

**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 (C) IN
RESPECT OF A BUSINESS
RELATIONSHIP WITH A COMPANY
IN RUSSIA**

10TH JANUARY 2013

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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 C because the issue is not substantiated in respect of UK Bank C's obligations under the Guidelines.**

The complaint and response

1. On 31st 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 C and two other UK banks¹. 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 relationship of confidence and mutual trust between enterprises and

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

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 1st 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 1st September 2011, or to new actions or events from 1st 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

- 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 C specifically:

- 7. The complainants alleged that UK Bank C has a business relationship with Company R as one of a group of financial enterprises providing a Project Finance Facility for the construction and commissioning of the production complex. In this context, the complainants said that UK Bank C made a corporate loan to Company R in 2008 and this loan had not yet matured.

Response of UK Bank C

- 8. UK Bank C responded on 15 October. It accepted that it has an ongoing business relationship with Company R, but said that it has met the standards in the Guidelines in this relationship. UK Bank C also drew the NCP's attention to what it said were a number of errors and inaccuracies in the complainants' allegations about the actions of Company R.
- 9. UK Bank C referred to supporting evidence of compliance mechanisms set for the health, safety, environmental and social impacts of Company R's production complex, and reports from independent consultants appointed to monitor these by UK Bank C and other lenders..
- 10. UK Bank C concluded that it is acting consistently with the Guidelines and the Equator Principles in its relationship with Company R. It added that it will continue monitoring and evaluating Company R's engagement with the complainants through the independent reporting arrangements already in place.

The UK NCP process so far

11. On 31st 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.
12. On 29 August the UK NCP informed the complainants of the agreed handling arrangements and asked them to clarify the complaint (see paragraph 4.).
13. On 29 August, the UK NCP forwarded details of the complaint and clarification request to UK Bank C and invited its response.
14. On 13 September the UK NCP received the complainants' clarification.
15. On 15 October the UK NCP received UK Bank C's response.
16. On 16 November, the complainants made a further submission commenting on UK Bank C's response, and on 29 November UK Bank C made a further response.
17. The UK NCP shared with both parties the details of the complaint, clarification, response and further submissions. Each party was offered a meeting with the UK NCP. The complainants did not take up the offer. The NCP met representatives of UK Bank C on 1 October to explain the complaints process, and shared the meeting notes with both parties.

UK NCP decision

18. The UK NCP **rejects** the complaint against UK Bank C. The 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:

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

Whether the issue is material and substantiated:

20. The UK NCP finds that the issue in respect of UK Bank C's obligations under the Guidelines is **not substantiated**. The NCP considered the following:
21. UK Bank C accepted that from 2008 it had a relationship with Company R to which obligations under the Guidelines applied, and that the relationship is ongoing.
22. From 2008 to 2011, the Guidelines requirement on UK Bank C in respect of its business partners was "*to encourage business partners.... to apply principles of corporate conduct compatible with the Guidelines*". The pre-2011 Guidelines did not require (or suggest) specific actions enterprises should take to encourage their business partners.

Pre-2011 Guidelines

23. There were, however, more specific requirements on UK Bank C in respect of the pre-2011 Guidelines requirement to "*apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate*". UK Bank C's self-regulatory practices included its membership of the Equator Principles. The loan to Company R was project finance to which the Equator Principles applied. To meet its obligations under the Equator Principles (and so observe the Guidelines requirement on self-regulatory practices) UK Bank C was obliged to require Company R to meet criteria relating to impact assessments, public consultation and disclosure, and development of a grievance mechanism. UK Bank C also had to include environmental and social compliance arrangements in its financing conditions for Company R, and provide for ongoing monitoring and independent audit of Company R's compliance.
24. UK Bank C referred in its response to the various documents provided under these arrangements by Company R and by the independent monitors appointed. Many of these documents are publicly available. They include reports on stakeholder engagement which note the concerns of the property owners represented by the complainants, and recommend that Company R continues to engage with them (but do not recommend more substantial remedial action by Company R).
25. The NCP considers that UK Bank C could reasonably regard the arrangements put in place to meet Equator Principles requirements (and so meet its Guidelines obligations on self-regulatory practices) as also meeting its Guidelines obligations in respect of business partners. Indeed, the requirements UK Bank C and its co-lenders made of Company R could be seen as going beyond the general encouragement the pre-2011 Guidelines require.

2011 Guidelines

26. The updated Guidelines applied by the UK NCP from September 2011 give enterprises additional and more specific obligations in respect of business relationships: to carry out due diligence, and to seek to prevent or mitigate actions of business partners that may have adverse impacts. As set out at Paragraph 5 above, UK NCP policy in applying these Guidelines to pre-existing relationships is to consider evidence that actions or events from September 2011 should have prompted an enterprise to review the relationship in the light of the updated Guidelines.
27. The complaint did not refer to any events or actions on or after 1 September 2011, apart from an appeal made by the complainants in January 2012 to Company R's Executive Director. The complainants do not say what form this appeal took, what response it received or whether UK Bank C would have been aware of the appeal.
28. In its response to the complaint, UK Bank C referred to two reports provided by different independent monitors in October 2011 and February 2012 (and also available publicly). These reports refer to the issues raised by the complainants. The reports conclude that Company R should continue to engage with the property owners represented by the complainants and should continue to monitor air pollution levels in the area of their properties and consider repeating other monitoring. But they conclude that Company R has otherwise met its obligations to the property owners, and do not propose any more substantial remedial action.
29. The NCP notes that the October 2011 monitoring report also refers to the size of the Sanitary Defence Zone undergoing a final revision by the competent authorities. Neither the complainants nor UK Bank C offered evidence about this consideration, however, and so the UK NCP has not considered it in reaching its decision on the complaint.

Additional submissions made by parties

30. The UK NCP was finalising its assessment before informing the parties of its findings when the complainants asked to make a further submission. The NCP considered this additional late submission and a further response to it made by UK Bank C.
31. In their submission, the complainants commended UK Bank C for setting up the monitoring arrangements for the project, but alleged that Company R had not complied with some recommendations of earlier monitoring reports and that this non-compliance was not recognised in later monitoring reports. The complainants alleged that UK Bank C should have noted this and concluded that it needed to take further

action to meet its Guidelines obligations. The complainants did not specify what action UK Bank C should have taken.

32. In its further response, UK Bank C noted that these allegations were not included in the initial complaint, and said that they were unsubstantiated. UK Bank C also noted that it could not reasonably be expected to second guess independent expert monitors.
33. Taking into account all the submissions made, the UK NCP considers that the evidence offered does not substantiate that UK Bank C has an obligation under the Guidelines to take action (beyond the arrangements to which the bank has already committed).

Other points noted by the NCP

Relevance of applicable law and procedures, including court rulings:

34. 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.

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

35. As the complaint has not been substantiated, no offer of mediation has been made. But the NCP notes that:
 - a) UK Bank C has undertaken to continue monitoring and evaluating Company R's compliance with relevant standards, and its own compliance with the Guidelines.
 - b) The latest independent monitoring reports recommend that Company R continues to engage with the property owners represented by the complainants.

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

36. As noted, the UK NCP considered allegations in relation to two other UK banks, and the NL NCP allegations in relation to a Netherlands based company. The alleged involvement of each company is different, and treatment of each complaint is only of limited assistance in determining how to proceed in the others.

37. The UK 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

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

10th January 2013

UK National Contact Point for the OECD Guidelines for Multinational Enterprises

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URN BIS/13/612