

OECD Watch Submission to the 2017 Peer Review of the Austrian NCP 21 November 2017

Introduction

OECD Watch appreciates this opportunity to provide feedback into the peer review process of the Austrian National Contact Point (NCP). The intention of this submission is to help the Austrian NCP identify ways in which it can further advance the effectiveness of the OECD Guidelines for Multinational Enterprises and serve as a forum for accessing remedy for complaints related to corporate abuses. Our recommendations are primarily based on consultations with our members, as well as our own observations of the Austrian NCP's performance and operations in terms of the requirements laid out in the OECD Guidelines' Procedural Guidance.

Civil Society's Confidence in the NCP

Civil society's confidence in the Austrian NCP is low, which is demonstrated by the very low number of complaints submitted to and handled by the NCP, as well as concerns raised by civil society and former complainants on the following factors:

- The NCP, in its current state, is an ineffective non-judicial grievance mechanism that lacks the necessary skills and resources required for successful mediation and has yet to facilitate and/or recommend remedy for victims of corporate harms;
- The NCP is perceived as being partial to business interests due to its current monopartite structure and location. Furthermore, the NCP's Steering Committee has limited decision-making authority to provide oversight to the NCP;
- There is a general lack of predictability and equitability in the proceedings due to inconsistencies in how the NCP handles specific instances, as there are currently no procedural rules established by the NCP guiding potential complainants on what to expect from the process. While the NCP has a [Terms of Reference \(ToR\)](#), it does not articulate how the NCP handles complaints in practice, such as requiring confidentiality and campaigning restrictions from the complainants throughout the proceedings.

Austrian NCP's Performance on Core Criteria

The implementation procedures of the Guidelines require NCPs to operate in accordance with the core criteria of visibility, accessibility, transparency and accountability, in order to promote the concept of 'functional equivalence' in the activities of NCPs.

Visibility and accessibility

The Austrian NCP's levels of visibility and accessibility are relatively low. While the NCP has [a website in German and English](#), which provides information relating to a wide range of issues related to the OECD Guidelines, the specific instance process, due diligence, amongst others, there is little information entailing the procedural rules of the NCP or information regarding the staffing composition of the NCP and its Steering Committee is unclear. Furthermore, information found on the English website is out-dated and incomplete in comparison to the German website.

The NCP will accept complaints only in German, English and French languages, restricting accessibility for potential complainants located in countries where Austrian multinational enterprises are found to be operating. While it is positive that the NCP has [a template](#) for submitting complaints on its website, which can help facilitate the accessibility, there is little information for potential complainants in terms of the process and what to expect, apart from the NCP's ToR. It is also concerning that in the NCP's ToR; Paragraph 3.11 states that "the costs of the proceedings shall be basically borne by the contracting parties," which may further prevent potential complainants from filing specific instances.

The 2011 Guidelines makes it clear that parallel proceedings, such as on-going legal proceedings, cannot be used as justification for not accepting a specific instance, but rather that NCPs should evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised and would not create serious prejudice for either of the parties involved. The Austrian NCP's ToR recognise the NCP cannot reject a complaint solely because parallel proceedings have been concluded, are underway, or are available to the parties concerned. However, the NCP's ToR, Paragraph 3.10, goes beyond the criteria listed in the Guidelines and states that the NCP "has no right to interrupt an already pending case for this sole reason, unless this is the mutual desire of all parties involved." As this requirement may limit the NCP's accessibility, the NCP should instead evaluate whether they may be able to make a positive contribution to the resolution of the specific instance, rather than unfairly dismiss such cases where both parties may not be in agreement.

Finally, the NCP has placed additional restrictions on complainants when it is handling specific instances, which are not mentioned in its Terms of Reference. There are no requirements prohibiting campaigning during the duration of a specific instance, yet the Austrian NCP in practice has demanded this, along with additional confidentiality measures. This has led to one complainant, International Rivers, to withdraw from the specific instance filed against Andritz AG. In a [letter sent to the NCP](#) in May 2015, the complainant International Rivers wrote “we will not proceed in the mediation process if the requirement remains that we must refrain from publishing any press releases or conducting any public campaigns that specifically name Andritz AG. We are disappointed that such a requirement be made, as we feel it’s beyond normal NCP procedural conduct and the intention of the OECD guidelines compliant process, and view such a requirement as an attempt to silence the campaign against the Xayaburi Dam and other destructive projects that Andritz is involved in.” Such restrictions hinder accessibility to the system.

Recommendation: The NCP should improve its accessibility for communities and civil society organisations seeking to use the NCP by removing financial and procedural barriers for non-English, German, and French language speakers and complainants with limited resources. The NCP should remove Paragraph 3.11 from its ToR. The NCP should also allow complaints in any language, guarantee that translation services are available, if needed, and offer to hold mediation in the home country, if desired by the complainants.

Recommendation: The NCP should develop procedural rules that provide detailed information as to how the NCP will handle a specific instance, including criteria in which an NCP will decide when to carry out a fact-finding mission and how decisions will be made regarding whether to have a professional mediator. The NCP should also clarify how the Steering Committee’s advice will factor in decision-making processes.

Recommendation: The NCP should revise its ToR regarding parallel proceedings to drop the requirement that both parties must be in agreement for the NCP to handle the case, in order to be in alignment with the Guidelines’ Procedural Guidance.

Recommendation: 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 and as such, the NCP should no longer demand such requirements from complainants. 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. Such requirements not only reduce the accessibility of the NCP, they further the unequal power balance that usually exists between the parties.

Recommendation: The NCP is able to carry out fact-finding research into specific instances, however, funding for this purpose must be requested on an ad hoc basis and to date, the NCP has not done so. The NCP should start conducting fact-finding missions when necessary to help clarify facts when deciding whether to accept a compliant and/or when requested by complainants.

Transparency and Accountability

The Guidelines' Procedural Guidance states that, as a general principle, the activities of an NCP will be transparent. The issue of confidentiality is only addressed in the Procedural Guidance, Part 1, Section C.4 stating that confidentiality of the proceedings will be maintained when an NCP has offered its good offices for mediation. The NCP in its ToR explains its position in transparency in terms of respecting the Guidelines' Procedural Guidance. In Paragraph 6.2 of the ToR, the NCP also expresses its commitment to share information provided to the NCP between the parties, unless there are justified reasons against disclosure. While this is positive addition to the updated ToR, it is unclear whether the NCP will accept all requests for confidentiality made by parties, or whether they have a process in place for determining whether or not such a request against disclosure is justified. In the NCP's ToR Paragraph 3.9, the NCP states that it will publish all initial assessments on its website, which is a positive improvement. By increasing transparency in the procedures and its decision-making processes, the NCP will likely be used more.

In its [2016 report to the Investment Committee](#), the Austrian NCP stated that while they report to the government, they do not report to the Austrian Parliament. Apart from the reports submitted to the Investment Committee that are published on the Austrian NCP's website, other reporting is not published. However, the only explicit obligations found for reporting by the NCP are found in its ToR, which are all directed towards ensuring that reporting is done to the OECD, but not to the Austrian government or the general public.

The Austrian government has also done little to promote policy coherence, as the NCP does not commit to carrying out determinations in its final statements, nor do they have the ability to attach material consequences on companies that do not adhere to the Guidelines. The Austrian government should do more ensure policy coherence.

Recommendation: In order to further the effectiveness of the Guidelines and ensure policy coherence, the NCP should commit to making determinations in its final statements of (non)-compliance when a mediated agreement is not reached, and to carry out fact-finding investigations when more information is required. The Austrian government should equip the NCP to attach material consequences on a company in breach of the Guidelines, such as through exclusions for public procurement contracts, state-backed export promotion mechanisms (such as through their officially contracted ECA OeKB or through their officially contracted development bank OeEB), etc., when a company fails to agree to mediation or when a company is found to have breached the Guidelines.

Recommendation: The NCP should take steps to ensure that transparency is the rule and not the exception, by only basing initial assessments and final statements on information that is available to both parties, and only requiring confidentiality from parties on the content gained during mediation. Transparency over information regarding the status of the procedures, the content of the complaint, and information already in the public domain, should be allowed.

Recommendation: The Commentary on the Procedural Guidance for NCPs state that parliaments could have a role to play, in order to ensure accountability and place the activities of NCPs in the public eye. Therefore, we recommend that the NCP publish all reporting that is made to its government and should begin reporting to the Austrian Parliament. All reports developed by the NCP should be first approved by its Steering Committee to ensure accuracy of information.

The Austrian NCP's Information and Promotional Activities

The Austrian NCP's website, as well as its annual reports to the OECD, describes the information related activities it has undertaken. In 2017, the [NCP organised three events](#), which were related to responsible business conduct, due diligence, and the specific instance procedure. These events all covered a wide-reaching audience of business representatives, civil society organisations, trade unions, and government representatives. Events held outside of Austria, in countries where its multinational enterprises are operating, were not reported. The Austrian NCP states that they have a promotional plan; however, this plan is not accessible to the public.

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 Austrian 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: In addition to the promotional activities being conducted inside Austria, the NCP should also undertake activities abroad, especially in non-adhering countries where Austrian multinational companies operate, reaching out also to local NGOs to explain the role of the NCP in handling complaints.

Recommendation: OECD Watch recommends that the NCP publish its promotional plan on its website, in order to increase transparency, stakeholder accessibility, and accountability.

Recommendation: In order to better understand the state of awareness amongst Austrian businesses regarding the Guidelines, and as such, adopt future promotional plans accordingly, we recommend that the NCP carry out research examining the following questions: 1) What is the percentage of Austrian businesses that are aware of the Guidelines; 2) What is the percentage of Austrian businesses that publicly commit to upholding the Guidelines; and 3) What is the percentage of Austrian businesses that have set up a robust due diligence system in line with the Guidelines and its sector-specific due diligence guidance (with a particular focus on the Austrian businesses operating in the minerals, garments, and agriculture sector supply chains).

The Austrian NCP's Institutional Arrangements

The Austrian NCP is a monopartite body located in the Federal Ministry of Science, Research and Economy's Directorate-General for External Trade Policy and European Integration (organizational unit C2/4a). The NCP was established through an Administrative Decree, which amended the Ministry's organisational structure in March 2012. The NCP has 1 dedicated full-time staff member, who began her position in 2017. Since 2014, there have been 2 other NCP Heads, plus an Interim Head. The NCP's ToR was updated in September 2017. According to the NCP's 2016 Report to the Investment Committee, the NCP has a dedicated budget to support its activities, including the ability to hire independent mediators. Funds can be obtained on an ad hoc basis for fact-finding missions.

The NCP has a multi-stakeholder Steering Committee, which is Chaired by the Federal Ministry of Science, Research and Economy and is composed of 11 members (five of which are government representatives, two represent business interests, one represents the Austrian Trade Union Federation, one is from the Chamber of Workers, one is an OECD Watch member, and one is an academic with expert knowledge in the field of extrajudicial dispute resolution). The Steering Committee members are nominated by their respective representative body and serve two-year terms. The [Steering Committee has a Terms of Reference \(ToR\)](#), which was last updated in September 2017. According to the ToR, the NCP can seek the advice of the Steering Committee on the handling of specific instances in exceptional cases. The Steering Committee can also provide oversight to the NCP, in providing evaluation of the activities of the NCP, “in particular with regard to the compliance with the Terms of Reference and the implementation of key criteria pursuant to the Guidelines’ Procedural Guidance.” The Steering Committee is also able to refer to the OECD Investment Committee in case doubts arise regarding the interpretation of the Guidelines. However, despite these positive capabilities on paper, the Steering Committee does not appear to be equipped with the necessary authority to fulfil its responsibilities as noted in its ToR and appears to only function as a consultative body at best. Furthermore, the Chair appears to hold significant weight over the Steering Committee as it determines the agenda, takes the minutes, and makes its own decisions over the handling of specific instances.

Minutes of the [Steering Committee’s meetings](#), while posted on the NCP’s website, are anonymized and extremely vague, further limiting accountability of the structure.

Given the current structure and location of the NCP, in addition to the limited functions and decision-making authority of its Steering Committee, the Austrian NCP is perceived to be lacking independence and being partial to business interests. In its current state, civil society has little confidence in the NCP.

Recommendation: The current structure and location of the NCP is perceived as being partial to business interests. The NCP also lacks genuine oversight. We strongly recommend that the Austrian government consider restructuring the NCP to be an independent body or in the form of a multipartite NCP, housed in a new government office that works on human rights issues, such as the Federal Chancellery, Federal Ministry of Labour, Social Affairs or the Consumer Protection or Federal Ministry for Europe, Integration and Foreign Affairs. The NCP should provide its Oversight Committee with the necessary authority it requires to serve as an

oversight and appeals mechanism or consider developing a multi-stakeholder advisory committee, as well as another body charged with oversight.

Recommendation: The NCP has undergone significant staff turn-over during the past few years, resulting in a loss of institutional memory and expertise in the Guidelines. Since 2014, the NCP has had 3 different NCP Heads, plus an Interim NCP. Some NCP staff members, in particular, have been perceived as acting partial towards business interests. For example, one former NCP Head, had worked in the legal department of Verbund AG, Austria's biggest hydropower generating company, directly before being posted as NCP to handle the Andritz AG specific instance regarding the Xayaburi Dam in Laos.

Recommendation: The ToRs for the NCP and its Steering Committee were updated in September 2017. More clarity is needed in Section 4 'Referral to the Steering Committee' of the NCP's ToR to explain when and how the NCP may have the Steering Committee involved in a complaint, how it coordinates amongst them, and how it bases its decisions on the advice and/or recommendations made the Steering Committee, as well as how it will deal with conflicting views of opinion in terms of how a complaint should be handled. Furthermore, it should be noted that should the NCP choose to involve the Steering Committee in a complaint, a conflict of interest could potentially arise, if the Steering Committee also has the oversight authority it is meant to have. The ToR for the Steering Committee should also be clarified to give the authority to the Committee to carry out the oversight tasks it is meant to have in Section 8 'Field of Duties.'

Recommendation: The Steering Committee's meeting notes, while published on the NCP's website, provide little information on the discussions and decisions made at its meetings. In order to improve transparency and accountability, the reports should be more comprehensive, with only sensitive matters related to the handling of specific instances removed from the minutes.

Reflections on the Implementation and Handling of Specific Instances

The Austrian NCP has only handled 7 specific instances since its formation in 2002, 4 of which were filed by civil society organisations. This small number of complaints received demonstrates the need for improved visibility and accessibility. The following highlights a few key trends to date:

- *Initial Assessments and/or Final Statement have not always been published.*
The NCP rejected two complaints in 2002 regarding labor rights in the supply chain, one against [Nike](#) and one against [Adidas](#), claiming no Austrian connection. The NCP referred the cases to the US and German NCPs who handled the cases. No initial assessments (or final statements) were published by the NCP for these cases. In another [NGO compliant filed against an Austrian company mining coltan in the Democratic Republic of Congo](#) (DRC), which was led by the Austrian NCP, no final statement was produced. Rather than carrying out a fact-finding mission, the NCP stated it was impossible to verify the claims due to the internal situation in the DRC. A final statement was not produced, despite the 2000 Guidelines stating that NCPs should make an initial assessment, and when issues raised merit further examination, issue a statement.
- *An ineffective platform for dialogue and remedy.* While the NCP has the funds necessary to hire a professional mediator, they have chosen to carry out the mediation themselves. However, this was problematic on many levels. During the handling of the specific instance compliant [Finance and Trade Watch Austria vs Andritz AG](#), four different NCP representatives handled the case between 2014 to 2017. Furthermore, while one NCP Head indicated that they would consider investigating the situation on the ground through their Austrian representations in Southeast Asia, other NCP heads did not demonstrate interest in doing so and did not follow-up on this. Furthermore, throughout the process, the NCP emphasized the mediation process and showed little interest in also ensuring that the procedures served as a grievance mechanism. Thus, when it was recongised that the proceedings were going over the indicative timeframe for handling a complaint, a few of the NCP heads handling the case placed pressure on the parties to reach a joint agreement, despite the fact that the parties were not close to reaching a mutual understanding of the issue at hand. .
- *Agreements without resolution of the issue.* It is important to note that most of the complainants of the Finance and Trade Watch Austria vs Andritz AG complaint withdrew from the procedures. At the end of the process, only 2 of the initial 9 complainants remained involved. International Rivers withdrew first due to the campaigning and confidentiality restrictions placed on all

complainants. The Mekong complainants then withdrew ahead of the agreement due to their frustrations in the process and the inability of the NCP to help the parties resolve the issue. The complainants were left disappointed with the process stating that the NCP staff who were involved in the case did not have the skills and knowledge necessary to professionally mediate the case. At times conversations held between the company and the NCP were not adequately translated and explained to the complainants that joined the meetings remotely. In two press releases published at the end of the Andritz case, the disappointment over the NCP was expressed.

[Earthrights International](#) stated “the OECD mediator, the NCP, proved itself to be an ineffective forum to find resolution. Ultimately, all the parties agreed that the NCP process was no longer an effective way to continue debating most of the environmental and social impacts.” In another press release put out by [International Rivers and the Mekong complainants](#) that withdrew from the process, they stated “the OECD mediation process, including the NCP’s role as mediator, failed to provide an adequate framework through which key issues and concerns raised in the complaint could be effectively discussed and negotiated. It was not possible to adequately address Andritz’s responsibility for the Xayaburi project’s transboundary impacts, including sediment trapping, damage to fish mass and biodiversity, or the dam’s social impacts.” While a partial Agreement between the remaining parties was reached in the end, the agreement did not cover many of the issues addressed in the complaint nor has it resulted in positive changes on the ground to date.

Recommendation: As providing access to remedy is a key component of the Guidelines, the NCP should strive to facilitate access to remedy or make recommendations for it when handling complaints. 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 of a company’s non-compliance to the Guidelines with recommendations for remedy. The Austrian government should grant the NCP the authority to make material consequences for non-compliance.

Recommendation: While it’s positive that the NCP has committed to follow up on the Andritz AG agreement in 2018, this should be regular practice and explicitly stated in the NCP’s ToR and procedural rules. When following-up on agreements,

the NCP should commit to publishing its report on its website. If a company is found to have not adhered to the agreement made, the Austrian government should apply material consequences on the company.

Recommendation: When accepting a specific instance for mediation, the NCP is encouraged to use professional mediators, unless its staff have undergone the necessary training required to carry out mediation and have sufficient knowledge of the issues contained in the Guidelines. Both parties should agree on the professional mediator to be used, as well as the terms of reference for the mediation talks.

Recommendation: The NCP should strive to handle specific instances according to the indicated timeframe and communicate and seek agreement amongst the parties on a new timeframe, when delays are necessary.

Conclusion

This submission advances recommendations that we have previously put forward to the Austrian NCP, as well as all NCPs, in our 2015 report [Remedy Remains Rare](#) and our updated 2017 [4 x10 Plan for why and how to unlock the potential of the OECD Guidelines](#).

While OECD Watch hopes that the recommendations made in this submission are considered and acted upon, we encourage the NCP to disseminate the final peer review report widely and to publicly report on an annual basis on the improvements made. We also encourage the Austrian government to adopt a policy towards ensuring regular peer reviews for the NCP at least once every five years in order to strengthen its effectiveness, as well as a means to achieve functional equivalency.

As the Austrian government has committed to developing a National Action Plan (NAP) on Human Rights, which will include a chapter on business and human rights, we encourage the government to prioritize finalizing the NAP, in order to help strengthen policy coherence and promote responsible business conduct, including corporate respect of human rights. The NAP should include information on the steps the Austrian government will take to strengthen the effectiveness of its NCP and improve its ability to facilitate access to remedy for victims of corporate harms.

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