

Second BIAC Survey of Member Companies' Experiences in NCP Specific Instance Procedures Recommendations for Notifying Parties

Discussion Paper for the 2013 Annual Meeting of NCPs

1. Introduction

The OECD Guidelines for Multinational Enterprises (MNEs) include the commitment of governments to set up a National Contact Point (NCP). At the NCP, interested parties can notify issues that have arisen between them and an MNE concerning the implementation of the Guidelines. The NCP can offer its assistance to parties with a view to resolving the issue.

As the Guidelines are intended to stimulate and promote fair behaviour, the NCP is not intended to be an instrument for legal investigation. It is fundamentally a platform for mediation and reconciliation. The purpose of the NCP process is to work frankly on the basis of facts and trust towards a common solution to the advantage of all parties.

In order to assess how the NCP procedures are functioning from the point of view of business, BIAC conducted a first survey among its membership in 2012. On the basis of the experiences from MNEs in specific instance procedures, BIAC formulated a number of recommendations for NCPs with a view to improving the effectiveness of NCP procedures (see annex to this paper).

In 2013 BIAC carried out a follow-up survey among its members, focusing more specifically on the experiences of companies with the notifying party in an NCP procedure. This discussion paper summarises the findings of the survey, and makes recommendations to notifying parties and NCPs alike in order to promote the best possible use of the NCP procedure.

BIAC looks forward to remaining actively involved in discussions at the OECD to support an optimal functioning of the NCP instrument and welcomes any comments on the recommendations put forward in this paper.

2. Key findings of the survey

In its 2012 submission, BIAC qualified the NCP procedures as a continuous learning process. This is true for business, for NCPs and, as our new survey shows, also for notifiers. BIAC considers that examining some concrete examples where business considered the behaviour by notifiers not to be constructive is a useful starting point for a discussion on how to improve the NCP procedure.

MNEs indicate in the survey that the NCP procedure has in a number of cases led to a meaningful stakeholder dialogue and a solution of the disagreement. However, the responses also show that in a number of cases the behaviour of notifiers has disregarded the fundamental nature of the NCP procedure and certain provisions of the procedural guidance, thus complicating the mediation effort.

The reported experiences contain lessons for all three parties involved: the MNE, notifier and NCP. It is important for all parties to realise the specific nature of the Guidelines: The NCP should be a forum for discussion between stakeholders with a view to resolving an issue in a constructive and forward-looking manner. All three stakeholders should have an attitude in the NCP process that makes a constructive and future-oriented solution possible.

3. Specific examples of behaviour that should be addressed

While in a number of cases, the NCP procedure has led to a meaningful dialogue and provided value for all parties involved, the following examples show behaviour that should be addressed.

- The start of an NCP procedure is in a number of cases publicly presented by notifiers as the start of a prosecution rather than of a confidential mediation process to resolve an issue. Some notifiers do still not recognise the specific nature of the Guidelines as voluntary principles and standards of behaviour of a non-legal character, which are not a substitute for local law or legal remedies. Some notifiers still seek 'condemnation' by the NCP or a remedy of the company's past actions.
- The mere fact that an NCP procedure is pending is sometimes perceived by the outside world as an indication that something is wrong with a company. This is a fundamental misconception of the NCP procedure and thus threatens the success of the NCP instrument. It can also result in financial and reputational damage for a company, even if the NCP in the end establishes that the company did not act contrary to the Guidelines. However, in a number of cases this misconception is promoted by notifiers.
- Notifiers are not always prepared to start a dialogue or to enter into a mediation process. Some notifiers refused to discuss the future or decided to terminate the proceedings once the mediation stage was reached. They sometimes make such discussion subject to unrealistic conditions that can never be fulfilled by the MNE.

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- In a number of cases companies have been faced with campaigns by notifiers around the filing of the complaint with an NCP. This includes campaigns in the media, internet and newspaper articles. The sometimes inflated media campaigns were counter-productive in the mediation process. Some companies experienced that notifiers used the NCP procedure mainly to give credibility to their campaign or to get additional information for such a campaign. To maintain a constructive engagement, it is important that notifiers do not use their (media) campaigns on the issue that is brought to the NCP.
 - In certain campaigns leading to an NCP procedure, factually untrue allegations were made that served as a basis for the notification. In these cases, MNEs experienced that during discussions with the NCP the (false) allegations were repeated in public.
 - In a number of cases, publicity generated by the notifier and associated with the complaint violated the procedural rules in general and more specifically its confidentiality rules.
 - Some MNEs experienced a lack of coherence between the notifiers (who were committed to the procedural rules of the NCP) and affiliated third parties. Such third parties continued campaigns on the same topic as discussed with the NCP, even when there was an agreement between notifiers and the company to (temporarily) put the campaigns on hold.
 - Sometimes notifiers try to bring the instance to a specific NCP in another country ('forum shopping') even when the issue did occur in countries where there is a functioning NCP. They are in particular artificially looking for Head Office involvement in such matters in order to get the NCP in the home country involved.
 - Some companies experienced that the pending notification was presented as a 'case study' in publications; this made constructive engagement with notifiers more difficult.
 - Some MNEs experienced that during the mediation process, notifiers tried to change the scope of the discussions, hence introducing new elements. Some companies also experienced that notifiers introduced additional conditions to continue the discussions or requests that are different from those which the NCP reviewed in connection with its initial assessment.

4. Recommendations to notifiers, NCPs and the OECD

To notifiers

Companies have had a **range of experiences** with notifiers. The fact that **a number of experiences have been valued positively** by MNEs shows that the notifiers and the companies can use the NCP process in a way where it provides added value for all parties concerned. To achieve that aim, it is important that the lessons from negative experiences

are drawn and will be used constructively to further develop NCP procedures and experiences to improve their quality.

- The survey shows that **improvement of behaviour is desirable in a number of fields**: the recognition of the specific nature of the NCP procedure and public communication on this nature; the willingness to enter into meaningful dialogue; avoiding the combination of an NCP procedure with campaigning; addressing the lack of coherent action by notifiers and affiliated third parties; avoiding false allegations, disrespect of confidentiality and procedural rules; avoiding forum shopping and changing the scope of the discussions.
- Before a notification to the NCP is made, prospective notifiers should first approach the MNE directly and try to resolve the issue in **direct stakeholder engagement**.
- The continuous learning process requires notifiers to reflect in their actions that they **accept the specific character** of the NCP procedure, which is not a pseudo prosecution, but a mediation effort. Public naming and shaming is contrary to the nature of the NCP procedure. A regular dialogue in OECD countries between the various stakeholders in the NCP procedures will promote the development of trust and a common understanding of the nature of the NCP procedure and its adaptation to the local specificities.
- BIAC considers that campaigning, which stirs up emotions and simplifies issues to increase pressure on companies, is by definition not conducive to a fruitful climate for a dialogue and mediation. Notifiers should realise that the non-binding character of the Guidelines introduces a specific character that is aimed at **a future-oriented solution**. The choice of notifiers to engage in an NCP procedure should bring with it the acceptance – at least during the time of the NCP procedure – of reneging on more confrontational approaches.
- Notifiers should **approach the scope of the dialogue in the NCP in good faith**. On the one hand, a certain degree of flexibility should be possible in order to permit that additional issues that come up during the dialogue can be part of the mediation effort. On the other hand, manipulation of the dialogue by changing or unreasonably extending the scope or introducing elements unrelated to the original notification should be avoided.

To NCPs

The above-mentioned BIAC recommendations for notifiers also imply recommendations for the NCPs. The NCPs can play a key role in promoting awareness and acceptance among the wider public and notifiers of the specific nature of the NCP procedure and in promoting constructive behaviour. In this respect, the good faith test in the initial assessment is an essential instrument.

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- Good faith is a precondition of participation in the NCP procedure. **NCPs should use the good faith test as an instrument to promote a common understanding of the nature of the NCP procedure.** The NCP procedure should be available only to those parties that are willing to abide by the rules and procedures of the NCP, including confidentiality.
 - It is encouraging that some NCPs have clearly expressed their views when they did not agree with the approach of the notifiers, for example where the notifiers continued an aggressive media campaign during the discussions. NCPs should engage in a dialogue with notifiers to create more awareness of the character of the mediation process.
 - As long as the mere fact of the start of an NCP procedure results in negative consequences for companies, the nature of the NCP procedure is not well understood. If the procedure is well understood, the start of a procedure should in fact have positive effects for the reputation of a company, because it shows the willingness of the company to engage in dialogue and improve its performance.
 - Some NCPs have created the **possibility for companies to file complaints concerning the improper behaviour of notifiers.** This possibility should also be introduced in other countries.
 - If untrue information is being spread by a notifier, or a specific instance is being misused or made part of a campaign, the NCP should consider termination of the process in the initial assessment. Where the NCP does not terminate the proceeding, it should be accepted that the MNE that is the subject of the specific instance withdraws from further participation. If the MNE chooses not to withdraw from further participation, the NCP should encourage the notifier to rectify the issue.

To the OECD

BIAC also calls upon the OECD to clearly highlight the broader context of the MNE Guidelines and the specific nature of the NCP procedure in its publications, outreach activities and at meetings and workshops organised with the participation of NCPs.

Annex:

Key Recommendations to NCPs (from the 2012 BIAC survey)

In 2012 BIAC made recommendations to the NCP in order to improve the quality of the Specific Instance procedure. The key recommendations are summarised below:

- The development of NCP procedures and experiences should be approached as a continuous learning process.
- Basic principles and quality criteria should be taken into account by all NCPs, and best practices should be exchanged.
- NCPs should be aware of their role in the public domain and should constantly take carefully into consideration that the way they communicate about instances can have substantive financial and reputational consequences for businesses.
- The OECD and NCPs should carefully see to it that the NCP procedure is presented (in language and approach) to the public at large as a mediation procedure and that the initiation of a procedure does not imply that there has been breach or disrespect of the OECD Guidelines.
- The OECD should approach third parties who misinterpret the nature of the NCP procedures, to explain the mediation character.
- NCPs should avoid becoming the instrument of campaigns of notifiers.
- NCPs should not openly solicit for instances.
- The NCP should limit its examination to the scope of the notified issue. The notifier should specify the issues. An unsubstantiated claim should not be an entry ticket for unspecified NCP examinations.
- Where parallel legal or administrative procedures are initiated on the same matters, NCP involvement should be suspended until other procedures are finalised. The principle of ne bis in idem should be applied. Where an issue has been settled in one forum, it should not then be accepted by an NCP.
- The good faith test is an essential element to build trust in the new NCP procedures. The criteria should be further developed.