



The OECD Guidelines for Multinational Enterprises and the National Contact Point procedure

High-level business seminar

Paris, 28 June 2017

The OECD Guidelines for Multinational Enterprises (MNEs) provide a comprehensive framework for responsible business conduct. They provide voluntary principles and standards, covering all major areas of responsible business conduct (RBC). They are based on a consensus view from adhering governments, which also incorporates the input of business, labor and civil society.

The MNE Guidelines are deliberately not legally enforceable as they are intended to stimulate responsible behavior, not to trigger legal disputes. However, MNEs are expected to fulfil the recommendations set out in the Guidelines and to have a policy in place that is consistent with these recommendations. Business at OECD (BIAC) considers responsible business conduct as promoted by the MNE Guidelines to be an essential part of an open investment environment. At the same time, expectations towards business must remain realistic and practical.

The MNE Guidelines include a unique implementation mechanism in the form of National Contact Points (NCPs). NCPs, set up by the governments adhering to the MNE Guidelines, provide a platform for mediation and problem-solving where issues can be raised in cases concerning the alleged non-observance of the Guidelines by a company. The MNE Guidelines are the only international corporate responsibility instrument with such a grievance mechanism. 47 NCPs are in place, which by the end of 2016 had handled over 400 specific instances relating to business operations in over 100 countries.

In light of the increasing importance of the NCP system, BIAC organized a meeting in June 2017 to provide a platform for business leaders to share their experience regarding the functioning of the NCP procedure in practice. The meeting brought together about 40 RBC business experts from companies around the world, including business panelists who shared their specific experience with the NCP system.

The meeting was organized under Chatham house rules. The following is a brief summary of key issues raised during the discussion. It is intended to inform the OECD discussions to ensure that the NCP process continues to work in the spirit of the MNE Guidelines and in the best interest of all parties involved.



Key outcomes

Participants generally felt that if the NCP system is used in the spirit of the OECD MNE Guidelines, which underline that they “provide a mediation and conciliation platform for resolving practical issues that may arise,” and if the mediation procedure is based on a constructive approach where all parties engage in good faith, it has a clear potential to provide added value to all stakeholders involved.

- As companies are struggling to keep track of different national and international initiatives, there is a clear advantage to have one generally recognized system in place. There is therefore a case for making the NCP system work effectively in the spirit of the Guidelines to help avoid a proliferation of different initiatives.
- If the NCP is efficient and has the necessary mediation skills and if all parties stick to the procedural guidelines, the process can provide an important platform for identifying a forward-looking solution to a specific instance and can lead to constructive dialogue and engagement.
- In addition, the NCP procedure can lead to a longer-term dialogue with key stakeholders, beyond the conclusion of a specific instance, thus providing a basis for longer-term communication and engagement.
- The dialogue facilitated in the context of an NCP procedure also has the potential to help enhance internal changes in the business culture by encouraging more coherence and long-term cooperation.
- The procedure is relatively quick, and less expensive for companies than litigation.

Despite the fact that the NCP process has in a number of cases led to a successful procedure and outcome, the experience with the process has not been unambiguously positive. The concerns expressed relate among others to the following issues:

- The visibility and understanding of the MNE Guidelines and the NCP process is still insufficient, underlining the importance of adequate communication to raise the visibility of the Guidelines and to encourage a common understanding of the specific instance procedure.
- The quality of NCPs and their ability to mediate still varies largely across adhering countries, which is not conducive to creating a level playing field. Capacity building of NCPs is therefore important, focusing in particular on those lagging behind.
- An immediate consequence of this unlevel playing field among NCPs is forum shopping, where notifiers approach the NCPs which are most active rather than approaching the NCP which is closest to the issue identified.



- Notifiers sometimes bring up a specific instance to target an MNE to use its leverage rather than targeting the company that has caused the adverse impact even if this company is located in a country which is adhering to the MNE Guidelines.
- While the objective is clearly to achieve a forward-looking solution, some notifiers take the approach to look backwards towards punishing the company. The difference between litigation and a mediation procedure is often not yet well understood.
- Some parties in the procedure use the mediation for political purposes or for campaigning against companies, for example around the filing of the specific instance. This is against the spirit of the MNE Guidelines and is counter-productive for constructive engagement of companies. Active campaigning in relation to the NCP process is not conducive to an atmosphere of trust and engagement, which is needed for effective mediation.
- In some cases, governments have asked NCPs to provide assessments without requiring a notifier. It is important to focus on the original objective of the NCP.
- The initiation of an NCP procedure is in some cases presented as proof that there has been disrespect by the company of the MNE Guidelines. On the contrary, BIAC believes that companies should be *positively recognized* for engaging in mediation.
- It is counterproductive to burden the NCP procedure with additional requirements, such as asking companies to cover the costs of the mediation procedure, which is not compatible with the spirit of the system and would raise questions concerning impartiality.
- Increasing efforts to link the NCP procedure to « sanctions » risk changing the nature of the procedure. The initiation of a specific instance should in no case be linked to any economic consequences.
- Some specific instances can create specific challenges if they relate to an incidence that is relatively old, which puts additional burden on companies providing the necessary background information.
- The role of the media was in some cases not helpful in ensuring a correct understanding of the NCP process.

Considering the various challenges and opportunities, a number of suggestions were offered:

- In light of the major differences between the functioning of NCPs in adhering countries, capacity building is important to ensure quality mediation and a level playing field across adhering countries. This should go hand in hand with continuing outreach to major non-adhering countries.
- There needs to be a clear understanding of the difference between litigation and a CSR process. The OECD and NCPs should ensure that it is clearly understood that the purpose of the NCP procedure is to help parties to work constructively on the basis of facts and trust towards a future-



oriented solution to the advantage of all parties. In all their communications, the OECD and NCPs should ensure that the NCP procedure is well understood and presented as an offer of good offices to help parties find a forward-looking solution.

- When an NCP decides to examine a specific instance, this should by no means be construed as implying that the NCP suspects the MNE of having failed to observe the Guidelines. Any communication of the NCP on this point should be very clear, as public reports on issues under examination can cause reputational damage. It occurs regularly in NCP procedures that no infringement is identified.
- On the contrary, NCPs should offer positive recognition if companies engage in the NCP process. The OECD should encourage NCPs to communicate positively when companies engage in the process, thus setting the right tone for the mediation process and future discussions. There should be no negative consequences when a company decides to engage in a specific instance.
- Additional guidance should be provided on where to bring up a specific instance to avoid forum shopping and enhance cooperation among NCPs if needed. In the case of an MNE and its supplier, which is also an MNE, is located in an adhering country and is responsible for the adverse impact, it would be best to bring up the specific instance where the adverse impact occurs rather than automatically addressing the situation through leverage.
- NCPs should make clear that the NCP procedure is available only to those parties that are willing to abide by the rules and procedures of the NCP and engage in good faith. 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 – to stay away from confrontational campaigning.
- The OECD and NCPs should take into account that if the NCP process becomes too legalistic and is linked to too many legal requirements, this would change the nature of how the system is perceived, which would be counter-productive to a constructive bottom-up engagement. We would like to recall that the Guidelines are intended to stimulate responsible behaviour and engage a wide variety of MNEs proactively in responsible business conduct.

As the NCP system is being increasingly used and to encourage proactive engagement by business, more than ever, we need a common understanding and clear communication on what the system is: a platform to help parties work constructively on the basis of facts and trust towards a common future-oriented solution, which is to the advantage of all parties.