Specific Instance under the OECD Guidelines for Multi-National Enterprises

APPLICATION FOR REVIEW OF THE INITIAL ASSESSMENT - RECOMMENDATION OF THE REVIEW COMMITTEE

JANUARY 2014

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Background

On 24 October 2013, an Application was made by a UK-based NGO for Review of the Initial Assessment by the UK National Contact Point in October 2013, entitled 'Complaint from a UK NGO against a UK Telecommunications Company'.

On receipt of the Application, the Steering Board were notified, and invited to declare their availability to participate in a Review. A Review Committee was established, comprising Jeremy Carver and Dan Leader, two External members of the Steering Board, and Peter Astrella of UKTI, an Internal member. On 12 November, the UK NCP submitted its written comments on the Application. The Applicant has commented on this by letter dated 19 November. The Company has not commented.

The Review Committee has duly considered the material provided, including the Initial Assessment, and, pursuant to paragraph 6.1 of the Review Procedure, has determined how the Application may best be addressed. Following initial exchanges by e-mail and telephone between members of the Committee, the Committee has agreed the following Recommendation to the Steering Board.

The Application

The Applicant, a well known NGO that campaigns for justice and the rule of law, seeks review of the Initial Assessment on grounds that the NCP failed to follow its own procedures by:

1. Failing to consider public statements made by the Company about the extent of due diligence and other information in the public domain about the Company's activities; and
2. Failing to "draw out" from the Company more information in the public domain about the nature and use of the service that is the subject of the Complaint.

As such, the Review appears to turn on the question of whether the NCP was under an obligation to inform itself – either or both from the Company and by means of its own public domain research – about the activities of the Company's customer (a government instrumentality) and the particular use to which the Company's services may have been applied by its customer so as to abuse the human rights of those whose interests the Applicant is representing.

We note that this issue of the NCP's obligation to take account of information in the public domain, but not made available by either party to the Complaint, was considered by the Steering Group in an earlier review, in which the Steering Board had clarified that "nothing in the Procedures requires the NCP

to undertake independent research in considering a complaint".[1] This must apply to information both in the public domain and available from the Company. If the NCP does carry out research to inform itself about background to the Complaint, which it generally does, and such information is relevant for the Initial Assessment the NCP will make, that information must be shared with the parties so that they can comment on it prior to the assessment being made. But if the information is not relevant to the assessment, there is no call for it to be further disseminated. The NCP will always refer a proper Complaint for comment by the company against which it is filed, and will take account of any information that the company provides. During the initial assessment phase, the NCP may, but is under no obligation to, interrogate the company about the information it does, or does not, provide; and it will share with the complainant such information as it does receive.

Role of the Review Committee

The review process is intended to identify procedural errors in the NCP's decision-making, and to ensure that, if identified, they are corrected to the extent possible. In the published Guidance, the powers of the Review Committee are limited to the identification and correction of procedural errors. The Review Committee does not have the power to examine or rule upon the substance of the NCP's decision. As a result, the Review Committee is not able to review the NCP's substantive decision that the complaint is not supported by sufficient evidence. The Application is based on the premise that the NCP has failed to take account of public statements by the Company regarding its due diligence in relation to the service provided to its customer. Specifically, in its letter of 19 November, the Applicant points to the ready availability of what it considers to be relevant information. It also noted that certain information was available to the Company, which "had refused to engage with us", so that the NCP should have used its "position" to obtain that information.

The Applicant acknowledges its own failure to provide the information said to exist, but rejects the comment by the NCP that the onus was on the Applicant to provide the relevant information. This is to misunderstand the role of the NCP, which is clearly set out in the NCP's procedures. The role of the NCP is to receive complaints that multinational corporations have transgressed the OECD Guidelines. When such a complaint satisfies the Initial Assessment, the parties will be invited to participate in mediation of the complaint, failing which it is the duty of the NCP to carry out its own assessment in order to determine whether the Guidelines have been breached.

Above all, the procedure of the NCP, progressively defined by the Steering Board, is to provide complainants with an independent forum that is

[1] October 2012 review of the complaint from an individual in India: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/34660/12-1230-specific-instance-oecd-guidelines-multinational-enterprises-review.pdf

straightforward, inexpensive and prompt. The Steering Board expects the NCP to make its Initial Assessment within one month of receipt of a Complaint. This is often difficult to achieve while the NCP is clarifying the Complaint or obtaining comments from the company. But it would be impossible if the NCP were under an obligation to conduct detailed research, particularly to fill gaps in information that the Complainant might have provided in making the Complaint.

The Steering Board should perhaps re-emphasise that it is not the function of the NCP to conduct such research at the Initial Assessment phase, and that complainants, when first making a Complaint, should make available to the NCP all the information it believes the NCP should take into account when making the Initial Assessment.

Conclusion on the Review

Consistent with Steering Board's decision on the October 2012 Review, this Application for Review must fail. The NCP has made a finding in its Initial Assessment that the Complainant has "not substantiated a link between the company's actions and the issues raised sufficient to give it any obligation under the Guidelines beyond a general level of due diligence". It goes on to find that the company "has provided reports as evidence that it meets this general due diligence requirement." The Review Committee does not have the power to review these substantive findings by the NCP. Thus, the Application asserts that the procedural failure by the NCP was not to conduct research or interrogate the Company to provide the missing "link". The NCP is not under a duty to make such enquiries at this stage. Accordingly, no procedural failing has occurred.

Nevertheless, the Application raises a novel issue, on which the Steering Board may sensibly provide guidance for the benefit of the NCP and future Complaints. This concerns due diligence and its requirements in the current OECD Guidelines. The NCP itself makes the point in paragraph 13 of its response, when noting "We also consider that the review raises important issues about the information required to trigger a company's obligations under the Guidelines with regard to its links to an impact". The Committee agrees with this comment and addresses the point in a separate note to the Steering Board.

Recommendation

The Review Committee recommends that the Steering Board should decline the Application for a review of the Initial Assessment, and should communicate the reasons for so doing as set out above.

17 January 2014

Separate Policy Note on Due Diligence

The 2012 Update to the OECD Guidelines introduced a principle that companies 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 other principles.[2] This is underscored in the Human Rights Chapter of the Guidelines, which calls on companies to:

" Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of risks of adverse human rights impacts."[3]

The Update also laid emphasis on a company's supply chains, where for example an adverse impact may be "*directly linked to their operations, products or services by a business relationship*".

Further, the Commentary on the General Principles of the Guidelines states at page 22:

"If the enterprise identifies a risk of contributing to an adverse impact, then it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible."

The issue which arises in the current case is identified by the NCP in the Response to the Review dated 19 November 2013 at paragraph 13:

"We also consider that the review raises important issues about the information required to trigger a company's obligations under the Guidelines with regard to its links to an impact".

In this Complaint, it was asserted that the services provided by the Company to its customer were closely linked to the adverse human rights impacts claimed. The Company denied this, claiming that its services were of a general nature and this it was not responsible for the use to which its customer put them. The Initial Assessment has found that "*The claimants have not identified a specific link between the provision of the telecommunications service and the human rights impacts on the Yemeni citizens complained of.*" (paragraph 14 of Final Statement). However, as the NCP identifies in its Response to the Review, the wider issue is in what circumstances are a company's due diligence obligations triggered? More specifically, once a heightened risk of human rights abuse has been identified by a complainant, is it for the complainant to prove a 'specific link' before any heightened due diligence requirements are engaged? Or, at that stage, is it for the company to demonstrate that it has conducted adequate due diligence in order to comply with the Guidelines?

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[2] General Policies A.10 & 12, see http://www.oecd.org/investment/mne/48004323.pdf, p.20
[3] Same citation, p. 31.

In the view of the Review Committee, an obligation to conduct due diligence cannot be an open-ended commitment to ensure that no harm ensues from whatever product or services it may provide to its customers. This would give rise to a responsibility for whatever a customer (or its further customers) might do – a responsibility that would amount to an open and unrewarded insurance policy against any harm that might subsequently follow. English law makes no such requirement. Indeed, save for narrowly defined circumstances of strict liability, no legal system would provide for such wide-ranging liability.

English law, as a general rule, looks to **foreseeability** as a necessary element; and it seems to the Review Committee that this may be a helpful factor to bear in mind when interpreting the due diligence requirements. However, the further question which arises is, once a foreseeable risk of contributing to an "adverse impact" has been identified by the complainant, is that complainant then required to go on to identify a "specific link" between the activities of the company and the adverse impact? The concern of the Review Committee is that proof of a "specific link" may be beyond the capacity of most complaints and that the Guidelines themselves do not propose a test of such stringency.

For example, if there is something inherent in the goods or services that a company provides which entails **risk of harm**; alternatively, if the activities or reputation of the customer to whom they are being supplied gives rise to such a risk, it may well be that the principle of due diligence requires a company to conduct inquiries specific to such risks before the goods or services are supplied. It is for the company to demonstrate that they have complied with the due diligence requirements of the Guidelines and taken "necessary steps to cease or prevent its contribution" to any risk of harm. A failure to do so may found a Complaint under the OECD Guidelines. But, in the absence of such factors, no more than general responsibility for risk-based due diligence can be expected.

Given the central importance of the Due Diligence provisions of the Guidelines which arise in this case, we invite the NCP to publish more detailed guidance with regard to the scope of the Due Diligence requirements so that both complainants and companies are clear as to the obligations they place upon companies.

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17 January 2014

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