

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

**COMPLAINT FROM AN NGO
AGAINST A COMPANY IN THE
SECURITY SECTOR**

DECEMBER 2014

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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 because it does not serve the purpose and effectiveness of the Guidelines for it to be considered further by the UK NCP. The UK NCP recommends that the complainants submit the complaint for consideration by the United States NCP.**
- **This does not mean that the UK NCP is making any finding about whether the issues raised are material and substantiated.**

Substance of the complaint

1. The complaint is made by a UK based NGO that works to promote the rule of law around the world.
2. The complainants identify a UK company in the security sector. They note that the company wholly owns a US subsidiary company that has contracted with the US Navy to provide support services to the Guantanamo Bay Naval Base in Cuba. The complainants provide information about human rights abuses they consider are associated with the prison facility at Guantanamo Bay and say that taking the contract is inconsistent with human rights obligations under the OECD Guidelines, as well as with the parent company's own human rights policy.
3. The complainants say that the company should cease to provide services under the contract, and should provide the complainants with details of the contract, and also details of its policies and due diligence relating to this and any similar contracts supporting US counter-terror operations, including any measures to mitigate adverse human rights impacts.
4. The UK parent company accepted an invitation from the UK NCP to respond to the complaint. It denies the allegations made by the complainants. The company noted that its influence over the subsidiary's decisions was limited by US Government foreign ownership and control procedures applying to companies that may access classified information or undertake classified tasks. The company also noted that it was divesting itself of the subsidiary, and has subsequently confirmed that the subsidiary has been divested.

Guidelines provisions cited

5. The complainants refer to the following provisions of the Guidelines:

Chapter IV Human Rights

States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

- 1 Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse*
 - 2 Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.*
 - 3 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.*
 - 5 Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.*
6. Provisions in Chapter IV were added when the Guidelines were updated in 2011. They are applied by the UK NCP to actions of enterprises from 1st September 2011 and to unresolved risks or impacts known to the enterprise at 1st September 2011.

The Initial Assessment process

7. The Initial Assessment process is normally a decision on whether the issues raised merit further examination. It does not determine whether the company has acted consistently with the Guidelines.
8. On receiving this complaint, the UK NCP believed it could be more appropriate for the United States (US) NCP to consider it. Complainants can be informally directed by one NCP to another where both NCPs and the complainants agree. In this case, however, the complainants asked for UK NCP handling and the US NCP did not make any submission. In these circumstances, the UK NCP's Steering Board has advised that the UK NCP should only refer a complainant to another NCP after setting out the reasons for doing so in an Initial Assessment.
9. In this case, therefore, the UK NCP has varied its standard Initial Assessment procedure so that the first determination is whether UK handling is appropriate. This is considered by the UK NCP as part of its consideration of whether the purpose and effectiveness of the Guidelines is served by considering the complaint.

Handling process

10.

27/08/2014	UK NCP receives complaint
10/09/2014	UK NCP advises complainants on handling and forwards complaint to company
12/09/2014	UK NCP receives complainants' letter on handling
15/09/2014	UK NCP shares complainants' letter with company
09/10/2014	UK NCP receives company's response
13/10/2014	UK NCP shares response with complainants
12/11/2014	UK NCP receives additional information from company and shares with complainant
24/11/2014	UK NCP issues draft Initial Assessment to parties
25/11/2014	UK NCP receives comments from company
10/12/2014	UK NCP issues finalised Initial Assessment to parties

11. All information in the complaint and response was shared with both parties. The NCP offered each party a meeting to explain the process. Neither party took up the offer.

UK NCP decision

12. The UK NCP has decided that it is not appropriate for the UK NCP to consider the complaint, and recommends that the complainants re-direct the complaint to the US NCP. The UK NCP took the following points into account when considering whether the complainants' concerns merited further consideration:

Whether consideration of the issue by the UK NCP would contribute to the purpose and effectiveness of the Guidelines

13. Each country that adheres to the OECD Guidelines provides an NCP to consider complaints against companies based or operating in that country. Advice on circumstances where more than one adhering country is involved in a complaint is provided in Paragraph 23 of the *Commentary on the Implementation Procedures for the OECD Guidelines*. This states that:

“Generally issues will be dealt with the NCP of the country in which the issues have arisen. Among adhering countries, such issues will first be discussed on the national level and, where appropriate, pursued at the bilateral level. The NCP of the host country should consult with the NCP of the home country in its efforts to assist the parties in resolving the issues. The NCP of the home country should strive to provide appropriate assistance in a timely manner when requested by the NCP of the host country.”

14. In this complaint, the issues that have arisen are the decisions to tender for, enter into and provide services under a contract with the US Navy. The "*country in which the issues have arisen*" therefore appears to the UK NCP to be the US. The contract is between a US multinational and the US Navy. The services will be provided at a US prison facility (located in Cuba, a non-adhering country), and the allegations refer to policies and practices of the US government in operating the facility.
15. The complainants say that the UK parent company was able to influence and profit from the decisions of the US subsidiary, but it does not appear to the UK NCP that this is an argument that the UK is the "*country in which the issues have arisen*".
16. According to OECD guidance, therefore, this complaint should be dealt with by the US NCP, as the NCP of the country in which the issues have arisen.
17. In some previous complaints, the UK NCP has agreed to consider issues relevant to another adhering country (see Paragraphs 34. and 35. below). The UK NCP's decision in each case is based on whether, taking account of the information provided, UK handling is appropriate.
18. The purpose of the OECD's handling guidance is to support effective resolution of complaints. The UK NCP has previously stated that it believes that the guidance does this in two ways: by ensuring a company's actions are examined by the NCP with the best knowledge of the operating environment in which they took place, and also by facilitating mediation between the people affected by a company's actions and company representatives at the operational level controlling them.
19. According to information offered about this complaint, the contract was awarded to the US company in August 2014, and work under it is expected to be completed by November 2015. It appears that there may be an option to review or extend the contract after the initial period of work.
20. The UK parent company has noted that Foreign Ownership, Control and Influence (FOCI) procedures apply to its relationship with the subsidiary. These procedures are developed by the US government and information provided about them in the company's response suggests that they effectively require the subsidiary to act independently of a foreign parent, and place restrictions on provision of information by the subsidiary to the parent.
21. Both complaint and response note that the UK parent announced in 2013 an intention to sell the US subsidiary, and the UK NCP notes that a sale has now been announced. The company has informed the UK NCP that the buyer is based in the US.

22. The UK NCP concludes that the operating environment where decisions were made is the US, and the people controlling the delivery of the contract are based in the US.
23. With regard to the participation of people affected by the actions to participate in any mediation, the UK NCP notes that the complaint is brought on behalf of prisoners in the Guantanamo facility and their families. The prisoners are not expected to participate in mediation wherever it takes place. Their families are based in a number of countries, including the UK. The UK NCP understands that the complainant NGO proposes to participate in mediation on its clients' behalf. The NGO is based in London, but operates internationally (and maintains a US office). The UK NCP does not consider that the NGO would be unable to represent its clients in any US based mediation.
24. The complainants consider that the issues they raise should be resolved by the company ending or ceasing to provide services under its contract, and also by the company providing information about the contract and the decision to pursue it. Engaging and obtaining information from the US subsidiary company will be necessary to achieve these objectives.
25. The UK NCP does not have a remit to engage a US company about US operations, and engagement by the UK NCP would therefore depend on the UK parent company and/or the US NCP. The sale of the subsidiary clearly affects engagement through the parent company.
26. The US NCP can engage the US company as a multinational enterprise in its own right. There is no bar to the US NCP also engaging the UK parent company, to the extent that it is operating in the US through its subsidiary.
27. Taking all the above factors into account, the UK NCP considers that US NCP handling is appropriate. The UK NCP also considers that it does not serve the purpose and effectiveness of the Guidelines for the UK NCP to lead handling of the complaint, because it could delay and inhibit engagement with the party capable of resolving the issues.
28. There is no bar to the UK NCP assisting the US NCP as necessary, and the UK NCP is willing to provide assistance if the US NCP requests it.
29. The UK NCP recommends that the complainants submit the complaint to the US NCP.

Identity of the complainants and their interest in the matter

30. The complainants identify themselves in the complaint as a legal action charity working to promote the rule of law around the world.
31. The UK NCP notes that during the Initial Assessment period the complainants made public statements about the complaint in which they referred to information provided by other parties. Following an enquiry by the UK NCP about these statements, the complainants have given an assurance that they understand and intend to respect the requirements on parties in complaints to act in good faith.

Whether the issue is material and substantiated and whether there seems to be a link to the enterprise's activities

32. Because of its decision on handling, the UK NCP does not comment further on this.

Relevance of applicable law and procedures, including court rulings

33. Because of its decision on handling, the UK NCP does not comment further on this.

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

34. The complainants note the UK NCP's handling of a complaint made in 2013 by Lawyers for Palestinian Human Rights (LPHR) against G4S.
35. The UK NCP also notes its discussion of handling in an Initial Assessment published in June 2014 in a complaint from US and UK NGOs against a company operating in the UK.

Next steps

36. This Initial Assessment concludes the UK NCP complaint process under the Guidelines. Should the US NCP be asked to consider the complaint, the UK NCP is ready to provide assistance as requested.

December 2014

UK National Contact Point for the OECD Guidelines for Multinational Enterprises

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URN BIS/15/17