



Federal Ministry
for Economic Affairs
and Energy



PROCEDURAL GUIDELINES

**of the German National Contact Point
for the OECD Guidelines for Multinational Enterprises
at the Federal Ministry for Economic Affairs and Energy**

**Adopted at the meeting of the Interministerial Committee
on the OECD Guidelines for Multinational Enterprises of 25 February 2019**

**[Courtesy translation of the original German version, the latter being the sole basis for any
interpretation that might become necessary.]**

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A. INTRODUCTION

- 1 The OECD Guidelines for Multinational Enterprises (hereinafter: “Guidelines”) provide that all member states and participating states are to establish National Contact Points whose tasks include that of helping to resolve any issues that arise in the implementation of the Guidelines in “specific instances” in an impartial, predictable and equitable manner which is compatible with the Guidelines. This refers to complaints procedures relating to potential violations of the Guidelines. For this purpose, the Guidelines provide “Procedural Guidance” to be used in the case of complaints against multinational enterprises due to possible conflicts with the recommendations made in the Guidelines.
- 2 Compliance with the Guidelines by companies is on a voluntary basis; there is no statutory requirement. Nevertheless, the Federal Government has a clear expectation that the multinational enterprises operating in or from Germany will comply with the principles set out in the Guidelines and participate constructively in the complaints procedures relating to them which are handled by the German National Contact Point (hereinafter: “NCP”) at the Federal Ministry for Economic Affairs and Energy.
- 3 The aim of these Procedural Guidelines is to illustrate the nature and the course of such a complaints procedure. They are based on the Procedural Guidance of the OECD in force since the revision of the Guidelines in 2011 and its “Commentary on the Procedural Guidance”. The latter describes the procedures to be used when applying the Guidelines in complaints procedures. It gives the NCPs a certain degree of discretion when it comes to its specific design. Therefore, the Procedural Guidelines at hand not only describe the basics of the process, but also provide information as to how the NCP handles certain aspects of it.
- 4 According to the Procedural Guidance of the OECD, it is important that the questions raised in the complaints procedure are dealt with swiftly, efficiently and in line with current law. As it does this, the NCP acts in close coordination with other federal ministries, which come together in the Interministerial Committee on the OECD Guidelines (IMC),¹ and coordinates the decisions to be taken in the context of the complaints procedure with them.

¹ The IMC consists, in addition to the staff of the NCP at the Federal Ministry for Economic Affairs and Energy, also of representatives of the Federal Ministry of Finance, Federal Foreign Office, Federal Ministry of Justice and Consumer Protection, Federal Ministry of Labour and Social Affairs, Federal Ministry of Food and Agriculture, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, and the Federal Ministry for Economic Cooperation and Development.

- 5 The Guidelines, these notes and other documents and information can be found on the NCP's website².

B. OBJECTIVES AND PRINCIPLES OF THE COMPLAINTS PROCEDURE AT THE NCP

I. Purpose of the complaints procedure

- 6 The purpose of the specific instances procedure (the complaints procedure) is to resolve specific issues that arise in specific cases in the application of the Guidelines. Assisted by the NCP, the aim of the complaints procedure is to build **trust** between the parties, achieve **agreement** on the contentious issues in a **dialogue-based and consensual** manner, and thereby promote adherence to and wider use of the Guidelines.
- 7 The complaints procedure is not a court procedure. The NCP is not a court-like institution. It offers a protected **discussion forum** and steers the procedure with a view to achieving agreement amongst the parties whilst observing the Procedural Guidance. It acts neutrally and maintains **impartiality** in relations with the parties. This means, for example, that all the comments by the parties are normally shared in order to ensure that the parties have a comparable level of knowledge. The NCP ensures **predictability** by providing clear and publicly accessible information about the course of the procedure and its role in it. It enables all parties to take part in the procedure under fair and **equitable** conditions. It can be contacted throughout the procedure by all parties with any questions or statements or requesting other support. The mediation it offers is **in line with the Guidelines** and oriented to their principles and standards.

II. Good faith

- 8 If a complaints procedure is to reach a successful conclusion, all of the parties must cooperate constructively in the proceedings and abide by the principle of **good faith**. The Guidelines define this as responding in a timely fashion, maintaining the necessary confidentiality, refraining from misrepresenting the process and from threatening or taking reprisals against parties involved, and in general a serious approach which fosters the finding of a solution. Conduct which might undermine the formation of a basis of trust between the parties and thus the successful outcome of the procedure should be avoided.

² URL: <http://www.oecd-nks.de>.

- 9 The NCP ensures that the parties respect the principle of good faith throughout the procedure and in case of need takes the necessary steps in this regard.

III. Transparency and confidentiality

- 10 The principle formulated in the Guidelines that the NCP's activities be transparent also applies to the complaints procedure. However, the Guidelines also provide that, in order to attain greater effectiveness, steps can be taken to uphold confidentiality in complaints procedures. The NCP aims to strike a balance between **transparency** as a general procedural principle and the **confidentiality** needed to ensure the trust of the parties to the procedure.
- 11 The call for transparency particularly reaches its limits where it comes to necessary protection for commercial secrets or personal data.
- 12 The principle of good faith can also entail a duty to maintain confidentiality. For example, disclosure of documents or information received during the procedure, or the conducting of a public campaign against a party, can in individual cases damage trust in the procedure and lessen the prospect of a successful outcome. This is particularly true of the mediation phase, which is afforded special confidentiality by the Guidelines. The NCP expects the parties to reflect on the possible effects of their conduct on the likelihood of a successful outcome to the procedure. As part of its efforts to steer the procedure, it can take appropriate measures to ensure the possibility of a successful conclusion to the procedure. If it no longer believes a consensus to be possible, it can terminate the procedure.

C. SEQUENCE OF EVENTS DURING THE PROCEDURE

I. Submission of the complaint

- 13 A complaints procedure before the NCP is launched by the submission of a written complaint.
- 14 If possible, this should be emailed to buero-nks@bmwi.bund.de using the form available on the NCP's website³ for the submission of complaints. The complaint should be accompanied by other documents which serve to back up the complaint.

³ Cf. footnote 2.

- 15 Alternatively, there is the possibility of sending the complaint in writing to the following postal address:

Bundesministerium für Wirtschaft und Energie (Federal Ministry for Economic Affairs and Energy)

National Contact Point for the OECD Guidelines (NCP)

Scharnhorststr. 34 - 37

10115 Berlin

Germany.

II. Receipt of the complaint, initial assessment

- 16 The NCP confirms receipt of the complaint and contacts the complainant to inform them how the complaint will be handled. This will usually happen within 10 days after the complaint has been submitted.
- 17 As a first step, the NCP assesses the complaint as to whether it is intelligible and as to whether there is a risk that it might violate any third party's rights, particularly to data privacy. The complainant may be asked to address any shortcomings in these areas. Similarly, the NCP can request that the complainant make additional information or documents available for assessment.
- 18 As soon as the NCP has received the complainant's representation (possibly supplemented by further documents), it will forward the letter of complaint to the company concerned, together with an invitation to respond to the allegations. The usual deadline here is six weeks. The NCP will also inform the company that its response will be forwarded to the complainant and that any confidential business information should be marked as such, accompanied where necessary by the reasons why it must be treated confidentially. Such information will only be shared if consent has been given by the holder of the information. Similarly, the NCP can request that the respondent make additional information or documents available for assessment.

III. Initial assessment

- 19 On the basis of the complaint and the response submitted by the company, the NCP undertakes an initial assessment and decides whether the issues raised in the com-

plaint merit further examination, i.e. whether or not to accept the complaint for further consideration. This usually happens within three months after the complaint has been submitted.

1. Eligibility criteria

- 20 When deciding whether to accept a complaint for further consideration, the NCP examines the following points:

a) Eligibility of the parties

aa) Complainant(s)

- 21 Complaints can be submitted by (natural and legal) persons, trade unions and non-governmental organisations. The complainant must be able to demonstrate their legitimate interest in the matter in question and justify the complaint. Provided they can demonstrate that they are authorised to do so, complainants can act on behalf of a third party.

bb) Respondent

- 22 The complaint must be directed at an addressee of the Guidelines, i.e. a “multinational enterprise”. The Guidelines apply to all sectors of the economy. Whilst the Guidelines do not specify exactly what constitutes a “multinational enterprise”, they do state that these “usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. The Guidelines also apply to activities of business partners of multinational enterprises including suppliers and subcontractors (cf. also paragraph 28 in this regard).
- 23 Small and medium-sized multinational enterprises are also subject to the Guidelines. Consideration has been and will be given to the fact that these smaller companies do not have the same possibilities and capacities as large corporations.

b) International competence of the German NCP

- 24 By default, complaints are handled by the NCP of the country in which the issues in hand have arisen, meaning that the German NCP forwards complaints to the relevant foreign NCP about issues that have arisen in another country adhering to the Guidelines. If the complaint relates to parts of companies or operations in more than one ad-

hering country, the NCP will consult with the NCPs in those countries on how to proceed.

- 25 If the complaint relates to activities in a non-adhering country, the NCP may be responsible for handling the case if the relevant company's main headquarters are in Germany. In this case, it applies the procedure described above and if appropriate will conduct the complaints procedure to the extent that it deems this to be useful and feasible in order to help mediate between the parties.
- 26 In cases where a different NCP is in charge of dealing with a complaint that pertains to a company based in Germany, the German NCP follows the proceedings and cooperates with the competent NCP.

c) Relevance of the issues raised for the implementation of the Guidelines and submission in good faith

- 27 The purpose of the examination by the NCP of the issues raised is to advance the objectives of the Guidelines and render the latter more effective. This is generally the case if the questions raised refer to the subject matter of the OECD Guidelines and if support from the NCP can foster the application of the Guidelines in the specific case or in future.
- 28 Furthermore, there must be a link between the company's operations – including the activities of their business partners (cf. paragraph 22 above) – and the issues raised in the complaint. This can derive from negative effects of the company's own activities, or from a contribution to negative effects. Where a company did not cause or contribute to a negative effect itself, there may nevertheless be a causal relationship because the negative effect was directly linked to a business relationship, the products or services of the company. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.
- 29 The complaint must be material and **sufficiently substantiated**. It is sufficient for the allegations to be presented in a credible manner; there is no requirement to prove the case, like in a court.

d) Court or administrative proceedings taking place in parallel

- 30 Court or administrative proceedings taking place in parallel are not, per se, grounds for a case to be dismissed by the NCP. The NCP takes a decision on the specific case as-

sessing whether an offer of good offices could make a positive contribution to the resolution of the issues raised and do so without causing serious prejudice for either of the parties involved in these other proceedings or resulting in contempt of court. It is important that the support provided by the NCP and the application of the Guidelines add value over and above the other proceedings.

2. Initial assessment

- 31 The German NCP undertakes an initial assessment. The Interministerial Committee carefully scrutinises the allegations of a breach of the Guidelines made in the complaint and considers the legal aspects of the case before weighing up whether or not the issues raised warrant further examination and whether involvement of the NCP could help resolve the issue.

a) Acceptance of the complaint for further consideration by the NCP

- 32 When the complaint is accepted for further consideration, the parties are informed about the NCP's decision to do so in writing. The information is not made public. At the same time, the NCP offers the parties its good offices in the form of a mediation or conciliation procedure⁴.
- 33 Acceptance of a complaint for further consideration means that the NCP holds that a complaint merits further examination as to whether the issues raised are of relevance when it comes to the implementation of the Guidelines. It does not mean that the issues raised have been given final consideration and does not constitute a "prejudgement" against the respondent.

b) Rejection of the complaint

- 34 If a decision is taken not to further examine the complaint, the NCP informs the parties of the grounds for its decision and draws up a statement containing the following points:
- names of the parties (if consent is given by the parties);
 - the allegations on which the complaint is based, including indications as to which parts of the Guidelines are alleged to have been breached;

⁴ For reasons of linguistic clarity, in the following only referred to as "mediation procedure".

- a summary of the complaints procedure;
- the grounds on which the case has been rejected.

35 The parties are issued with a draft of this statement on the decision not to examine the complaint and are invited to respond to it within a deadline of usually 10 days. Whether or not these comments are included in its statement is a matter for the NCP's due discretion.

36 The statement is then sent to the parties and published on the NCP's website.

IV. Mediation phase

1. Preliminary remarks

37 At the beginning of the mediation phase, the NCP reminds the parties of the importance of the general procedural principle of good faith.⁵ Also, it informs the parties that the maintenance of confidentiality is of particular importance in the mediation phase.⁶

38 The NCP primarily aims at a joint discussion between the parties; however, separate contacts between the NCP and the parties can also be useful. If all parties so desire, the NCP can involve external mediators in the mediation phase.

39 The NCP keeps in contact with the parties during procedure. It discusses the latest state of the procedure with them as well as possible steps that could be taken in order to resolve the issues in hand.

40 If necessary, the NCP can seek advice from the competent authorities, the local embassies, representatives of the business community, employee organisations, other NGOs as well as proven experts. It can consult the NCPs of other countries. If the NCP is unsure as to how to interpret the Guidelines in a particular case, the NCP can seek the guidance of the OECD Investment Committee.

⁵ Cf. paragraph 8.

⁶ Cf. paragraph 12.

2. Preparation of the mediation meeting

- 41 If the parties accept the the NCP's offer of its good offices, the NCP prepares the mediation by engaging in discussions and written contact with the parties. The expectations and objectives of the parties are discussed, and the procedure is explained.
- 42 In order to ensure that the mediation procedure runs efficiently, the parties can, with support from the NCP, make a separate agreement about the scope and course of the discussions, confidentiality or other matters of interest.

3. Mediation meeting

- 43 The NCP puts the organisational preconditions in place for the holding of efficient and protected talks. In order to facilitate the greatest possible participation of the parties in the mediation talks, it can use appropriate communication technologies.
- 44 At the beginning of each mediation process, the mediator will give the parties time to explain their view of the matter in hand. The purpose of the talks, which are usually conducted in the presence of members of the IMC, is to facilitate an agreement between the parties about issues raised and to find adequate solutions in order to further-implementation of the Guidelines in the future.

V. Conclusion of the procedure

1. If there is agreement between the parties

- 45 If the parties succeed in reaching agreement on substantial points during the mediation, the process will be concluded with a report agreed with the parties.
- 46 The report should provide information on the issues raised, the procedure conducted by the NCP in the interest of helping the parties reach agreement, and the date of the agreement. Information regarding the terms of the agreement will only be included insofar as the parties give their consent. At the request of the parties, the NCP can help with the implementation of the agreement. It can take appropriate steps to follow up on the implementation of agreed solutions.

2. If there is no agreement between the parties

- 47 If there is no agreement between the parties on the issues raised, or if one of the parties is not willing to take part in the procedure, the NCP will publish a statement.

- 48 This statement will provide information on the allegations on which the complaint is based, including indications as to which parts of the Guidelines are considered to have been breached and
- information about the parties;
 - the issues raised;
 - the reasons why the NCP decided that the matter warranted further examination;
 - a summary of the course of the complaints procedure;
 - if applicable, the reasons which prevented agreement being reached;
 - if applicable, recommendations as to how the Guidelines are to be implemented.
- 49 The NCP sends the draft of the statement to the parties, who will be asked to make any comments within a 10-day period, if possible, and exercises due discretion regarding the undertaking of changes before it sends the final version to the parties.
- 50 The NCP can take appropriate steps to follow up on the implementation of its recommendations.

3. Publication

- 51 The report or – where it was not possible to reach an agreement – the statement is published on the NCP's website⁷.

D. SUPPLEMENTARY POINTS

I. Duration of the procedure

- 52 In accordance with the Procedural Guidance, the NCP aims to conclude the initial assessment within three months and the entire procedure within a year. The exact duration of the proceedings will, however, depend on the precise nature of the case and on factors that cannot be controlled by the NCP (e.g. translation services, involvement of other country's NCPs). In some cases it may be necessary to seek advice from experts or ask the Investment Committee for their comments. The Guidelines therefore do not set rigid deadlines for good reason.

⁷ Cf. footnote 2.

- 53 Should the NCP be unable to keep to the schedule set out in the Guidelines, it informs the parties as soon as possible, stating the reasons and – if possible – setting out an alternative timeframe.

II. Languages of the procedure

- 54 The languages of the procedure are German and, if necessary, English. Wherever possible, the NCP makes translation or interpretation services available. However, this offer will be restricted to the most important steps of the proceedings.

III. Enquiries

- 55 Questions about the complaints procedure and other activities of the NCP can be submitted using the relevant form on the NCP's website⁸.

IV. Data protection

- 56 The processing of personal data at the NCP is handled in accordance with the European General Data Protection Regulation and the Federal Data Protection Act. The legal basis for the processing of personal data by the NCP is Article 6(1)(e) of the General Data Protection Regulation in combination with Section 3 of the Federal Data Protection Act. Personal data are processed by the NCP in its work to handle complaints and enquiries in accordance with the data protection statement⁹ of the Federal Ministry for Economic Affairs and Energy and only to the extent necessary. Further information about data protection can be found in the aforementioned data protection statement.
- 57 In order to process complaints, where necessary the NCP obtains information from public and non-public bodies in EU Member States or countries outside the EU.¹⁰ Also, the NCP coordinates with foreign NCPs when verifying which NCP is responsible for the case.¹¹ In individual cases, it may be necessary to transmit personal data (also of third parties) pursuant to Section 25 in conjunction with Article 49(1)(d) of the General Data Protection Regulation to countries outside the EU in order to process the complaint or enquiry. Pursuant to these provisions, the transmission of data to countries outside the EU is permissible on the grounds of public interest. The tasks of the NCP

⁸ Cf. footnote 2.

⁹ URL: <http://www.bmwi.de>.

¹⁰ Cf. paragraph 40.

¹¹ Cf. paragraph 24 - 26.

envisaged in the OECD Guidelines and the Procedural Guidance, and particularly the consultations between NCPs and the international sharing of data required for this, are grounds of public interest. When data is transmitted to a country outside the EU, the affected parties are informed about this in advance

V. Freedom of information

- 58 This is without prejudice to the provisions of the Freedom of Information Act and the Environmental Information Act.