

BIAC Survey of Member Companies' Experiences in NCP Specific Instance Procedures and Recommendations for National Contact Points

*Discussion Paper for the Annual Meeting of National Contact Points
in Paris on 19-20 June 2012*

I. Introduction

The implementation of the OECD Guidelines in specific instances is an important element of the implementation process. It can help to advance the overall objective of the Guidelines to increase mutual confidence between enterprises, governments and civil society. But in order to do so, it is critical that the key aspects of the implementation procedures are respected.

In order to determine how the National Contact Point (NCP) procedures are functioning, BIAC conducted a survey among its entire membership, which elicited responses from a representative group of MNEs that have participated in specific instance procedures, drawn from a range of sectors and adhering countries.¹

It is important that the OECD and NCPs learn from both the positive and negative experiences of enterprises in the specific instances to further develop NCP procedures and advance the objectives of the Guidelines. With this attitude in mind, BIAC sets out a number of specific recommendations to the Investment Committee and the NCPs at the end of this paper.

II. General comments

- Companies have mixed experiences with NCPs. While some are positive, others are rather critical. This variation is due in part to discrepancies in how notifications are handled by NCPs in different countries, as well as to the nature of the specific instance and the parties involved. However, the responses show that companies see the potential added value of NCP procedures if certain conditions are respected (and some NCPs show this is possible).

¹ Amongst others, the questionnaire dealt with NCP cases in the following countries: Argentina, Brazil, Canada, France, Germany, Italy, Ireland, the Netherlands, United Kingdom and United States of America. Sectors include food and agriculture, chemicals, extractives, telecommunications and other sectors.

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- To be clear, BIAC is not advocating the use of a single, uniform procedure all over the OECD area. Flexibility has always been one of the hallmarks of the NCP-procedure. But basic principles and quality criteria should be taken into account by all NCPs and best practices should be exchanged.
 - It should be recognised that nowadays many forms of stakeholder dialogue are developing alongside the NCP procedures; a confrontational, campaign-oriented approach to the NCP procedure is not conducive to dialogue. This is a point that both NCPs and notifiers should take into account in the development of NCP procedures. A solution-focused approach based on mediation (as opposed to a campaign focused approach) is the best guarantee for a constructive process and a successful outcome for all.
 - BIAC sees the development of NCP procedures and experiences as a continuous learning process. The development of best practices is expected to gradually increase the level of trust and facilitate a degree of convergence in the existing approaches.

III. Specific comments

1. Public communication

- 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.
- In the public perception, the start of an NCP procedure is often perceived as the start of a prosecution or hearing, rather than a confidential initial consultative and conciliatory approach to an issue. In such a situation, there is de facto no presumption of innocence. As a consequence, the mere initiation of an NCP procedure is damaging the reputation of companies.
- In order to avoid such effects, the OECD and NCPs should carefully see to it that the NCP procedure is consistently presented (in language and approach) to the public at large, as a *mediation* procedure and that the start of a procedure does not, of itself, imply any violation on the part of the company. For example, the word 'notification' should be used instead of 'complaint,' and 'issue' instead of 'case'. The NCPs should also explain this to notifiers. The NCP procedure is not designed as a legal procedure, providing sufficient guarantees for fair trial.
- A false public image may especially develop in cases where notifiers use NCP procedures to push forward a political agenda or as elements of their campaigns. For example, in a number of cases, the opening, and later withdrawal, of specific cases coincided with collective bargaining negotiations. In such cases, NCPs risk becoming the instruments of campaigns; something that should be strictly avoided. It should also be taken into account that NGOs are in practice relatively free to claim certain points without facing consequences if these allegations later turn out to be

unsubstantiated. In that sense the consequences for business of an unjustified instance and careless communication are very different from those for NGOs.

- In the business community, there is a co-operative attitude and a willingness to participate in NCP procedures as an element of a broader CSR policy. However, there is a clear downside to doing so. In cases where a company adopts a *legal approach* in a procedure, the discussion generally stops when there is no proof of breach of the Guidelines; but with a *CSR approach*, the discussion continues to see what improvements could be made in company performance, even if there is no breach of the Guidelines. This could be perceived in the public eye as implying that there is nevertheless something wrong with company performance. This downside can make companies understandably wary to get involved in NCP procedures, particularly when a complaint is linked to a campaign. Careful communication on the nature of the process can help avoid such effects.
- BIAC accepts that one of the functions of the NCP is to promote awareness of the Guidelines. However, BIAC questions the approach of certain NCPs to openly solicit for notifications. This is not compatible with the nature of the NCP as mediator.

2. Financial and reputational consequences of NCP procedures

- Financial consequences of an NCP procedure for companies can be significant although not always easy to quantify. Examples are: direct financial loss relating to engaging and cooperating with NCPs, working time and labour costs, travel expenses and consultancy costs, efforts to avoid reputational damage and subsequent relationship management. Another example is that companies have been subject to increased interest rates if downgraded by rating agencies as a consequence of the initiation of an NCP procedure. The OECD should make clear to rating agencies that the start of a procedure does not imply that something is wrong.
- All OECD instances are cited in UN contracted 'Controversy Reports', regardless of the final outcome, which can impair partnering opportunities with UN agencies. The OECD should address this point with the UN.
- The fact that an NCP procedure may imply significant costs for a company should be taken into account by an NCP in the initial assessment of a notification.

3. Quality of procedures

- Length of procedures: BIAC received varied feedback from companies on this point. Some NCPs work swiftly, while with others procedures are subject to substantial delays. Delays are problematic for companies because their reputation is at stake, and they can be significantly costly. It is therefore important that the new indicative timeframes are respected.
- Confidentiality and trust: Some NCPs get high marks from companies on these points, whereas others need to improve their performance. This is particularly important in situations where NGO campaigns run parallel to NCP procedures. In certain cases, NGOs proceed with their campaigns unhindered, publishing details of

NCP proceedings/recommendations to bolster these campaigns. Such behaviour risks damaging the relationship of trust between companies and NCPs, decreasing the willingness of companies to engage in NCP procedures and ultimately failing to reach an adequate solution for the issues raised.

- **Impartiality:** Some NCPs are appreciated for their sensitivity to justified company interests, but in other cases, companies feel that NCPs are biased towards the NGO position, in particular by allowing unsubstantiated claims as the basis of instances, by allowing wide scope complaints that are difficult to rebut, by making recommendations where there is no violation of the guidelines, or by basing their findings on disputed allegations.
- **Factual basis:** It is important that NCPs properly check allegations before accepting notifications to avoid unsubstantiated claims (e.g. with the sole aim of ‘naming and shaming’).
- **Not all NCPs have sufficient capacity, knowledge or experience to deal with instances in a responsible and objective manner.**

4. Parallel proceedings

- NCPs should, when deciding on whether to start an examination of an issue, be sensitive to the difficulties involved for companies in proceeding with notifications where the same issue is also the object of parallel proceedings. Parallel proceedings should be avoided.
- There are wide discrepancies in how various NCPs handle such cases; some NCPs rarely consider parallel proceedings as impediments to start an examination.

5. The Good Faith Test

The ‘good faith test’ is an essential element to build trust in the new NCP procedures. Opening an NCP procedure after a notification is a possibility, not an automatism. The criteria should be further developed. It should take the following elements into account:

1. Is there sufficient evidence of a genuine willingness to reach a mediated solution, or is the issue predominantly part of an NGO publicity campaign, in which case it should not be accepted?
2. Are there any parallel proceedings on the same or similar matters (e.g. pending court cases, administrative proceedings, or alternative dispute resolution)? In such a case, is there a need for additional proceedings covering essentially the same matter?
3. Is the NCP procedure used by the notifier to obtain information from the company that can be used in the parallel proceedings?
4. Is the NCP procedure or related publicity used to influence the outcome of such parallel proceedings?

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5. Are there any ongoing contractual issues between parties? Is the NCP procedure being used by the notifier to put pressure on such a situation? If so, a specific instance should not be accepted.

IV. Recommendations

Companies have a range of experiences with NCPs. The fact that a number of experiences have been valued positively by MNEs, shows that the NCP instrument can be developed in a direction 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 in terms of length of procedures, confidentiality, impartiality and factual basis. With this attitude in mind, BIAC makes the following recommendations:

- 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.