Restoring Trust in the NCP System

Business at OECD (BIAC) considers responsible business conduct as promoted by the Guidelines for Multinational Enterprises (MNEs) to be an essential part of an open investment climate and in the best interest of business. To that end, we have worked in partnership with the OECD, national governments and multinational enterprises to support effective implementation of the MNE Guidelines and promote them in adhering countries and beyond.

However, despite the collective efforts to promote the OECD Guidelines and the National Contact Point (NCP) process, companies’ experience with the NCP system has been mixed. There are several challenges that need to be addressed so that companies have trust in the system and are encouraged to get involved, including the following:

- Too many companies are still unfamiliar with the NCPs and the proceedings.
- The lack of trust regarding respect of confidentiality and impartiality of the NCP process can prevent companies from becoming and staying involved in a specific instance process.
- The fact that the public perception of a company being involved in a specific instance is that a company has done something wrong serves as a disincentive.
- Public campaigning against companies is counter-productive to building broad-based trust and is not compatible with a system, which is designed to be constructive and consensus-building.

To address these challenges, we call upon the OECD, adhering governments and stakeholders to consider the following questions and recommendations:

**At the beginning of the process: What are the conditions that need to be in place to encourage more companies to accept the good offices of an NCP:**

- Increased and more user-friendly communication about the practical functioning of the NCP proceedings would help companies to better understand the importance and the role of NCPs. In addition to the existing outreach efforts, business recommends that all NCPs have a public website and publish practical information about the procedure and their activities (see French NCPs documents as an example).

- More proactive communication towards companies could also be considered on digital networks such as Linkedin or twitter in addition to the promotion at various meetings.

- Some NCPs have business organizations, trade unions and NGOs as members or consult them in the context of specific instances. Many companies hesitate to commit themselves because they
want assurance that there is a strict confidentiality of the documents and information they will share with the NCPs and their members. For this reason, NCPs should consider giving written confirmations of confidentiality.

- The good faith test in the initial assessment is an essential element. The initial assessment must be based on objective criteria. If this is not the case or if a specific instance is being misused as part of a campaign, the NCP should consider termination of the process.

- An increasing number of specific instances are dealing with several countries and NCPs.

- In order to avoid forum shopping in some specific instances, we call upon the OECD to

  ✓ Clearly state that being a shareholder of a company is not a sufficient criterion for a complainant to choose an NCP to lead which is not located in the country where the specific instance occurred,
  ✓ Actively help NCPs that are not working well to improve,
  ✓ Provide additional support to NCPs outside of the NCP peer review process (e.g. technical assistance) in order to improve the functioning of the NCPs.

**During the proceedings (good offices/mediation): How to ensure companies have trust in the NCP process**

- One important issue is the burden of proof. Many companies involved in an NCP procedure are “suspected”, especially at the beginning of the procedure, to be in breach with the OECD Guidelines until the contrary is proven. This is very detrimental for the company and raises the issue of the reversal of the burden of proof. For this reason, the OECD should recall that NCPs must carry out an in-depth initial assessment before offering mediation/their good offices and that the fact that a company engages in an NCP process is not a proof that the company has not observed the Guidelines.

- Despite many efforts by the OECD and some NCPs, campaigning is still a major issue and negatively impacts some specific instances. Some notifiers continue to publish press releases or public articles, which jeopardizes companies’ trust in the process.

- Business has raised this issue many times and underlines the need for the OECD to elaborate some guidelines that could be used by the NCPs when such a situation arises to ensure that companies can engage with trust in the system.

- The OECD should also ensure that ongoing cases are not discussed during public OECD meetings or the OECD stakeholder consultations. We recommend that NCPs adopt clear rules on confidentiality in their own rules of procedures.
• It is crucial that the OECD ensures that ongoing cases are not discussed during public OECD meetings, neither directly nor in an anonymized way.

• Companies need assurance that information acquired during an NCP process cannot be used for another specific instance.

• Another important issue that must be addressed is the risk of conflict of interest. It can happen that there are close links between NCP members and complainants, which raises issues in the areas of confidentiality, but also impartiality, which need to be ensured. For this reason, we recommend the OECD Secretariat and the Working Party to provide guidance in these areas.

Implementation and follow-up: How to improve trust in NCPs and follow up to the recommendations:

• We recommend NCPs to stay in touch with companies and stakeholders when appropriate regarding follow-up of their recommendations.

• The NCP should reassure the parties involved that confidentiality regarding sensitive issues remains valid also during the follow-up to the specific instance.

Peer review process:

• We also believe that it is important to have an effective peer review process in place to establish trust in the system and ensure a more level playing field. The threshold for accepting cases, the approach to mediation, and the final statements differ greatly across adhering countries. The peer reviews should help to achieve greater alignment rather than having just a few selected high-performing NCPs.

• While the situation varies from country to country, in some instances the peer review process has not been transparent enough.

• We therefore call on the OECD to share the agenda well in advance and have a transparent and open process in place for other NCPs to be part of the procedure. Stakeholders should have the same opportunities and material conditions to express their views (bearing in mind time limits).

• The OECD secretariat’s role should be to facilitate the process, but it should not take the lead in writing the report. This should be up to the peer NCPs in charge of the review process.

• The OECD should play an active role and exchange with NCPs to ensure transparency on the follow up and the implementation of the recommendations they have implemented after a peer review. This follow-up work is very important to improve the NCPs functioning and detect good practices.