

National Contact Points and the Handling of Complaints

Is the functional equivalency gap widening?

The complexities governments and NCPs face in promoting adherence to the OECD Guidelines, the farthest-reaching set of voluntary CSR standards for multinational enterprises, are undeniably daunting. Despite due appreciation for the considerable practical and other difficulties involved in monitoring the behavior of world wide operating corporations, there are instances where some NCPs appear inexplicably reluctant to take effective action. A case in point, in the view of OECD Watch, is the flawed handling of the complaint against Ratiopharm by the German NCP.

OECD Watch maintains a data bank of all cases filed by NGOs (over 50 so far), and thus has a good overview of NCPs' handling of cases and issues demanding attention. To uphold the credibility of the Guidelines as a useful tool for promoting corporate social responsibility and accountability, Shirley van Buiren of Transparency International–Germany, the complainant in the Ratiopharm case, has been invited by OECD Watch to share her experience and views on the handling of that case.

1. RATIOPHARM - the facts of the case

- 1.) April 2006. TI-Germany first tabled a complaint against Ratiopharm, a multinational producer and distributor of generic pharmaceuticals with headquarters in Germany and 24 foreign subsidiaries operating in 38 countries. The complainant alleged, that Ratiopharm was bribing doctors and pharmacists and thereby allegedly violating the OECD Guidelines: Chapter III (Disclosure) and Chapter VI (Combating Bribery).
- 2.) June 2006. The German NCP refused to accept the case on the grounds that no transnational investment was involved and that according to an OECD Investment Committee (IC) clarification, the Guidelines did not apply in cases where existing national solutions were available. As a sign of good will, the German NCP offered its *"informal good offices"*.
- 3.) July 2006. TI-Germany informed the NCP that it did not agree with either of the reasons for the refusal to accept the case, but would file a revised complaint to explicitly demonstrate the involvement of foreign investment. The revised and extended complaint against Ratiopharm alleged violations of the OECD Guidelines Chapters III (Disclosure), VI (Combating Bribery), VII (Consumer Interests) and IX (Competition) in Belgium, Canada, Spain and Estonia in addition to Germany and documented that the alleged bribery of pharmacies and the corruptive marketing practices followed the same pattern in a number of Ratiopharm controlled foreign subsidiaries.
- 4.) December 2006. The German NCP responded to TI's revised complaint against Ratiopharm by reiterating its refusal to deal with any of the alleged violations in any of the countries. In this second refusal the NCP no longer proclaimed the lack of transnational investment. Instead it argued that complaints had to be dealt with by the NCP of the country where the alleged misbehavior occurred, e.g. by the respective NCP in Belgium, Canada, Estonia, and Spain. The German NCP thus may not deal with the Ratiopharm case and thereby pre-empt the other NCPs actually responsible for the case. Not a word about who was required to deal with Ratiopharm's alleged violations of the Guidelines in Germany, if not the German NCP.
- 5.) February 2007. At an informal meeting requested by TI-Germany to clarify the reasons for the repeated refusals, the NCP merely reiterated that it definitely could not and thus would not deal with the complaint (the German NCP's hands are tied), that it would not pass the complaint to other NCPs (that was the complainants task) nor would it take the initiative to cooperate with other NCPs.

2. RATIOPHARM – a partisan view of the German NCP's complaint management

The German NCP's persistence in refusing to deal with the complaint presented by TI-Germany against Ratiopharm seems inexplicable. By and large the arguments presented to justify the NCP's position

appear untenable when measured against the objectives, concepts and principles of the OECD Guidelines and the procedural guidance designed to facilitate the resolution of conflicts.

- The justification given for the refusal of the original complaint, *“the lack of an international investment”*, had been shown to be without basis in the revised complaint.
- The reference to the Investment Committee (IC) Clarification in the Swiss case is irrelevant, as German domestic institutions already had ascertained their inability to deal with Ratiopharm’s alleged misbehavior.
- The argument, *“violations of the Guidelines must be dealt with by the NCP of the country where they allegedly occurred”*, clearly creates an obligation on all NCPs and thus also on the German NCP, rather than exempting the German NCP from considering the complaint.
- The refusal to be concerned with alleged misbehavior in Germany is all the more untenable as the headquarters of the Ratiopharm Group are located in Germany and this is where the strategies for international investment and the marketing campaigns that pattern the behavior of the foreign subsidiaries are made. And therefore according to the “Clarifications” to Chapter I (Concepts and Principles) of the OECD Guidelines. *“parent companies (exercising) control over the activities of their subsidiaries,... have a responsibility for observance of the Guidelines by those subsidiaries”*. The “Clarification” suggests that the German NCP should take the lead in resolving the conflict over Ratiopharm’s alleged misbehavior rather than negating its responsibility (*“our hands are tied”*)
- Finally, in deciding to accept or reject a case, the IC encourages the NCPs to be flexible and consider what would contribute best towards “furthering the effectiveness of the Guidelines”. Surely dealing with headquarters is more promising than dealing with 24 foreign subsidiaries. Indeed, to achieve worldwide observance of the OECD Guidelines by the Ratiopharm Group, the only effective way is to deal with headquarters.

3. Functional equivalence of NCPs and implications for the effectiveness of the Guidelines

A few NCPs have undergone assessments and are in the process of changing their organization to cope better with the exigencies of their assignment. More transparency in procedures and increased participation of stakeholders is but one of the positive directions of institutional change. Greater practical cooperation between NCPs in handling complaints, where appropriate jointly, is another. Thus for example a complaint filed May 2006 with the Dutch NCP against Shell for alleged violations in Brazil has been transferred by mutual agreement from the Dutch to the Brazilian NCP mid last year. The promise of continued support by the transferring, more experienced Dutch NCP, the provision of information and recommendations upon request after the transfer have inspired appreciation and confidence by both the accepting Brazilian NCP and the complainant. According to reports, the Dutch NCP continues to follow-up on the case.

Transfers and subsequent coordination between NCPs are not yet routine, but neither is the above-described handling of a complex case unique. In the past, the German NCP has accepted a case from Austria and itself provided good offices to a case involving a German company in Mexico. The reasons and motives for insisting its *“hands are tied”* in the Ratiopharm case, of offering good offices to TI and providing none, remain in the dark. Due to a general lack of transparency and unevenness in its complaint management, the reasons for the German NCP’s restrictive approach to handling the Ratiopharm case are anyone’s guess.

There has been a progressive drop in the number of cases being filed before the German NCP: 3 each in 2002 and 2003, two in 2004, none in 2005 and one, Ratiopharm in 2006. Increasingly NGOs seem to find it not worth their time to bother filing complaints with the German NCP. Unpredictability regards the NCP’s assessment of cases, as much as recurrent disappointments (only 4 of 9 cases filed were accepted for mediation and only one resolved thus far) maybe at the root of the withdrawal. In any case, countries with broader minded and more pragmatic NCPs by contrast are experiencing an increase in the number of complaints being filed.

For a number of years and with growing concern OECD Watch has noted the considerable differences in the way NCPs view their responsibility and conduct their tasks. Repeatedly we have proposed

- that a stronger oversight function should be exercised by the Investment Committee,
- that systematic peer reviews should be introduced and
- that funding for independent research on cases be made available in order to achieve a more homogeneous and overall better level of NCP performance and Guidelines effectiveness.

Yet rather than achieving a higher degree of the prescribed functional equivalency, it appears that presently improvements in some NCPs, stagnation and even rollbacks in others conspire to widen the gap still further.

Shirley van Buiren
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