

Ensuring a shared understanding of the role of National Contact Points of the OECD MNE Guidelines

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1. The role of the National Contact Points

A unique feature of the OECD Guidelines for Multinational Enterprises (MNEs) is that they include the commitment of adhering governments to set up a National Contact Point (NCP). The objectives of the NCPs are to raise awareness of the Guidelines, ensure their fair interpretation and communication, respond to information requests and provide a platform where interested parties can notify issues that have arisen between them and an MNE concerning the implementation of the Guidelines. The NCP offers its assistance to parties with a view to resolving the issue and to reach an amicable settlement.

However, in public debates, there is often no uniform representation of the role of NCPs. While for business it is essential that the NCPs are fundamentally understood as a platform for mediation and conciliation, they are sometimes misrepresented by others as an instrument for legal investigation. In order to maintain broad-based trust and support for the Guidelines and the NCP process, it is important to ensure that there is a shared understanding that the purpose of the NCP process is to work frankly on the basis of facts and in good faith towards a common solution to the advantage of all parties.

In line with the MNE Guidelines, the OECD brochure issued in 2013 provides a useful summary of what specific instances are about. While NCPs provide a platform for discussion and assistance to stakeholders to help find a resolution to issues arising from alleged non-observance of the Guidelines, it is clearly underlined that NCPs must do so in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines.

The OECD brochure also rightly highlights that specific instances are *not* legal cases, and NCPs are *not* judicial bodies. NCPs focus on problem-solving – they offer good offices and facilitate access to consensual and non-adversarial procedures (e.g. conciliation or mediation). The parties' commitment to participate in good faith and recognize the importance of confidentiality as stated in the Procedural Guidelines is a crucial element to a successful resolution of the issues.

2. Making the process work

BIAC has previously underlined that in a number of cases the NCP process has led to a meaningful stakeholder dialogue and a solution of the disagreement. These positive examples highlight that when used correctly, the process can work in the interest of all parties involved. However, in other cases, the fundamental nature of the NCP procedure has been disregarded, thus complicating the mediation effort. To make the process work, we call upon the OECD to ensure that there is a clear and shared understanding among all stakeholders of what the process is and what it is not, thus helping to address some of the challenges that business has faced in a number of cases.

In particular, we believe that it is essential to underline the following:

- It is important to clearly recognize the specific nature of the Guidelines as voluntary principles and standards. Therefore the NCP mechanism should focus on facilitating a future-oriented solution through 'good offices' and mediation.
- The opening of an NCP procedure is sometimes perceived by the outside world as an indication that there is a problem with a company. This is a fundamental misconception of the procedure which threatens the success of the NCP instrument. Rather, a willingness to participate at the outset should be characterized as a willingness to address concerns head-on and work together to find mutually agreeable paths forward.
- The fact that there continue to be examples where the start of an NCP procedure results in negative consequences for companies demonstrates that the nature of the NCP procedure is not well understood. This underlines the importance of accurate communication of the NCP procedure.
- OECD and NCPs should clearly underline that public campaigning during the NCP procedure is not compatible with the nature of the procedure and infringes the principle of good faith, which is an important element of the Guidelines. The sometimes inflated media campaigns are counter-productive in the mediation process. Public 'naming and shaming' is contrary to the nature of the NCP procedure.
- According to the Guidelines, NCPs will take appropriate steps to protect sensitive information and the interests of stakeholders involved. If the confidentiality is violated, the NCP should communicate this in an appropriate manner or even consider discontinuing the process. Confidentiality of the discussions and written materials provided must be maintained throughout the process during good offices. General rules and more specifically the confidentiality rules must not be violated by any of the parties.
- The initial substance or scope of the specific instance needs to be clear and maintained. On the one hand, a certain degree of flexibility should be possible, but on the other hand, changing or unreasonably extending the scope or introducing elements unrelated to the original notification must be avoided. New elements and additional conditions, for example, should not be introduced as a condition to continue the discussions, unless both parties agree on this.

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- The Guidelines state that the complaint must be lodged in good faith. NCPs should clearly communicate at the outset of an instance that all parties must approach the process in good faith with a willingness to move towards mediation, dialogue and problem solving and with a view to work constructively towards a future-oriented solution that is in the interest of all parties involved. In making an initial assessment of whether the issue is raised merits further examination, the NCP has to determine whether the issue is 'bona fide'. Good faith is a precondition for the whole process and an essential element to build trust in the NCP procedure. The practical meaning should be further developed.
 - NCPs should engage in a dialogue with notifiers and MNEs to create awareness, fair interpretation and a clear understanding of the character of the mediation process and should clearly express their views when they do not agree with the approach of the notifiers or MNEs. If untrue information is being spread, or a specific instance is being misused or made part of a campaign, the NCP must consider termination of the process in the initial assessment or at least encourage the issue to be rectified. Some NCPs have actually created the possibility for companies to file complaints concerning the improper behaviour of notifiers.
 - We highly welcome and encourage additional focus on outreach and awareness raising activities. In our view the Guidelines are a comprehensive, pragmatic and concrete reference instrument to serve as a basis for a global level playing field. They are formulated in such a way that they can be accepted by all countries which participate in and benefit from world trade. BIAC would be pleased to work in close cooperation with NCPs, participate in related activities and establish contacts with our members, observers and third countries as appropriate.

3. A clear role for the OECD

There are still wide differences in how NCPs conceive their precise role and how it is presented. A regular dialogue in OECD countries between the various stakeholders will promote the development of trust and a common understanding of the nature of the NCP procedure and its adaptation to the local specificities. This could include 'exit' interviews to ensure that lessons can be drawn from the NCP mediation procedures.

NCPs should be aware of their role in the public domain and should constantly take carefully into consideration that the way they communicate about specific instances can have substantive financial and reputational consequences for businesses. The OECD and NCPs should ensure that the NCP procedure is presented to the public at large as a mediation procedure.

BIAC sees a continued and important role for the OECD to clearly highlight the specific nature of the NCP procedure in its publications, outreach activities and at meetings organized with the participation of NCPs. We also encourage the OECD to approach third parties who misinterpret the nature of the NCP procedures, to explain the mediation character.

Building on the 2013 OECD brochure, one specific next step could be the preparation of a smaller brochure further elaborating specifically on the key conditions to make the specific instance procedure a success for all parties. Such a publication should be developed in close cooperation with all stakeholders, highlighting basic principles and quality criteria that should be taken into account.

BIAC looks forward to remaining actively involved in discussions at the OECD to support an optimal functioning of the NCP instrument. We would also welcome comments and feedback on the recommendations put forward in this paper and the more specific recommendations in the surveys we carried out in 2012 and 2013 ([click here](#)).