

**OECD NCP Initial Assessment regarding the notification
of alleged non-observance of the
OECD Guidelines for Multinational Enterprises
Warsaw, 20 November, 2017**

The case pertains to a notification of alleged non-observance of the *OECD Guidelines for Multinational Enterprises* (hereafter: the OECD Guidelines) by a company with its headquarters in Warsaw (hereafter referred to as “the company”), and which is part of a larger capital entity whose main headquarters are located in France.

SUBJECT OF THE NOTIFICATION

The notification of alleged non-observance of the OECD Guidelines was submitted to the Ministry of Economic Development, in which Poland’s OECD National Contact Point (NCP) is located, on 27 June, 2017. The following chapters of the OECD Guidelines were outlined as the subject of the notification:

- **Chapter I, Concepts and Principles, point 2**, according to which: *Obeying domestic laws is the first obligation of enterprises. The Guidelines are not a substitute for nor should they be considered to override domestic law and regulation. While the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements. However, in countries where domestic laws and regulations conflict with the principles and standards of the Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic laws.*
- **Chapter II, General Policies, A, point 6**, according to which: *Enterprises should support and uphold good corporate governance principles and develop and apply good corporate governance practices, including throughout enterprise groups.*
- **Chapter II, General Policies, A, point 9**, according to which: *Enterprises should refrain from discriminatory or disciplinary action against workers who make bona fide reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise’s policies.*
- **Chapter V, Employment and Industrial Relations, point 1. e)** according to which: *Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices and applicable international labour standards, be guided throughout their operations by the principle of equality of opportunity and treatment in employment and not discriminate against their workers with respect to employment or occupation on such grounds as race, colour, sex, religion, political opinion, national extraction or social origin, or other status, unless selectivity concerning worker characteristics furthers established governmental policies which specifically promote greater equality of employment opportunity or relates to the inherent requirements of a job.*

In the part of the notification form of alleged non-observance of the OECD Guidelines that refers to the specific description of actions/conduct of the enterprise falling under non-observance of the Guidelines, the Notifier also pointed to the following in the areas mentioned above: *“consciously breaching stipulations of Polish law, through the discrimination of some workers’ right to their jubilee benefits, which is exemplified by differentiating the benefit amount based on the date of employment in the company, as well as unjustified preference towards seniority in entities nationalized at the expense of the remaining entities. We are concerned here with the breaking of article 11 and article 18 of the Labour Code for over 10 years. Despite a declaration to end discrimination of workers, said individuals must still appeal for their due benefits in court. A portion of the cases ended in sentencing, e.g. the judgements of the District Court in Warsaw with regards to cases XXI Pa 129/11 and XXI Pa 833/13, some concluded in a settlement, while many others are still ongoing.”*

In the Notifier’s opinion: *“the case does not pertain to singular incidents, but a comprehensive resolution to the problem. In most cases, workers fear demanding their due benefits, as they are worried of harassment and retaliatory actions from their superiors.”* In accordance with the information disclosed in the notification, the scale of harassment is broader as similar violations appear in other stock companies of the enterprise in Poland, where seniority benefits are improperly paid out.

SUMMARY OF ACTIONS

Upon receiving the notification, the NCP took the following actions:

- on 10 July 2017 the company was informed of the notification, upon which it took a written position in the matter by letter dated 19 July 2017,
- on 11 July 2017, in accordance with the provisions of the *Conduct procedure in specific instances related to an alleged breach of OECD Guidelines*, France’s NCP was informed of the notification’s submission,
- on 11 September 2017 members of Poland’s NCP met with the notifying party,
- on 13 September 2017 members of Poland’s NCP met with representatives of the company pertaining to the notification,
- the NCP conducted a thorough analysis of the case on the basis of information and documentation provided by the parties of the proceeding,
- the NCP prepared a draft Initial Assessment, which was sent to the parties on 3 October 2017 with a request for comments within 10 days of receiving the document,
- comments to the contents of the Initial Assessment were submitted only by the notifying party,
- the NCP implemented a correction of the contents and prepared a final version of the Initial Assessment.

SUPPLEMENTARY INFORMATION

During the meeting held on 11 September 2017, the notifying party signaled its withdrawal of the previously evoked violation of point 9 of the OECD Guidelines (chapter II, General Policies, A).

In accordance with the information attained from both parties, the NCP determined that the company's Collective Labour Agreement differentiates the principles and procedure of paying out jubilee benefits for workers employed before 1 December 1993 and workers employed after 1 December 1993 in such a way that workers hired before 1 December 1993 can, in accordance with the stipulations of attachment no. 10 to the Corporate Collective Labour Agreement, add periods of prior employment outside the company in chosen places of work to the employment period required for receiving their jubilee benefits. However, for workers hired from 1 December 1993 the qualifications for receiving their jubilee benefits only take into consideration the period of employment at the company.

In line with information attained by the NCP, the stipulations of the Corporate Collective Labour Agreement relying on the differentiation of the manner in which the employment period is counted on the basis of the date of hire at the company have not been applicable since the year 2015, on the basis of article 9 par. 4 of the act from 26 June 1974 of the Labour Code (Journal of Laws from 2016, item 1666, with amendments), according to which *stipulations of corporate collective labour agreements and others based on collective agreements, regulations, and statutes, determining the rights and responsibilities of parties to an employment relationship, that violate the rule of equal treatment in employment are not binding.*

In line with information provided by a representative of the company, jubilee benefits are paid out "automatically" when a worker meets the requirements for their dispensation. Information about requirement fulfillment appear in the cadre system, while workers are not required to submit separate applications in this matter. The company does not analyze the correctness of jubilee benefit payments from before 2015. It should be noted that claims resulting from an employment relationship, in accordance with Labour Code regulations, are barred after a period of three years.

At the same time, in its evaluation of the case, the NCP determined that in cases relating to the subject of the notification, only after 2015 were there 18 cases being conducted through court. Eleven cases have already been closed, while seven are ongoing. One of the ongoing court cases is a case to which the Notifier of the above described notification of non-observance of the OECD Guidelines is a party.

DECISION OF THE NCP

Following its evaluation of the case, the NCP has decided not to open proceedings in this matter, given the congruent court proceedings concerning the subject of the notification, including the one proceeding to which the Notifier is a party.

JUSTIFICATION

In line with the rules adopted by the NCP in the *Conduct procedure in specific instances related to an alleged breach of OECD Guidelines* (Section II. Procedure, Stage I), the initial assessment of the case conducted by the NCP includes an evaluation of the fulfillment of seven criteria required by the NCP in order to conduct proceedings.

As a result of the evaluation, the NCP decided that, in the case of the notification described above, the following criteria have not been met:

- 1) **Are there alternative paths of conduct in the specific instance (arbitration, appeal mechanism, court proceedings, etc.)?** In the evaluated case, the subject of the notification may also be examined by way of court. A key consideration for the NCP is that the court proceedings in cases related to the notification were and are still in process. Since 2015, there have been 18 court cases. Eleven have been concluded, while seven remain ongoing. One of the cases currently being examined in court is a case to which the Notified is a party.
- 2) **Is execution of the procedure possible – if there is a procedure carried out before another body in the same specific instance?** In the evaluated case, conduction of proceedings by the NCP could be considered an attempt to settle the dispute extra-judicially, in the case where the parties had already entered into court proceedings. In the NCP's opinion, proceedings conducted by the NCP should not be conducted congruently with a court proceeding/proceedings.

In reference to the entries of the *Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises* (section I. Commentary on the Procedural Guidance for NCPs, *Initial Assessment*, point 26 – pg. 82 of the OECD Guidelines), the NCP does not turn away the above-described case only due to the fact that there are congruent proceedings before another body. In the NCP's opinion, acceptance of the above notification by the NCP could negatively impact the relevant parties in the congruent court proceedings.

It should be underlined that proceedings conducted by NCPs are proceedings of a specific character, conducted on the basis of the *OECD Guidelines for Multinational Enterprises*, which are so-called international soft law, and constitute an international standard of responsible business conduct. As a member of the OECD for over 20 years, Poland belongs to a group of countries implementing the *OECD Guidelines for Multinational Enterprises*. This is why the government administration of Poland recommends multinational enterprise operating in Poland to aim towards minimalizing the negative impacts that may arise as a result of their business activity. At the same time, NCP proceedings not of an administrative or judicial nature must take into account the provisions of the OECD Guidelines and cannot be conducted out of accordance with the regulations and principles of Polish law. In line with these provisions, the aim is to avoid conducting two proceedings simultaneously in a situation of case identity occurrence. Case identity occurs when a case is ongoing between the same parties, and is identical with regards to its subject and essential legal basis. In the NCP's opinion, it is irrelevant that in the court proceedings particular workers of the company appear as parties, whereas in any potential NCP proceeding, in accordance with the submitted notification, the party would be defined in a more general manner.

Literature on this subject does not provide examples of cases of coincidental proceedings: neither judicial nor extra-judicial cases conducted by NCPs, resulting largely from the small output of proceedings conducted by Poland's NCP. Analogously, one may use as a supplement the existing tendency in the Polish legal system of aiming towards a reduction of responsibility regimes where coincidences of penal, and for example administrative or transgressive responsibility come into play, signaling a discrepancy between such actions and article 2 of the Polish Constitution, article 4 statute 1 of Protocol no. 7 to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, and article 14 statute 7 of the *International Covenant on Civil and Political Rights*. The above also concerns claim preclusion (*res iudicata*), according to which settlement in a given issue cannot be reached more than once. The rule of *res iudicata* also applies in cases of legally binding judgements, as well as in cases where another proceeding is conducted simultaneously. In such instances the second proceeding in the same case should be nullified. The authority of claim preclusion also causes a proceeding being conducted under the *res iudicata* principle to become null and void.

In the opinion of the NCP, accumulation of responsibilities resulting from labour law and an NCP proceeding would constitute an expression of excessive rigor, a lack of balance, and would not take into account the interests of the parties in relation to which court proceedings are currently being conducted. On account of the case's dismissal from further proceedings by the NCP, the content of the Initial Assessment does not contain the names of the parties nor details of the case.

Subsequent procedural stages

This final text of the Initial Assessment will be sent to both parties and published in Polish and English language versions on the Polish NCP's webpage:

<http://www.mr.gov.pl/en/site/polish-national-contact-point-responsible-business-conduct/>.

The most important information resulting from the Initial Assessment above will be made available to the NCP of France.