

Joint Position of the European Center for Constitutional Rights and Public Eye

Recommendations for the improvement of the Guidelines on Monitoring and Observance of the Code of Conduct on the Distribution and Use of Pesticides

The set of recommendations made below is the result of our engagement with the monitoring process throughout the last two and a half years taking into account prior instances of use of the monitoring procedure that were commenced and carried out by Public Eye and the Pesticides Action Network.

We are perfectly aware of the institutional and financial limitations that may influence the ability of the FAO/WHO to make improvements when it comes to cost and resource intensive recommendations. We have made the following recommendations with the best intention of creating a mechanism that can have a real impact on those who express their grievances about pesticides management worldwide during the monitoring procedure.

The UN Guiding Principles on Business and Human Rights as adopted by the Human Rights Council in 2011 may offer a relevant benchmark against which the effectiveness and adequacy of the ad-hoc monitoring procedure can be assessed. This covers not only business activities having a negative impact on the enjoyment of human rights of pesticides users and third persons but also the obligations of states to regulate the conduct of business that either operates or has its seat in the territory of a member state.

The relevant standard for the assessment of the functioning of the ad-hoc monitoring procedure is principle 31 of the UN Guiding Principles on Business and Human Rights according to which a set of qualities is considered essential for a non-judicial grievance mechanism to be effective.

1. **Legitimacy:** the mechanism should enable trust from the stakeholder groups for whose use it is intended and guarantee the fair conduct of grievance processes:
 - Based on prior experience with ad-hoc monitoring reports the replies of the Panel of Experts reveal a relatively weak and incomplete nature and follow-up of recommendations is lacking entirely.

2. **Accessibility:** the mechanism should be known to all stakeholder groups for whose use it is intended, and provide adequate assistance for those who may face particular barriers to access:
 - The possibility to submit ad-hoc monitoring reports is not widely known. Local organizations regularly do not know about the Code of Conduct and even less about the possibility to submit reports. However, it is those local organizations that possess first-hand information on the reality in the fields and on plantations.

- Smaller local NGOs may also not have sufficient financial resources to engage in an at least year long process culminating in a travel to the JMPM to explain their monitoring outcomes.
 - Monitoring organizations should have the possibility to attend the JMPM to present their monitoring activity and its results in their own right without being affiliated to NGOs that have taken part at the JMPM on prior occasions.
- 3. Predictability:** the mechanism should provide a clear and known procedure with an indicated time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation:
- The Guidelines and Code of Conduct do not contain detailed information on how to react if one of the affected stakeholders does not issue a reply.
 - The Guidelines and Code of Conduct do not provide a clear indication on the nature and time schedule for meetings of the JMPM (regular/extraordinary).
 - There is no clear explanation of how the monitoring organizations will be involved in the review of the monitoring report in preparation of and at its evaluation during the JMPM.
 - There is no clear statement on what kind of follow-up mechanism the FAO/WHO can engage in.
 - The Guidelines neither clearly define the possible outcomes of the monitoring process nor the means for monitoring implementation.
- 4. Transparency:** the mechanism should keep parties to a grievance informed about its progress, and provide sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake:
- There is no clear obligation of the FAO secretariat to publish the FAO report prior to the deliberations of the JMPM.
 - There is no clear schedule for dealing with an ad-hoc monitoring report either in the Guidelines or an obligation to prepare such a schedule by the FAO Secretariat after receiving an ad-hoc monitoring report.
- 5. Rights compatibility:** ensuring the outcomes and remedies accord with international recognized human rights:
- The Panel of Experts does not make a final statement if and to what extent companies adhere to the Code of Conduct and is thus failing to clarify the content of the relevant provisions.
 - In relation to reports on shortcomings of transnational pesticides companies, the responsibility of home states has to be engaged with in accordance with well established extraterritorial human rights obligations to monitor conduct of business actors abroad. This was recognized, e.g. in the statement of the United Nations

Special Rapporteur on Hazardous Substances in relation to Germany in September 2016.

Against the background of these concerns we would like to propose the following recommendations for improvement of the ad-hoc monitoring procedure. These recommendations should be incorporated in the respective provisions of the Guidelines on Monitoring and Observance of the Code of Conduct during the elaboration of its update:

1. Recommendations on the monitoring process

- Include home states of business entities identified in a report as affected stakeholders with respective obligations
- Set up a clear timeline to deal with a report after its reception specifying the different steps in the process including procedural position of all stakeholders in particular the reporting organization and communicate this to all stakeholders
- Define what concrete steps FAO/WHO are taking as a response to the inactivity of stakeholders
- Publish all preparatory material prepared by the FAO Secretariat online before the meeting of the Panel of Experts
- Keep at hand a limited amount of funding, which should be accessible for those organizations submitting reports but not possessing sufficient funds to attend meeting of Panel of Experts
- Put in place standards for JMPM assessments, which should address all allegations and include reasoned conclusions and practical recommendations
- Carry out further outreach efforts to publicize the possibility to submit reports
- Create a database with older reports and further documentation of the proceedings

2. Recommendations on the outcomes of the monitoring process

- Provide a clear assessment if company behavior identified in a complaint is in violation of the Code of Conduct and publish an official statement in that regard
- Issue practical recommendations how to end violations of the Code; those may include the identification of products that should be taken off the market under Art. 5.2.5 and 3.6. Code of Conduct
- Addressed stakeholders should submit compliance reports to the JMPM to explain actions undertaken on the basis of JMPM recommendations
- Introduce supervision of compliance and define competences of the FAO/WHO to engage in follow-up activities after an ad-hoc monitoring procedure was concluded

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