

SPECIFIC INSTANCES AND PARALLEL PROCEEDINGS: DRAFT SUMMARY OF DISCUSSIONS

By Rights and Accountability and Development and The Corner House

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According to the June 2005 Report by the Chair of the Annual Meeting of National Contact Points, “parallel legal proceedings’ refer to ‘specific instances’ that deal with business behaviours that are also the subject of legal or administrative proceedings in the host country”.¹ The Chair’s report refers to the relevant paragraphs in the Guidelines.² However there is no explicit statement that supports the view that parallel legal and administrative processes will take precedence over the Guidelines.

The Investment Committee has set out a number of reasons to justify NCP interventions even when there are parallel legal or administrative proceedings underway: NCPs may be able to promote global values; provide guidance to companies when there are shortcoming in host country legal and administrative systems; communicate external perspectives to help countries attract more and better investment flows; and provide guidance to companies when law does not provide full descriptions of acceptable behaviour.³

The March 2006 “Draft Summary of Discussions” concerning specific instances and parallel proceedings, the Investment Committee has further expanded the definition of parallel proceedings. According to the Draft, “these proceedings may be of the following types: 1) criminal, administrative, or civil; 2) alternative dispute settlement proceedings (arbitration, conciliation or mediation); 3) public consultations; or 4) other enquires (e.g. by UN agencies).⁴

In view of the shortcomings in the legal systems in many non-adhering, host countries, RAID and The Corner House maintain that domestic proceedings in such countries should not preclude the examination of specific instances by the NCP. The NCP is only required to assess a company’s adherence to the Guidelines, not to make a judgment on whether it has broken host or home country laws. In many areas, the Guidelines go beyond national law and the implementation procedures offer the possibility of reaching settlements out of court. The current practice of many NCPs upholds the position adopted at the time of the 2000 review of the Guidelines that legal or other proceedings do not automatically rule out NCP proceedings.

A survey of NCPs handling of specific instances published in the NCPs’ 2003 Annual Report shows that specific instances considered in parallel with legal and administrative procedures are common.⁵ According to the Japanese NCP, when domestic legal proceedings are underway, NCPs should seek to collect relevant information and to develop an understanding of the issue. In Belgium, in the case concerning Marks and Spencer, the NCP coordinated its consideration with another domestic process and felt that it had ‘value added relative to this process’. In 2004, the French NCP looked into the declaration of bankruptcy by the French subsidiary of the Finnish

¹ See section VII.A, p.20.

² The paragraphs cited are: Preface, 1; I. Concepts and Principles, 1 and 7; Procedural Guidance, C.1. See OECD Investment Committee, *OECD Guidelines for Multinational Enterprises: Specific Instances and Parallel Legal Proceedings*, 3 March 2005.

³ See *ibid.*

⁴ Specific Instances and Parallel Legal Proceedings -- Draft Summary of Discussions, para. 1, p. 2.

⁵ OECD Guidelines for Multinational Enterprises: Specific Instances and Parallel Legal Proceedings, *op. cit.*

company ASPOCOMP Oyj, despite the parallel signing of a redundancy scheme with its French employees.⁶

In the context of the UK, a distinction can be drawn between, on the one hand, those cases where either criminal investigations are underway or criminal proceedings have begun and, on the other hand, civil and administrative proceedings. In criminal cases, there is a danger of prejudicing a prosecution that does not arise in the context of civil and administrative proceedings. However, the fact that companies and individuals, first and foremost, must abide by UK law does not mean that it is correct to infer that the NCP is automatically precluded from acting when a parallel criminal proceedings are contemplated or underway. Provided that the NCP process does not prejudice a prospective or ongoing criminal case, there is no reason why the NCP should not examine a complaint in parallel. Of course, the NCP office should work closely with investigative or prosecuting authorities, following directions where appropriate, to ensure that any NCP findings that may be of assistance are properly handled. It may be appropriate in some cases, when the outcome of legal proceedings is awaited, that the NCP defers the examination of relevant parts of a complaint on the grounds that evidence may emerge which could assist the NCP in making its assessment. Where charges are not forthcoming within a reasonable period, or if a criminal case collapses, then the NCP procedures should be resumed without delay.

The suggestion by the UK NCP that it “will forebear from handling a complaint where a parallel administrative proceeding is more likely to address the issues raised” causes particular concern.⁷ What constitutes such a process and why should it have precedence? Indeed, a proper assessment by the NCP of whether breaches of the Guidelines have occurred might provide the basis for constructive input into decisions being made about administrative proceedings. Moreover, it is apparent that such processes can never decide questions of compliance with the Guidelines or provide Guidelines-specific advice. The same argument applies to civil proceedings – for example, those considering defamation claims – as these too do not address questions of compliance, although information disclosed and the verdict reached may be relevant to the NCP.

⊙ **There should be no blanket rule that parallel proceedings take precedence**

There is no reason why parallel legal proceedings, either civil or criminal, should preclude the consideration of a complaint by the NCP. The only caveat is that the NCP should take instruction so as not to prejudice criminal proceedings. Indeed, by ensuring coordination between the NCP process and other proceedings, information on common issues can be shared effectively. To give other administrative proceedings precedent over the Guidelines sends out an undesirable signal about the status of the latter. The Guidelines require a robust, impartial and fair complaints mechanism in their own right. Neither criminal, civil nor administrative proceedings can ever decide on questions of compliance with the Guidelines.

Two recent cases exemplify why a blanket ban on the consideration of complaints under the Guidelines when parallel processes are underway would be highly undesirable. In their complaint concerning British Aerospace, Airbus and Rolls-Royce, The Corner House argued that the failure of the companies to provide the names and addresses of agents used on transactions with public bodies or state-owned enterprises to the Export Credit Guarantee Department is a violation of the Guidelines (chapter III. Disclosure). Yet the NCP, after considering the complaint admissible, then decided to defer its examination of the case on the grounds that a parallel consultation

⁶ Ibid.

⁷ Stakeholder Consultation Document on the UK National Contact Point’s Promotion and Implementation of the OECD Guidelines for Multinational Enterprises, para. 7, p. 3.

process being held by the Export Credit Guarantee Department (ECGD) – which had not ruled on the issue – took precedence. The Corner House maintains that, irrespective of the outcome of the ECGD process, the NCP's refusal to consider the case means that no one will be any the wiser as to whether such conduct is in breach of the Guidelines. Moreover, a decision by the NCP on compliance may have helped inform the ECGD in reaching its own decision on the case. Most importantly, it may also have helped inform multilateral discussions at the OECD about improving export credit agency anti-bribery procedures, where the question as to whether companies should be required to disclose agents' names to competent authorities such as export credit agencies, is a major issue.

In the Oryx case, the UK NCP ruled out consideration of much of the complaint on the grounds that once a civil defamation case had been settled, the same matters, as raised by the UN Panel with the company, would be considered resolved under the Guidelines. The UK NCP took this view despite the fact that the defamation claim was settled out of court without a definitive ruling. Moreover, and this notwithstanding, RAID maintains that while certain facts and material information emerged in the court case, which the UK NCP should have examined, it was never the purpose of the court (nor the intention of the UN Panel) to decide the issue of whether or not the company was in compliance with the Guidelines. This was a matter for the UK NCP to determine and the existence of the court case should not have been used as a pretext for abdicating this responsibility.

We would like to see much more information made available by NCPs before the Investment Committee issues any formal guidance on this matter. In particular it would be useful for the OECD Secretariat to provide an inventory of national legislation that prevents an NCP from taking up specific instances that are also the subject of other proceedings.