

OECD Guidelines for Multinational Enterprises

Conduct procedure in specific instances related to an alleged breach of OECD Guidelines

I. INTRODUCTION

This procedure has been developed on the basis of the implementation procedure for *OECD Guidelines for Multinational Enterprises (OECD Guidelines)*, Procedural Guidelines for OECD National Contact Points (NCPs) and commentaries for the above-mentioned guidelines, attached to the Declaration on International Investment and Multinational Enterprises, which the Polish government undertook to follow on 25 May 2011 as an element of the obligations arising from its membership in the OECD.

1. Terms and abbreviations

OECD Guidelines for Multinational Enterprises - are recommendations concerning standards of responsible business conduct for multinational enterprises. For companies that are located within the territory of a signatory state to the OECD Guidelines, its adherence is obligatory wherever they conduct their operations.

OECD National Contact Point - established by the governmental administration of the country that adopted the OECD Guidelines. Its purpose is to promote the OECD Guidelines and to consider reports on multinational enterprises that breach the OECD Guidelines.

OECD Guidelines alleged breach notification - refers to information communicated by the affected party or other entity directly connected to it as a result of operations of the multinational enterprise or the related entity.

Specific instance/issue - the subject of the notification of an alleged breach of OECD Guidelines.

2. Purpose

The purpose of this procedure is to specify the manner of conduct adopted by the NCP in case of receiving a notification of an alleged breach of OECD Guidelines by a multinational enterprise, its share, or by another company cooperating with such an entity e.g. in a supply chain. According to the OECD Guidelines, in such a situation **the basic objective of the NCP is to aid the parties in settling the specific instance.**

The procedure specifies:

- when the NCP makes a decision on accepting the specific instance
- what is the course of the detailed specific instance examination
- and what are the rules regarding the publishing of proceeding results in particular specific instances

3. Process stages and duration

The procedure covers 3 stages:

Stage I: from receiving the notification to preparation of an initial assessment and a decision on providing support to the parties (about 3 months);

Stage II: accepting the specific instance and helping the parties solve the specific instance, including mediation;

Stage III: closing the procedure and preparing and publishing the final report.

Total duration of the above-mentioned stages should not exceed 12 months.

In justified cases it is permissible to extend the procedure duration. If the process extends due to reasons not attributable to the NCP, said NCP will inform the relevant parties thereof. It is assumed that the parties will likewise communicate necessary information as not to cause additional delays. The NCP will make every effort to monitor the specific instance after the procedure is completed, including especially the execution of the agreement reached by the parties.

4. Who can submit a notification of an alleged breach of OECD Guidelines

OECD Guidelines alleged breach notifications, according to their provisions, may be submitted by any “party concerned”. The “party concerned” may be a community or its member, a group of workers, or individual persons affected by actions undertaken by enterprises, trade unions, non-governmental organizations, etc. The submitting party does not have to be affected at the same time, but needs to prove its connection to the specific instance, i.e. supporting issues of a given kind included in their mission or objectives. Moreover, the submitting party must remain in contact with the affected individuals as to be capable of providing the NCP with detailed information on the emerged situation.

5. What may the notification of an alleged breach of OECD Guidelines be related to

The notification may be submitted in cases where a multinational enterprise fails to adhere to one or several principles provided for in the OECD Guidelines. The submitting party should specifically determine the rules provided for in the Guidelines that have been breached in their view, as well as describe and document the emerging situation. The NCP’s decision in a given specific instance will be based on presented information and evidence. The NCP may also reject issues of a trivial nature or such that are directed against the company rather than aiming to solve the specific instance.

The enterprise that the notification regards should generally be located in one of the states that undertook to adhere to the OECD Guidelines. Otherwise, NCPs may undertake an attempt to establish a dialog, but the course of negotiations and success of the procedure will depend solely on the good will of the enterprise in relation to which a notification of an alleged breach was submitted. If there is no will for cooperation from such a company, the NCP may only deliver its recommendations.

6. How are the OECD Guidelines interpreted

At any given moment of a specific instance consideration procedure, if the NCP finds that the OECD Guidelines’ provisions are unclear, it should take care of the interpretation. Therefore, the NCP:

- 1) analyzes similar specific instances conducted by NCPs in other countries to obtain information on previous practices within this scope
- 2) as the case may be, contacts those NCPs to confirm the manner the provisions were comprehended in
- 3) in case of further doubts, applies for interpretation to the OECD Investment Committee. If it is necessary to specify the manner in which the OECD Guidelines are comprehended, the information thereof is published on the NCP’s website and in a final statement on a given specific instance

7. Principles for preserving transparency of the process and confidentiality of information that is sensitive for the parties

Basic criteria for the NCP’s actions are: visibility, accessibility, transparency, and accountability. These principles should contribute to the preservation of transparency of behavior. First of all, it means caring to communicate information in full to the parties of a specific instance. Deviations from this principle are permissible only in a situation where they contribute to an agreement worked out by the parties, and they require a justification in the specific instance documentation each and every time.

At the same time, in its actions the NCP pays special attention to:

- protecting confidentiality of business information and other data, interests of the parties concerned
- maintaining full confidentiality of talks, especially in the mediation process

Moreover, the NCP operating in Poland assumes that personal details of harmed individuals can be included in the published documentation only if those individuals give their written consent.

8. Principles for documenting a specific instance

All documents related to the specific instance procedure are kept in a case file. Specifically, these are:

- 1) correspondence regarding the specific instance kept with the parties, experts, and institutions involved in its consideration
- 2) notes made after meetings carried out in relation to the specific instance consideration

An exception to the above-mentioned principle is documentation relating to the mediation process. Its course is confidential in whole. The only document that is generated is the agreement or summary of talks agreed to by the parties. The agreement or the summary of talks is published by the NCP as an element of the final statement.

A summary of works in each specific instance is composed of two documents: the initial assessment and the final statement.

II. PROCEDURE

STAGE I: FROM RECEIVING THE NOTIFICATION TO PREPARATION OF INITIAL ASSESSMENT AND DECISION ON PROVIDING SUPPORT TO THE PARTIES

Within 10 days from receiving the notification, the NCP will:

- confirm its receipt to the submitting party
- send a copy of the notification to the concerned enterprise, together with a request for an initial response
- inform NCPs in other countries that the notification was submitted, if the specific instance concerns them due to the parent company's location or place of business.

Afterwards, the NCP will start an **initial analysis of the specific instance**, which covers verification of:

- whether a given specific instance is related to the OECD Guidelines implementation process
- whether the specific instance is significant and justified
- whether there is a connection between the enterprise's activity and the specific instance
- whether there are alternative paths of conduct in the specific instance (arbitration, appeal mechanism, court proceedings, etc.)
- whether execution of the procedure is possible - if there is a procedure carried out before another body in the same specific instance
- whether similar issues took place, and how the procedures of their consideration ended
- whether the NCP's involvement may contribute to the implementation of new good practices within the scope of responsible business conduct

The NCP organizes **separate meetings with each party**, when:

- possibilities resulting from cooperation with the NCP and the course of the process are presented, and any questions regarding those matters are answered
- content of the notification is specified and any potential ambiguities are clarified during a talk with the submitting party
- during a talk with the company's representatives the initial response of the company is addressed and any potential ambiguities are clarified

The NCP may also turn to parties with a request for additional explanations in writing, at any stage of the proceedings. **Afterwards, the NCP will make a decision on accepting or rejecting the specific instance, and draw up the initial assessment in writing.**

The **initial assessment** should specifically include:

- **names of the parties**, if the specific instance was accepted for consideration (otherwise they will not be provided)
- **a subject of the notification**, including an appeal from the OECD Guidelines provisions that it refers to

- **a summary of actions** that were undertaken by the NCP from the moment the notification was submitted
- **a decision** on accepting or rejecting the specific instance, together with a justification
- **an explanation of the situation** when a part of or the whole specific instance goes beyond the OECD Guidelines provisions, is of trivial character, or aimed against the company rather than focused on solving the issue
- **an explanation** that acceptance of the specific instance for further consideration does not mean the NCP confirms that OECD Guidelines were breached
- **an outline of other stages of the procedure**

An NCP's **acceptance of a specific instance requires that it undertakes it for further consideration, but it does not mean the NCP confirms a breach of OECD Guidelines.**

Rejection of the specific instance means that the issue is not justified or documented sufficiently, ensuring the possibility to conduct it further. Rejection may also be applied in issues that go beyond the OECD Guidelines provisions, that are of trivial character, or aimed against the company rather than focused on solving the disputable specific instance.

Once the initial assessment is prepared, it is sent to the parties with a request to communicate any potential comments within 10 working days from receiving the document. The NCP makes a decision on whether to take the comments into account or not. The initial assessment in its final version is sent to the parties and published on the NCP's website. If an NCP in another country was informed about the specific instance, they are provided with the most significant information from the initial assessment.

It is also possible to **withdraw the specific instance**. This occurs when the parties reach an agreement before the initial assessment is completed, and they inform the NCP thereof. In such cases a specific instance is assumed to be closed, and the agreement contents are disclosed only when the parties agree to it.

STAGE II: ACCEPTING THE SPECIFIC INSTANCE AND AIDING THE PARTIES IN DISPUTABLE MATTERS

Having accepted the specific instance, the NCP should make every effort to achieve an agreement that will be satisfactory to both sides.

At the second stage of the proceedings, the NCP is authorized to:

- consult the specific instance with public administration bodies, representatives of the business environment, employee organizations, non-governmental organizations, experts
- consult the specific instance with NCPs operating in countries that the dispute concerns
- turn to the Investment Committee in the case of arising doubts related to the OECD Guidelines interpretation in a given situation

The NCP proposes the parties undertake negotiations or mediation.

Mediation represents a form of talks supported by an independent individual - a mediator - who can be both a representative of an NCP and an external mediator. The NCP remains neutral in each situation. The parties may undertake mediation voluntarily. The parties must understand what a mediation is, what is its course, and what it is expected to bring. The course of mediation - excluding the achieved agreement or agreed summary - remains confidential in whole.

During the preparation and conduct of mediation, the NCP may use external experts. However, these must sign a confidentiality obligation as regards to information relating to the specific instance each and every time.

The parties undertaking mediation must ensure participation of persons that will be capable of enforcing the developed agreement.

Furthermore:

- **if the parties refuse to take part in the mediation process**, the NCP communicates this in the final statement, pointing to reasons behind such a decision
- **if mediation is not undertaken or fails to bring about a satisfactory understanding, the NCP will examine the specific instance independently**
- **parties can decide to carry out the mediation independently, without an NCP**

During mediation, the NCP:

- conducts and supports meetings with the parties - both individual and bilateral - taking care of effective exchange of information, trust and confidentiality
- when cooperating with a mediator, specifies the principles of cooperation with him and with the parties
- obtains the parties' consent for the participation of a particular mediator
- obliges the mediator to specify the principles of cooperation with the parties
- obtains feedback on the process progress at least once per month

The mediation process may be composed of the following stages:

- **individual meetings with the parties** - preparation of mediation, explanation of ambiguities, explanation of the principles and course of mediation, providing answers to the parties' questions
- **bilateral meeting/s** - during such meetings each party will have time to present their position and explain the disputable matters and other issues emerging during the talks in detail; the meeting may finish with an agreement or a framework for a further dialog
- **agreement** - at the end of the process, the parties prepare an agreement

A detailed mode and schedule of mediation is agreed upon by the mediator, following an agreement with the parties.

If the parties so decide, the NCP may support preparation of the agreement. If they decide that they do not want to publish the whole agreement, the final statement will include its summary.

If mediation is not undertaken or fails to lead to a satisfactory understanding, the NCP will examine the specific instance independently. The purpose of further analysis is to specify whether the OECD alleged breach notification was justified or not.

Within the scope of examining and assessing the situation, the NCP:

- prepares the conduct plan and informs both parties about the steps that are to be undertaken, and if the assumptions change - also about those changes
- undertakes planned actions, including reaching for opinions from bodies, institutions, and experts, if they can bring significant contributions to the specific instance examination
- may decide to visit the location where a specific instance occurred

The NCP will present selected material and its conclusions to both parties, together with information on whether it believes that OECD Guidelines were breached.

STAGE III: ENDING THE PROCEDURE AND PREPARING AND PUBLISHING THE FINAL STATEMENT

The **final statement** should specifically include:

- **a specific instance description** with specification of the OECD Guidelines provisions that were potentially breached
- **a specification of parties to the specific instance**, i.e. the submitting party, the enterprises that the notification concerns, and any potential affected entities
- **a summary of actions** undertaken by the NCP in relation to the specific instance, including information on potential interpretation of OECD Guidelines

- if applicable – a **summary of mediation results** or the **contents** of the parties' **concluded agreement**
- if applicable - **results from the examination and assessment of the situation by the NCP**, especially including specification of whether the company breached the OECD Guidelines and in what scope
- justification and explanation of arguments for each conclusion from the evaluation
- details of accusations found out to be of a trivial nature or directed against the company, and thus not subordinate to mediation or examination, and at the same time excluded at the stage of initial assessment
- if applicable - **recommendations for the company** on actions allowing to avoid OECD Guidelines breaches in the future
- determination of a **date**, when both parties will be asked to present information on the **implementation status** of the concluded **agreement** and the related organizational changes
- if during its work on the specific instance, the NCP finds **good practices in the company** as regards to OECD Guidelines adherence - **a description** of such practices

The statement draft will be delivered to the parties, which will have the right to submit their comments within 15 working days from the date of receiving the document. The NCP decides to take the comments into account or not.

The final version of the statement is sent to the parties and published on the NCP's website. If possible, the NCP provides a translation of the final statements with any potential complementary information from the initial assessment into English, to enable publication of the documents on its website.

The final statement is not a sentence, thus it is impossible to make an appeal. The only resulting sanction may be the online publication of information on an alleged breach of OECD Guidelines or on a failure to settle a disputed specific instance.

FURTHER PROCEEDINGS

The NCP, as far as possible and to the extent the parties are willing to cooperate, will monitor the execution of the agreement.

The final statement will stipulate a date by which the parties should provide the NCP with the first piece of information on progress in agreement execution and organizational changes related to the enterprise's procedure improvement, so as to avoid OECD Guidelines breaches in the future.

The NCP contacts the enterprises in order to monitor the progress at least bi-yearly. Upon obtaining information about full or satisfactory implementation of the agreement for both parties, the NCP develops and publishes information thereof on its website, including:

- designation of the specific instance, parties, and period during which it was considered
- a summary of the concluded agreement
- information on steps undertaken by the parties to implement the agreement
- information on additional changes in the procedures of the enterprises, implemented in order to avoid OECD Guidelines breaches in the future
- an explanation of the occurred situation, if execution of the agreement was conducted in a manner different than assumed, but the parties accepted such a state of affairs

The NCP, as far as possible, will ensure the translation of the above-mentioned information into English and its publishing on those websites where the initial assessment or the final statement was previously published.