

# EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS



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## ECCHR Policy Paper

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### A Comparison of National Contact Points - Best Practices in OECD Complaints Procedures

**Berlin, November 2011**

### **Executive summary**

The parallel submission of mostly congruent complaints in four European countries has enabled ECCHR to carry out some form of “peer review”, with respect to individual aspects of the procedure. The German NCP has also volunteered for a formal peer review and is thus willing to contribute to an optimization of the procedure. The comparison of the four NCPs has indicated that all NCPs involved have attributed a high degree of importance to the complaints. In addition, all four NCPs have consulted each other during the procedure. The UK’s NCP can be highlighted as an example for others performing very transparent communication with the parties, the use of an external mediator, and the publication of all relevant decisions. By engaging for the first time an external mediator, the Swiss NCP has strengthened mediation. Nevertheless, important aspects of their process management were not entirely transparent. While the proceedings before the German NCP can be optimized in some areas, it should be stressed that the NCP handled the procedure from the beginning with great interest and sought a goal-oriented procedure.

The comparatively good functioning of the British NCP can be attributed to its newly created structure which was implemented in response to a consultation process that took place in 2007 and involved different stakeholders. Like the other three NCPs, the British NCP is based in one single ministry, the Department for Business, Innovation and Skills (BIS). However, since 2007 it is monitored by a steering committee, which consists of representatives of five ministries as well as four external members who represent companies, trade unions and NGOs. In addition, the new structure provides a review process for procedural issues.

For that reason it is appropriate that recommendations addressing the NCPs should not only cover the individual measures listed below but also suggest that they take structural measures to generate the implementation of procedural principles which are thus ensured also in the long run.

## Introduction

The OECD Guidelines for Multinational Enterprises (hereinafter: Guidelines) are considered to be one of the most important international non-judicial complaint procedures in the field of business and human rights.

A significant factor contributing to the importance of the Guidelines is the complaint procedure which integrates both government agencies as well as civil society actors and business. While the current practice and the lack of sanctioning possibilities decrease the potential effectiveness of the individual complaint procedure as a remedy for victims of corporate wrongdoing, the procedure gives companies the opportunity to reassess and correct their own actions. In addition, coherent assessments provided by the National Contact Points (NCPs) might actually transform the currently non-binding soft law into binding standards applicable to enterprises. Eventually, such standards could also lead to sanctioning or compensation claims.

In order to exploit the potential of the Guidelines, the procedure has to be fair in all respects. A fair procedure is an indispensable requirement to counterbalance structural inequalities existing between companies and victims. Furthermore, having a fair procedure would allow a constructive approach through mediation mechanisms.

However, the complaint procedure is constantly criticised by representatives of the civil society. Therefore the recent revision process<sup>1</sup> dealt with, inter alia, ways to improve the parameters for the complaint procedure. As a result, particular action-guiding principles as well as stricter transparency requirements and timelines for the procedure were adopted. The amendments include provisions stipulating that the contact points shall contribute impartially to resolving arising conflicts and shall treat the conflicting parties equally. Moreover, the procedure shall be predictable due to clear provisions regulating the individual steps.<sup>2</sup> The UN Framework on Business and Human Rights as well as the UN Guiding Principles (hereinafter: GP) have outlined similar standards for effective non-judicial remedies.<sup>3</sup>

## Aim of this Paper

By comparing the complaint procedures in four countries, this paper aims to contribute to a standardization and, as a result, a more effective realisation of the complaint procedure through the countries' different NCPs. For this purpose, essential criteria will be the mentioned principles of transparency, impartiality and predictability. Special attention will be paid to the particular configuration of the respective mediation talks.

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<sup>1</sup> After a one year revision process, the OECD has presented the new Guidelines on 25 May 2011 in Paris.

<sup>2</sup> For an evaluation of the updates, see: *Utz*, Update or Upgrade? Eine Bilanz zur Revision der OECD-Leitsätze für multinationale Unternehmen (2011); *OECD Watch*, OECD Watch statement on the update of the OECD Guidelines for MNEs (2011).

<sup>3</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations "Prospect, Respect and Remedy" framework, Principle 31.

ECCHR has submitted overall seven OECD-complaints to the NCPs in Germany, Switzerland, Great Britain and France against cotton trading enterprises. The complaints deal with the trading of Uzbek cotton that was harvested with state-organized forced child labour. All four countries declared the acceptance of the cases. While the French mediation procedure is still pending, the ECCHR has already met up with representatives of the cotton trading enterprises in the three other countries. The following sections provide a comparison and evaluation of the procedures convened by the NCPs in Germany, Great Britain, Switzerland and France. The focus of the comparison will be on the following three areas, which are most crucial for a fair and effective non-judicial proceeding, as also outlined in the revised version of the Guidelines and in the GPs (Principle 31 of the GP):

1. Impartiality
2. Predictability
3. Transparency

Moreover special attention will be paid to the particular configuration of the respective mediation talks.

To ensure adherence with these principles, the following recommendations can be suggested to the NCPs:

❖ **Recommendations to ensure impartiality:**

- Mediations should involve external mediators.
- External mediators should have to be endorsed by both parties. Parties should have the possibility to reject the mediator in justified cases.
- The NCPs should refrain from commenting on the claims the complaint is based on prior to and during the mediation talks.

❖ **Recommendations to ensure predictability**

- NCPs should submit a detailed initial assessment
- Terms of reference should be negotiated prior to the mediation
- Specified time frames should be set up by the NCPs and be adhered to
- The NCPs must ensure that parties are regularly informed about the upcoming steps of the procedure
- Adequate staffing of NCPs in order to be able to settle complaints within the foreseen time frame

❖ **Recommendations to ensure transparency:**

- NCPs must understand that there is a public interest in the Guidelines proceedings, which makes it indispensable to provide public information on the important steps of the proceeding.
- Publication of the initial assessments
- Publication of pertinent final agreements
- Transparency towards the participants concerning information exchanged between the parties
- Transparency towards the participants with reference to the content and participants in forthcoming discussions

❖ **Recommendations to ensure an open mediation:**

- Negotiations led by external mediators
- Establishment of terms of reference for the procedures including binding rules how to treat the contentious points and how to follow up and monitor their elimination
- Finalization of the agreement solely by the parties
- No content-derived statement on the part of the NCP regarding the demands of the complaint before or during the mediation
- Mediation proceedings to be held under conditions of ‘limited access’ with the parties, a mediator and, at the most, a representative of the NCP only

## Comparison of complaint procedures

### 1. Impartiality

When resolving specific cases, the NCPs should ensure impartiality at all times.<sup>4</sup>

An impartial mode of operation is a crucial aspect for the effective application of the Guidelines. Only an objective approach can ensure that affected persons, social partners and NGOs have confidence in the procedure. In addition, such an approach contributes to a wide acceptance of the Guidelines. In the case presented here, the British NCP has, overall, oriented its procedure towards this principle to a greater extent than the other NCPs.

The **British NCP** adhered to the principle of impartiality throughout the entire procedure:

- The NCP refrained from commenting on the contents of the complaint prior to the mediation. This ensured a constructive mediation.
- The talks took place without the participation of a representative of the NCP and were conducted merely by one external mediator who had previously been agreed on by both parties.
- The NCP did not determine any parameters or submit own position papers in the mediation process. The content of the settlement was left entirely to the parties involved.

The consultation procedure convened in **Switzerland** followed a similar pattern. However, here the parties were not in the formal position to reject the mediator. In addition, a representative of the Swiss NCP was present during the talks. The representative did, however, most of the time refrain from interfering with the negotiation.

In the procedure carried out before the **German NCP** the following issues arose:

- a proposal made by the NCP suggesting to conclude the procedure by adopting a "atypical (settlement) statement" for the purpose of sparing the company the "stigma of acceptance" – the proposal was based on the (incorrect, at least disputable) assumption that the company had already complied with the requests put forward by the complainant. Such a declaration would have deprived the complainants of taking advantage of one of the mediation mechanisms expressly provided for by the Guidelines.
- prior to the mediation a written opinion was provided by the NCP in view of the content of the complaint as well as its requests; the opinion declared the complaint to be unfounded and already settled/fulfilled. This did not induce the company to reach an agreement with the complainants by ways of mediation.

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<sup>4</sup> OECD Guidelines for Multinational Enterprises, 2011, Commentary on the Procedural Guidance for NCPs, para. 22.

## 2. Predictability

The NCPs should ensure the predictability of the procedure by providing clear and publicly accessible information about the course of the complaint procedure. Such information should include, inter alia, details relating to the available mediation services, the stages of the procedure, the rough time frame, as well as the NCP's own potential role.<sup>5</sup> In addition, both parties of the particular complaint procedure should at all times be informed about the upcoming steps.

Meanwhile, all four participating NCPs have published manuals containing rules of procedure for the complaint procedure. These guidelines contain statements about the essential aspects of the complaint procedure.<sup>6</sup> The procedural manuals drafted by the respective NCP differ greatly both in scope and concrete implementation.

The most detailed and binding rules for the complaint procedure have been established by the **British NCP**. The manual provides concrete and mandatory steps governing any possible development of the procedure. The **German and Swiss texts** merely address individual aspects of different procedural stages as well as the respective NCP's participation therein. They do not, however, define all relevant issues in detail.<sup>7</sup>

In addition, the **German rules of procedure** often rely on the use of rather elastic terms which runs contrary to a clear procedure.<sup>8</sup>

Finally, the **French NCP** has published a mere summary of the complaint procedure.<sup>9</sup>

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<sup>5</sup> OECD Guidelines for Multinational Enterprises, Commentary on the Procedural Guidance for NCPs, 2011, para. 22.

<sup>6</sup> Leitfaden zum Verfahren in besonderen Fällen („Beschwerde“) bei der deutschen Nationalen Kontaktstelle für die OECD-Leitsätze für multinationale Unternehmen, <http://www.bmwi.de/BMWi/Redaktion/PDF/M-O/occd-leitfaden-zum-beschwerdeverfahren,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf>; UK National Contact Point Procedures For Dealing With Complaints Brought Under The OECD Guidelines For Multinational Enterprises, <http://www.bis.gov.uk/assets/biscore/business-sectors/docs/u/11-1092-uk-ncp-procedures-for-complaints-oecd.pdf>; Verfahrensanleitung des NKP der Schweiz, <http://www.seco.admin.ch/themen/00513/00527/02584/index.html?lang=de>; La mise en œuvre des principes directeurs de l'OCDE par le Point de contact national, <http://www.tresor.bercy.gouv.fr/pcn/pcn.php>.

<sup>7</sup> See, for example, the procedure prior to the publication of the final statement:

**Great Britain:** Once the NCP has drafted its Final Statement, it will be passed, to the Minister at the same time as it is sent to the parties. Upon finalisation the Minister will be asked by the NCP to inform the Chairman of the BIS Select Committee that the NCP's statement is to be lodged with the House of Commons and House of Lords libraries. At the same time the NCP's statement will be sent to the parties for factual checking, with a deadline of 10 working days for comments. The NCP will, in its discretion, then incorporate any necessary factual changes before sending the finalised statement to the parties, together with information of how they can seek a review if they consider that the process set out in this note has not been properly followed.

**Germany:** The NCP agrees on their decision about the end of the mediation phase and the content of their final statement with the relevant ministries and other relevant federal departments in the OECD Guidelines ministerial group. The publication of the final declaration is made on the website of the NPS.

<sup>8</sup>“**If necessary**, the NCP can request a statement from the company during this stage already.” “The NCP seeks to involve both parties in the mediation talks. It will, however, begin with separate talks **where appropriate**.” “If the complaint concerns incidents that took place in a non-member state, the NCP based in the concerned company's country of origin will, **as a rule**, initiate further steps (...).” “During the talks that **normally** involve also the responsible department, the NCP will offer the parties (...).” “In order to evaluate the questions comprehensively, it will **generally** be necessary to obtain a detailed statement from the enterprise.”

All details of the procedure that took place in the **UK** were governed by strict adherence to the procedural guidelines, making the entire course of the procedure predictable:

- The initial schedule was met at all times.
- After accepting the complaint, the NCP acted in accordance with the rules of procedure by issuing a comprehensive initial assessment with a detailed description of the following steps.
- Prior to the mediation, the parties were involved in the compilation of comprehensive terms of reference for the negotiations. Such an agreement guaranteed that the parties are familiar with the foundations of the mediation.

The **Swiss NCP** also issued a comprehensive initial assessment as well as detailed terms of reference which were negotiated with the parties to the procedure.

The approach taken by the **German NCP** was not fully predictable at all times.

- The complainants were not always duly informed about important developments of the procedure. For that reason the complainants were deprived of the possibility of adequate preparation.
- The NCP's proposal to conclude the procedure with an atypical final statement (ie, completion of the complaint process with an agreement between the parties, without prior acceptance of the complaint and without mediation) is not a procedurally envisaged option.
- The NCP did not provide a comprehensive initial assessment accounting, firstly, for the decision to accept the complaint and, secondly, giving an overview over the stages of the upcoming procedure.
- The NCP did not negotiate terms of reference for the mediation talks.
- The decision to accept the complaint was taken more than six months after the filing of the complaint. The German guidelines established by the NCP provide a "general guidance" for the acceptance of a complaint, suggesting that the decision should be taken within a period of three months (unless the circumstances of the case make it necessary to exceed this time frame). The complainants were informed about the reasons and extent of the delay only on request.

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<sup>9</sup> [www.tresor.bercy.gouv.fr/pcn/pcn.php](http://www.tresor.bercy.gouv.fr/pcn/pcn.php).



### 3. Transparency

It is important that NCPs understand that the procedures under the Guidelines are also in the public interest. It is therefore legitimate and even necessary to release information of the procedures to the public. There is no collision with the legitimate interest of companies to keep their business internals confidential.

#### Transparency towards the public

The Guidelines state that transparency of the NCPs' behaviour towards the public constitutes a fundamental principle.<sup>10</sup> It is, however, conceded that sensitive corporate data is subject to confidentiality.<sup>11</sup> Yet neither the initial nor the final assessments are covered by the confidentiality parameters stipulated in the Guidelines. Both represent procedural decisions in administrative proceedings to which there is a right for information.<sup>12</sup> Moreover, transparency and public scrutiny represent a strong incentive for responsible corporate governance and thus support the NCPs in their mission to promote and implement the Guidelines. Accordingly, the NCPs are advised to publish them both in full.<sup>13</sup>

In the procedures at issue, the **British NCP** was the only institution that met the requirement of **publishing the initial assessment**. The **Swiss NCP** did not only refrain from publishing the initial assessment but criticized the complainants for mentioning the decision in a public statement and even considered to close the case.

This failure cannot be justified with a mere reference to the confidentiality partially required by the Guidelines. The confidentiality parameters aim at the protection of sensitive corporate data. Such data is, however, not affected by NCP decisions that are released to the public.

The same applies to the **publication of final agreements** concluded after a successful mediation. All NCPs are bound by their manuals with the rules of procedure which stipulate that the result of the mediation shall, in case a settlement has been reached, be published in "coordination" with the parties. Yet the required "coordination" does not require that parties agree with the published details. Otherwise this may result in the publication of a version that does not contain any information relating to the factual negotiation. Apparently such a publication of a limited amount of information is intended to constitute an alternative option.

Thus, the **Swiss NCP** has indicated that it will, if necessary, only publish whether a dialogue has taken place at all and, if so, whether an agreement concerning further measures has been reached. This would indeed not meet transparency requirements with respect to a public interest of the proceeding.

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<sup>10</sup> See OECD Guidelines for Multinational Enterprises, Commentary, para. 9 – Core Criteria.

<sup>11</sup> OECD Guidelines for Multinational Enterprises, 2011, Procedural Guidance, C-4.

<sup>12</sup> In Germany: § 29 VwVfG and Art. 1 Informationsfreiheitsgesetz, IFG

<sup>13</sup> The British NCP additionally foresees to publish the decision on the acceptance of the complaint and has met this parameter in the procedure at issue. The German procedural guidance considers the publication of the decision only where it dismisses the complaint.

At the time of this writing, a joint declaration has been published only by the **UK NCP**. In this case it has managed to convince the companies to agree to the publication of meaningful statements.

At this stage, none of the four cases have resulted in the **publication/issuance of a final statement** after a failure of the mediation talks. For that reason, this question can be addressed only in light of the relevant regulations stipulated in the respective procedural guidelines. All four cases provide for the publication of a final statement as well as, where appropriate, the publication of recommendations for the observance of the Guidelines.

Representatives of the **Swiss NCP** have, however, already informed the complainants at the beginning of the procedure that the NCP understands itself as a mediator within the procedure and will, as a matter of principle, not comment on violations of the Guidelines. ECCHR, however, takes the view that the Guidelines will only unfold their full potential if the NCPs actually name the violations of the Guidelines. In this respect, the NCPs take on a dual role: mediator and adjudicator.

### **Transparency towards participants**

As well as transparency towards the general public, the NCPs are obliged to demonstrate transparency towards the participants in the procedure. To ensure protection of company data, less stringent standards may be set in as much as parties within the framework of the procedure must regularly declare that they will treat any information exchange with confidentiality.

The management of the procedure at the **British NCP** was transparent at all times.

- The parties were continually and promptly informed regarding communication with the company. In this way, the opportunity to comment on statements made by the company was continually presented.
- The parties were continually and promptly informed regarding the subject matter and the participants in scheduled discussions.

The **German NCP** on the other hand

- notified the statement of the company regarding the complaint only with delay and only on precise inquiry from the complainant.
- at times informed the complainant only at the commencement of negotiations regarding the proposed content of the discussion.

The **Swiss NCP** also released the statements of the respective enterprises with delay together with the initial assessments.

The **French NCP** notified the statement of the company to the complainant with considerable delay.

#### 4. Efforts at mediation by the NCPs

The NCPs are urged to support the parties in the solution of the issues which arise.<sup>14</sup> The foundation for this is the setting-up of a mediation situation which permits the open exchange of information and arguments, which has no preordained objective and is not subject to influence from the NCPs or any other institutions. For effective mediation, those questions yet to be resolved as well as the underlying procedure should, from the outset, be defined and determined.

In the **UK**, these challenges have been successfully met to a considerable extent.

- Through the previously agreed terms of reference the nature of the negotiations had been precisely defined in advance.
- In each case, one external mediator – in Great Britain accepted by both parties- provides support for the parties to work out and implement commonly agreed potential solutions for the issues in question.
- The NCP did not exercise any influence as it did not even assist the mediation.

The procedure in **Switzerland** was similar. But although the **Swiss NCP** did not influence the agreement, the mediation atmosphere was less open than in the UK.

The circumstances in which the mediation at the **German NCP** took place were influenced by the following factors:

- Submission of a four-page draft agreement with a statement from the NCP at the very beginning of the discussions. Thus, the NCP was in a position to influence the outcome of the negotiations, as it had already made its own inherent position clear with reference to the individual demands of the complainants. Mediation with no preconceived outcome is yet not guaranteed if the result is, to a large extent, already established.
- The complainants were neither provided with sufficient time nor a suitable place in order to discuss the draft.
- The negotiation took place in the presence of members of all involved departments as well as a representative of the Textile and Fashion Confederation. As a consequence, in addition to the parties themselves, 15 other persons were present.

As a matter of principle, ECCHR and those NGOs working in this field generally advocate for the inclusion of other departments in the activities of the NCPs. The mediation negotiation itself should, nevertheless, take place between the parties and a mediator and should not be subject to additional observation. This enables a more open exchange between the parties.

- Although the complainants made it clear during the proceedings that, under the prevailing circumstances, it was not possible for them to commit firmly and

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<sup>14</sup> OECD Guidelines for Multinational Enterprises, 2011, Procedural Guidance, para. C 2d.

immediately to any negotiated agreement, certain retrospective requests for alterations were rejected by the NCP with the argument that these points had already been negotiated and were no longer a subject of deliberation.