

**Initial Assessment By The UK  
National Contact Point For  
The OECD Guidelines For  
Multinational Enterprises**

**COMPLAINT FROM A CIVIL  
SOCIETY ORGANISATION  
AGAINST A UK BANK (A) IN  
RESPECT OF A BUSINESS  
RELATIONSHIP WITH A COMPANY  
IN RUSSIA**

**DECEMBER 2012**

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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 to reject the complaint against UK Bank A, because the link with UK Bank A's activities is not substantiated. This Initial Assessment concludes the complaint process under the Guidelines.**

## The complaint and response

1. On 31<sup>st</sup> July 2012, a Russian civil society organisation wrote to the UK NCP, raising concerns related to the impacts on local property owners of an oil and gas production complex in Russia.
2. The complaint named UK Bank A and two other UK banks<sup>1</sup>. The complainants alleged that these banks had business relationships with the Russian company operating the oil and gas complex (Company R), and that the banks had failed to comply with the responsibilities placed on them by the OECD Guidelines to address impacts to which they were linked by a business relationship. The impacts resulted from actions of Company R that were allegedly inconsistent with many of the OECD Guidelines standards (the Guidelines do not apply to Company R directly as Russia is not an adhering country).
3. The same failures of compliance were alleged for all the banks named, but the nature of the alleged relationship with Company R was different in the case of each bank.

## Guidelines provisions cited in the complaint

4. The complaint referred to events taking place between 2002 and 2012. Multinational enterprises' responsibilities in respect of business relationships were strengthened when the OECD Guidelines were updated in 2011. At the UK NCP's request, the complainants clarified how they applied requirements in the former and updated Guidelines to their allegations:
  - a) They alleged that the UK banks had failed to comply with the following responsibilities under Chapter II of the pre-2011 Guidelines:

*Paragraph 7. [Enterprises should] develop and apply effective self-regulatory practices and management systems that foster a*

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<sup>1</sup> The complaint also named a Netherlands-based enterprise. See paragraph 8 for details of handling discussions with the Netherlands NCP.

*relationship of confidence and mutual trust between enterprises and the societies in which they operate. (retained in updated 2011 Guidelines)*

*Paragraph 10. [Enterprises should] encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines. (retained as part of paragraph 13 in updated 2011 Guidelines)*

- b) They alleged that continuing business relationships with Company R meant that from September 2011 the banks failed to comply with responsibilities under the updated 2011 Guidelines:

#### *Chapter II General policies*

*Paragraph 10. [Enterprises should] carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.*

*Paragraph 12. [Enterprises should] seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.*

#### *Chapter IV Human Rights*

*Paragraph 3. [Enterprises should] seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.*

- c) The complainants also alleged that the business relationship implicated the banks in actions inconsistent with a range of provisions in:

*Chapter I Concepts and Principles, Chapter II General Policies, Chapter III Disclosure, Chapter IV Human Rights, Chapter VI Environment*

These provisions were in the pre-2011 Guidelines and were carried forward unchanged in the updated Guidelines, with the exception of the Human Rights Chapter which was added in the 2011 update. The complainants alleged that the banks were implicated in actions before 2011 inconsistent with the Guidelines applying at that time,

and that continuing relationships with Company R implicated them from September 2011 additionally in actions inconsistent with the Human Rights Chapter.

### **Note on UK NCP application of 2011 Guidelines**

5. The UK NCP applies the 2011 Guidelines to actions of multinational enterprises from 1 September 2011 onwards. In respect of the new provisions on business relationships added in the 2011 Guidelines, the UK NCP's policy is as follows:
  - a) Enterprises are not accountable under the new provisions for actions they took before those provisions applied.
  - b) the due diligence provision added in Chapter 2, paragraph 10 acknowledges that the nature and extent of due diligence will depend on circumstances. The UK NCP does not consider that it obliged enterprises proactively to review all their existing business relationships at 1<sup>st</sup> September 2011.
  - c) The UK NCP therefore looks for evidence that an enterprise should have been prompted to apply the provisions in a specific relationship. This evidence might relate to the enterprise's knowledge of an ongoing impact at 1<sup>st</sup> September 2011, or to new actions or events from 1<sup>st</sup> September 2011 (for example, the enterprise signing a new contract with the related business, receiving a new report on the related business, or receiving representations from stakeholders about an impact of the related business).

### **Detail of the allegations**

6. The complainants alleged:
  - a) That Company R had established a Sanitary Defence Zone (SDZ) around the oil and gas production complex smaller than that required by the Russian Ministry of Natural Resources in giving its permission for construction in 2003. Stakeholder communications produced by Company R also suggested to property owners represented by the complainants that a larger SDZ would apply. These property owners understood that their properties and cultivated land would be within the SDZ. Under Russian law this would have required Company R to resettle and fully compensate them. However, their properties were not within the smaller SDZ established. Company R made them an offer of compensation in 2006, but this was significantly less than would have been due in the case of a legally mandated resettlement.
  - b) That the construction of the complex from 2003-2007, and its operation from 2007 had adverse impacts on the property owners, and their land. Pollution and associated health risks affected their food security, and other impacts included safety risks, damage and

disturbance, loss of property values and loss of cultural and community life. These impacts also suggested that the smaller sanitary zone was inadequate.

- c) That each UK bank was involved in making loans to Company R and/or its controlling shareholder, and so had a business relationship with Company R.
- d) That each UK bank was a signatory to the Equator Principles, and so had committed to self-regulatory practices that required loans not to be made unless projects met social and environmental standards.
- e) That each UK bank was failing to comply with Guidelines requirements on business relationships and self-regulatory practices, and that each bank had a responsibility under the Guidelines to use its influence with Company R to address the adverse impacts of the project and provide a remedy for the property owners represented by the complainants.

#### **Allegations against UK Bank A specifically:**

- 7. The complainants alleged that UK Bank A had a business relationship with Company R through loans made in 2007 and 2010. The 2007 loan was made by UK Bank A and other lenders to Company R's controlling shareholder, and supported that company's acquisition of its controlling interest. The 2010 loan was a three year loan made in May 2010 by UK Bank A to Company R itself.

#### **Response of UK Bank A**

- 8. UK Bank A responded on 10 October and said that:
  - a) UK Bank A did not make any loan to Company R in 2010. The report cited by the complainants as evidence of this loan was wrong and had subsequently been corrected. UK Bank A has never had any business relationship with Company R.
  - b) UK Bank A understands that Company R's major shareholder purchased its controlling interest through a bridge loan. UK Bank A did not participate in this loan.
  - c) UK Bank A did participate, as one of a syndicate of 20 banks, in a later re-financing of the bridge loan through a term loan to Company R's controlling shareholder.
  - d) The complaint was based on incorrect presumptions and without foundation, and UK Bank A asked the NCP not to accept it.

## The UK NCP process so far

9. On 31<sup>st</sup> July 2012 the complainants sent the complaint to the UK NCP and the Netherlands NCP (NL NCP), naming the 3 UK banks and a Netherlands based enterprise. The UK NCP and the NL NCP subsequently agreed to treat the complaints against each company separately, with the NL NCP considering the complaint against the Netherlands company and the UK NCP considering the complaints in respect of each of the UK banks.
10. On 29 August the UK NCP informed the complainants of the agreed handling arrangements and asked them to clarify the complaint (see paragraph 4).
11. On 29 August, the UK NCP forwarded details of the complaint and clarification request to UK Bank A and invited its response.
12. On 13 September the UK NCP received the complainants' clarification, and on 10 October the UK NCP received UK Bank A's response.
13. On 7 November the UK NCP asked for and received clarification from UK Bank A relating to the evidence from the complainants that it disputed. The UK NCP also made an independent check on this evidence.
14. The UK NCP shared the details of the complaint, clarification and response with both parties. Each party was offered a meeting with the UK NCP, but neither took up this offer.

## UK NCP decision

15. The UK NCP **rejects** the complaint against UK Bank A. The UK NCP took the following points into account when considering whether the complainants' concerns merited further consideration:

### **Identity of the complainants and their interest in the matter:**

16. The UK NCP **is satisfied** that the complainants are legitimate, credible, and that they represent parties directly interested in the issues raised in the complaint, and that they are able to supply information about impacts of the oil and gas facility and actions of Company R.

### **Whether the issue is material and substantiated:**

17. The complaint depends on demonstrating that UK Bank A's responsibilities under the Guidelines in respect of self-regulatory

practices and/or in respect of business relationships should apply in relation to Company R.

18. The UK NCP finds that this is **not substantiated** for the reasons set out below. As these responsibilities are not shown to apply, evidence about the actions of Company R and their impacts is not relevant to a complaint against UK Bank A.
19. The UK NCP is satisfied that the claim in the complaint that UK Bank A made a loan to Company R in 2010 is based on inaccurate information and the report the complainants relied on was subsequently corrected. The complainants have not contested UK Bank A's evidence on this point, and the NCP notes that they were not aware that the report they relied on was inaccurate when they submitted the complaint.
20. The remaining link between UK Bank A and Company R is the loan made in 2007 to the Russian multinational that was Company R's controlling shareholder. The loan was made by a syndicate of banks, and UK Bank A says it was one of 20 banks in the syndicate. The complainants allege that the loan was "in support of" the Russian multinational's acquisition of its controlling interest in Company R, and UK Bank A accepts that it re-financed a bridge loan (in which UK Bank A did not participate) used to acquire this controlling interest.
21. The complainants cite the Equator Principles as the self-regulatory practices applying to UK Bank A's link to Company R. In 2007, when the loan was made, the Equator Principles applied to project finance, defined as follows:

*"project finance is a method of funding in which the lender looks primarily to the revenues generated by a single project, both as the source of repayment and as security for the exposure. This type of financing is usually for large, complex and expensive installations that might include, for example, power plants, chemical processing plants, mines, transportation infrastructure, environment, and telecommunications infrastructure. Project finance may take the form of financing of the construction of a new capital installation, or refinancing of an existing installation, with or without improvements. In such transactions, the lender is usually paid solely or almost exclusively out of the money generated by the contracts for the facility's output, such as the electricity sold by a power plant. The borrower is usually an SPE (Special Purpose Entity) that is not permitted to perform any function other than developing, owning, and operating the installation. The consequence is that repayment depends primarily on the project's cash flow and on the collateral value of the project's assets."*

22. The loan in which UK Bank A participated does not appear to fall within this definition and the UK NCP does not consider that the Equator Principles' requirements would apply to it. The UK NCP notes, however, that the Equator Principles Association is currently finalising an update that may extend the Principles to similar types of loans in future.
23. In respect of the responsibilities under the Guidelines relating to business relationships, the requirement on UK Bank A when the loan was made was to *"encourage, where practicable, business partners...to apply principles of corporate conduct compatible with the Guidelines"*. OECD Commentary on this provision refers to the importance of the Guidelines to:
  24. *"suppliers, contractors, subcontractors, licensees and other entities with which MNEs enjoy a working relationship. It is recognised that there are practical limitations to the ability of enterprises to influence the conduct of their business partners. The extent of these limitations depends on sectoral, enterprise and product characteristics such as the number of suppliers or other business partners, the structure and complexity of the supply chain and the market position of the enterprise vis-à-vis its suppliers or other business partners. The influence enterprises may have on their suppliers or business partners is normally restricted to the category of products or services they are sourcing rather than to the full range of activities of suppliers or business partners. Thus the scope for influencing business partners is greater in some instances than in others. Established or direct business relationships are the major object of this recommendation rather than all individual or ad hoc contracts or transactions that are based solely on open market operations or client relationships. In cases where direct influence of business partners is not possible, the objective could be met by means of dissemination of general policy statements of the enterprise or membership in business federations that encourage business partners to apply principles of corporate conduct compatible with the Guidelines"*.
25. The 2007 loan does not show an established or direct business relationship between UK Bank A and Company R. No claim is made that Company R participated in the loan arrangement or was affected by UK Bank A's decision to participate in it, or that repayments to UK Bank A were linked to the activities of Company R. The loan establishes only an indirect link between UK Bank A and Company R via the Russian multinational to which the loan was made.
26. The information relating to the 2010 loan was found to be inaccurate , and no evidence is offered of a link between UK Bank A and Company R from September 2011 (the date from which the UK NCP applies the enhanced requirements of the updated Guidelines).

## **Other points noted by the NCP**

### **Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines:**

27. As the complaint has not been accepted, mediation or further investigation will not be pursued. But the UK NCP notes that in a complaint about business relationships, the scope of any mediation may be limited where the relationship in question has ended.
28. The UK NCP believes that the general nature of the pre-2011 Guidelines requirement on encouraging business partners is open to a broad range of interpretation. The 2011 Guidelines provide more detailed guidance to multinational enterprises on their responsibilities in this area.

### **Relevance of applicable law and procedures, including court rulings:**

29. The complainants allege that Company R broke Russian law by not resettling owners whose properties fell within the larger sanitary zone on which permission for the project is based. The UK NCP notes that the Guidelines represent voluntary principles and standards of behaviour of a non-legal character and are not a substitute for (nor should they be considered to override) local law or legal remedies.

### **How similar issues have been, or are being, treated in other domestic or international proceedings:**

30. As noted, the UK NCP is considering allegations in relation to two other UK banks, and the NL NCP is considering allegations in relation to a Netherlands based company. The alleged involvement of each company is different, and the treatment of each complaint is of limited assistance in determining how to proceed in the others. However, the NCP took a consistent approach in the treatment of the parallel complaint against UK Bank B.
31. The complaints also raise some general issues about applying the Guidelines in the financial sector, and the UK NCP will ask the OECD to consider these in the context of its current work in this area

## **Next steps**

32. This Initial Assessment concludes the complaint process under the Guidelines.

**21<sup>st</sup> December 2012**

**UK National Contact Point for the OECD Guidelines for Multinational Enterprises**

**Steven Murdoch  
Danish Chopra  
Liz Napier**

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Any enquiries regarding this publication should be sent to:

UK National Contact Point for the OECD Guidelines for Multinational Enterprises  
Department for Business, Innovation and Skills  
3VIC3  
1 Victoria Street  
London SW1H 0ET  
Tel: 0044 (0)20 7215 5756

If you require this publication in an alternative format, email

[uk.ncp@bis.gsi.gov.uk](mailto:uk.ncp@bis.gsi.gov.uk), or call 0044 (0)20 7215 5756.

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