



# OECD Guidelines for Multinational Enterprises: National Contact Point for Switzerland

## Information on the Specific Instances Procedure

Bern, November 2014

The OECD Guidelines for Multinational Enterprises (OECD Guidelines) provide for setting up National Contact Points (NCPs), one of whose tasks is to assist in resolving issues arising from the implementation of the Guidelines. Under the OECD Guidelines, issues can be raised with the NCP in writing if it is suspected that an enterprise has breached the Guidelines. This is known as the "specific instances procedure". This document describes how this procedure works and what it intends to achieve. The information is based on the Procedural Guidance for OECD Guidelines and its Commentary on the Implementation Procedures, with some additional information on how the Swiss NCP deals with specific instances.

### **1 The OECD Guidelines**

The OECD Guidelines are recommendations addressed by the governments of the OECD states and other adhering countries to multinational enterprises from their respective countries. They lay down principles and standards for responsible business conduct, but these are not legally binding.

### **2 National Contact Points under the OECD Guidelines**

All states which sign up to the OECD Guidelines are required to set up an NCP. The NCP's task under Chapter I.11 of the Guidelines is to encourage multinational enterprises based or permanently settled in Switzerland to implement the Guidelines and to assist in resolving any problems that arise when the Guidelines are implemented.

Both individuals and organisations can raise an issue with the NCP in writing if they believe that a multinational enterprise has acted in breach of the OECD Guidelines. They should do this in the country in which the alleged violation took place. If there is no NCP in that country, the issue should be raised in the country in which the multinational enterprise has its headquarters.

Under the OECD Guidelines, the adhering countries have a certain degree of flexibility in the way they set up their NCP, but under Clause I of the Procedural Guidance section of the Guidelines, they should operate in accordance with core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence. The NCP is also expected to cooperate in an adequate manner with the various stakeholders (primarily the business community, trade unions and other non-governmental organisations).

### **3 The Swiss National Contact Point**

#### **3.1 Structure**

In Switzerland, the NCP is part of the International Investment and Multinational Enterprises Unit of the Foreign Economic Affairs Directorate, located in the State Secretariat for Economic Affairs SECO (in the Federal Department of Economic Affairs, Education and Research EAER).

The NCP is advised on its strategy and on the application of the OECD Guidelines and the procedural guidance by the Federal Commission advising the National Contact Point for the OECD Guidelines for Multinational Enterprises (NCP Advisory Board). The NCP Advisory Board has 14 members. They comprise the Director of SECO and three additional members from the Federal Administration, along with two members each from the employers' federations, the trade unions, trade associations, NGOs and academia.

Whenever a specific instance is raised with the Swiss NCP, an internal ad hoc working group is formed to support the NCP in addressing the issue. The members of the working group are selected according to the issue at hand, i.e. representatives from other relevant government agencies who can contribute the required expertise.<sup>1</sup> Country representatives from the Bilateral Economic Relations Division at SECO and the Swiss embassy or representation in the country concerned are also involved.

Each year in June, the NCP draws up an annual report on its activities, which is submitted to the OECD. The report is also published on the NCP website.

#### **3.2 Role**

When dealing with specific instances, the Swiss NCP provides a platform for dialogue and mediation to take place between the parties involved, thus helping to find a solution to the dispute. The parties are not obliged to take part in this dialogue, but are actively encouraged to do so by the NCP.

The Swiss NCP's task is to encourage discussion between the parties involved rather than establish whether or not a breach of OECD Guidelines has taken place. It is essentially up to the parties to state clearly what the specific instance involves and to take an active part in the dialogue. However, the NCP may seek to clarify questions in connection with the issue either on its own or with the help of internal experts. When dealing with any specific instance, the NCP observes the core criteria for functional equivalence together with the following criteria in accordance with § 22 of the Commentary on the Implementation Procedures for the OECD Guidelines: impartiality, predictability, equity and compatibility with the OECD Guidelines.

#### **3.3 Raising issues with the NCP**

When raising specific instances with the NCP, the written submission should provide details of the party raising the issues and of the multinational enterprise concerned. It should name the relevant chapter of the OECD Guidelines and explain why, in the opinion of the party raising the specific instance, the multinational enterprise has breached the OECD Guidelines. If a submission is incomplete, the NCP can return it for revision.

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<sup>1</sup> e.g. SECO/Labour Directorate for issues relating to international labour, FDFA/Human Security Section for issues relating to human rights, FDF/SIF for tax-related issues, FDFA/Directorate of Political Affairs, Sectoral Foreign Policies Division for corruption, environment and tax issues, FDFA/Swiss Agency for Development and Cooperation for development-related issues.

### 3.4 Specific Instances Procedure

#### *Step 1: Confirmation and Information*

When a specific instance issue is raised, the Swiss NCP confirms receipt of the submission in writing within ten working days and notifies the company concerned. The company is then given the opportunity to respond and is informed that the answer given will be communicated to the party that has raised the specific instance.

The NCP invites the parties involved to take part in a meeting with the NCP, either individually or with the other party, in order to discuss how to proceed and explain the role of the NCP. It also makes it clear that, for the sake of transparency, all written information received will be passed on to the other parties involved, unless there are valid reasons for information to be retained (e.g. company confidentiality).

#### *Step 2: Initial Assessment*

In a second step, the Swiss NCP makes an initial assessment of the matter in accordance with the OECD Guidelines. It decides whether it should pursue the matter and offer the parties involved its good offices. Where possible, the Swiss NCP concludes this phase within three months of the specific instance being submitted.

The NCP assesses the specific instance according to the following criteria; if these criteria are not met, the NCP does not consider the issue raised or returns it to the party raising the issue for modification:

- **Identity of the party raising the specific instance and its interest in the case:** It is necessary to ascertain who has raised the specific instance and what their motivation was. The party raising the specific instance is required to disclose its identity and its legitimate interest in the issue at hand.
- **Responsibility of the NCP:** A specific instance must be raised in the country in which the alleged breach occurred. If this country does not have an NCP, the issue should be raised in the country where the multinational company has its headquarters. The Swiss NCP is therefore responsible for cases in which multinational companies from other signatory states have allegedly acted in breach of the Guidelines. It is also responsible in cases where a Swiss enterprise abroad is involved in a country that does not have its own NCP. If the specific instance concerns more than one NCP (e.g. if the company involved is owned by several multinational enterprises or in the case of holding companies), the NCPs concerned decide which of them will assume the lead for the specific instance. If the Swiss NCP is not responsible for a particular case, it forwards the specific instance to the responsible NCP and informs the party that has raised the instance. If the multinational enterprise has a connection with Switzerland, Switzerland's NCP will on request provide or offer appropriate support to the NCP in the host country.
- **Scope of application of the OECD Guidelines and materiality of the specific instance:** The NCP ascertains whether or not the specific instance raised falls within the scope of the OECD Guidelines and was raised in good faith (*bona fide*). Sufficient evidence related to the alleged breach of the Guidelines must also be given in the specific instance.
- **Legal context and parallel procedures:** Even if the company has met all the legal requirements, the NCP may still pursue the specific instance, as the OECD Guidelines are internationally recognised standards which may be more stringent than local law. The NCP also ascertains whether the issue has already been dealt with in local proceedings or if proceedings are pending (so-called parallel proceedings). If parallel proceedings have already been concluded or are ongoing, this will not necessarily prevent the NCP from pursuing a specific instance. However, in each individual case

the NCP assesses whether or not an offer to mediate would make a positive contribution to the resolution of the issues raised or if it would prejudice either of the parties involved in other proceedings.

- **Contribution to the effectiveness of the OECD Guidelines:** The NCP assesses whether pursuing the issue would contribute to the effectiveness of the OECD Guidelines.

If required, the NCP can carry out further clarifications in connection with the matter with the parties involved or invite the parties to respond to the issue raised.

Once the Initial Assessment phase has been completed, the NCP provides a written report stating whether or not the specific instance will be pursued. In the decision, the relevant chapter of the Guidelines is mentioned and confirmation is given of whether the specific instance falls within the Guidelines. The NCP does not comment on whether the Guidelines have been breached or not. It expressly states that the decision does not mean that a conclusive assessment has been made of the issues raised or that a breach of the OECD Guidelines has occurred.

The report on the Initial Assessment is published on the NCP website. If the Swiss NCP decides not to pursue an issue, it publishes an explanation and a summary of the main reasons for its decision on the NCP website.

### *Step 3: Providing a platform for dialogue to the parties*

When the NCP decides to pursue a specific instance, it offers its help in finding a solution to the parties involved. If the parties accept this offer, the NCP initiates an informal conciliation procedure. The aim here is for the parties to agree on the essential facts of the case, consider them according to the OECD Guidelines and discuss possible solutions.

The NCP's main task is to facilitate communication between the parties and provide a discussion forum, i.e. the NCP plays a neutral role, giving the parties the opportunity to express their position and address any unresolved issues. The NCP may lead the discussions itself or engage an external mediator.

The parties are not obliged to participate in discussions. Before discussions begin, the NCP may agree with the parties involved on the form that they will take and record this in writing. In order for frank discussions to take place, it is essential that they can be conducted confidentially and informally. The results of the discussions are recorded in writing and made available to the parties.

Discussions normally take place in Switzerland, at the premises of the NCP in Bern. The language spoken during the proceedings is determined by the NCP in advance. The NCP cannot provide the parties taking part in the discussions with any financial assistance (e.g. travel expenses, translation or interpreting fees). In well-founded exceptional cases the NCP can in its own discretion consider a financial assistance to the parties.

### *Step 4: Conclusion of the procedure*

If the parties reach an agreement and find a solution to the dispute or a further means of resolving the dispute, the NCP publishes a final statement. Information on the results of the discussion is only recorded with the express consent of the parties involved.

If no agreement is reached or one of the parties is not willing to take part in the proceedings, the NCP also makes this publicly available in a final statement. The statement includes a summary of the reasons why no agreement was reached.

The NCP may draw up recommendations for implementation of the OECD Guidelines, which are also included in the statement. In addition, in consultation with the parties, it can envisage specific follow-up activities, for which the NCP will provide support following completion of the specific instance procedure.

Final statements are published on the NCP website and in the annual report by the Chair of the OECD working group responsible for the Guidelines. Unless there is good reason not to do so (e.g. protection of individuals), the NCP publishes the names of the parties involved in its written statement. Before the statement is issued, the NCP gives the parties the opportunity to comment on a draft statement. If there is no agreement between the NCP and the parties about the wording of the statement, the NCP makes the final decision.

#### *Step 5. Feedback to the NCP*

On conclusion of the proceedings, the NCP provides the parties with a questionnaire so as to provide the NCP with feedback on the procedure. This allows the parties to assess the work carried out by the NCP and to suggest improvements.

### **3.5 Confidentiality**

The NCP procedures remain confidential during the mediation process. The parties involved must also respect this confidentiality and may not make public any information during proceedings. If no agreement on the issues raised is reached between the parties at the end of the proceedings, they may comment publicly on these issues. However, any information or opinions expressed by a party during the NCP proceedings remains confidential, unless that party expressly states that it may be made public.

At the start of the proceedings, the NCP draws the attention of the parties involved to the need for confidentiality expressed in the OECD Guidelines. It informs the parties that it reserves the right to stop the proceedings if one or other of the parties does not respect this confidentiality. The NCP recommends that the parties involved restrict their communication as much as possible.

The Swiss NCP and other representatives of the Swiss federal authorities do not provide any information on ongoing proceedings.

## **4 Contact and queries**

The Swiss NCP is ready to answer questions:

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