

# Linklaters



## Old dog, new tricks – Complaints under the OECD Guidelines for Multinational Enterprises

Old enough to adopt, apply for a pilot's licence and drink (even in the US), the National Contact Points (“**NCPs**”) for complaints under the **OECD Guidelines for Multi-national Enterprises** (“**Guidelines**”) are hardly the new kid on the block.

While recent years have seen the non-judicial grievance mechanism established to hear complaints against multi-nationals under the Guidelines become increasingly prominent, there is still room for stakeholders to improve awareness and understanding of the Guidelines' purpose and process. We explore the Guidelines and NCPs, how they work and why multi-national enterprises should be aware of them.

### Background

**The Guidelines are non-legally binding principles and recommendations that set the standard for responsible business conduct for multinational enterprises,<sup>1</sup> specifically covering areas such as human rights, labour rights, the environment and bribery.**

Adopted as part of the 1976 Declaration on International Investment and Multi-national Enterprises, the Guidelines were intended to provide non-binding principles and standards addressed to governments and enterprises with a view to providing an open and transparent environment for international investment and encourage enterprises to contribute to economic and social progress. They are expressed to apply to all multinational enterprises which are either headquartered or operate in an OECD member state or an adherent state (together covering a total of 50 jurisdictions).<sup>2</sup> Substantial revisions to the Guidelines in 2000 clarified the role and function of NCPs, resulting in the NCP complaints process we have today.

The NCPs offer a forum for stakeholders to raise complaints (known as “specific instances”) against multi-nationals they believe to have failed to meet the standards of responsible business conduct set out in the Guidelines. The NCPs, which are often a government office and represent the key institution for furthering the effective implementation of the Guidelines, are a non-judicial mechanism whose purpose is to provide a forum for resolution of issues related to the Guidelines. They do not have the power to issue binding judgments, order disclosure, or provide for direct remediation.

Complaints can be brought to the NCPs regardless of whether a multi-national has committed to implement the Guidelines or not (although NCPs cannot compel companies to appear or participate). The Guidelines are extraterritorial in effect, meaning that NCPs can hear complaints against enterprises concerning their global operations. They also extend beyond an enterprise's own activities, extending to their management of their business relationships. This means that complaints can also be brought in relation to incidents that occur in or in relation to an enterprise's supply chain.<sup>3</sup>

Since the 2011 inclusion of a human rights chapter in the Guidelines, following the launch of the UN Guiding Principles on Business and Human Rights, this has been the chapter most often referenced in NCP complaints (over 50% of complaints since 2011). The chapter relating to due diligence practices is the second most frequently referenced in complaints and is increasingly being leveraged by complainants to hold enterprises to account for activities in their wider group structure and supply (and value) chain.

The OECD's **Action Plan for strengthening NCPs from 2019-2021** noted that cases handled by NCPs had increased in terms of the complexity of issues and number of geographies involved.

<sup>1</sup> Multinational enterprise is a term which is explicitly not defined but is said to “usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways”: OECD Guidelines, page 17. See also: *UK NCP Final Decision on Lawyers for Israel Complaint*, para 9, finding that PwC was a multinational enterprise, despite its use of local structures in various jurisdictions.

<sup>2</sup> Adherent states currently include: all 37 OECD member states plus 13 non-OECD countries, namely Argentina, Brazil, Costa Rica, Croatia, Egypt, Jordan, Kazakhstan, Morocco, Peru, Romania, Tunisia, Ukraine and (as of February 2021) Uruguay.

<sup>3</sup> The wording of Principle 3 of the Guidelines indicates that by simply operating in an adherent state, an NCP would have jurisdiction to hear a complaint about that multinational's activities wherever they occur (even if not headquartered in an adherent state): “Governments adhering to the Guidelines encourage the enterprises operating on their territories to observe the Guidelines wherever they operate...”.

It is also notable that the 2019 OECD Annual Report on the Guidelines reported that the most prevalent sectors referenced in complaints were no longer just focused on businesses involved supplying goods (particularly in the manufacturing, wholesale and retail trade, and mining sectors) but also included service industries – the finance and insurance sector suffered the largest number of complaints in 2019. This year has even seen the first human rights complaint accepted by a NCP against a financial institution in relation to their asset management business and passive products.

### The NCP complaints process

The NCP complaints process is set out in Part II of the Guidelines, which requires adhering states to set up an NCP. To date, 49 states have established a NCP. The **UK NCP**, managed by the Department for International Trade, has been the busiest of all NCPs having handled 54 complaints since 2000.<sup>4</sup>

#### Who can bring a complaint?

Complaints to NCPs can be made by a very broad range of interested parties, including members of the public, the business community, worker organisations and other non-governmental organisations.<sup>5</sup>

#### What is the process for complaints?

The Guidelines set certain guiding principles and minimum standards of procedure but permit governments some flexibility in the way they organise their NCP.<sup>6</sup> Broadly speaking, the NCP complaint process has three stages.

#### Stage One

This involves an initial assessment of whether the complaint merits further examination. The NCP evaluates (amongst other things): (i) the nature of the complaining party's interest in the issue; (ii) whether the issue is material and substantial; (iii) the link between the enterprise's activities and the implementation of the Guidelines; and (iv) how similar issues have been treated in other proceedings.<sup>7</sup>

As part of the initial assessment, the NCP will either determine that the issues raised:

- > do not merit further consideration and make a public statement to that effect; or
- > merit further consideration in a second stage of dispute resolution and offer to assist with informal resolution of those issues.

NCPs should aim to conclude this stage within three months. The UK NCP states that, during the first stage, it aims to write to the enterprise named in the complaint within 10 days of receipt of the complaint and usually gives the enterprise 20 working days to provide a response, after which it will circulate the draft initial assessment to the parties for comment.

The UK NCP typically makes available its initial assessment, as do some of the other NCPs such as the Dutch NCP (which takes third place in having received the most specific instances behind the UK and US). Others however tend only to disclose their final assessment or the initial assessment where the complaint is rejected. This appears to be the case with the popular French and German NCPs (joint fourth on the list).

#### Stage Two

This part of the process sees the NCP offer its “good offices” to the parties. This includes dialogue, conciliation and mediation services which the parties can use to seek to resolve the complaint and offer the ability to seek advice from experts or other groups. It is worth noting that the UK NCP does not have any legal powers to compel parties to provide information as part of this process, nor can it compel an enterprise to engage (or penalise them for failure to do so).

#### Stage Three

The third stage of the process involves the publication of a statement by the NCP (which they aim to do within three months) on the issues raised in the complaint, the support offered by the NCP and the outcome. NCPs may also use the statement to make (non-binding) recommendations to the enterprise or to clarify expectations under the Guidelines. The parties will be given the opportunity to comment on the statement and can issue a response should they choose.<sup>8</sup>

As the Guidelines are relatively high-level, the UK NCP has produced **its own detailed procedural guidance** on how it addresses complaints. The UK NCP's procedures include a fourth stage whereby, if the NCP has made recommendations on compliance with the Guidelines, it will ask the parties to provide a progress update on compliance by a certain date, then publish a follow-up statement summarising its findings.

Overall, the NCP procedure should (according to the Guidelines) take 12 months from receipt of the complaint. Unfortunately in practice, due in no small part to human and financial resourcing difficulties (acknowledged in the 2019 NCP Progress Report issued by the OECD Ministerial Council), the process often takes much longer.

### Packing a punch – a new form of corporate accountability?

With the global increase in attention on environmental, social and governance (ESG) issues leading to heightened expectations (and requirements) of corporate conduct from governments, investors, NGOs and civil society, the Guidelines and NCPs, with their extra-territorial and cross-border reach represent a potentially powerful mechanism for holding multi-national enterprises to account.

But the NCPs do more than just offer a forum for a much broader range of complaints than traditional judicial mechanisms typically permit. While they cannot impose legally binding judgments, NCPs have still been able to have a substantial impact on the actions of multinational enterprises, including changes in policy, improvements to processes, operational and business impacts and enabling the provision of remedies direct to impacted stakeholders.

<sup>4</sup> <https://www.gov.uk/government/publications/oecd-peer-review-of-the-united-kingdoms-national-contact-point-government-response-october-2020/uk-government-response-to-the-oecd-peer-review-of-the-united-kingdom-national-contact-point>.

<sup>5</sup> OECD Guidelines, page 72, Implementation in Specific Instances; UK Department for International Trade: <https://www.gov.uk/guidance/uk-national-contact-point-for-the-organisation-for-economic-co-operation-and-development-oecd-guidelines-for-multinational-enterprises>.

Other NCPs and governments of non-adhering countries can also make enquiries of another state's NCP – see page 80.

<sup>6</sup> OECD Guidelines, page 78.

<sup>7</sup> OECD Guidelines, page 82-83.

<sup>8</sup> OECD Guidelines, page 85.

## Examples of complaints and their impact

- > A complaint was made to the French NCP against a multi-national manufacturing enterprise in relation to adverse impacts of that enterprise's operations on the land surrounding the facility. It resulted in the enterprise voluntarily undertaking steps to conduct environmental, social and human rights assessments of its project and committing to developing plans to adapt its CSR policy and internal due diligence systems accordingly. Follow-up NCP reports indicated that due diligence has now been incorporated into operations and the enterprise has helped develop innovative standards in the sector.
- > A NGO complaint submitted to the UK NCP alleged that the exploration activities of a British oil company abroad did not align with the human rights, due diligence, environmental protection and stakeholder engagement aspects of the Guidelines. Following mediation facilitated by the UK NCP, the company agreed to discontinue its exploration activities unless both UNESCO and the local government agreed such activities were not incompatible with the World Heritage status of the area being explored.
- > In 2017 a number of NGOs submitted a complaint to the Dutch NCP concerning a bank's failure to observe the Guidelines on environment, disclosure and consumer interests by failing to sufficiently commit and contribute to targets set in the 2016 Paris Agreement on climate. The Dutch NCP facilitated mediation between the parties resulting in an agreement in 2019, whereby it was agreed the bank would set intermediary targets in line with the Paris Agreement.
- > Two complaints brought before the French and Polish NCPs have in recent years resulted in: (i) a subsidiary of an asset manager subject to complaint divesting its shareholding (invested on behalf of a pension fund) in an enterprise said to be in breach of the Guidelines, as well as the asset manager integrating the OECD Due Diligence Guidance for Institutional Investors into its asset management activities; and (ii) an internet service company operating an advertising portal voluntarily remove over 16,000 adverts the content of which was deemed not to align with environmental protection and sustainable development principles.
- > A complaint to the Dutch NCP about a consumer goods manufacturer in respect of one of its subsidiary's activities in a third jurisdiction resulted in an agreement whereby the enterprise agreed to pay financial compensation to those adversely impacted.

## Implications for businesses

### Reputational risk

The act of making a complaint tends to be accompanied by significant publicity. The NCP will also report publicly on the complaint, making findings and recommendations which can pose real challenges to the business concerned. Any refusal to engage in mediation (or the complaints process more generally) is also recorded and risks exacerbating reputational issues, as well as increasing the chance of incorrect factual assertions going unaddressed. The reputational risks worsen if (as the UK NCP's procedures provide for) a NCP's follow-up report indicates that recommendations made by a NCP have not been implemented.

### Interaction with other legal proceedings

Businesses should also be cognisant of the risk that claimants in civil proceedings may integrate a complaint under the Guidelines into a wider litigation strategy (or use it as an alternative/precursor to a civil claim, for example for reasons of cost and reduced complexity or to seek to bolster a future claim).

The Guidelines provide that NCPs must take into account the impact of parallel domestic or international proceedings. The existence of parallel proceedings addressing similar issues is not, of itself, grounds for an NCP to dismiss a complaint at the initial investigation stage. Instead, the NCP must decide whether proceeding: (1) could make a positive contribution to resolution of issues raised in the complaint; and (2) whether it would create serious prejudice for the parties involved in parallel proceedings; and/or (3) would cause a contempt of court situation.<sup>9</sup>

Guidance issued by the UK NCP says serious prejudice is likely to arise where a finding by the NCP "will be accepted by a foreign court as a deciding factor in an important issue before it" or where material provided to the NCP could prejudice a director's right to silence in criminal proceedings.

The NCP's factual findings may still end up having a substantial impact on parallel proceedings, even where serious prejudice is not made out. One way this might occur is that publicity arising from the complaint under the Guidelines may alter settlement dynamics in other proceedings.

### Conclusion

The developing trends in relation to the scope and impact of complaints demonstrate the need for awareness of both the Guidelines and the NCPs. With scrutiny of sustainability likely to continue to increase in future, it may be worth multi-nationals' time to make themselves familiar with: (i) the recommendations laid out in the Guidelines, including considering how best to integrate them into their policies, processes and operations; and (ii) the NCP process, which despite its limitations has shown an ability to have an impact and offers an alternative to traditional judicial mechanisms. Overall, it's fair to say, there's life in the old dog yet.

<sup>9</sup> OECD Guidelines, page 83.

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