



Procedural Notes for Specific Instances (“Complaints”) of the German National Contact Point for the OECD Guidelines for Multinational Enterprises¹

The OECD Guidelines for Multinational Enterprises envisage the establishment of National Contact Points tasked not least with *contributing to the resolution of issues that arise relating to implementation of the Guidelines*. The “specific instances procedure”, which is described in greater detail in the Procedural Guidance of the OECD Guidelines is mainly used where there is a suspicion that companies have violated the Guidelines, and is therefore generally designated a “complaint”. The aim of these procedural notes is to illustrate the nature and the course of such a procedure.

These notes are based on the Procedural Guidance of the OECD Guidelines for Multinational Enterprises (“Guidelines”) and their Commentary on the Procedural Guidance, supplemented by details on the handling of the procedure by the German National Contact Point within the scope of its discretion².

The Guidelines, these notes and other documents and information can be found at <http://www.bmwi.de/English/Navigation/External-economic-policy/oecd-guidelines-for-multinational-enterprises,did=326672.html>.

What is the purpose of the procedure?

The procedure aims to resolve *issues that arise relating to implementation of the Guidelines* where complaints are made. To this end, the National Contact Point *offers its good offices to help the parties involved*. The support of the National Contact Point is intended to help the parties involved to *reach agreement on the issues raised*.

It can therefore be seen that the main function of the National Contact Point is to mediate.

¹ Status: 24 June 2010

² Quotations from the OECD documents are in italics.



If the parties involved do not reach agreement on the issues raised, the National Contact Point shall issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines.

Of what stages does the procedure consist?

The procedure can be divided into three stages:

1. Receipt of and decision on whether to accept the complaint for consideration

The National Contact Point informs the parties involved of the receipt of a complaint and forwards this to the respective company.

In an *initial assessment*, it is decided *whether the issues raised merit further examination*.

For a complaint to be accepted for consideration, the following preconditions must be met³:

a) Eligibility of the parties

The complaint must be submitted by an *interested party*, e.g. a trade union, non-governmental organisation, individual person or a company with a justified *interest in the matter*, and must be made against a multinational company.

b) Regional competence

The German NCP is responsible for handling complaints relating to Germany. *Generally, issues will be dealt with by the NCP in whose country the issue has arisen*. The German NCP is therefore not generally responsible for issues which have arisen in another country adhering to the Guidelines. The German NCP forwards such complaints to the relevant NCP. In the case of complaints for which a different NCP is responsible, but which pertain to a company headquartered in Germany, the German NCP will follow the procedure and co-operate with the relevant NCP. The German NCPs are required to co-operate on such cases especially if it is suspected that the German section of the company is partly responsible, e.g. for taking decisions of relevance to the dispute or for issuing instructions from headquarters.

³ Further information on the criteria can also be found in the answers to specific questions.



If issues arise in non-adhering countries, the National Contact Point of the home country shall as a rule *take steps to develop an understanding of the issues involved, and follow these procedures where relevant and practicable*. If the complaint also refers to parts of companies in other adhering countries, the German NCP consults with the local NCP on how to proceed.

c) Scope of application of the Guidelines and compliance with their intentions

The issue must be *bona fide and relevant to the implementation of the Guidelines* and adequately substantiated. To establish this, the scope of application of the Guidelines needs to be considered along with the pertinence of the allegedly violated recommendations. The Guidelines form part of the OECD's Declaration of Investment and are primarily intended to ensure that corporate social responsibility is upheld where companies invest abroad. For the Guidelines to apply, therefore, an investment must have taken place (the "investment nexus"). For a condemnation to be issued, it is sufficient for the accusations to be credible. Unlike in a court, there is no requirement for strict evidence. The *consideration of the specific issue* should *contribute to the purposes and effectiveness of the Guidelines*. Pending court or administrative proceedings taking place in parallel do not necessarily mean that a complaint will not be accepted for consideration, but their repercussions on these criteria must be assessed in each such decision. Furthermore, the consideration of the issue should not contravene the *relevance of applicable law and procedures*.

As far as is necessary, the National Contact Point can call on the company to make comments at this early stage. Even if the NCP does not ask for comments at this stage of the procedure, the relevant company is at liberty to provide comments on the questions raised.

The German National Contact Point conducts the initial assessment together with the Federal Ministry/ies chiefly affected and involves the Federal Ministries represented in the "OECD Guidelines" interministerial group (see below) in the decision on whether to accept a complaint for consideration. The **plausibility** of the accusations made in the complaint is subjected to a **thorough examination** in terms of the Guidelines, taking



legal aspects into account. Careful consideration is given to the possible contribution by the NCP to resolving the issue raised.

If the complaint is rejected, the *National Contact Point informs* the parties and *justifies* its decision. The NCP publishes information about the rejection of the complaint on its website with a summary of the main reasons.

The **acceptance of a complaint for consideration** signifies that in-depth consideration of it is justified. It does not signify any final assessment of the issues raised and therefore does not imply any prejudgement.

2. Mediation procedure

If the NCP accepts the complaint for consideration, it contacts the parties involved and *offers to help to resolve the issues*. To this end, it *consults* with the parties involved. The aim is to achieve a consensus between the parties involved on the facts of the matter, the evaluation of these facts in terms of the guidelines, and potential solutions. The NCP will if necessary commence with separate talks with the respective parties, but its aim is to hold a joint discussion with the parties involved. In these talks – which generally also involve the ministry responsible for the subject matter – the NCP offers the parties a *forum for discussion*, i.e. it is neutral and does not place the parties under pressure to achieve a particular outcome. It gives the parties an opportunity to explain their views and to clarify questions. During the procedure, the NCP keeps in contact with the parties and discusses the current state of the procedure and possible future steps.

Furthermore, *as part of making available good offices, and where relevant to the issues at hand, NCPs will offer, or facilitate access to, consensual and non-adversarial procedures, such as conciliation or mediation, to assist in dealing with the issues at hand. In common with accepted practices on conciliation and mediation procedures, these procedures would be used only upon agreement of the parties concerned.*

In order to evaluate the issues raised in depth, it is usually necessary to obtain detailed comments in writing from the relevant company. The NCP will call on the company to do this and will grant it an appropriate deadline not exceeding three months. Furthermore, if necessary the NCP will *seek advice from relevant authorities* including local embassies



and/or representatives of the business community, employee organisations, other non-governmental organisations and relevant experts, consult the National Contact Point in the other country or countries concerned and seek the guidance of the OECD Committee on International Investment and Multinational Enterprises if it has doubt about the interpretation of the Guidelines in particular circumstances.

3. Conclusion of the procedure

- If the parties are able to **agree** on key points, the mediation is deemed successful and the procedure can be concluded. In order to document the attainment of this objective, the NCP produces a final statement co-ordinated with both parties. The *results* of the procedure must be *made publicly available unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines*.
- If the parties are **unable to agree** on key points or if they do not accept the NCP's efforts to mediate, the mediation shall be deemed to have failed. In such cases, the NCP is required to publish a **final statement** which may contain *recommendations* on compliance with the Guidelines. The NCP will formulate such recommendations if, despite its efforts to mediate, it believes that a violation of the Guidelines has taken place which should be condemned despite the fact that the company does not recognise this and has not indicated any likelihood that it will alter its conduct. The NCP co-ordinates its decision on the end of the mediation phase and the content of the final statement with the Federal Ministry/ies chiefly affected and the other Federal Ministries represented in the "OECD Guidelines" interministerial group. The final statement is published on the NCP's website.
- In appropriate cases, the German NCP will **follow up** on the implementation of agreed steps towards solutions or the implementation of its **recommendations** ("monitoring"). To this end, the NCP can call on the parties involved to make reports and can provide information about progress on its website.

Where and in what form should a complaint be submitted?



The complaint must be submitted by post to the Federal Ministry of Economics and Technology, National Contact Point for the OECD Guidelines for Multinational Enterprises, Division VC3, Scharnhorststr. 34-37, 10115 Berlin, and if possible in parallel by email to oeed-nks@bmwi.bund.de or buero-vc3@bmwi.bund.de. The date on which the complaint is received by post is recorded as the date of receipt of the complaint.

Who can submit a complaint?

Complaints can be submitted by *business, labour representatives or other interested parties*. The party must be able to explain its *interest in the matter* and *substantiate* its complaint. The need to provide substantiation and any additional contributions necessary to clarify the facts of the matter mean that the complainant has to have sufficient knowledge of and familiarity with such facts. A complaint can be submitted either by a natural or by a legal person. In practice, they tend to come from non-governmental organisations.

What is a multinational enterprise within the meaning of the Guidelines?

The Guidelines refrain from providing a precise definition of the term “multinational enterprise”, but do state that *these usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed. The Guidelines are addressed to all the entities within the multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the Guidelines.*

Do the Guidelines also apply to small and medium-sized multinational enterprises?

Governments wish to encourage the widest possible observance of the Guidelines.

While it is acknowledged that small- and medium-sized enterprises may not have the same capacities as larger enterprises, governments adhering to the Guidelines nevertheless encourage them to observe the Guidelines’ recommendations to the fullest extent possible.



On what basis can a complaint be submitted?

The complainant must *raise issues relevant to the implementation of the Guidelines*, i.e. there will normally be an allegation that the Guidelines have been violated. If the NCP is to be able to undertake an *initial assessment* of the complaint, this complaint must be sufficiently substantiated and the Guidelines which have allegedly been violated must be individually cited. The complaint must be made *in good faith*. When undertaking the *initial assessment*, the NCP has to decide whether the *consideration of the specific issue* raised in the complaint *would contribute to the purposes and effectiveness of the Guidelines*.

What happens to the information submitted in the course of the procedure?

The NCPs are required to uphold both the fundamental principle of transparency, and the confidentiality of certain information. *It remains important to strike a balance between transparency and confidentiality in order to build confidence in the Guidelines' procedures and to promote their effective implementation*. The publication of the findings when a complaint is rejected or when a procedure is completed can contribute to this.

In order to facilitate resolution of the issues raised, the NCP will take appropriate steps to protect sensitive business and other information. For example, it can prove necessary for *other information, such as the identity of individuals involved in the procedures, to be kept confidential*. *While the procedures under paragraph 2 are underway, confidentiality of the proceedings will be maintained*. *It is understood that proceedings include the facts and arguments brought forward by the parties*. *However, information and views provided during the proceedings by another party involved will remain confidential, unless that other party agrees to their disclosure*.

The question of confidentiality also needs to be considered when parties to the procedure or third parties apply for access to information under the provisions of the Freedom of Information Act or the Environmental Information Act.

What are the duties of the parties involved?

If mediation is to be successful, the parties involved must play their part. They should therefore co-operate constructively with the NCP and transmit relevant information to it without delay. They should be seriously interested in the objective of the mediation and refrain from any steps



which cast doubt on their seriousness. They must maintain confidentiality of the information gained during the procedure.

What is the relationship between the Guidelines and national law?

The Guidelines represent joint recommendations by governments to multinational enterprises. They contain principles and yardsticks for good practice in compliance with current legislation. Compliance with the Guidelines by companies is on a voluntary basis; there is no statutory requirement. The Guidelines are not a substitute for, nor do they override, applicable law. They represent standards of behaviour supplemental to applicable law and, as such, do not create conflicting requirements. Accusations of such a nature would not be compatible with the purposes of the Guidelines. The relevance of applicable law and procedures must therefore be borne in mind when assessing whether to accept a complaint for consideration.

What is the significance of court or administrative proceedings taking place in parallel?

A procedure which is pending in parallel does not necessarily prevent the acceptance of a complaint for consideration. The yardstick for the decision on whether to accept a specific complaint in such a situation is the question of whether the implementation of the procedure would serve the purposes of the Guidelines and would enhance their effectiveness. This will not usually be the case if the parallel procedures offer clarification of the issues raised in the complaint to the NCP. However, in justified cases, the NCP can offer their mediatory role in instances in which parallel procedures are already underway. If, in the course of the NCP's procedure, a danger arises that the parallel procedures could be negatively influenced, the NCP's procedure can be temporarily suspended on the request of one of the parties.

Do the Guidelines also apply in countries which have not signed up to them (non-adhering countries)?

Governments adhering to the Guidelines encourage the enterprises operating on their territories to observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country.



How does the procedure work when the conduct which is the subject of the complaint has occurred in a non-adhering country?

In the event that a complaint raises Guidelines-related issues referring to the conduct of a German company or part of that company in a non-adhering country, NCPs will take steps to develop an understanding of the issues involved and follow these procedures where relevant and practicable. While it may not always be practicable to obtain access to all pertinent information, or to bring all the parties involved together, the NCP may still be in a position to pursue enquiries and engage in other fact finding activities. Examples of such steps could include contacting the management of the firm in the home country, and, as appropriate, government officials in the non-adhering country.

Conflicts with host country laws, regulations, rules and policies may make effective implementation of the Guidelines in specific instances more difficult than in adhering countries. As noted in the commentary to the General Policies chapter, while the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in a situation where it faces conflicting requirements.

The parties involved will have to be advised of the limitations inherent in implementing the Guidelines in non-adhering countries.

Which countries adhere to the OECD Guidelines?

The OECD Guidelines for Multinational Enterprises are supported, and adherence to them fostered, by all OECD member states and a growing number of other countries. Current information about additional adhering countries can be found at www.oecd.org/daf/investment/declaration.

What is the language of the procedure?

The language of the procedure is German. In order to fulfil the purposes of the Guidelines, the NCP may offer translation services. In order not to overtax such services, this offer will be restricted to the main steps of the procedure and to the official OECD languages of English and French. When complainants from other countries are involved, complaints can be submitted in the official OECD languages.



How long does a complaint procedure take?

The NCP endeavours to hold the procedure as quickly as possible. How long it lasts depends on the special features of the case and is co-determined by factors beyond the NCP's sphere of influence. For example, there may be a specially great need to clarify the facts of the matter or to obtain expert advice or comments from the Investment Committee. Nor is it usually possible to determine in advance how long the mediation phase will take. Furthermore, rigid timetables could impede the finding of a solution. There are thus good reasons why the Procedural Guidance of the Guidelines does not provide for any deadlines.

However, the aim is to avoid unnecessary delays. The **following periods** can be taken as an indication of how an orderly procedure might run, although deviations from this are certainly possible.

The German NCP endeavours to undertake the **initial assessment within three months**. Within **the next six months**, there should be **clarity about the prospects for success of any mediation**, and a decision should be taken on whether to continue the mediation. Should it be necessary for the NCP to **publish a statement**, the aim is again to do so **within three months**. If these periods are to be adhered to, it is not least necessary for the parties to co-operate.

What happens if the parties wish to reach agreement outside the procedure?

Should the parties agree to resolve the issue without the mediation of the NCP, both parties will inform the NCP about this in writing. The NCP will then terminate the procedure, but will be informed by the parties about how successful they are in reaching agreement, so that – should they fail – the procedure can be revived.

Mediation outside the NCP can take place either directly between the complainant and the company, or via a mutually acceptable third party.

The NCP will provide information about such terminations of procedures on its website.

To whom is the NCP answerable?

The OECD Investment Committee *examines the annual reports of the National Contact Points on the nature and results of their activities. It also considers substantiated submission by an adhering country or an advisory body (Business and Industry Advisory Committee to the OECD*



(BIAC) and Trade Union Advisory Committee to the OECD (TUAC)) that an NCP was not fulfilling its procedural responsibilities in the implementation of the Guidelines in specific instances.

The non-binding nature of the Guidelines precludes the Committee from acting as a judicial or quasi-judicial body. Nor should the findings and statements made by the NCP (other than interpretations of the Guidelines) be questioned by a referral to the Committee. The Committee shall not reach conclusions on the conduct of individual enterprises.

In Germany, all interested parties can express doubt about compliance with the Procedural Guidance of the OECD Guidelines to the members of the OECD Guidelines Working Group. The issues are discussed in the Working Group.

What is the “OECD Guidelines” interministerial group, and what powers does it have?

The “OECD Guidelines” interministerial group consists of Federal Ministries with a special interest in the Guidelines. At present, these are: Federal Foreign Office and Federal Ministries of: Labour; Finance; Justice; Environment; Economic Co-operation.

The group is chaired by the Federal Ministry of Economics and Technology.

The members of the group are informed about the receipt of complaints and are involved in the decisions on their acceptance for consideration and their conclusion. Ministries which are particularly responsible for the subject matter will also be included in the examination of the complaint, the consultations with the parties and the co-ordination of procedural steps and decisions.

What is the OECD Guidelines Working Group, and what powers does it have?

The OECD Guidelines Working Group consists of the interested Federal Ministries (cf. section on the interministerial group) and the German Global Compact Network, as well as representatives of business associations, trade unions and non-governmental organisations. At present, these are: BDA, BDI, DIHK, DGB, IG Metall, VERDI, Amnesty International (with a mandate from the Human Rights Forum), EED (with a mandate from VENRO), Germanwatch and Transparency International.

The Working Group offers an opportunity to discuss current issues related to the Guidelines.



The members of the Working Group are informed about the receipt of complaints. All members of the Working Group uphold the confidentiality of ongoing complaints procedures.

Where can I get advice if I have questions about the procedure or about a specific complaint?

The NCPs are available as contact points for all questions about the Guidelines.

The German NCP can be reached at the Federal Ministry of Economics and Technology, Division VC3, Scharnhorststr. 34-37, 10115 Berlin, Tel. 030-2014 7521 (office), email oeed-nks@bmwi.bund.de or buero-vc3@bmwi.bund.de.

The contact details of the NCPs of other adhering countries can be found at <http://www.oecd.org/dataoecd/17/44/1900962.pdf>.

In Germany, it is also possible to contact the members of the OECD Guidelines Working Group, who can offer their experience and expertise particularly when it comes to specific (projected) complaints.