



GUIDELINES: CONFIDENTIALITY OF PROCEEDINGS

BASICS

- Confidentiality of the Guidelines procedure is a core principle for guaranteeing effective implementation of the Guidelines.
- BIAC continuously asks all participants of the Guidelines procedures, namely the governmental National Contact Points (NCPs), NGOs and the companies, to strictly observe the confidentiality requirements agreed upon.
- If the Guidelines would evolve into a campaigning instrument for the benefit of some interested parties - they would lose their credibility with companies.
- The formula agreed upon is: Filing notice of a Guidelines issue with an NCP *is public information*; discussion/deliberations with the NCP *are confidential*; conclusion of deliberations *is public information*.
- This refers to the behaviour of the NCPs as well as to interested parties (NGOs, Trade Unions): Public statements only at the beginning and at the end of a procedure.

CONTEXT

- Besides international agreements, the only legally binding instrument of the OECD are "Decisions". The Decision of the OECD Council from June 2000 obliged adhering countries to set up National Contact Points [NCP], "so that they can contribute to the solution of problems which may arise in this connection, *taking due account of the attached Procedural Guidance*". Thus, the provision of the "Procedural Guidance" and all its confidentiality requirements *are legally binding* for adhering countries.
- In addition, national administrative law may have further confidentiality requirements (e.g. from data protection laws). Infringements of these requirements may give rise to claims of affected companies before national courts/fora.
- **Public statements on specific instances do infringe the principle of confidentiality as long as these instances are pending with NCPs. This affects both, companies' business secrets and the content of deliberations between interested parties as long as a specific instance is pending.**

"The spirit of the confidentiality requirement in the Guidelines procedures does indeed refer to the integrity of the process as a whole, and not only to the area of company secrets." (Chairman of the 24 June 2003 Consultations with NCPs)

CONFIDENTIALITY IN PRACTICE

- In the past, there were a few occasions where Trade Unions and NGOs published lists of specific instances and their state of deliberations, which were already raised with National Contact Points. Also, NGOs were using instances in their campaigns and in public discussion forums while they were pending.
- *However, most National Contact Points and the OECD's Investment Committee are proactively enforcing the confidentiality requirement and helping to keep interested parties within the boundaries of the principle.*

TEXT REFERENCES

Procedural Guidance

"C. Implementation in Specific InstancesIn providing this assistance, the NCP will:

4. a) In order to facilitate resolution of the issues raised, take appropriate steps to protect sensitive business and other information. While the procedures under paragraph 2 are underway, confidentiality of the proceedings will be maintained. At the conclusion of the procedures, if the parties involved have not agreed on a resolution of the issues raised, they are free to communicate about and discuss these issues. However, information and views provided during the proceedings by another party involved will remain confidential, unless that other party agrees to their disclosure.

b) After consultation with the parties involved, make publicly available the results of these procedures unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines."

Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises

Paragraph 19:

"Transparency is recognised as a general principle for the conduct of NCPs in their dealings with the public. However, paragraph C-4 recognises that there are specific circumstances where confidentiality is important. The NCP will take appropriate steps to protect sensitive business information. Equally, other information, such as the identity of individuals involved in the procedures, should be kept confidential in the interests of the effective implementation of the Guidelines. It is understood that proceedings include the facts and arguments brought forward by the parties. Nonetheless, 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. Thus, while para. C-4 broadly outlines that the proceedings associated with implementation will normally be confidential, the results will normally be transparent."