

National Contact Point, The Netherlands
Annual Report 2009 (June 2008 - May 2009)

A. Institutional Arrangements

The Ministry of Economic Affairs hosts the National Contact Point (NCP).

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| Independent members | Advisory members | NCP Secretariat |
|---|--|--|
| Mr F.W.R. Evers (ch) Mrs J.F.G. Bunders Mr H. Mulder Mr L. de Waal | Mr W. Bel (SZW) Mr R.E. van Hell (EZ) Mr H. von Meijenfeldt (VROM) Mr R.J. Scheer (BZ/OS) | Mr T.D. van Hoolwerff Mr J. van Wijngaarden Mr M. van Yperen |

The independent members of the NCP all have backgrounds in the various stakeholder groups of the NCP's work. They are independent in the sense that they have a seat in the NCP in their personal capacity and are by no means bound by the policies and goals of the Dutch Government; they are only bound by the OECD Guidelines. They are primarily responsible for promotion of the OECD guidelines and for managing specific instances. In the NCP, the independent members are supplemented by advisory members from the ministries of Economic Affairs (EZ), Foreign Affairs (BZ/OS), Social Affairs and Employment (SZW), and of Housing, Spatial Planning and the Environment (VROM). The ministry of Economic Affairs, being the ministry responsible for the functioning of the NCP, provides the NCP with secretarial support, by means of a Secretariat with two full time equivalents.

Involvement of the stakeholders is secured through regular stakeholder meetings (see below). The NCP is also involved in ongoing discussions about e.g. supply chain management at the Dutch Social Economic Council (SER). As an advisory and consultative body to the government, consisting of employers' representatives, union representatives and independent experts, the SER is a typical platform organisation for social dialogue.

During the 2008 Annual NCP meeting in Paris, the Dutch NCP announced it would gladly submit itself to a peer review, for which the Austrian and the UK NCPs volunteered as peers. This review will take place in the second half of 2009, when the Dutch NCP has been established in its current constitution for two years. The goals of the peer review will be an appreciation of this

constitution and formulating recommendations for revision of the Guidelines, mainly with regards to procedural guidance. The review process, in which the social partners, OECD Watch and the OECD IC Secretariat will be involved, will be guided by an experienced external consultant.

B. Information and Promotion

Promotion of the guidelines has the constant attention of the Dutch NCP and of the ministry of Economic Affairs. Specifically for the NCP's promotional task, a communication advisor has been appointed at the national CSR knowledge centre "MVO Nederland" (CSR Netherlands).

The communication strategy and activities of the Netherlands NCP in 2008 – 2009 were primarily focused on:

- a) The development of the website www.oesorichtlijnen.nl with easily accessible information in Dutch on the guidelines, the NCP, the specific instances, practical (business) tools for implementing the guidelines, factsheets, presentations and best practices (average of 400 unique visitors per week);
- b) Training on applying the guidelines for intermediary business organisations like the agency for international business and cooperation (EVD), the chambers of commerce (KvK's), several sector associations (total of 150 business consultants attended these trainings);
- c) Integration of the OECD guidelines as normative framework in the [Statement on International Corporate Social Responsibility of the Social and Economic Council of the Netherlands \(SER\)](#); in the CSR policies of the EVD and the Dutch Chamber of Commerce; and the Dutch Sustainable Trade Initiative (IDH).
- d) Promotion of the guidelines to stakeholders and interested parties by interpersonal talks, trade fairs and by giving presentations (total of 75 organisations were addressed);
- e) Dissemination of the guidelines and NCP to SME entrepreneurs and their sector associations through sector-media, seminars and presentations (e.g. textile industry, chocolate and sweets industry, medical equipment, flowers, agro-food, tourism).

In addition the NCP conducted the following high level presentations:

- Congress on Business and Human Rights with Special Representative of the UN Secretary General, John Ruggie, December 1, 2008, by Mr Evers on the NCP grievance mechanism;
- OECD Investment Committee Working Group meeting on 24 March 2009 in Paris, Mr Mulder gave a presentation on the OECD Guidelines in relation to the financial sector.
- Congress on International Corporate Social Responsibility of the Social and Economic Council of the Netherlands (SER), April 2, 2009, by Mr De Waal on NCP dilemma's and lessons learned.
- Interview with Mr De Waal on Dutch national TV about the National Contact Point and its object and purpose, broadcasted on 24 April 2009.

The NCP gained from publicity in newsletters, trade magazines, corporate magazines and sector media on the guidelines and the NCP.



Screenshot www.oesorichtlijnen.nl

On a continuous basis, the guidelines are actively promoted through trade missions and by integrating compliance with the guidelines as a condition in the Dutch export credit programmes.

To enhance its effectiveness, the NCP seeks to organise two stakeholder meetings per year, of which the first was held in November 2007 and the second in June 2008. On 30 March 2009, the NCP held its third stakeholder meeting, which was attended by individual companies, business organisations, both general and sector specific, trade unions, OECD Watch and other NGOs, government agencies, heads of central works councils and consultants. In this meeting, stakeholders were updated and given the opportunity to comment on the ongoing specific instance procedures (SIs) and communication activities. The updates on SIs regarded procedural steps taken by the NCP and sharing of substance matters in as far as this regarded publicly available information, such as court decisions, local political procedures and alternated business relations (see below at Implementation in Specific Instances). Also an in-depth discussion was moderated on the coherence of international CSR codes based on the ‘OECD-ILO overview of selected initiatives and instruments relevant to CSR’.¹ The main result of this discussion is the articulation of a need for a ‘roadmap’ for individual firms in specific sectors on how to select and implement the most applicable code.

¹ *Overview of selected initiatives and instruments relevant to Corporate Social Responsibility*, OECD document belonging to the OECD-ILO Conference on Corporate Social Responsibility, 23-24 June 2008, OECD Conference Centre, Paris, France.

At the end of April 2009, the Dutch NCP met with the Norwegian NCP in order to discuss the structure of the Dutch NCP and its functioning in practice.

In 2009 and early 2010, the communication activities will be more focused on:

- Direct approach of larger companies by direct mailing and a business seminar;
- Extended cooperation with sector associations;
- Publicity on the NCP grievance mechanism;
- Promotion of the guidelines and the NCP grievance mechanism to NGOs in non-OECD countries;
- Disclosure of lessons learned and discussions on dilemma's during mediation of the specific instances, and organisation of learning sessions for companies, sector organisations, and other interested groups;
- Development of a roadmap or guidance on the coherence of international CSR codes.

C. Implementation in Specific Instances

During the past year the Dutch NCP has been involved in four specific instances, of which one was already pending since June 2006. In two specific instance procedures the Dutch NCP is the primary acting NCP, in the two other procedures the Dutch NCP plays an assisting role.

The number of newly brought specific instances can be considered low, given the means and efforts put into the Dutch NCP. This low number could be explained by the scepticism with the NGO world towards the NCP procedure, the fact that the procedure remains known with only a small group of actors, or the general lengthiness of the procedure.

- **Philippines**

One SI, which was brought in July 2006, deals with an oil depot of a Philippine Joint Venture between Royal Dutch Shell's local subsidiary. The alleged infringements with the Guidelines relate to improper influencing of local decision making processes and violations of environmental and safety requirements (Chapters II General Policies, and V Environment). Due to local legal proceedings, the handling of this specific instance was put on hold until the end of February 2008. An NCP-led process towards a dialogue between the firm and the notifiers of the SI was resumed, part of which was a fact-finding mission of the NCP to Manila. During this mission the storage facility was investigated by the Rotterdam based Environmental Protection Agency (DCMR) on health, safety and environmental aspects. Currently, the NCP seeks to come to a mediated result between the parties involved.

- **Pakistan**

A new SI was brought in October 2008 by Pakistani NGO Shehri - Citizens for a Better Environment (CBE) and relates to a point of sale in Karachi of a joint venture of SHV Holding, an investment company active in *inter alia* the business to consumer retail sector. The complaint related to alleged violations of Chapters II General Policies, and V Environment. After the NCP declared that the SI *prima facie* merited further consideration, a meeting was held with representatives of the company in which they shared their views on the alleged violations with the NCP. The company happened to have sold one part of its share in the joint venture in June 2008 and the remaining part just at the time the SI was declared admissible. The main part of the allegations was

based on a lawsuit that was filed against the joint venture. However, after deciding to take the SI in consideration, it turned out that the local Court had already dismissed the complaint before the SI was notified. In early March, the NCP requested petitioners for a reaction on the information presented by the company. When drawing this report, a response by Shehri-CBE was not yet received.

- **Argentina**

In June 2008, an SI was notified by Argentinean NGOs with both the Argentinean and the Dutch NCP. The complaint relates to a subsidiary of Royal Dutch Shell in Buenos Aires. The Argentinean NCP, the leading NCP in this procedure, and Dutch NCP have been cooperating on both the procedural aspects as on sharing views on the merits of the SI. For more information on the SI itself, the Dutch NCP respectfully refers to the report of the Argentinean NCP.

- **Ireland**

In August 2008, an organization of local citizens supported by an Irish and a French NGO brought an SI to the Dutch NCP regarding the location of a facility that was being built by a joint venture in which Royal Dutch Shell was the main investor. The complaint related to alleged violations of Chapters II General Policies, and V Environment. In conformity with the Procedural Guidance and the Commentaries of the Guidelines, the Dutch NCP requested petitioners to also notify the SI with the Irish NCP, as this is the country in which the alleged violations took/are taking place. In February 2009 the Dutch NCP paid a visit to Dublin where both NCPs met and after discussing the SI found that issues raised merited further consideration. In late April, both NCPs met with each of the parties to discuss the SI and the (then) current situation.

- **Enquiries**

The NCP received inquiries from two NGOs on potential specific instances, dealing with the cocoa trade and a timber importer respectively. Both enquiries were discussed with the NGO and internally. As for the cocoa case, the NCP considered that an SI against a group of cocoa importers would not be appropriate because 1) it concerned a trade relation, 2) it did not concern one *specific* instance, but in fact an industry as a whole, but most of all 3) the Dutch Sustainable Trade Initiative (IDH), a cooperation between government, business and NGOs, was already at the verge of starting research on how to make the cocoa supply chain more sustainable.

The enquiring NGO of a possible SI against a timber importer was explained that, although this NCP favours a broad definition of the investment nexus, this issue would concern too much of a trade relation to meet that broad definition.

D. Other

- **The core criteria**

The core criteria for the functioning of NCPs were applied by the Dutch NCP as described under B.

- **Procedural guidance**

On the basis of the procedural guidance for NCPs and the Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, the Dutch NCP developed a more elaborate procedural guidance. This document is made available in Dutch and English at the [website](#) of the Dutch NCP. On the basis of this document a far more comprehensive set of procedural rules was developed early 2009, which determine internal responsibilities, timeframes, and other organisational matters. The goal of this set of procedural rules is to provide for a more disciplined, clear and equal procedure for all specific instances brought to the attention of the Dutch NCP.

In dealing with several specific instances, the Dutch NCP has encountered several issues that may merit further discussion within the OECD Investment Committee:

- **Procedures parallel to an SI procedure**

In the currently ongoing SI procedures, the NCP has been confronted with the involved MNE's unwillingness to cooperate on the basis of parallel (legal) procedures. The NCP of course does not wish to interfere with local governmental or legal procedures; the NCP, being a governmental body of a state, fully respects the legal autonomy of any other country. However, the OECD Guidelines set out the OECD member states' expectations of corporate conduct that is not regulated by legislation in a specific situation. Therefore, those typical 'supra legal' issues that are often the subject of an SI procedure, such as setting up and maintaining a proper dialogue with local stakeholders, could still be dealt with by an NCP, parallel to a local legal procedure. Moreover, a company's position in court could even benefit from it, as the company then shows it takes its good corporate citizenship seriously. The mere existence of a parallel procedure is not enough reason for the NCP to abstain from involvement. Unfortunately, in a few cases, the involved company takes a legalistic and confidential path, so leaving little room for the SI procedure. Also see Confidentiality.

- **Increased legalistic approach of petitioners**

Not only involved companies take a legalistic approach in a specific instance procedure. Also petitioners can do so, albeit at a different level. Some SIs received in the past year, were notifications of alleged violations of the Guidelines based on violation of local law. Possible explanation for this is that local stakeholders think that their grievances are more easily and quicker addressed by a mediatory body such as an NCP, rather than a local legal procedure which may be very expensive and very long in duration. However, one cannot expect an NCP to overtake the seat of a (local) Court. If it would, the NCP's decision would not be of any legal value given its lack of legal authority, and an NCP would disrespect another country's legal order. Originally, specific instances deal with those situations that can be in conformity with local laws, while allegedly in violation of the Guidelines. Nevertheless, NCPs could contribute to resolving local issues through mediation next to ongoing legal procedures if a local Court favours such out-of-court proceedings.

The NCP will discuss this with the NGO community and interested unions.

- **Paradox between mediation and ‘adjudication’**

In the specific instance procedure, NCPs are usually asked to determine whether the OECD Guidelines have been violated and to bring about a mediated solution. Those two kinds of requests have proven to be hard to match sometimes. In such cases, it is either the one or the other. In ‘adjudication’ the main goal is establishing the facts, because one has to match those with the OECD Guidelines in order to determine whether they have been complied with. Digging into a company’s (past) behaviour for that purpose may however cause the company to turn uncooperative in fear of reputational damage. This does not foster a successful outcome of the procedure. In mediation this search for the objective truth is of lesser importance; most important is that the parties involved reach a future oriented agreement. In every SI procedure, an NCP will have to find that fine balance between mediation or offering its good offices to resolve the issue on the one hand, and determining whether the OECD Guidelines have been complied with on the other. In dealing with specific instances, the Dutch NCP primarily focuses on resolving the issue through mediation and prefers a forward looking approach, while not hesitating to issue a final statement dealing with OECD Guidelines compliance if parties fail to reach an agreement.

- **Joint ventures / third party rights**

In three out of four specific instances currently under consideration by the Dutch NCP, the activities allegedly in violation of the OECD Guidelines were carried out by joint ventures between the involved multinational and third parties. These third parties are not part of the procedure because that party either originates from a non-adherent country, or the notifying party only filed a complaint against the Dutch partner in the joint venture. The position of the involved company in a JV and the consequences of that position for an SI procedure form an issue following the question on the investment nexus. As with the investment nexus, the JV issue has to be looked at on a case-by-case basis. The Dutch NCP considers it valuable to further discuss this topic in the Investment Committee (working group).

- **Applicable minimum level for stakeholder consultation**

Many of the recommendations of the OECD Guidelines require only vaguely specified corporate action such as ‘adequate and timely consultation’ (Chapter V par.2 sub b.) without further appraisal of what constitutes *adequate* and *timely* consultation. When trying to match the actual actions with what could be expected on the basis of the OECD Guidelines, one can either look at what constitutes (in this case) an adequate and timely consultation under the local circumstances, or from the perspective of the homeland, or maybe on the basis of a general average minimum level as seen in all the adhering countries. Companies may advocate local practice as the leading perspective, while on the other hand such interpretation would not bring the objective of the OECD Guidelines – good corporate conduct in a level playing field – any further. In a global, sustainable society, level playing field is not a notion relevant for just inter company behaviour; it also applies to how companies in general manage the social dialogue with their (local) stakeholders in either the Netherlands, India or South Africa.

- **Confidentiality**

The Dutch NCP has noticed that companies can take very strict views on confidentiality of any information regarding a specific instance procedure in which they are involved. However, often an issue, before being notified with an NCP, has already been discussed publicly, and also OECD Watch publishes on its website all SIs, both the closed ones and those still under consideration. Therefore, the substance of an SI as notified cannot be considered confidential. The same applies to an NCP's decision that an SI merits further consideration or is declared admissible. Such decision in no way constitutes a judgment on the company's behaviour; it only means that an NCP finds that the SI *prima facie* meets the criteria set forth in par.14 of the Procedural Guidance for NCPs. As transparency is one of the NCPs' core criteria, the Dutch NCP is of the opinion that in principle, procedural steps (e.g. admissibility, conducting of local fact finding) are not confidential.

- **Representativeness of notifier**

It is often unclear from notifications of specific instances in how far the notifying party is representational for all the local stakeholders. Local fact finding by an NCP can be of great added value of understanding the position of the notifiers in the total group of local stakeholders. In some cases, the notifying party turns out to represent only a small group of stakeholders, which may give rise to doubts about the usefulness of extensive mediatory negotiations on a solution, if the NCP is not able to involve other stakeholders in the process. A workable solution is one that will be carried by all involved stakeholders, and not by only the MNE and the notifiers.

- **Role of parent company in an SI procedure**

In accordance with the 2008 Ruggie report, the NCP considers the involvement of the parent company in the SI procedure at least equally important as of the subsidiary. It is the parent company that sets out the 'triple P values' of the enterprise as a whole. For that reason, an alleged violation of the OECD Guidelines is a concern for both the subsidiary and the parent company. Likewise, a successful solution in an SI procedure should be carried by both these parties, in order to guarantee optimal 'ownership' with this solution, which may set a sustainable precedent for the MNE as a whole. When the parent company and the subsidiary are located in two different countries adherent to the OECD Guidelines, close cooperation between the NCPs is required, with due respect to the leading role of the NCP in which the acts leading to the alleged violations occur(red).