

OECD Watch 2006/07 Review of National Contact Points and the implementation of the OECD Guidelines - June 2007

Introduction

The last year has seen growing consensus among NGOs, and policymakers that OECD governments need to greatly improve the policies and procedures of their National Contact Points (NCPs). Several calls to the OECD and national governments to adopt better procedures for implementing the OECD Guidelines have been made.

In February 2007, the *Special Representative of the Secretary General of the UN, John Ruggie*, pointed out in his report that “some NCPs have also become more transparent about the details of complaints and conclusions, permitting greater social tracking of corporate conduct, although the NCPs’ overall performance remains highly uneven.” His Special Advisor, Gerald Pachoud, remarked at the OECD Watch conference in Brussels that the “OECD Guidelines and the NCP architecture is currently the only existing international instrument for corporate accountability...therefore it is even more important to ensure effective functioning of the OECD Guidelines”.

In March 2007, the *European Parliament* called on the European Commission and Member States to “[I]mprove the functioning of [NCPs] in particular in dealing with specific instances raised concerning alleged violations throughout operations and supply chains of European companies worldwide”. Furthermore, the resolution calls “for the development of a model for European NCPs with best practice on their institutional set-up, visibility, accessibility for all stakeholders and handling of complaints”.

Recently and most prominently, the *G8 summit* referred to the OECD Guidelines, stating, “We commit ourselves to promote actively internationally agreed CSR and labour standards (such as the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration), high environmental standards and better governance through the OECD Guidelines National Contact Points”.

These statements confirm the growing consensus that the current governance of NCPs and their institutional structures are, in many instances, a significant barrier to the Guidelines reaching their full potential.

In some countries, structural changes have already been implemented to improve the functioning of NCPs, notably the Netherlands and the UK. This is a welcome development. To assist NCPs and the Investment Committee to achieve improved functioning of the NCPs, OECD Watch is developing a ‘Model NCP’.

OECD Watch’s 2006/07 review of the functioning of NCPs used the draft Model NCP as a reference against which OECD Watch evaluated the functioning of the NCP in their country. Analysis suggests that the functioning of NCPs remains inconsistent and is still a long way from what is proposed in the Model NCP and recently recommended by international leaders. Considerable efforts are required to meet the expectations of civil society organisations.

This review is based on NGO evaluations of the following NCPs: Australia, Argentina, Brazil, Belgium, Canada, Denmark, Finland, Germany, the Netherlands, Norway, Spain, Sweden and the United Kingdom. In addition, input was provided by a number of OECD Watch members from non-OECD countries.

Structure, information and promotion

Current structure and structural changes

The structure of many NCPs was criticised by OECD Watch members. There is a significant gap between existing structures and that proposed in the Model NCP. For example, most NCPs have no supervisory board and many are still only situated within one ministry.

A number of NCPs have undergone structural changes over the past year. The UK, Dutch, Canadian and Argentinean examples are welcomed by NGOs, but recent changes in Norway and Australia have received criticism from NGOs in these countries.

In Norway, the NCP was transferred from the Human Rights Department to the Protocol Department. Although Norwegian NGOs have not yet tested the new NCP structure, concerns were raised about the shift of responsibility to the same department that is responsible for promoting Norwegian business. This presents a potential conflict of interest.

In Australia, whilst a structural change has not occurred, frequent changes in NCP personnel (four NCPs since 2000) is perceived as frustrating for community groups and trade unions. Further, it significantly reduces the potential for consistent functioning of the NCP and systematic improvement and skill acquisition by the NCP. It suggests the Australian Government's commitment to the Guidelines is difficult to uphold in the current structure.

A further concern is the reduction in regular community consultation and meetings with stakeholder working groups on the OECD Guidelines. In the case of Australia no consultation was held for the period of this review. Previously consultations were held three times a year.

It has become apparent that NCPs are often praised for their "good performance" outside of their country, but that these views are not always shared by NGOs who have monitored their performance from within their own country. For example, in Sweden it is common practice for all government representatives to publish their identity on their websites, yet the Swedish NCP is not visible or easily accessed.

The recent restructuring of the UK NCP has resulted in an NCP comprised of three civil servants from different ministries: Trade and Industry, International Development and the Foreign Office. All have one representative, with the Trade and Industry representative taking the lead role. According to UK NGO RAID, this has resulted in more openness to NGO participation.

The newly-restructured Dutch NCP consists of experts with a long-standing reputation among stakeholders. The chair is the former director of the Society for the Preservation of Nature Reserves in the Netherlands; other members include a former vice-president of ABN-Amro, the former chair of the Dutch trade union FNV and a professor of Biology and Society. According to Frank Heemskerk, Dutch Minister for Economic Affairs, "these appointments are intended to guarantee the independence of the NCP". The members of the NCP have been appointed for a period of three years.

In Argentina, the NCP has announced plans to appoint a multistakeholder board. This will include representatives from government, business, trade unions and NGOs. This board will advise the NCP and will act as an expert panel in specific instance discussion and decision making. OECD Watch welcomes these initiatives and encourages similar developments in the office of other NCPs .

Finally, a proposal for a new structure in Canada have been put forward by the "Advisory Group of the National Round Table Process on CSR and the Mining Sector in Developing Countries". The Advisory Group's report supports an ombudsman office with inquiry capability and public accountability. This is seen as a useful mechanism to regain trust and support from Canadian civil society. This has been eroded in the past and many groups have lost confidence in the NCP procedure.

Parliaments working towards better implementation of Guidelines

In recent years, reforms in a number of countries have been initiated through parliamentary support or pressure. The UK NCP identifies Parliament as a "key actor" in the implementation of the OECD Guidelines. Recently, parliaments in Australia and Germany have taken up the issue of the OECD Guidelines as well. In Australia, a substantial parliamentary inquiry was conducted on CSR. Whilst many of the recommendations did not meet NGO expectations, the strong endorsement of the OECD Guidelines and recommendations to better promote the Guidelines were welcomed. The European Parliament has recently called on national governments to actively improve the functioning of NCPs. There is growing consensus that parliaments in all OECD and adhering countries must take an active

role in monitoring the functioning of their NCP and work towards improving the structure and governance of the NCP.

Information and promotion of the OECD Guidelines

With regard to information sharing among NCPs, two reviews were satisfactory. In Sweden, the national government organizes open seminars and workshops informing the broader public about the OECD Guidelines and CSR in general. In the UK, the promotional work of the NCP has greatly improved, and the NCP is actively trying to provide information on the Guidelines. A number of references to the OECD Guidelines and the UK NCP have been made by British government ministers.

In Australia, the Brotherhood of St Laurence has advised that no promotional activity appears to have been undertaken since May 2006. In Norway, the NGO ForUM indicates that there is a severe lack of transparency at the Norwegian NCP. The reviews from Nepenthes in Denmark and Germanwatch in Germany indicate that very limited information is made public about the activities of the Danish and German NCPs. The German NCP did update its website over the course of last year and published a report on their work, but the provision of information is still very limited, especially when it comes to information on specific instances. At the OECD Watch Roundtable in Brussels in June 2007, the Dutch NCP announced their intention to improve the link between the OECD Guidelines and export credits. The Dutch government's current requirement that companies acknowledge the Guidelines and endeavour to comply to the best of their ability is seen as weak and lacking active compliance monitoring.

Handling of cases

Since the June 2006 review, NGOs have filed eleven new complaints, several of them noteworthy. The case against 57 German companies involved in the Oil for Food scandal by Transparency International is perhaps the largest single case to date.. Another interesting development was the first 'South-South' complaint. This involved several trade unions and civil society groups from raising a complaint with the Chilean NCP regarding the activities of a Chilean bank for alleged labour and human rights abuses in Peru. A complaint has also been filed against a German car producer in the first test of the relevance of the OECD Guidelines will be tested with regard to climate change.

The review confirms that many previously-cited concerns regarding the effective handling of complaints still exist. Respondents expressed particular concern with regard to the investment nexus, functional differences and inactive NCPs, rejecting cases, inequitable treatment of parties, narrow interpretation of the confidentiality requirement and lack of resources.

The "investment nexus"

Since the introduction of the term "investment nexus" by the OECD Investment Committee in 2003, NCPs have used the term numerous times to dismiss cases. The Special Advisor to John Ruggie, Gerald Pachoud, stated at the June 2007 OECD Watch Roundtable in Brussels that the investment nexus definition needed to be resolved as it was currently being used by NCPs to reject specific instances and was therefore preventing the Guidelines from reaching their full potential.

This was recently evident in Australia where a case filed by the Australian Conservation Foundation (ACF) against a major Australian bank for allegedly financing unsustainable logging operations in Papua New Guinea was rejected. There was significant evidence of major human rights abuses, environmental damage and illegal conduct by one of the bank's clients. Despite the evidence, the Australian NCP rejected the case on the ground that there was not sufficient proof of an investment nexus between the bank and the logging company and the financial arrangements did not trigger the supply chain provisions of the Guidelines.

By comparison, the Swedish NCP has demonstrated a far more open approach to the issue and accepted a complaint against a Nordic Bank for its financing of a pulp-mill in Uruguay. The Swedish NCP also contributed a well-received paper to the general debate about the role of the Guidelines and the financial sector. The Swedish paper includes discussion about criteria for assessing the responsibility in the supply chain using the concept of "sphere of influence" as an argument. This was

a major contribution to the 2007 OECD Investment Committee Roundtable on CSR. Another good example of a broad interpretation of the investment nexus is the Dutch NCP's acceptance of a case against a Dutch jeans brand involving labour rights violations at the company's Indian supplier.

Functional differences

In addition to the functional difference between the Australian and Swedish NCPs with regard to the investment nexus, the German NCP's behaviour in this review period reinforces OECD Watch's argument that the principle of NCP "functional equivalence" does not seem to be working. In the case of Transparency International against Ratiopharm for alleged bribery of doctors and pharmacists in Canada, Belgium, Spain and Estonia, the German NCP argued that it should be taken up by the NCPs of the countries in which these bribes took place. However, instead of liaising with and forwarding the complaint to the appropriate NCPs as other NCPs have done in similar situations in the past, the German NCP was unwilling to redirect TI's complaint to the respective NCPs or to examine the violations in Germany.

Unequal treatment

A basic requirement for mediation is that both parties receive equal treatment; however, this is often not the case with NCPs. According to RAID, the UK NCP has a poor track record in this regard. Although there has not been enough time to evaluate how the UK NCP's new structure will affect the handling of cases, there is a sense that these changes could have negative consequences for pending cases. The NCP procedure in the BTC-pipeline case was criticised in OECD Watch's April 2007 newsletter, which reported that the UK NCP has been too heavily reliant on a BP document that was not disclosed to the complainants. The BTC and Anglo American cases may cause embarrassment for the NCP, and a statement may be issued simply to conclude the matter. This would further confirm the concerns of some NGOs that raising a complaint is not worth the investment of time and resources.

The Dutch NCP is also dealing with a number of pending complaints raised by NGOs and trade unions. In the case against jeans producer G-Star, the complainants, Clean Clothes Campaign and the India Committee of the Netherlands, are frustrated at the way the case is proceeding. The complainants have made several suggestions as to how the process could be furthered, but the NCP has not responded to these suggestions. The complainants believe that the NCP has been coerced by the company into playing a weaker role in the procedure. The perceived lack of transparency regarding the procedure and the inequitable treatment of the parties is unsatisfactory.

Narrow interpretation of the confidentiality requirement

A disturbing development is the request from some NCPs that complainants suspend any advocacy work during the complaint procedure. It must be recognised that NGOs have a public role and should be regarded as essential 'watchdog' organisations that form part of the checks and balances needed to ensure the benefits of globalisation are evenly maximised. OECD Watch and NGOs involved in specific instances have a common understanding of the procedure's confidentiality principle. NGOs believe that public statements on information and/or documentation brought forth by the parties during proceedings would infringe the Guidelines' confidentiality principle unless the other party agrees the information can be disclosed. However, it is inappropriate and without basis that demands are made of NGOs to withdraw information from the public domain that existed prior to the complaint being lodged. Similarly, expectations that NGOs suspend advocacy work related to the company's practices are also considered unreasonable. NGOs would not expect an enterprise to cease trading or conducting their business activities while the specific instance is being resolved. Any attempt to use the NCP procedure to restrict NGOs' actions would seriously undermine the trust of civil society organisations in the OECD Guidelines.

OECD Watch interprets the Guidelines as allowing disclosure of information and publicity during the initial assessment phase of a case and use of the media to announce that a case has been lodged.. OECD Watch is very clear that once the complaint is accepted as a specific instance then the above-mentioned confidentiality rule comes into effect. To date NGOs have never violated this principle. For further information on the OECD Watch position on the confidentiality requirement see OECD Watch's

2006 briefing paper “The Confidentiality Principle, Transparency, and the Specific Instance Procedure”, available at www.oecdwatch.org.

Inactive NCPs

The concerns highlighted above apply to those NCPs that are endeavouring to uphold their responsibilities. However, some NCPs are completely inactive. Even those NCP who have never had to deal with a specific instance can actively promote the Guidelines. It has become evident that NCPs are frequently inactive or function poorly not only due to a lack of political will, but also a lack of resources. Governments must provide the necessary resources for NCPs to fulfil their job and conduct work in a constructive way. The Dutch NCP is leading by example and now has a budget of €900,000 over three years.

Critical issues from non-OECD countries

Threats to NGOs

OECD Watch is extremely concerned about recent serious threats to NGOs directly involved in a specific instance in Ecuador, the Democratic Republic of Congo and India. These threats range from verbal death threats to police harassment and various legal actions aimed at silencing the NGOs and making their work impossible. In India, in an attempt to silence NGOs seeking to address labour rights violations at a garment factory, the garment producer requested a restraining order against the NGOs, including OECD Watch members. Under the restraining order, the Indian NGOs are not allowed to communicate about the issue outside of India and have therefore been unable to raise the issue at the NCP or seek international solidarity.

In an effort to support the Indian NGOs and trade unions and to address the responsibility of buyer companies, the Clean Clothes Campaign and the India Committee of the Netherlands filed a complaint against jeans brand G-Star at the Dutch NCP. The CCC and ICN have since received legal threats from the Indian producer and have been summoned to appear in an Indian court for alleged “cyber crime, acts of racist and xenophobic nature and criminal defamation”.

Legal proceedings to restrict the freedom of speech of NGOs involved in OECD Guidelines procedures is seriously harming the effectiveness of the instrument and the willingness of NGOs to engage in the process. If the OECD Guidelines are to reach their full potential in the resolution of conflict between business and the communities in which they operate, they must not be associated with attempts to silence NGOs and keep them from addressing societal concerns.

Usefulness in changing corporate behaviour

In order for the Guidelines to be effective in encouraging responsible business conduct, NCPs must have an authoritative voice so that their decisions are respected by business. In Spain, the Observatorio de la RSC expressed concerns about pressure from commercial sectors and enterprises on the Ministry of Industry to keep the NCP at a low profile. The Observatorio also points out that only two companies from the IBEX 35 have mentioned the OECD Guidelines in their annual or sustainability report. They suggest, “Either the companies do not consider the Guidelines important enough to mention or they do not want to commit to them”. One solution put forward by the Observatorio is to use adherence to the OECD Guidelines as a criterion for export and foreign investment credits. OECD Watch supports this.

In Australia, the Brotherhood of St. Laurence (BSL) reports that the OECD Guidelines are gaining recognition among the business community, although the absolute level is still very low. According to BSL, “There are examples of enterprises using the Guidelines as a risk assessment tool and identifying aspects of their business that may be in breach of the Guidelines. This is yet to be made public by the company, but it is being considered. Further, the CEO of Global Solutions Limited (Australia) indicated that the application of the Guidelines through the specific instance process would have a long-term impact on the corporate culture of GSL with regard to their human rights responsibilities. Using the specific instance mechanism appears to be the most effective way to focus both enterprises and the Australian NCP on their responsibilities with regard to the Guidelines”.

In the Netherlands, the NCP commissioned a survey among Dutch companies regarding their knowledge and use of the OECD Guidelines. The clear result was most companies had not even heard of the OECD Guidelines.

The Danish NGO Nepenthes reports that the OECD Guidelines do not seem to be very successful in changing the behaviour of MNEs in that country. For example, the timber company Dalhoff, Larssen & Hornemann (DLH) voted down a proposal to conduct business in accordance with the OECD Guidelines. Instead, a proposal put forward by the DLH board merely stating that the enterprise "aims at" conducting business in accordance with the Guidelines was passed after the board announced that the enterprise believes the current practice to be in accordance with the Guidelines. A specific instance was raised against DLH in March 2006, and the case is pending at the Danish NCP.

OECD Watch Activities in the reporting period

OECD Watch has been actively promoting the use of the OECD Guidelines by NGOs and other stakeholders including Socially Responsible Investors (SRI) as one of the key intergovernmental instruments to hold corporations to account and assess their sustainability performance. OECD Watch remains concerned that the current functioning of the OECD Guidelines and many NCPs is adversely affecting the reputation of the instrument in the international discourse on corporate social responsibility. OECD Watch is committed to addressing the malfunctioning of the instrument and developing constructive solutions to fill the gaps in corporate accountability at the global level.

In addition to taking part in Investment Committee consultations and coordinating submissions reflecting NGO perspectives, OECD Watch has initiated a number of activities to advise NGOs about the OECD Guidelines and the work of the IC.

Recent publications include:

- Quarterly Case Update with up-to-date information about the latest developments in specific instance procedures filed by NGOs;
- OECD Watch Newsletter sent to over 500 recipients;
- OECD Watch Guide to the Guidelines to assist NGOs in using the OECD Guidelines specific instance procedures entitled "Guide to the OECD Guidelines for Multinational Enterprises' Complaint Procedure: Lessons from Past NGO Complaints," published in June 2006

Training and capacity building

OECD Watch has carried out several training workshops in the following countries to inform NGOs of the policies and work of the OECD in general and to train NGOs and trade unions in using the OECD Guidelines specific instance procedure in particular:

- Argentina, 2006;
- Ghana, July 2006, which included a field trip to communities impacted by gold mining.
- Nairobi, January 2007, in conjunction with the World Social Forum
- An interregional seminar will be organised in India in October 2007

Additional promotional activities have included interregional roundtables in Spain, Finland, Slovakia and Belgium. Further, OECD Watch members have been active in their own countries promoting the Guidelines among senior government officials and policy advisors, the business sector and civil society.

OECD Watch's project to promote the OECD Guidelines in the SRI community

OECD Watch believes there is a key role for financial market actors in improving corporate behaviour. Therefore, the development of criteria and indicators to identify socially responsible enterprises is essential. The OECD Guidelines offer a set of shared principles to increase convergence of screening methodologies, criteria and indicators among socially responsible investors. Furthermore, information with regard to alleged non-compliance with the OECD Guidelines, such as is documented by OECD Watch through its monitoring of NGO cases filed, could be very valuable for investors that need to assess a company's social and environmental performance.

OECD Watch has partnered with the European Social Investment Forum (Eurosif), a European-wide group whose mission is to address sustainability through financial markets. Eurosif's members include pension funds, financial service providers, academic institutions, research associations and NGOs. The project aims to promote the use of the OECD Guidelines among responsible investors and extra-financial ranking and rating agencies. OECD Watch is developing a number of tools and fact sheets on how the SRI community can use the OECD Guidelines and how specific chapters and paragraphs in the Guidelines (such as human rights and supply chain responsibility) can be interpreted in socially responsible screening. The first in a series of four fact sheets was published in June 2007. OECD Watch has also organised a dialogue session with SRI agencies and investment funds to discuss how best to use the OECD Guidelines in ethical investment decisions, including the information documented by OECD Watch on cases filed against MNEs by NGOs in its case database.

The Model NCP

OECD Watch has responded proactively to concerns raised in the 2005 "Five Years On" report regarding the functioning of NCPs. Given the emphasis of European governments on corporate social responsibility, OECD Watch, with support from the European Commission, initiated the Model NCP (MNCP) survey in order to obtain the views of NGOs, trade unions, business groups and, not least, of the NCPs themselves. The overall aim was to discover whether there is a consensus about best practice and what changes or improvements are regarded as necessary or desirable to improve the functioning of NCPs. OECD Watch and the participants in the survey believe that the exercise should be extended to NCPs based outside of the European Union.

To help the debate on the MNCP, OECD Watch drew up its 'model', which was then widely distributed along with a questionnaire. Given the focus on Europe, in March, April and May 2007, OECD Watch organized roundtables in Madrid, Helsinki and Bratislava that were well attended by NCPs and NGOs from Southern and Eastern Europe and the Nordic and Baltic States. The MNCP was also discussed at OECD Watch's Multi-Stakeholder Roundtable that took place in Brussels on 15 June 2007. Speakers at the Roundtable included Manfred Schekulin, Chair of the Investment Committee; Stephane Ouaki, Deputy Head of Cabinet of European Commissioner for Employment, Social Affairs and Equal Opportunities; Richard Howitt, Member of European Parliament; Gareth Llewellyn, National Grid; Veronica Nilsson, TUAC; and Gerald Pachoud, Special Advisor to Professor John Ruggie, the UN Secretary General's Special Representative on Business and Human Rights. NCPs from Argentina, Australia, Canada, the Netherlands, Spain and the UK also participated.

In its Model NCP, OECD Watch is proposing changes regarding NCP structure and procedures, especially when it comes to the handling of complaints. OECD Watch also provides proposals for improved implementation of the OECD Guidelines.

Regardless of the structure adopted, for the instrument to work, NCPs have to be informed, authoritative and command the confidence of all parties. As a long-term goal, OECD Watch would like to see the evolution of the NCP into an quasi-legal expert panel along the lines of an employment tribunal. Though funded and possibly directly appointed by the government, NCPs should have sufficient autonomy to reach decisions and make recommendations based on the merits of a complaint. NCPs should be chaired by a senior judge.

Currently, there is overwhelming support from NGOs and TUAC, as well as many NCPs, for the idea of an inter-ministerial NCP headed by a senior, suitably qualified civil servant. But this is not enough; without proper training and clear and equitable procedures, the ill-prepared and ill-equipped NCP is little more than a half-hearted and amateurish gesture by governments toward the growing problems of globalisation and corporate misconduct.

Conclusions and recommendations

1. Harmonise NCP procedures in an upward manner

OECD Watch calls on NCPs and the OECD Investment Committee to consider OECD Watch's Model NCP and assess how components of the model could be used to ensure a minimum level

of acceptable common procedures and expectations among all NCPs. Proposals to improve the functioning of NCPs should be discussed with stakeholders and therefore be put on the IC's agenda for consultations.

2. Take forward the recent calls from intergovernmental bodies

In order for the OECD Guidelines to be a meaningful tool in the international debate on corporate responsibility, the Investment Committee and NCPs should consider very carefully the recent statements made at the international level, such as that of the European Parliament's resolution and John Ruggie's interim report. In particular, OECD Watch calls on the OECD and NCPs to take forward the recommendations made at the G8 summit with regard to providing better governance through the NCPs.

3. Address NCP inconsistencies in the Investment Committee's work agenda

OECD Watch's survey for the Model NCP identified areas of work that the IC could undertake to address unequal and ineffective functioning of NCPs, such as:

- ✓ obtaining more information from tripartite and quadripartite NCPs about the role and responsibilities of external members, particularly in dealing with specific instances.
- ✓ obtaining more precise information about the legal status of NCPs, how decisions on specific instances are arrived at and by whom, for example, by clarifying whether decisions on final statements are ministerial decisions or acts.
- ✓ obtaining information about staffing levels and funds available to NCPs to engage in fact-finding in relation to specific instances. Resources are a major constraint faced by most NCPs, the problem being most acute in Southern and Eastern Europe and the Baltic region.

4. Evaluate the role of the Investment Committee as oversight body

Currently, the OECD Investment Committee has the responsibility for overseeing the way in which NCPs function and implement the Guidelines. But in reality, the Committee has not been able to fulfil this role effectively, mainly because of national sensitivities about economic interests and any suggestion that companies are being scrutinised by third parties. A study should be made to evaluate the role of the Investment Committee and its procedures in order to see how the IC might be made more effective in its role as an oversight body.