

Identified gap in the OECD Guidelines: minimum expectations for the establishment of effective National Contact Points

Outcome sought: Broad and comprehensive stocktaking of the OECD Guidelines for Multinational Enterprises (Guidelines) that addresses gaps in the minimum expectations for the institutional arrangements, promotional activities, and complaint handling procedures of National Contact Points.

Problem: The OECD Guidelines do not set adequate baseline expectations for governments on how to establish National Contact Points (NCPs) that meet the core criteria and complaint handling principles laid out for them in the Guidelines, as well as stakeholders needs and expectations

The UN Guiding Principles (UNGPs) find that states have a duty to provide victims of business-related human rights abuse access to judicial and non-judicial grievance mechanisms, and also that multinational enterprises (MNEs) have a responsibility to provide or participate in remedy. Unfortunately, remedy is often considered the “forgotten pillar” of the UNGPs. Because access to remedy via judicial systems is still impossible or extremely difficult in many cases of irresponsible business conduct, impacted workers and communities often rely on non-judicial mechanisms to seek justice. The OECD Guidelines’ Procedural Guidance (Part II of the Guidelines) requires member and adherent states to establish such a mechanism in the form of an NCP, a government-supported entity tasked with promoting the Guidelines and helping to resolve claims that MNEs have breached the Guidelines’ standards. The OECD Guidelines call on member and adherent states to ensure their NCPs meet core criteria of *visibility, accessibility, transparency, and accountability* and are equipped to handle complaints in a manner that is *impartial, predictable, equitable, and compatible with the Guidelines*. The Procedural Guidance allows almost complete flexibility to governments to set up NCPs that meet these expectations, so long as they are “functionally-equivalent” to each other.

As long as obstacles to other remedial mechanisms persist, the NCPs represent a vital means through which victims of business-related human rights abuses may attempt to find remedy. Unfortunately, because the Guidelines’ Procedural Guidance does not set adequate minimum practical requirements for NCP performance, after 20 years of NCPs’ existence, the NCPs are not functionally equivalent. More specifically, when viewed collectively, they do not meet the Guidelines’ core criteria and complaint handling principles, nor stakeholders’ needs and expectations.

- **Institutional Arrangements:** AN NCP’s structure has significant bearing on its effectiveness, and the Procedural Guidance does not set adequate minimum expectations for NCP institutional arrangements most conducive to success. The Procedural Guidance does not set adequate minimum requirements for the resourcing of NCPs. A functional NCP needs sufficient funding as well as high quality and quantity of staff. To this end, the Guidance should, but does not, call for a designated and public budget for each NCP, nor discourage high staff turn-over and recommend ensuring staff or external advisors have broad knowledge of the topics covered in the Guidelines. The Procedural Guidance does not guide states on the merits of locating the NCP outside export promotion agencies to isolate the NCP from conflict of mission with the host ministry. The Guidance also does guide states in choosing an organisational structure that helps promote NCPs’ independence and expertise and boost stakeholder confidence in its *impartiality* and effectiveness. The Procedural Guidelines also sets no minimum requirements for involvement of stakeholders (including civil society) in NCP decision-making activities, ideally in the NCP structure itself, or secondarily through an oversight or advisory body.
- **Information and Promotion:** States are called to ensure their NCP is *visible* and *transparent*, but the Procedural Guidance does not give adequate guidance to states on how to achieve this, such

as by facilitating the NCPs engagement across government ministries and ensuring the NCP shares and implements an ambitious prospective promotional plan targeted towards *all* stakeholder groups, maintains a public complaint database, and publishes complaints when they are received and initial assessments and final statements when they are drafted.

- **Implementation in Specific Instances:** In general, there is too much variation in specific instance handling and outcomes. OECD Watch believes this variance results from the fact that the Procedural Guidance sets insufficient basic standards for complaint-handling. Accessibility of NCPs is low for a few reasons: the current six admissibility criteria are difficult for NCPs and notifiers alike to interpret and often result in too high a threshold to acceptance – and, likely, in *unpredictably* long initial assessment reviews lasting well-beyond the designated three months. A simpler admissibility standard, such as ones common at other non-judicial complaint mechanisms, would better enable access to good offices. The Procedural Guidance also does not encourage NCPs to promote accessibility through steps such as helping indigent notifiers draft effective complaints, gain mediation training support, and participate in mediation through remote access technologies (all steps employed by some NCPs). Nor does the Guidance encourage NCPs to take efforts to mitigate potential barriers to women filing complaints, and anticipate and respond to risks to human rights defenders. The partiality and equitability of NCPs is regularly in doubt because they adopt practices that elevate the power of companies over notifiers. For example, too many NCPs require overly broad confidentiality terms allowing companies to protect their reputations, simply dismiss complaints when companies refuse to engage, and adopt only forward-looking grounds for discussion rather than accepting discussions on past breach. To promote impartiality, the Procedural Guidance should instead propose methods to right power imbalance between parties, such as recommending that NCPs maintain transparency over complaints, assess past company actions, and carry-out independent investigations and seek material consequences when companies refuse to engage in the process (again, all steps employed by some NCPs). Accountability of NCPs is also low because the Procedural Guidance does not instruct NCPs to issue public determinations when companies have breached the Guidelines (thereby ensuring a form of remedy to complainants and a teaching moment for MNEs) and undertake follow-up to monitor fulfilment of recommendations made or agreements reached in complaints (again, all steps employed by some NCPs). The Procedural Guidance also does not advocate states' development of substantive or procedural reviews for their NCP complaint-handling. Finally, the Guidelines do not encourage NCPs to engage and cooperate with other state-based and non-state-based grievance mechanisms, primarily for the sharing of good practices.

Partly as a result of these and other problems at NCPs, effective remedy is not the outcome in the vast majority of NGO- or community-led complaints.¹

Further, the Procedural Guidance does not adequately clarify the role of the Investment Committee itself in measuring and monitoring the functional equivalence of NCPs. Various methods – such as developing and applying a set of indicators to NCPs, appointing a team to spot-check a certain number of complaint outcomes each year, or appointing a centralised person or team to assist with each actual ongoing complaint, could help ensure greater consistency in NCP performance and complaint outcomes. Additionally, the Guidance doesn't clarify the substantiated submission procedure to ensure it is undertaken according to the same core criteria and principles that the Guidelines demand of NCPs in their complaint handling.

Impact of the problem: Lack of access to remedy for impacted parties and lack of clear expectations for MNEs.

Many victims of corporate impacts have no avenue to remedy except via the NCP complaint mechanisms, and therefore the collective failure of OECD states to establish a coherent and accountable NCP grievance system has two main consequences:

- 1) Diminished ability for impacted people to seek and secure remedy from NCPs for business-related impacts.²
- 2) Lack of clarity for MNEs on the meaning of responsible business conduct (particularly through NCPs' failure to follow-up on complaints, issue determinations of Guidelines breach, and seek consequences for lack of good faith engagement in the complaint process).

Guidance on remedy from public institutions and civil society and examples from other grievance mechanisms

The stocktaking of gaps in the Procedural Guidance should consider the findings of recent evaluations of the NCPs, recommendations that have been developed to achieve better implementation of the UNGPs, and examples of certain practices and policies of other non-judicial mechanisms, such as:

- Evaluations of the NCPs by OECD Watch and the OECD RBC Unit;³
- Recommendations of the UN (OHCHR)⁴ and the European Agency for Fundamental Rights⁵ on barriers to accessing remedy;
- Analysis of practices of the Independent Accountability Mechanisms (IAMs) of the development finance institutions, including a civil society Good Policy guide highlighting current good policies of the IAMs across ~70 key performance indicators;⁶ and
- (as useful) Analysis of procedures of certain multi-stakeholder initiative complaint mechanisms.

Why ensuring a comprehensive stocktaking on gaps is important

The OECD Guidelines, originally drafted in 1976, have not been revised since 2011 and are out of date in many ways. Ten years of implementation of the current text of the Guidelines have revealed numerous gaps in the text that cause both a serious lack of clarity and coherence in international norms on key elements of responsible business conduct, and diminish victims' chances for remedy and accountability via the NCPs. Meanwhile, recent developments in RBC standards made beyond the OECD Investment Committee are threatening to make the OECD Guidelines comparatively less useful or even obsolete. The OECD Investment Committee's Working Party on Responsible Business Conduct (WPRBC), responsible for the OECD Guidelines, has begun a stocktaking to identify what gaps exist in the Guidelines and assess whether steps are needed to address them. A comprehensive stocktaking that addresses all the gaps identified by civil society and other stakeholders is essential to evaluate whether the Guidelines are still fit for purpose.

Who needs to act?

OECD Watch urges governments to show commitment to keeping the OECD Guidelines up to date with evolving issues in the field of business and human rights – and acknowledge civil society's concerns regarding the current limitations in the Guidelines' standards and the NCP complaint system – by ensuring that the stocktaking studies all the issues of concern to civil society. OECD Watch also urges that states ensure the final stocktaking report responds to each concern raised by civil society. OECD Watch welcomes the stocktaking and stands ready to support the review process and any further steps taken to address gaps identified.

About OECD Watch

OECD Watch is a global network with over 130 member organisations in more than 50 countries. Founded in 2003, OECD Watch's primary aim is to help support CSO activities related to the OECD

Guidelines and the work of the OECD's Investment Committee. Membership consists of a diverse range of civil society organisations – from human rights to environmental and development organisations, from grassroots groups to large, international NGOs – 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 adverse impacts around the globe. For more information, please visit www.oecdwatch.org.

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¹ See OECD, *Providing access to remedy: 20 years and the road ahead*, (2020), available at: <http://mneguidelines.oecd.org/ncps/ncps-at-20/>.

² For examples of cases that have not reached remedy, see, e.g., OECD Watch's annual *State of Remedy* reports, available at <https://www.oecdwatch.org/?s=state+of+remedy>, and its *Remedy Remains Rare* report, available at: <https://www.oecdwatch.org/remedy-remains-rare/>.

³ See notes 1–3 as well as OECD Watch's *NCP Evaluations*, available at www.oecdwatch.org/indicator.

⁴ See, OHCHR, [Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse through State-Based Non-Judicial Remedies](#)

⁵ See FRA, [Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse through State-Based Non-Judicial Remedies](#)

⁶ Learn more about IAMs at the IAM Network (www.independentaccountabilitymechanism.net); the Good Policy guidance is in creation led by the NGO SOMO in the Netherlands (www.somo.nl).

