

**Initial Assessment by the UK
National Contact Point for the
OECD Guidelines For
Multinational Enterprises**

**COMPLAINT FROM REPRIEVE
AGAINST BT – SERVICES
PROVIDED TO US DEFENCE
AGENCY**

JANUARY 2015

Contents

Summary of the UK NCP decision.....	3
Substance of the complaint	3
Additional allegation and separate assessment.....	3
Guidelines provisions cited	4
The Initial Assessment process	5
Handling process.....	5
UK NCP decision.....	5
Identity of the complainants and their interest in the matter	5
Whether the issue is material and substantiated and whether there appears to be a link to the enterprise’s activities	6
Relevance of applicable law and procedures, including court rulings.....	8
How similar issues have been, or are being, treated in other domestic or international proceedings:.....	9
Whether the consideration of the specific issue would contribute to the purpose and effectiveness of the Guidelines	9
Next steps	10

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.**
- **The Initial Assessment is the NCP's finding about the information parties offer: the NCP cannot require any party to provide information and in the Initial Assessment cannot seek third party information (except to confirm points of fact).**

Substance of the complaint

1. The complaint is made by Reprieve, a UK based NGO that works to promote the rule of law around the world.
2. Reprieve refers to a complaint it made to the UK NCP in July 2013 alleging that British Telecommunications plc (BT) provides a communications cable between United States military facilities in the UK and Djibouti, and through this is linked to human rights impacts of US military operations in Yemen. The UK NCP rejected the complaint in an Initial Assessment published in February 2014. Where a complaint is rejected, the Initial Assessment does not usually name parties, but in this case both parties agreed to be named (and so are also named in this assessment).
3. Reprieve now says that new information means that the reasons for the rejection of the complaint no longer apply, and asks the UK NCP to accept the issues for further examination.
4. BT accepted an invitation from the UK NCP to respond. It denies the allegations, as before, and does not accept that the complainants have identified any new information.

Additional allegation and separate assessment

5. Reprieve also alleges that BT is linked to the same impacts by allowing US intelligence services access to its customers' communications. BT denies this. Because this issue was not raised in the earlier complaint, it has been separately assessed by the UK NCP (see linked assessment).
6. Because the two sets of allegations relate to the same company and the same impacts, the UK NCP has also considered whether information submitted in support of one set of allegations would materially change the initial assessment findings in regard to the other set of allegations. That is, if all the information supporting both sets of

allegations is taken together, would the NCP's finding be different in regard to either set of allegations. The UK NCP does not consider that its findings would be different.

Guidelines provisions cited

7. The complainant refers to the following provisions of the Guidelines:

Chapter II General Policies

Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard: Enterprises should...

2. *Respect the internationally recognised human rights of those affected by their activities.*

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 human rights impacts with which they are involved.*

- 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 *Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.*

8. 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

9. The Initial Assessment process is to determine whether the issues raised merit further examination. It does not determine whether the company has acted consistently with the Guidelines.
10. This complaint concerns issues previously rejected by the UK NCP. UK NCP procedures were updated from November 2013 to state clearly that a new complaint may be raised about issues previously rejected if new information means that the reasons for rejection no longer apply.
11. This is the first complaint brought on this basis since the procedures were updated. The UK NCP therefore thinks it is helpful to confirm the process for considering a “repeat complaint”: this process is not a decision on the new information only, but a full new Initial Assessment by the UK NCP. It therefore takes account of all the information now provided by parties.

Handling process

12.

19.08.2014	UK NCP receives complaint
02.09.2014	UK NCP shares complaint with company and confirms handling to complainant
12-29.09.2014	UK NCP receives further advice from complainant and updates handling advice
08.10.2014	UK NCP receives response
13.10.2014	UK NCP shares response with complainant
18.12.2014	UK NCP issues draft Initial Assessment
14.01.2015	UK NCP issues finalised Initial Assessment

13. All documents provided in the complaint and response were shared with both parties. The UK NCP notes at Paragraph 40 below the apparent sharing of some information with third parties, in breach of good faith.
14. The NCP offered each party a meeting to explain the process. Neither party took up the offer.

UK NCP decision

15. The UK NCP has decided to reject the complaint. 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 accepted in the original complaint, and accepts here, that Reprieve has an interest in the impacts of drone operations, and represents identified individuals affected by drone strikes in Yemen. Reprieve has noted that it is likely its clients would participate remotely in any UK based mediation.
17. The OECD Guidelines process also relies on complainants being able to provide information about how a company is involved in the issue raised and why its Guidelines obligations are therefore relevant.
18. In the original complaint, Reprieve said that it was unable to provide information to clarify the nature of BT's link to the impacts identified (i.e. what part the BT equipment played in drone operations), because BT had refused to provide it to Reprieve. Reprieve also noted that it did not consider that the nature of the link was material to the complaint.
19. In making its new submission, Reprieve does not have any new direct knowledge of the company's link to the impacts, but relies on new information from generally available sources. Some of this information was generally available at the time of the original complaint. The UK NCP considers that a well-resourced NGO should be capable of identifying information relevant to allegations it makes. The UK NCP considers that Reprieve's failure to do this in the original complaint weakens its claim to have an interest in the matter.

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

20. Most of the additional information provided by Reprieve is offered to show how the BT cable is linked to drone operations (since this was the reason for rejection of the original complaint). Reprieve also offers statements of BT's Chairman in response to questions Reprieve asked about the issue at BT's AGM. No new information is offered about court rulings or other statements of international or government bodies about the issues.
21. The UK NCP notes that this means that the information offered to it does not include any definitive statement of an international authority on the international law position of the drone operations in the complaint, and does not include any statement of UK government policy on the issue. In support of the original complaint, Reprieve offered a press article reporting 2012 comments of the UN Special Rapporteur on Extrajudicial Executions, and also offered the 2013 Annual Report of the UN Secretary General on Children in Armed conflict: this report says only that states should "*ensure drone attacks comply with principles of precaution, distinction and proportionality.*" No new information has been offered on this aspect of the complaint.

22. Information offered about BT's link to the impacts of drone operations includes articles that were published in an IT sector publication after the original complaint was rejected, and that refer to the complaint process (including this complaint). The articles draw on sources including a December 2013 US Department of Defence publication and this publication is also separately submitted. Reprieve also provide a 2011 news report noting that non-military communications at the base mentioned in the complaint are provided by a local (Djibouti) company.
23. The IT publication articles summarise and extrapolate from a variety of publicly available source documents. These sources do not appear to include any new documents relating to BT's contract. The writer is an IT specialist but does not appear to have specialist knowledge of defence issues. The UK NCP cannot be confident that the articles accurately summarise or correctly interpret the (lengthy and technical) source material.
24. The main sources for the articles are two US Department of Defence "roadmap" publications about development of unmanned systems. One of these source documents, the 2013-2038 Roadmap published in December 2013 is also submitted by Reprieve. The other source is the 2005-2030 Roadmap published in August 2005. The Roadmaps appear to be published biennially, but the UK NCP believes the articles do not draw on any published between 2005 and 2013.
25. The company contracted to provide its services in September 2012. The 2005-2030 Roadmap (and more recent updates not offered) were therefore available to the company when it made its contract (and to Reprieve when it made the original complaint).
26. The UK NCP accepted in the original complaint and still accepts that during a period when the BT contract was in operation, drone operations (as well as other activities) took place at a base the cable serves. The new information provided by Reprieve suggests (in one of the articles) that drone operations at the base ceased from April 2014.
27. Having reviewed the new information, the UK NCP accepts that the roadmaps detail US plans to develop a "military internet", linking thousands of military facilities and capable of use for purposes that include informing and conducting drone operations. The UK NCP agrees that it is likely that BT's communications cable is a link in this internet, and that in making the contract BT would have anticipated that it would be used for military communications. Based on the information provided by both parties, it appears to the UK NCP that the cable was a general purpose product required under the contract to be high bandwidth and capable of being adapted by the customer to the customer's needs.
28. None of the information offered suggests that the cable was necessary to drone operations. None of the information suggests that it was

designed specifically for drone operations. Information offered by Reprieve about relevant dates suggests that one of the strikes affecting its clients took place before BT contracted to provide the cable. The Roadmap information suggests that the aim of developing the military internet was to make existing operations more effective (including better targeted). Reprieve's argument would appear to the UK NCP to apply equally to any other link in the military internet: the BT cable's proximity to the drone operations base is not in fact significant.

29. Taking account of all the information noted above, the UK NCP does not consider that Reprieve has substantiated an issue in relation to BT's obligations to address human rights impacts either of its activities or its business partnerships (its obligations under Chapter II Paragraph 2, and Chapter IV, Paragraphs 1, 2, 3 and 6).
30. The UK NCP has considered whether there may, however, be a due diligence issue under Chapter IV, Paragraph 5. Following information sharing in the original complaint, and separate observations on due diligence made by the UK NCP Steering Board (which are included in the new information provided by Reprieve), the UK NCP has considered whether there was an obligation on BT to review its due diligence to satisfy itself that it was adequate for this kind of risk.
31. The UK NCP notes that the note produced by the UK NCP Steering Board refers to foreseeability as the (English law) principle that would guide a (UK) company, and says that a company's due diligence should include consideration of the nature of its product and its customer.
32. In this complaint, the UK NCP has noted in Paragraphs 27 and 28 above that the product is of a general nature. With regard to the customer, the UK NCP understands that Reprieve challenges the policy of the US government rather than operational decisions of the specific defence agency that BT contracted with. The UK NCP has not been offered any information that findings of international authorities or policies of its (UK) home government should have suggested to BT that enhanced due diligence was warranted in supplying a general product to this customer.
33. The UK NCP has also taken into account whether it serves the purpose and effectiveness of the Guidelines to take forward a due diligence issue in this complaint, and discusses this at Paragraph 38 below.

Relevance of applicable law and procedures, including court rulings

34. The complaint referred to international law on human rights under the International Covenant on Civil and Political Rights (right to life, right to a fair trial), and also to international conventions on torture and war. The complainants do not refer to any rulings by international courts.

35. As noted at Paragraph 20 above, in support of the original complaint, the complainants referred to the UN Secretary General's 2013 report on Children in Armed Conflict and to 2012 remarks of the UN Special Rapporteur on Extrajudicial Executions. The UK NCP is aware that the Special Rapporteur has made subsequent reports to the UN on the issue.

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

36. The UK NCP notes that the complainants are pursuing legal action against the German government in connection with the role of a US military base in Germany in the operations that are the subject of this complaint.

Whether the consideration of the specific issue would contribute to the purpose and effectiveness of the Guidelines

37. The aims of the Guidelines as set out in the preface are: *“to ensure that the operations of [multinational] enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises”*.
38. The Preface to the Guidelines describes them as *“recommendations addressed by governments to multinational enterprises* and the UK NCP notes that the target of this complaint is the business relationship of a multinational with a state that adheres to the Guidelines. As noted by the NCP previously, the UK NCP does not examine the actions of any party other than the company identified in a complaint, and does not consider it would be within its remit to do this. The UK NCP therefore looks to home government policies and findings of international authorities in considering whether companies' Guidelines obligations arise in regard to a complaint involving a state business partner.
39. In considering a due diligence issue in this complaint, the UK NCP has also considered the extent to which it is dependent on the company providing information about its due diligence (since only the company has this information and the UK NCP has no powers to require it). In deciding whether to share information, it is to be expected that the company will consider whether the confidentiality the OECD says should apply to the complaint process will be respected.
40. The writer of the articles submitted in support of this complaint has subsequently published information about the complaint, including

information shared with the parties in the complaint under 'good faith' provisions that oblige them not to share it further.

41. The UK NCP does not consider that a breach of good faith automatically rules out further consideration of an issue (particularly where responsibility cannot conclusively be determined). But breaches of good faith clearly damage the prospects for resolving a complaint, whether by mediated agreement or by examination and recommendations from the NCP. More significantly, breaches of good faith risk damaging the wider NCP process and the opportunity for remedy it provides.

Next steps

42. As the complaint has been rejected, this Initial Assessment concludes the complaint process under the Guidelines.

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UK National Contact Point for the OECD Guidelines for Multinational Enterprises

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