific instance proceedings in situations where they would be otherwise unable to do so. This should include assisting with necessary translation, as well as necessary transportation costs and/or offering to hold mediation in the host country when requested by the complainants (as now being done by the Dutch NCP).

Recommendation: The NCP should make provisions that enable it to carry out fact-finding missions in order to help clarify facts.

Transparency and Accountability

While the German NCP's Procedural Notes acknowledge the need for the NCP to strike a balance between the principles of transparency and confidentiality, the

same notes lean towards confidentiality by placing excessive confidentiality and campaigning restrictions on the complainants that go beyond what is stated in the Guidelines. Instead of just requiring confidentiality during the mediation phase as is stated in Guidelines, the NCP demands it as soon as the complaint is filed and with that comes restrictions on the complainant's ability to campaign and/or use the media. The NCP also does little to promote transparency in its operations apart from committing to publish Final Statements. While reports are made to the OECD's Investment Committee and the German parliament, these annual reports do not share information that is verified by stakeholders involved in the process nor do they share information regarding how decisions were reached regarding complaints handled by the NCP. By increasing transparency in the system and its decision-making processes, stakeholder confidence in the system will likely increase.

Finally, the [2016 German National Action Plan on Business and Human Rights](#) has a specific section on National Action Plans, which according to a report by the [Federal Government to the German parliament](#), the NAP "establishes a link between participation in a complaints procedure at the NCP and the approval of certain instruments to promote foreign trade and investment (export credit guarantees, investment guarantees and untied financial loans). For example, it is expected that companies that make use of the foreign trade and investment promotion instruments fulfil their due diligence obligations. This includes in particular the companies' participation in complaints procedures against them at the NCP." This is a positive development that comes with limitations, as it should ideally also include material consequences against companies' who breach the Guidelines. We hope that these new commitments will be incorporated into the NCP's procedural rules as a general rule for all companies that refuse to engage in mediation and/or breach the Guidelines.

Recommendation: The NCP should revise its Procedural Notes to remove its excessive confidentiality restrictions, especially on campaigning and the use of media. The confidentiality rules in the Guidelines' Procedural Guidance should be considered adequate as parties are already expected to abide by the principle of "good faith" throughout the process. Confidentiality agreements between the parties should not be considered necessary. Please

see the annex for OECD Watch's position on the principles of transparency and confidentiality in specific instance complaints to help guide this revision.

Recommendation: Given that the handling of a specific instance normally takes longer than one year for the parties involved, the NCP should commit to publishing all Initial Assessments on its website, in addition to the Final Statements, in order to further improve the NCP's information disclosure and transparency of the procedures.

Recommendation: Annual reporting to the OECD and the German parliament should have information regarding how decisions are reached regarding specific instance complaints, as well as the wider participation that occurred in the process, in order to increase transparency and accountability of the NCP.

Recommendation: In order to ensure procedural compliance and encourage German multinational enterprises to abide by the OECD Guidelines, the NCP should commit to carrying out determinations and ensuring material consequences not only for companies refusing to engage in mediation, but rather for all companies that are found to have breached the Guidelines.

Recommendation: In order to improve accountability and assist in making sure outcomes are honored after the mediation phase, the NCP should require follow-up to take place one year after mediated agreements. Follow up reports should be made and published yearly describing the steps that have been made by the parties to resolve the situation.

The German NCP's information and promotional activities

The German NCP's annual reports to the OECD's Investment Committee describe the information related activities it has undertaken in previous years, which included co-organizing an event in 2016, as well as publishing an article on the anniversary of the OECD Guidelines in various newspapers. The NCP also made presentations and joined in events organised by others, including the Swiss NCP's Peer Review in November 2016. The NCP does not have a promotional plan and does not appear to have initiated organizing information and promotional activities on its own.

In OECD Watch's view, the principal objectives of promotional activities should be: first, to inform business enterprises of the expectations with respect to their behavior contained in the OECD Guidelines, as well as the expectation by the German Government that the standards of the Guidelines should be abided by, and second, to make stakeholders aware of this mechanism and to encourage them to make use of it.

Recommendation: Promotional activities should be focused on the two objectives mentioned above. In terms of the first objective, the NCP should do more than merely state that the Guidelines are voluntary, but rather work to fulfill the Germany's responsibility to promote its observance by companies operating in or from Germany by not only stating that the Guidelines are voluntary, but rather by outlining the government's expectations that they will be observed. In terms of increasing awareness of the mechanism amongst stakeholders, we encourage the NCP to improve its public descriptions of the NCP filing and mediation procedures, so that it is easy to understand and use.

Recommendation: In addition to the promotional activities inside Germany, the NCP should also undertake activities abroad, especially in non-adhering countries where German multinational companies operate, reaching out also to local NGOs.

Recommendation: As the NCP has stated that it aims to make use of its new capacities for additional engagement in promotional activities, OECD Watch recommends that the NCP publish a promotional plan on its website, in order to increase transparency and stakeholder accessibility.

The German NCP's institutional arrangements

The German NCP is a monopartite body with advisory bodies that it uses on an ad-hoc basis when the NCP considers necessary or relevant. The NCP restructured itself in late 2016, when it went from being based in the unit of Foreign Direct Investments to becoming a distinct unit named NCP attached to the Directorate-General for External Economic Policy, located inside the Federal Ministry for Economic Affairs and Energy. At the same time, the NCP also expanded its personnel from three to four dedicated staff members (two of which are full time employed) with a practice of continually rotating ministerial staff members. The NCP states in its Procedural

Notes that it reports back regularly to its Interministerial Steering Group for the OECD Guidelines (which is composed of numerous federal ministries), and coordinates all its decisions based on this group. However, it's important to note that the Procedural Notes states "the extent to which a ministry is involved in the examination of a particular complaint, in the consultations with the parties, and in the co-ordination process regarding specific procedural steps and decision will depend on the extent to which the subject matter falls into the remit of this ministry."

Additionally, the NCP has an OECD Guidelines Working Group (composed of representatives from business associations, trade unions, NGOs, and the German Global Compact Network), which meets twice a year to discuss fundamental issues related to the Guidelines and to cooperate on promoting the application and dissemination of the Guidelines. Various federal ministries also take part in this working group on an irregular basis. There appears to be no terms of reference for either group and there is no oversight body.

Furthermore, the German NCP only received a dedicated budget in the 2017 financial year to support its activities. Prior to that it was dependent on the allocation of financial resources on an ad hoc basis to support its promotional activities and the handling of specific instances. This is a positive move to allow for long-term sustainability and will hopefully continue in future years.

Recommendation: The current structure of the NCP does not ensure impartiality. As such, we strongly recommend that the German government introduce an independent multi-stakeholder steering body charged with oversight, which should also include the right to review complaints and an appeals mechanism.

Recommendation: As there are currently no terms of reference for the Interministerial Group for the OECD Guidelines, as well as the OECD Guidelines Working Group, the NCP should develop terms of references for the respective groups in order to clarify when and how the NCP decides which ministries and other stakeholders should be involved in a specific instance complaint, how it will coordinate amongst them, and how it will base its decisions on the advice and/or recommendations made by both groups, as

well as how it will deal with conflicting views of opinion in terms of how a complaint should be handled or in the interpretation of the Guidelines.

Reflections on the implementation and handling of specific instances

When analyzing the implementation and handling of specific instances, some common themes arise that merit specific consideration, namely that:

- Very rarely has the specific instance procedure resulted in a joint agreement made between both the complainant and company. The general lack of access to remedy experienced by complainants with the process has likely reduced stakeholder satisfaction with the system.
- The NCP appears to require complainants to meet excessively high standards of proof despite stating in its Procedural Note that “there is no burden of proof.” The threshold placed on complainants appears to be very high compared to other NCPs. For example, other NCPs have accepted similar cases that were rejected by the NCP (compare the Gamma International cases filed with the UK NCP that was accepted by the UK NCP vs the Troivicor case that was only partially accepted by the German NCP due to supposed lack of proof).
- The NCP has regularly exceeded the recommended indicative timeline for handling complaints, however, we have been informed by members that the NCP has recently begun explaining the reasons for the delay to the complainants. While it’s unclear what justification is being given for the delays, it should be noted that delays in the timeframe impede the predictability of the process.
- When accepting a complaint for mediation, the NCP does not negotiate the terms of reference for the mediation talks with the parties involved.

Recommendation: When a joint agreement between parties cannot be made or when a company refuses to engage in mediation, the NCP should still seek to deliver a positive outcome by issuing a determination and material consequences for non-compliance.

Recommendation: The NCP should maintain a reasonable standard of substantiation when determining whether a complaint is bona fide.

Recommendation: The NCP should carry out a review as to the reasons why it is unable to meet the indicated timeframes and address them. It would be recommended that along with our recommendation to publish the Initial Assessment, the NCP also provide the parties a timeframe that can be referenced should mediation be offered, and the NCP should publish the reasons for the delays on its website.

Recommendation: When offering mediation, provide both parties draft terms of reference for the mediation process, while also allowing them to comment on it and approve the mediator.

Conclusion

This submission advances recommendations that we have previously put forward to the German NCP, as well as all NCPs, in our 2015 report Remedy Remains Rare and our 2016 4 x10 Plan for why and how to unlock the potential of the OECD Guidelines. As a G7 country, our recommendations also advance previous recommendations made in regards to the 2015 G7 Leader's Commitment to continue strengthening its NCP to serve as an access point for remedy for victims of corporate misconduct, as well as to lead by example.

While OECD Watch hopes that the recommendations made in this submission are considered and acted upon, we encourage the German government to adopt a policy towards ensuring regular peer reviews for the NCP at least once every five years in order to lead to further improvements, as well as a means to achieve functional equivalency.

Contact details

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ANNEX:

OECD Watch's Position on Transparency and Confidentiality in Specific Instances

The Procedural Guidance for the Guidelines stipulates that one of the core criteria with which NCPs must handle complaints is transparency. NCPs should ensure that the parties can engage in the specific instance process on fair and equitable terms by providing access to information relevant to the procedure. At the same time, NCPs have to be aware of the need to protect sensitive business and other stakeholder information, such as the identity of individuals involved in the case. In order to prevent and mitigate security risks that complainants (such as human rights defenders or labour leaders) may face when using the NCP system, OECD Watch encourages NCPs to have safety protocols in place.

The general rule for the initial assessment phase is transparency. OECD Watch advises NGOs to always assess the risks (e.g. reprisals from the company including threats or a lawsuit) before making allegations about a company (publicly or through an NCP complaint). Some NGOs issue a press release upon filing their complaint with the NCP and publicize the case while the NCP is conducting the initial assessment. This should be considered an acceptable strategy that can help raise awareness about the issues in the complaint and increase pressure on the company to engage in the process to quickly and genuinely resolve the problem. Furthermore, some of the best-performing NCPs make the outcome of the initial assessment public on their website, and complainants are also free to do so.

After the case has been accepted the next phase of the process can include mediation and other exchanges between the parties, fact finding by the NCP, and the drafting of a final agreement or statement. OECD Watch's rule for this phase is transparency of process, but confidentiality of content. The Procedural Guidance is clear that NCPs should seek to keep sensitive information confidential once the initial assessment has been concluded and the case has been accepted. During the entire time that the specific instance is being handled by the NCP, complainants should not publicly disclose information, including correspondence, documentation, or opinions that are learned or exchanged during the process. Complainants should make clear their commitment not to publicize information exchanged during the processes. This will assist NCPs in encouraging both parties to be as open and transparent within the process as possible. Complainants should also make it clear to

NCPs that it is not acceptable for the NCP to base decisions on information supplied by the company that has not also been made available to the complainants.

Committing not to disclose information exchanged during the process does not mean that complainants cannot conduct a public campaign against the company (based on publicly-available information) while the process is on-going. In a number of recent cases, public campaigning by complainants during an OECD Guidelines case has incentivized the company in question to prioritize resolution of the dispute through NCP-facilitated mediation, leading to a more positive outcome for the NCP process than would have occurred if the complainants had not engaged in a public campaign.¹ OECD Watch believes firmly that it is up to the complainants, not the NCP, to decide whether or not to engage in public campaigning during the process. Even if complainants decide not to pursue a high-profile public campaign, OECD Watch believes it is acceptable for complainants to communicate publicly about purely procedural aspects/events in specific instance processes. Such procedural aspects include whether or not the company responds to the allegations (though not the content of the company's response), whether meetings between the parties are being organized or have taken place (though not the content of the meetings), and if mediation has begun/ended. As long as it does not conflict with the agreed need to protect information exchanged by the parties, transparency on these objectives and the procedural elements of a case is crucial to maintain the legitimacy and effectiveness of the Guidelines.

Complainants should be aware that some NCPs have taken to the practice of requiring complainants to agree to overly strict levels of confidentiality or restrictions that prevent complainants from engaging in a campaign during the complaint procedure. This may reflect the NCP's weakness vis-à-vis a company and indicate that the case has little chance of a fair hearing. This is beyond the guidance NCPs have received from the OECD. Should the NCP consider it legitimate for complainants to stop campaigning on a case they have lodged, then they should also require the company to stop pursuing the business operations that are the subject of the complaint. Faced with overly strict confidentiality and/or campaigning requirements from an NCP, many potential complainants have decided not to use the OECD Guidelines complaints mechanism and to pursue other avenues for seeking remedy or resolving disputes.

At the conclusion of a case, the Procedural Guidance instructs NCPs to make the results of the process publicly available in a public report or statement, taking into account the need to protect sensitive information. Outcomes should always be transparent unless it can be argued that not publicizing the outcome would be in the best interest of effective implementation of the Guidelines. In order to ensure transparency, NCPs should be required to keep a case registry and publish documents such as initial assessments, final statements and agreements. Complainants should also be free to communicate about the outcome and process

¹ See, for example, WWF vs SOCO, https://www.oecdwatch.org/cases/Case_307.

of the case, keeping in mind the need to respect the confidentiality of sensitive information exchanged during the process.

In some countries and jurisdictions, the NCP operates under legislation that gives the public the right to access to all correspondence between the NCP and the parties, with the exception of those parts of documents that contain commercial secrets (this is a narrower concept than the concept of 'confidential information').