

Investment Nexus and Parallel Legal and Administrative Proceedings: Preventing Forum Shopping

Basics

- In order to deal with a case ('specific instance') under the Guidelines procedure in front of a National Contact Point (NCP), any transaction covered must include an **"investment nexus"**, i.e. an operation equivalent to investment.
- The OECD Guidelines procedures are supposed to be used only after the host countries' **legal and administrative procedures** have been exhausted.

Context

Investment Nexus

- The issue can be of relevance for MNE activities involving sub-contractors and other global sourcing practices.
- Any transaction covered by the Guidelines must include an **"investment nexus"**, i.e. an operation equivalent to investment. That means that **pure trade cases** are clearly outside the scope of the Guidelines. However, as long as a **direct influence** of the investor on the commercial transaction in question can be proved, an "investment nexus" exists. That means, that under certain narrowly defined conditions and depending on the nature of the commercial relationship trade cases *could* in fact be regarded as falling under the scope of the Guidelines.
- No 'one-size fits all' approach, each specific instance will be treated by NCPs on its own merits. Difficulties in drawing the borderlines between "investment nexus" and "pure trade" cases are unavoidable.
- There seem to be an understanding amongst some NCPs that even for issues outside of the scope of the Guidelines, NCPs remain "allowed to provide a helping hand", though not under the Guidelines procedures.

Parallel national legal or administrative proceedings

- Forum shopping by interested parties must be prevented. The Guidelines Commentary must be interpreted in a way that NCPs can not override national rules and regulation nor override or interfere with national legal or administrative procedure. Investors' conduct which is dealt with by host country law and procedures can not be brought in front of NCPs.
- The OECD should encourage interested parties to address their issues with the appropriate regulatory/legal authorities prior to lodging a complaint with the NCP. This issue which was very sensitive for some OECD member countries during the 2000 revision, must be taken seriously.

Guidelines Procedures in Practice

A NCP happened to be confronted with a specific instance that concerned investors' conduct that was also the subject of administrative procedures dealt with in another Ministry and decided that it could not proceed in dealing with the specific instance.

Text

The OECD Guidelines for Multinational Enterprise, Text and Commentary

Investment Nexus

Guidelines are part of the "Declaration on International Investment and Multinational Enterprises", the other being the National Treatment Instrument. They serve to "improve the foreign investment climate" (Preface, para.1).

Parallel legal or administrative procedures

Para. 2 of the Commentary on the Guidelines: "The Guidelines are not a substitute for nor should they be considered to override local law and regulation...[.....]...they should not and are not intended to place an enterprise in a situation where it faces conflicting requirements."

Para. 14 of the Commentary on Procedures:

In this context, the NCP will take into account: ...[...] the relevance of applicable law and procedures; how similar issues have been, or are being, treated in other domestic or international proceedings.

Para. 20: Conflicts with host country laws, regulations, rules and policies may make effective implementation of the Guidelines in specific instances more difficult than in adhering countries. As noted in the commentary to the General Policies chapter, while the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in a situation where it faces conflicting requirements.