

**INITIAL ASSESSMENT BY THE UK
NATIONAL CONTACT POINT FOR
THE OECD GUIDELINES FOR
MULTINATIONAL ENTERPRISES**

Complaint from The LEAD
GROUP against Xstrata PLC in
the UK

16 DECEMBER 2011

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Summary of the UK NCP decision

- The UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (the Guidelines) has decided that some of the concerns raised by The LEAD GROUP in its complaint merit further consideration and has decided to accept the Specific Instance for further consideration. This does not mean that the UK NCP considers Xstrata PLC to have acted inconsistently with the Guidelines. The UK NCP is accepting for further consideration the alleged breach of the following parts of the 2000 version of the Guidelines: chapeau of Chapter V (Environment); Chapter V(6)(a); and Chapter V(6)(b).
- The UK NCP considers that, by accepting this Specific Instance, it could help both parties in reaching a conciliated/mediated solution to the issue of Xstrata PLC's role in Innospec Inc's production of the fuel additive "tetraethyl lead" (TEL).
- Taking into account the status of the complaint against Innospec Inc in the US, the UK NCP will formally contact Xstrata PLC and The LEAD GROUP to ask whether they are willing to engage in conciliation/mediation with the aim of reaching a settlement.

The complaint and response

1. On 27 August 2011 (with supplementary notes received on 25 October 2011, 29 November 2011 and 9 December 2011), the Australian non-governmental organisation (NGO), The LEAD GROUP¹, wrote to the UK NCP raising a number of concerns which it considered constitute a Specific Instance under the Guidelines in respect of Xstrata PLC (Xstrata)'s operations in the UK.
2. The LEAD GROUP alleged that Xstrata had failed to comply with the chapeau of Chapter VI (Environment) and with Chapters VI(6)(a) and VI(6)(b) of the Guidelines², as updated on 25 May 2011, which state that:

*"Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development. In particular, enterprises should:
[...]"*

¹ "The Lead Education and Abatement Design Group Incorporated".

² *OECD Guidelines for Multinational Enterprises, 2011* – available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf> (accessed on 29 November 2011).

6. Continually seek to improve corporate environmental performance, at the level of the enterprise and, where appropriate, of its supply chain, by encouraging such activities as:

(a) adoption of technologies and operating procedures in all parts of the enterprise that reflect standards concerning environmental performance in the best performing part of the enterprise;

(b) development and provision of products or services that have no undue environmental impacts; are safe in their intended use; reduce greenhouse gas emissions; are efficient in their consumption of energy and natural resources; can be reused, recycled, or disposed of safely;”.

3. The LEAD GROUP made the following two specific allegations in respect of Xstrata:
 - a) That Xstrata supplied lead, extracted from Mount Isa (Australia) and smelted in the UK by Britannia Refined Metals LTD (Xstrata’s UK subsidiary), to a US-based multinational, Innospec Inc (Innospec), which in turn used the lead allegedly supplied by Xstrata to produce the environmentally-harmful fuel additive TEL for use in Afghanistan, Algeria, Burma, Iraq, North Korea and Yemen.
 - b) That, following from paragraph 3(a) above, Xstrata must be presumed to have breached the Guidelines if Innospec is found to have breached the Guidelines following the conclusion of a parallel complaint process against Innospec in the US.

4. In their response dated 21 November 2011, Xstrata denied having contravened paragraph 6 of the Guidelines. In particular, Xstrata stated:
 - a) That some of the lead production from Mount Isa is smelted by Britannia Refined Metals LTD (BRM), and that BRM did supply lead to Innospec to produce TEL; but that there is no evidence that all of the lead used by Innospec to produce TEL is supplied by Xstrata through BRM.
 - b) That the amount of lead supplied by BRM to Innospec has been in decline for many years indicating a successful approach to phasing out leaded fuels worldwide. Xstrata also explained that, at present, there is no available safe substitute for TEL’s usage in the aviation industry.
 - c) That BRM supplied lead to Innospec for the production of TEL additives because Innospec supports the gradual phasing out of these additives worldwide and provides a support programme including remediation and decommissioning of redundant lead facilities. Xstrata also stated that Innospec expects to cease the sale of TEL for use in automotive gasoline in 2012, and that, at the Partnership for Clean Fuels and Vehicles (PCFV) Global Partnership Meeting (GPM) held on 26-27 October 2011 at UNEP (United Nations Environment Programme) Headquarters in Nairobi, it was stated that “leaded petrol has now been all but phased out

globally. There are still a handful of countries that use small amounts that will also phase out in the near future”.

- d) That according to the Guidelines, responsible business conduct not only includes contribution to environmental performance but also economic and social progress with a view to achieving sustainable development.

The UK NCP process so far

5. The UK NCP received The LEAD GROUP’s complaint against Xstrata on 27 August 2011.
6. As the complaint was filed before 1 September 2011, the UK NCP has considered it under the 2000 version of the Guidelines³. For the avoidance of doubt, on 3 October 2011, the UK NCP sent to both parties a paper copy of (and the electronic link to) the 2000 version of the Guidelines. The UK NCP therefore considered the complaint from the LEAD GROUP in respect of the chapeau of Chapter V (Environment) and Chapters V(6)(a) and V(6)(b) of the 2000 version Guidelines, which state that:

“Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development. In particular, enterprises should:

[...]

6. Continually seek to improve corporate environmental performance, by encouraging, where appropriate, such activities as:

(a) adoption of technologies and operating procedures in all parts of the enterprise that reflect standards concerning environmental performance in the best performing part of the enterprise;

(b) development and provision of products or services that have no undue environmental impacts; are safe in their intended use; are efficient in their consumption of energy and natural resources; can be reused, recycled, or disposed of safely;”.

³ OECD Guidelines for Multinational Enterprises, 2000 – available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (accessed on 29 November 2011). On 25 May 2011, the OECD endorsed an update to the Guidelines (available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf> - accessed on 29 November 2011). On 29 June 2011, the UK NCP’s Steering Board agreed that the UK NCP will apply the updated text with effect from 1 September 2011. The UK NCP’s application of the updated Guidelines is set out on the UK NCP’s website (accessed on 29 November 2011) under: www.bis.gov.uk/nationalcontactpoint and www.bis.gov.uk/ukncp-complaints-procedures .

7. The LEAD GROUP's complaint was primarily against Innospec (in that Innospec had allegedly provided TEL to Afghanistan, Algeria, Burma, Iraq, North Korea and Yemen) and involved Xstrata only to the extent that Xstrata was alleged to have supplied lead (from the UK) to Innospec, which Innospec then used to produce TEL. None of the countries to which Innospec is alleged to have provided TEL is an OECD Member, nor are they adhering to the Guidelines, therefore it falls to the NCP of the country in which the companies concerned are established to deal with the complaint.
8. On 26 September 2011, after liaising with all the relevant NCPs (namely the US, Swiss and Australian NCPs), the UK NCP agreed:
 - a) That the US NCP would take the lead in the complaint against Innospec (because Innospec is a US-based company) but the UK and Swiss NCPs would assist the US NCP if so requested, in engaging Innospec's subsidiaries located respectively in the UK and in Switzerland; and
 - b) That the UK NCP would take the lead in the complaint against Xstrata (because Xstrata is a UK-based company and the alleged breach of the Guidelines occurred in the UK) and that the UK NCP would take into account the status of the parallel complaint against Innospec and the complainant's request first to engage Innospec, before proceeding to engage Xstrata in conciliation/mediation. In considering the complaint against Xstrata, the UK NCP also agreed to keep the Swiss and Australian NCPs closely engaged in the process, and to keep the US NCP updated on the progress of the complaint.
9. On 3 October 2011, the UK NCP forwarded the complaint to Xstrata and, in accordance with the UK NCP's published complaint procedure, offered the company the opportunity to submit a preliminary response to the allegations by 1 November 2011.
10. On 25 October 2011, the complainant submitted substantial supplementary information in support of the complaints. On 25 October 2011, the UK NCP forwarded this information to Xstrata. In view of the supplementary information submitted by The LEAD GROUP, the UK NCP extended Xstrata's deadline for submitting a preliminary response until 23 November 2011. Xstrata submitted its preliminary response dated 21 November 2011.
11. On 29 November 2011 and on 9 December 2011, the complainant submitted additional supporting evidence which the UK NCP forwarded to Xstrata.
12. Neither party decided to meet with the UK NCP but both parties remained in contact with the UK NCP.

UK NCP decision

13. The UK NCP has decided that some of the concerns raised by The LEAD GROUP in its complaint merit further consideration and has decided to accept the Specific Instance for further consideration. This does not mean that the UK NCP considers Xstrata to have acted inconsistently with the Guidelines.
14. The UK NCP is accepting for further consideration the alleged breach of the following parts of the 2000 version of the Guidelines: chapeau to Chapter V (Environment); Chapter V(6)(a); Chapter V(6)(b).
15. As stipulated in paragraph 14 of the “Commentary on Implementation Procedures of the OECD Guidelines for Multinational Enterprises”⁴, the UK NCP took the following points into account when considering whether The LEAD GROUP’s concerns merited further consideration:
 - a) Identity of The LEAD GROUP and its interest in the matter:
 - a.1. The UK NCP is satisfied that The LEAD GROUP is a legitimate and credible body to make this complaint. The LEAD GROUP is an NGO based in Australia and works towards the elimination of lead poisoning (and the protection of the environment) across the world. The UK NCP considers that The LEAD GROUP is directly interested in the issues raised in the complaint and is in a position to supply information about it.
 - b) Whether the issue is material and substantiated:

Allegation that Xstrata supplied lead to Innospec and that Innospec used the lead supplied by Xstrata to produce TEL.

 - b.1. Amongst the supporting material referred to in the complaint, the UK NCP noted the statement made by The LEAD GROUP in its own news report dated 4 June 2011 (page 4): “[Xstrata’s UK smelter] supplies the lead to Innospec in the United Kingdom”.
 - b.2. In a response dated 21 November 2011, Xstrata confirmed that it did supply lead, through BRM, to Innospec for the production of TEL. The UK NCP notes however Xstrata’s submission that there is no evidence to show that Xstrata is Innospec’s sole supplier of lead for the production of TEL.
 - b.3. In light of the above, the UK NCP concludes that the allegations under paragraph 3(a) above are, within the scope of the Initial Assessment, sufficiently substantiated.

⁴ *OECD Guidelines for Multinational Enterprises, 2000*, page 58 – available at of the <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (accessed on 29 November 2011).

Allegation that Xstrata must be presumed to have breached the Guidelines if Innospec is found to have breached the Guidelines following the conclusion of a parallel complaint process against Innospec in the US.

- b.4. The UK NCP considered The LEAD GROUP's contention that Xstrata must be presumed to have breached the Guidelines if Innospec is found to have breached the Guidelines at the conclusion of a parallel complaint process against Innospec in the US.
 - b.5. The UK NCP considered the status of the complaint under the Guidelines against Innospec in the US. As at 29 November 2011, the US NCP has not reached a conclusion on whether Innospec acted in accordance with the Guidelines. The UK NCP does not consider that the UK NCP's published complaint procedures allow the UK NCP to suspend a complaint before completing the Initial Assessment in order to wait for the outcome of a parallel complaint process run by another NCP. The UK NCP's published guidance on situations where there are parallel proceedings⁵ clearly states at paragraph 8 that: "The UK NCP will only consider a request [to suspend the complaint process] once a complaint has been accepted for consideration and has become a Specific Instance". In other words, the UK NCP cannot suspend the complaint process before the complaint has actually passed the Initial Assessment stage and has been accepted for further consideration. The rationale for this approach is to avoid creating uncertainty amongst the parties in a situation where the complaint might not even be accepted for further consideration.
 - b.6. In light of the above, the UK NCP concludes that the allegation under paragraph 3(b) above is not, at present, material to the complaint against Xstrata, and has therefore rejected it.
 - b.7. The above conclusion notwithstanding, the UK NCP will take into account (if available) the outcome of the complaint process in the US against Innospec, as part of the UK NCP's examination of the allegations against Xstrata. Such examination will only be undertaken if the conciliation/mediation process between The LEAD GROUP and Xstrata is not successful (or is declined).
- c) Relevance of applicable law and procedures, including court rulings:

⁵ See UK NCP, *Approach to Specific Instances in which there are parallel proceedings* – available at www.bis.gov.uk/ukncp-complaints-procedures (accessed on 29 November 2011).

- c.1. The UK NCP is not aware of parallel legal proceedings against Xstrata in respect of the same allegations made by The LEAD GROUP.
- d) How similar issues have been, or are being, treated in other domestic or international proceedings:
 - d.1. With the exception of the parallel complaint under the Guidelines against Innospec in the US, the UK NCP is not aware of other domestic or international proceedings against Xstrata, brought on the basis of the same allegations made by The LEAD GROUP in this Specific Instance.
- e) Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines:
 - e.1. One of the stated aims of the Guidelines, specifically the role of NCPs, is for the NCP to “offer a forum for discussion and assist the business community, employee organisations and other parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law”⁶. To this end, the UK NCP considers that, by accepting this Specific Instance, it could assist the parties in reaching a conciliated/mediated solution to the issue of Xstrata’s role in Innospec’s production of TEL.

Next steps

- 16. Taking into account the status of the complaint against Innospec in the US, the UK NCP will formally contact Xstrata and The LEAD GROUP to ask whether they are willing to engage in conciliation/mediation with the aim of reaching a settlement. Subject to their response to this offer, the UK NCP will then liaise with both parties to arrange the conciliation/mediation meetings.
- 17. If a conciliated/mediated solution is possible, the UK NCP will reflect the successful outcome of this process in its Final Statement without making a determination as to whether the company has acted inconsistently with the Guidelines.
- 18. If a conciliated/mediated settlement is not possible (or the parties do not wish to engage in conciliation/mediation), the UK NCP will conduct a separate examination into the complaint and will reflect in its Final Statement the outcome of this examination, and a determination of whether the company has acted inconsistently with the Guidelines.

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⁶ *OECD Guidelines for Multinational Enterprises, 2000*, paragraph I(C) of the “Procedural Guidance”, page 34 – available at <http://www.oecd.org/dataoecd/17/44/1900962.pdf> (accessed on 29 November 2011).

UK National Contact Point for the OECD Guidelines for Multinational Enterprises

Steven Murdoch, Danish Chopra, Sergio Moreno