

Advocacy brief: Arguments for updating the OECD Guidelines to specify minimum expectations for the establishment of effective National Contact Points

Outcome sought: Update of the OECD Guidelines for Multinational Enterprises (Guidelines) to specify minimum expectations for the institutional arrangements, promotional activities, and complaint handling procedures of National Contact Points (NCPs).

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.

Unfortunately, because the Guidelines’ Procedural Guidance does not set 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:** The core criteria of *accessibility* and *accountability* depend on NCPs being adequately resourced and structured to carry out their tasks. But the Procedural Guidance does not set adequate minimum expectations for the funding of the NCP or the quantity and training of staff and external advisors. The Procedural Guidance does not guide states on locating the NCP outside export promotion agencies to isolate the NCP from conflict with the mission of the host body, nor guide states in choosing an organisational structure that promotes NCPs’ independence, expertise, and appearance of *impartiality* to stakeholders. The Procedural Guidance also sets no minimum expectations for involvement of stakeholders in NCP activities through the NCP’s structure itself, or through an oversight or advisory body.
- **Information and Promotion:** NCPs are called to meet core criteria of *visibility* and *transparency*, but the Procedural Guidance does not set adequate expectations for states on how to achieve this, such as by facilitating their NCP’s engagement across government ministries, ensuring their NCP implements an ambitious promotional programme targeting all stakeholder groups, supporting their NCP’s maintenance of a well-documented public complaint database, and helping their NCP establish specific instance procedures that prioritize transparency and reserve confidentiality for appropriate elements of the complaint process.
- **Implementation in Specific Instances:** Problematic inconsistency in specific instance handling and outcomes results in large part from the fact that the Procedural Guidance sets insufficient basic standards for complaint-handling. First, the Guidance does state plainly that NCPs have an

important role to play in facilitating **access to remedy** for people adversely impacted by business conduct. Further, 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 lack of predictability, as initial assessment reviews last well-beyond the designated three months. The Procedural Guidance also does not encourage NCPs to support access by, for example, guiding indigent notifiers in drafting effective complaints, providing mediation training support, and offering 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 marginalised group filing complaints or anticipate and respond to risks to human rights defenders. The impartiality and equitability of NCPs are 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; adopt only forward-looking grounds for discussion rather than accepting discussions on past breach; and seek no consequences for companies that engage in poor faith in the complaint process. Accountability of NCPs is also low because the Procedural Guidance does not instruct NCPs to issue public determinations when companies have breached the Guidelines (providing a form of remedy for 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 with other state-based and non-state-based grievance mechanisms to share good practices.

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.¹
- 2) Lack of clarity for MNEs on the meaning of responsible business conduct – particularly through NCPs' failure to issue determinations of Guidelines breach, follow-up on complaints, and seek consequences for lack of good faith engagement in the complaint process.

Solution to the problem: Update the OECD Guidelines' Procedural Guidance to set minimum expectations for the institutional arrangements, informational and promotional activities, and specific instance procedures of NCPs

As long as the NCPs remain a key means for victims of business-related harms to seek remedy, it is vital their performance be strengthened. The Procedural Guidance should be updated to raise minimum expectations for NCPs, covering the following topics:

 **Institutional Arrangements:** The Procedural Guidance should be update to:

- Set minimum guidance for the resourcing of NCPs in terms of designating and publishing a budget, ensuring adequate staff levels and access to technical and subject matter expertise, and limiting staff turn-over;
- Prohibit states from locating NCPs in export promotion agencies, discourage them from locating NCPs in economic ministries, and require them to develop conflict of interest procedures to avoid conflicts in individual complaints and with respect to the mission of the host agency or ministry;

- Encourage states to choose from an array of organisational structures that promote NCPs' independence, access to broad expertise, and perception of impartiality in the view of stakeholders;
 - Ensure that NCPs involve stakeholders (including civil society) in NCP decision-making activities, ideally in the NCP structure itself, or through an oversight or advisory body; and
 - Call for NCPs to host periodic internal public reviews to improve their visibility, public relations, structures, and modes of operation.
- **Information and Promotion:** The Procedural Guidance should be updated to:
- Require NCPs to maintain a public complaint database sharing the complaint text and, in a timely fashion, updates on the complaint status, initial assessments, and final statements; and
 - Ensure NCPs publicize and implement prospective promotional plans targeting all stakeholder groups, involving outreach to groups together as well as separately, as well as rightsholders potentially impacted by businesses operating in or from that state.
- **Implementation in Specific Instances:** The Procedural Guidance should be updated to:
- Establish simpler admissibility criteria and a lower expectation for fact analysis at the admissibility stage;
 - Encourage NCPs to provide guidance to complainants on how to draft complaints that meet the admissibility criteria (e.g. via complaint templates, personal advice, and workshops), engage effectively in mediation, and engage in mediation remotely when necessary;
 - Ensure NCPs mitigate language barriers for complainants and address cultural or access barriers, particularly for marginalised and disadvantaged groups;
 - Ensure NCPs establish procedures to anticipate and respond to risks to human rights defenders;
 - Set common expectations for transparency across NCPs that allow confidentiality only to protect individuals' identities; legitimate business secrets (*not* simply business reputations); and the discussions had and documentation shared during the good offices (second stage) of the specific instance process;
 - Ensure NCPs independently evaluate claims that meet the admissibility criteria even if the implicated company(ies) refuse(s) to engage in mediation;
 - Ensure NCPs issue clear determinations when companies have breached the Guidelines, and recommendations whenever warranted;
 - Clarify NCPs' role in facilitating access to remedy whenever a company's conduct has been linked to adverse impacts, including by opening conversation on remedy of past impacts and introducing discussion of all potential forms of remedy (from apology to reversal of action, to compensation of harm);
 - Require NCPs to undertake follow-up to monitor whether MNEs fulfil recommendations made or agreements reached, and whether remedies are benefiting all impacted rightsholders;
 - Ensure NCPs seek material consequences for companies that refuse to engage in the NCP process, engage in poor faith in the NCP process, or fail to implement recommendations given or agreements reached; and
 - Call upon states to enable substantive or procedural reviews of complaints allegedly incorrectly handled by their NCP.

Language in the Procedural Guidance regarding **the role of the Investment Committee** could also be strengthened to:

- Clarify and expand the Committee's role in supporting NCP complaint handling, such as by developing model rules of procedure and transparency rules, providing guidance and in-house advice regarding potential defender risks, and facilitating NCPs' engagement with other state-based and non-state-based grievance mechanisms to share good practices;
- Clarify and expand the Committee's role in measuring and monitoring the functional equivalence of NCPs, such as by 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; and
- 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.

Finally, if the Guidelines' standards are not updated, the Investment Committee should issue guidance interpreting the Guidelines' standards for the next decade as regards key issues inadequately covered in both parts of the Guidelines (Part I and Part II).

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

An update of the Procedural Guidance could draw on 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:

- Evaluations of the NCPs by OECD Watch² 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,⁶ including a civil society Good Policy Guide highlighting current good policies of the IAMs across ~70 key performance indicators;⁷ and
- (as useful) Analysis of procedures of certain multi-stakeholder initiative complaint mechanisms.

Why address this issue now?

The OECD Guidelines, originally drafted in 1976, have not been updated 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 and laws 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 completed a comprehensive stocktaking to identify what gaps exist in the Guidelines and assess whether an update is needed to close them. The stocktaking results show broad consensus among NCPs, stakeholders, and the public that the Guidelines are not adequately clear on this and other issues. The Investment Committee is now considering whether to update the Guidelines, as it has done every decade since 2001 and before that as well. Such an update would provide an opportunity for OECD governments to address the problems OECD Watch and others have identified. ***Wholesale update is not needed. Instead, smart, targeted edits to principles and/or commentary in key sections would go a long way in closing the gaps.***

Who needs to act?



OECD governments should 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 over limitations in the Guidelines' standards and complaint system, by improving the Guidelines through a textual update. Governments have a critical opportunity right now to close the gaps identified by NCPs and stakeholders. OECD Watch asks all states to support ongoing discussion on specific textual edits on the issues civil society is prioritizing and encourages those states that wish to champion various concerns of civil society to present proposals to resolve the gaps found. OECD Watch stands ready to support individual states and the Committee during the anticipated update process.

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

² See OECD Watch, NCP Evaluations, available at www.oecdwatch.org/indicator.

³ See notes 1–3.

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).

⁷ SOMO et al, "Good Policy Guide," December 2021, available at https://www.somo.nl/wp-content/uploads/2021/12/Good-Policy-Paper_V6.pdf.