

**Final Statement by the UK National Contact Point (NCP) for the OECD
Guidelines for Multinational Enterprises (the Guidelines)**

**Complaint from the Malaysian Trade Union Congress against British
American Tobacco Malaysia Berhad (Malaysia)**

SUMMARY OF THE CONCLUSIONS

- The UK NCP took the view that it could not examine the ruling of 29 October 2007 of the Malaysian Director General of Trade Unions, nor the Malaysian Ministry of Human Resources' decisions of 14 December 2006 and 8 March 2007, without expressing a view on the legal merits of these acts. This would have the risk, in the light of Chapter IV of the Guidelines, of reaching different conclusions from those reached by the Malaysian authorities. This would have had the effect of purporting to override Malaysian law, or of placing British American Tobacco Malaysia Berhad (BATM) in a situation where it faced a conflict between the requirements of the UK NCP's conclusions and Malaysian law. This would be contrary to the Guidelines. The UK NCP also had no means to determine whether the weakening of the "British American Tobacco Employees' Union" (BATEU) was a motivating factor for BATM's re-classifications, without calling into question the two rulings of the Malaysian Ministry of Human Resources. This action would have been contrary to the Guidelines. Therefore, the UK NCP did not examine the allegations under paragraphs 8(a), 8(b), 8(c) and 8(e) below, and, as a result, it cannot reach any conclusion as to whether BATM breached Chapter IV(1)(a) of the Guidelines.
- The UK NCP however concludes that BATM failed to uphold the higher standards on employment and industrial relations reflected through Chapter IV(8) of the Guidelines by failing adequately to consult the BATEU about the re-classifications before finalising the decision to carry them out and to advertise the new positions. The UK NCP therefore concludes that BATM breached Chapter IV(8) of the Guidelines.
- Although the UK NCP could ascertain the expected and recommended standards on employment and industrial relations in Malaysia, it could not reliably determine whether BATM's practices in this instance were consistent with the standards of employment and industrial relations actually observed by comparable employers in Malaysia in similar situations. Therefore, the UK NCP has insufficient evidence to determine whether or not BATM acted consistently with Chapter IV(4)(a) of the Guidelines.
- In order to assist BATM in minimising the risk of committing the same breaches of the Guidelines in the future, the UK NCP recommends that British American Tobacco PLC should encourage BATM to establish a permanent and regular process to consult and inform its employees on issues of mutual concern before key decisions of mutual concern are taken by management. Such process should be endorsed by both management and employees (and their representatives, where they exist). Both parties are asked to provide the UK NCP with a substantiated update by 6 June 2011 on measurable progress towards BATM's implementation of this recommendation.

BACKGROUND

OECD Guidelines for Multinational Enterprises

1. The Guidelines comprise a set of voluntary principles and standards for responsible business conduct, in a variety of areas including disclosure, employment and industrial relations, environment, combating bribery, consumer interests, science and technology, competition, and taxation.
2. The Guidelines are not legally binding. However, OECD governments and a number of non OECD members are committed to encouraging multinational enterprises operating in or from their territories to observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country.
3. The Guidelines are implemented in adhering countries by NCPs which are charged with raising awareness of the Guidelines amongst businesses and civil society. NCPs are also responsible for dealing with complaints that the Guidelines have been breached by multinational enterprises operating in or from their territories.

UK NCP complaint procedure

4. The UK NCP complaint process is broadly divided into the following key stages:
 - (1) Initial Assessment - This consists of a desk based analysis of the complaint, the company's response and any additional information provided by the parties. The UK NCP will use this information to decide whether further consideration of a complaint is warranted;
 - (2) Conciliation/mediation OR examination - If a case is accepted, the UK NCP will offer conciliation/mediation to both parties with the aim of reaching a settlement agreeable to both. Should conciliation/mediation fail to achieve a resolution or should the parties decline the offer then the UK NCP will examine the complaint in order to assess whether it is justified;
 - (3) Final Statement – If a mediated settlement has been reached, the UK NCP will publish a Final Statement with details of the agreement. If conciliation/mediation is refused or fails to achieve an agreement, the UK NCP will examine the complaint and prepare and publish a Final Statement with a clear statement as to whether or not the Guidelines have been breached and, if appropriate, recommendations to the company to assist it in bringing its conduct into line with the Guidelines;
 - (4) Follow up – Where the Final Statement includes recommendations, it will specify a date by which both parties are asked to update the UK NCP on the company's progress towards meeting these recommendations. The UK NCP will then publish a further statement reflecting the parties' response.

5. The complaint process, together with the UK NCP's Initial Assessments, Final Statements and Follow Up Statements, is published on the UK NCP's website:
<http://www.bis.gov.uk/nationalcontactpoint>.

DETAILS OF THE PARTIES INVOLVED

6. **The complainant.** The "Malaysian Trades Union Congress" (MTUC) is the recognised federation of trade unions representing workers in Malaysia¹. The MTUC brought the complaint on behalf of the BATEU, an affiliate of the MTUC².
7. **The company.** British American Tobacco PLC is a UK registered multinational involved in the manufacture, distribution or sale of tobacco products. The company is listed in the FTSE 100. The allegations contained in the complaint from the MTUC were directed against BATM. The majority of BATM's shares are held by British American Tobacco PLC and by British American Tobacco Holdings (Malaysia) BV. British American Tobacco Holdings (Malaysia) BV is wholly owned by British American Tobacco PLC³. Therefore, British American Tobacco PLC is BATM's controlling company.

COMPLAINT FROM THE MALAYSIAN TRADE UNION CONGRESS

8. On 11 December 2007, the MTUC submitted a complaint, on behalf of the BATEU, to the UK NCP under the Guidelines in relation to BATM's operations in Malaysia. The MTUC made the following allegations:
- a) That in August 2006 BATM re-classified "process technicians", a non-managerial role, as "process specialists", a managerial role, whereas there was in fact little difference between the two roles.
 - b) That during 2006 BATM re-classified "trade marketing and distribution representatives", a non-managerial role, as either "trade marketing representatives" (TMRs) or "sales and distribution representatives" (SDRs), both managerial roles, whereas there was in fact little difference between the old and new roles.
 - c) That the effect and intention of the re-classifications described above was to reduce BATEU's membership by some 60% because under Malaysian law the BATEU may only represent employees in non-managerial roles, and may not represent workers employed by any company other than BATM. The MTUC alleged that this

¹ International Trade Union Confederation (ITUC), *List of affiliated organisations*, 21 June 2010 (available at http://www.ituc-csi.org/IMG/pdf/No_36_-_Affiliated_Organisations-2.pdf, visited on 10 December 2010).

² Malaysian Trade Union Congress, <http://www.mtuc.org.my/affiliates.htm>, visited on 10 December 2010.

³ Mint Global - Bureau Van Dijk, *MINT reports on British American Tobacco Malaysia Berhad, British American Tobacco PLC, and British American Tobacco Holdings (Malaysia) BV*, <http://www.bvdinfo.com/Home.aspx>, visited on 10 December 2010.

virtually eliminated BATEU's bargaining strength for the purpose of signing collective agreements and also reduced the number of workers covered by the collective agreements signed to date.

- d) That BATM was required under the applicable collective agreements to consult the BATEU about the re-classifications described above, but that it failed to do so adequately or at all, and that it harassed union members into applying for the reclassified non-unionised positions.
 - e) That on 29 October 2007, at BATM's request, the Director General of Trade Unions (DGTU) ruled that the BATEU could not represent employees of both BATM and its subsidiaries, notwithstanding that the BATEU had done so for many years previously. The BATEU subsequently applied for a judicial review of that ruling and, on 15 July 2010, the Malaysian High Court ruled in favour of the DGTU. The UK NCP understands that the BATEU has appealed this ruling.
9. The MTUC submitted that BATM's alleged conduct as summarised above was contrary to the following chapters of the Guidelines⁴:

"Chapter IV. Employment and Industrial Relations

Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices:

1(a). Respect the right of their employees to be represented by trade unions and other bona fide representatives of employees, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on employment conditions.

[...]

4(a). Observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country.

[...]

7. In the context of bona fide negotiations with representatives of employees on conditions of employment, or while employees are exercising a right to organise, not threaten to transfer the whole or part of an operating unit from the country concerned nor transfer employees from the enterprises' component entities in other countries in order to influence unfairly those negotiations or to hinder the exercise of a right to organise.

8. Enable authorised representatives of their employees to negotiate on collective bargaining or labour-management relations issues and allow the

⁴ OECD, *OECD Guidelines for Multinational Enterprises*, pp. 17-18 (downloadable from www.oecd.org/dataoecd/56/36/1922428.pdf - visited on 10 December 2010).

parties to consult on matters of mutual concern with representatives of management who are authorised to take decisions on these matters”.

RESPONSE FROM BRITISH AMERICAN TOBACCO

10. BATM responded to the MTUC’s allegations by stating:
- (a) In relation to the claim at 8(a) above, that the BATEU asked the Director General of Industrial Relations (DGIR) to investigate whether process specialists were correctly defined as managerial posts. Following the DGIR’s investigation, in late 2006 or 2007, the Malaysian Ministry of Human Resources ruled that they were. The BATEU has subsequently applied for a judicial review of that ruling and that application remains pending.
 - (b) In relation to the claim at 8(b) above, that BATM asked the DGIR to investigate whether TMRs and SDRs were correctly defined as managerial posts. On 14 December 2006, the Malaysian Ministry of Human Resources ruled that they were.
 - (c) In relation to the allegations at paragraph 8(c) above, that the re-classifications of “process technicians” and “trade marketing and distribution representatives” were made in order to enhance the company’s efficiency and effectiveness, involve greater responsibility and were therefore correctly reclassified at managerial level.
 - (d) In relation to the allegations in paragraph 8(d) above, that BATM respects trade unions’ rights and freedom of association; that workers were not forced to apply for the new positions; and that BATM was not required to consult the BATEU on the creation of managerial posts (but that BATM however notified the BATEU of potential redundancies).
 - (e) In relation to the allegations in paragraphs 8(d) and 8(e) above, that under Malaysian law, a single union cannot represent employees in both managerial and non-managerial roles; and that, as a result, the BATEU can only represent employees in non-managerial roles because its collective agreement with BATM only covers employees in non-managerial roles. As a result, the BATEU cannot legally represent “process specialists”, “trade marketing representatives” and “sales and distribution representatives”.
 - (f) In relation to the allegations in paragraph 8(e) above, that under Malaysian law a single union cannot represent the employees of both a parent company and its subsidiaries, and that the DGTU’s ruling of 29 October 2007 was therefore correct, notwithstanding BATEU’s earlier representation of staff from both BATM and its subsidiaries. In this case, “process specialists” are formally employed by the “Tobacco Importers & Manufacturers Sdn. Berhad” (TIM), a subsidiary of BATM; “trade marketing representatives” and “sales and distribution representatives” are formally employed by the “Commercial Marketers and Distributors Sdn. Bhd” (CMD), also a subsidiary of BATM.

UK NCP PROCESS

11. The UK NCP received the complaint from the MTUC on 11 December 2007. British American Tobacco PLC and BATM responded to the allegations on 13 December 2007, 9 January 2008 and 28 January 2008. On 9 April 2008, the UK NCP published its Initial Assessment accepting the complaint from the MTUC as a Specific Instance under the Guidelines. The UK NCP agreed to consider the alleged breach by BATM of the following Chapters of the Guidelines: IV(1)(a), IV(4)(a), and IV(8). The UK NCP also clarified that Chapters IV(1)(a) and IV(8) covered the two key issues raised in the MTUC's complaint: (a) whether the restructuring undertaken by BATM intentionally caused a reduction in the membership of the BATEU; and (b) whether consultation with the BATEU took place before and during the restructuring. The UK NCP did not accept for consideration the alleged breach of Chapter IV(7) because no supporting evidence was provided by the MTUC.
12. On 9 April 2008, the UK NCP also offered professional conciliation/mediation to the parties in order to facilitate an amicable solution to the complaint. On 15 April 2008, British American Tobacco PLC (and on 15 May 2008, BATM) declined the offer of conciliation/mediation on the ground of ongoing legal proceedings in Malaysia. Therefore, on 21 April 2008, the UK NCP suspended the complaint process in the light of ongoing legal proceedings in Malaysia.
13. Between November 2009 and April 2010, the UK NCP reviewed this Specific Instance in the light of its parallel proceeding guidance (which was endorsed by the UK NCP's Steering Board on 16 September 2009⁵). Having sought the views of both parties, the UK NCP informed both parties on 6 April 2010 that it would apply the guidance to this Specific Instance and progress the complaint in accordance with the UK NCP's complaint procedure⁶. The UK NCP offered again conciliation/mediation to the parties.
14. On 20 April 2010, BATM declined the offer on the grounds of ongoing legal proceedings in Malaysia and asked the UK NCP to reconsider its decision to progress the complaint. On 30 July 2010, the UK NCP wrote to the parties informing them that, in light of the explanation for the restructuring provided by BATM and the subsequent official rulings by Malaysian authorities, the UK NCP considered that it would be unproductive to examine further the question of whether the restructuring undertaken by BATM intentionally caused a reduction in the membership of the BATEU (issues 8(a), 8(b) and 8(c) in the list of MTUC's claims above). However, the UK NCP considered that it would

⁵ UK NCP, *Approach of the UK NCP to Specific Instances in which there are parallel proceedings*, available at <http://www.bis.gov.uk/files/file53069.pdf>, visited on 10 December 2010.

⁶ UK NCP, *UK National Contact Point (NCP) procedures for dealing with complaints brought under the OECD Guidelines for Multinational Enterprises*, available at <http://www.bis.gov.uk/files/file53070.pdf>, visited on 10 December 2010.

be appropriate to continue to examine whether consultation with the BATEU should have, and did, take place before and during the restructuring (issue 8(d) in the list of claims above), and, if consultation did not take place, whether that constituted a breach of the Guidelines. The UK NCP also asked both parties to submit by 13 September 2010 any document that the UK NCP should examine in relation to the complaint from the MTUC. BATM responded to this request on 6 September 2010. The MTUC did not respond to this request. On 23 November 2010, the UK NCP asked the parties to submit by 7 December 2010 supplementary information in relation to the complaint. Both parties responded to this request.

15. All the evidence received by the UK NCP on this complaint has been shared with the parties.

UK NCP ANALYSIS

16. The analysis of the complaint against BATM will address the following key areas. Firstly, it will explain the UK NCP's reasoning behind the decision to exclude some elements of the MTUC's complaint from the examination process. Secondly, it will clarify the meaning of "adequate consultation". Thirdly, it will examine the issue of whether BATM should have consulted the BATEU, whether the BATEU was adequately consulted before and during the restructuring, and whether BATM harassed union members into applying for the reclassified non-unionised positions.

Elements of the complaint not examined by the UK NCP

17. In the course of correspondence with the UK NCP, the parties confirmed that the following two judicial reviews related to the complaint were pending in Malaysia:
 - a) Judicial review requested by the BATEU of the DGTU's ruling of 29 October 2007 that the BATEU could not represent employees of both BATM and its subsidiaries. The UK NCP understood that on 15 July 2010, the Malaysian High Court ruled in favour of the DGTU but that the BATEU subsequently appealed this ruling. At the time of writing, the appeal is still pending.
 - b) Judicial review requested by the BATEU of the decision of 8 March 2007 of the Malaysian Ministry of Human Resources that process specialists were correctly defined as managerial posts. At the time of writing, the ruling is still pending.
18. In addition, BATM confirmed that it asked the DGIR to investigate whether TMRs and SDRs were correctly defined as managerial posts. On 14 December 2006, the Malaysian Ministry of Human Resources ruled that they were. This decision has not been judicially reviewed.

19. The Guidelines⁷ clearly state that: *“Obeying domestic law is the first obligation of business. The Guidelines are not a substitute for nor should they be considered to override local law and regulation. They represent supplementary principles and standards of behaviour of a non-legal character, particularly concerning the international operations of these enterprises. While the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in a situation where it faces conflicting requirements”*.
20. In light of the above, the UK NCP took the view that it could not examine the DGTU’s ruling of 29 October 2007, nor the Malaysian Ministry of Human Resources’ decisions of 14 December 2006 and 8 March 2007, without expressing a view on the merits of these acts, with the risk, in the light of Chapter IV of the Guidelines, of reaching different conclusions from those reached by the Malaysian authorities. This would have had the effect of purporting to override Malaysian law, or of placing BATM in a situation where it faced a conflicting requirement between the UK NCP’s conclusions and Malaysian law, which is contrary to the Guidelines. Therefore, the UK NCP did not examine the allegations made by the MTUC under paragraphs 8(a), 8(b), and 8(c) above.
21. The UK NCP also considered whether it could usefully examine the MTUC’s allegation under paragraph 8(c) above. In particular, the UK NCP noted that, in its response of 30 May 2007 to the general secretary of the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations (IUF), which includes the BATEU amongst its affiliates⁸, British American Tobacco PLC stated that *“Changes in the business environment have led BATM to implement a range of initiatives to restructure their operations as well as their workforce, in order to enhance efficiency and effectiveness”* and that *“the Industrial Relations Department of Malaysia has conducted an investigation on the claim of ‘union-busting’ and we [British American Tobacco PLC] have been notified that after due investigation, there is no basis for this claim”*.
22. On 9 January 2008, British American Tobacco PLC further clarified that *“Over the years, BATM has sought to enhance production efficiency and has accordingly introduced more sophisticated machines. This has generated a need to replace Process Technicians with a smaller group of more highly skilled specialists who would not be purely machine operators but would manage the entire process as part of self-managing teams [...] BATM decided that the way forward was for it to market and distribute BATM’s products directly and have its own personnel to do this [...] As such, the functions and responsibilities of the existing TM&D [Trade Marketing & Distribution] Reps will also*

⁷ OECD, *Commentary on the OECD Guidelines for Multinational Enterprises*, paragraph 2, p. 39 (downloadable from www.oecd.org/dataoecd/56/36/1922428.pdf - visited on 10 December 2010).

⁸ IUF, *IUF Affiliates*, <http://cms.iuf.org/?q=node/506>, visited on 10 December 2010.

change to reflect the level of professionalism required by BATM of TM&D Reps and in future to provide more professional and dynamic service in marketing and distribution activities". On 28 January 2008, British American Tobacco PLC also stated that "the self managed team concept role of Process Specialists has been successfully implemented in countries such as Brazil, South Korea, Chile and Venezuela".

23. The UK NCP also noted that, on 24 March 2008, the MTUC stated to the UK NCP that: *"Neither MTUC nor the BAT Employees Union oppose company's effort to restructure for greater efficiency. But every action by the company since August 2006, is carried out with ulterior motive – To destroy the 44 years old union. At that time in August 06 the union was suspicious of company's motive".*
24. The UK NCP noted that, according to the MTUC, the practical effects of the re-classifications have been a reduction of the BATEU's bargaining strength because Malaysian law does not allow the same union to represent employees in both managerial and non-managerial roles. However, the UK NCP also noted that the Malaysian Ministry of Human Resources ruled, on 14 December 2006, that TMRs and SDRs were correctly defined as managerial posts, and, on 8 March 2007, that process specialists were correctly defined as managerial posts.
25. In light of the above, the UK NCP concluded that it had no means of determining whether the weakening of the BATEU was a motivating factor (or one of the reasons) for BATM's re-classifications, without reopening the issues subject to the two rulings of the Malaysian Ministry of Human Resources. This action would have been contrary to the Guidelines.
26. Therefore, the UK NCP did not examine the allegation from the MTUC under paragraphs 8(a), (b) (c) or (e) above. The UK NCP was therefore unable to reach any conclusion as to whether BATM breached Chapter IV(1)(a) of the Guidelines.

What does "adequate consultation" mean?

27. The Commentary to Chapter IV of the Guidelines states that: *"This chapter opens with a chapeau that includes a reference to "applicable" law and regulations, which is meant to acknowledge the fact that multinational enterprises, while operating within the jurisdiction of particular countries, may be subject to national, sub-national, as well as supra-national levels of regulation of employment and industrial relations matters [...] The International Labour Organisation (ILO) is the competent body to set and deal with international labour standards, and to promote fundamental rights at work as recognised in its 1998 Declaration on Fundamental Principles and Rights at Work"*⁹.

⁹ OECD, *Commentary on the OECD Guidelines for Multinational Enterprises*, paragraph 19, p. 43 (downloadable from www.oecd.org/dataoecd/56/36/1922428.pdf - visited on 10 December 2010).

28. The UK NCP noted that the ILO's "Tripartite declaration of principles concerning multinational enterprises and social policy"¹⁰, originally adopted in 1977 and subsequently amended in 2000 and 2006, states that: *"In multinational as well as in national enterprises, systems devised by mutual agreement between employers and workers and their representatives should provide, in accordance with national law and practice, for regular consultation on matters of mutual concern. Such consultation should not be a substitute for collective bargaining"* (paragraph 57).
29. Chapter IV(8) of the Guidelines reflects the above principle by recommending that enterprises should *"allow the parties [that is, authorised representatives of the employees] to consult on matters of mutual concern with representatives of management who are authorised to take decisions on these matters"*.
30. Chapter IV(4)(a) of the Guidelines recommends enterprises to *"observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country"*. The UK NCP noted Malaysia's 1975 "Code of conduct for industrial harmony"¹¹ (the Malaysian Code) which was agreed by the MTUC and the then Malaysian Council of Employers' Organisations (now the Malaysian Employers' Federation) under the auspices of the then Malaysian Ministry of Labour and Manpower (now Ministry of Human Resources). The Malaysian Code is voluntary and not legally enforceable but can be deemed to reflect Malaysia's expected standards of employment and industrial relations because it was agreed by both employers and employees' representative bodies, and because it is still promoted by the Malaysian Ministry of Human Resources. This Ministry's website currently states that: *"The Code of Conduct exhorts management and unions to recognise the human relations aspect of industrial relations. It stresses that it is only with an abundance of goodwill, combined with constant consultation and communication between the parties involved, that we can hope to contain the destructive expression of industrial conflict and encourage a more equitable and efficient system for the benefit of those involved and the community at large. The Code has been agreed after numerous meetings between representatives of the Malaysian Trade Union Congress and the Malaysian Council of Employer's Organisations held under the auspices of the then Ministry of Labour and Manpower. The agreed Code, endorsed voluntarily by both employers' and*

¹⁰ ILO, *Tripartite declaration of principles concerning multinational enterprises and social policy*, 28 March 2006 (available at http://www.ilo.org/empent/Whatwedo/Publications/lang--en/docName--WCMS_094386/index.htm - visited on 10 December 2010).

¹¹ Malaysian Ministry of Human Resources, *Code of conduct for industrial harmony and areas for co-operation and agreed industrial relations practices – document I (under clause 7 of the Code of Conduct for Industrial Harmony)*, Malaysia, 1975, reprinted in 2008.

*employees' organisations commend both employer and employees to observe and comply with its provisions"*¹².

31. The stated aim of the Malaysian Code is *"To lay down principles and guidelines to employers and workers on the practice of industrial relations for achieving greater industrial harmony"* (clause 1¹³). Clause 6¹⁴ of the Malaysian Code states that: *[the Malayan Council of Employers' Organisation as representatives of employers generally and the Malaysian Trades Union Congress as representatives of workers generally] Hereby endorse, with the collaboration and approval of the Ministry of Labour and Manpower, this Code of Conduct for Industrial Harmony and commend both employers and workers in Malaysia to observe and comply with its provisions"*. Clause 7¹⁵ further states that: *[the Malayan Council of Employers' Organisation as representatives of employers generally and the Malaysian Trades Union Congress as representatives of workers generally] Hereby further endorse and commend the observance and compliance by both employers and workers, of such industrial relations practices as may be agreed, from time to time, between the Malayan Council of Employers' Organisation as representatives of employers generally and the Malayan Trades Union Congress as representatives of workers generally and accepted by the Ministry of Labour and Manpower"*. Document I (*"Areas for co-operation and agreed industrial relations practices (under Clause 7 of the Code of Conduct for Industrial Harmony"*), annexed to the Malaysian Code, states that: *"Good employer-employee relations is dependent upon efficiency. Employees' efficiency may be enhanced if (a) they are kept informed on matters which concern them; and (b) their views are sought on existing practices and on proposed changes which would affect them"* (paragraph 43¹⁶). Document I further clarifies that: *"The employer has an important role in this and, in particular, he should (a) ensure that management personnel regard it as one of their principal duties to explain to those responsible to them plans and intentions which will affect them. (It is of great importance that this chain of communication should be effective down to each supervisor and through him to each individual employee); [...] (c) ensure that arrangements for consultation with workers or their representatives are adequate and are fully used"* (paragraph 44¹⁷). Paragraph 47¹⁸ states that: *"Methods of communication and consultation should suit the particular circumstances within the undertaking. The most important method is by word of mouth through regular personal contact between managers and employees at all levels. This could be supplemented by: [...]"*

¹² Malaysian Ministry of Human Resources, *Promote Code of Conduct for Industrial Harmony*, http://jpp.mohr.gov.my/index.php?option=com_content&task=view&lang=en&id=40&Itemid=56 (visited on 10 December 2010).

¹³ *Code of Conduct for Industrial Harmony*, op. cit., p. 3.

¹⁴ *Code of Conduct for Industrial Harmony*, op. cit., p. 4.

¹⁵ *Code of Conduct for Industrial Harmony*, op. cit., p. 5.

¹⁶ *Code of Conduct for Industrial Harmony*, op. cit., p. 29.

¹⁷ *Code of Conduct for Industrial Harmony*, op. cit., p. 29.

¹⁸ *Code of Conduct for Industrial Harmony*, op. cit., p. 31.

regular consultation between managers and other means established for the purpose”.

32. The final section of Document I is titled “*Joint Consultation and Works Committee*” and states that “*Consultation between employer and employees or their trade union representatives at the floor level would be useful in all establishments or undertakings, whatever their size.*” (paragraph 48¹⁹); and that “*The employer should take the initiative in setting up and maintaining regular consultative arrangements best suited to the circumstances of the establishment in co-operation with employees’ representatives and the trade union concerned.*” (paragraph 49²⁰). It concludes by stating that: “*As far as is practicable every establishment or undertaking should have a recognised machinery for consultation through the establishment of a works committee comprising employer’s and employees’ representatives at floor-level. The employer’s and the employees’ representatives or trade union should agree to: (a) a formal constitution which sets out the Committee’s aims and functions, its composition and that of sub-committees, if any, arrangements for the election of representatives and rules of procedure; (b) enable the committee to discuss the widest possible range of subjects of concern to employees, paying particular attention to matters closely associated with the work situation; (c) ensure that all members of the committee have enough information to enable them to participate effectively in committee business, and that the committee is used as a medium for a genuine exchange of views and not merely as a channel for passing information on decisions already taken; (d) make arrangements to keep all employees informed about the committee’s discussions.*” (paragraph 50²¹).
33. The UK NCP also noted that the Malaysian Ministry of Human Resources’ publication titled “*Harmony at the workplace*”²² recommends that “*The management should take the initiative to establish a negotiating machinery between the employer and employees as well as their trade unions so as to improve relations between them and facilitate problem solving*” (p. 7); and states that “*Industrial relations deals with people and thus industrial relations problem is essentially human problem which at time requires humane consideration and the application of large doses of common sense solution in resolving them, without compromising the enforcement aspect of the laws*” (p. 11).
34. In light of the above, the UK NCP concluded that “adequate consultation” should follow the approach reflected in, amongst other

¹⁹ *Code of Conduct for Industrial Harmony*, op. cit., p. 31.

²⁰ *Code of Conduct for Industrial Harmony*, op. cit., p. 31.

²¹ *Code of Conduct for Industrial Harmony*, op. cit., p. 32.

²² Department of Industrial Relations (Malaysia Ministry of Human Resources), *Harmony at the workplace*, 2008 (downloadable from http://jpp.mohr.gov.my/images/stories/jppm/Keharmonian_Di_Tempat_Pekerjaan.pdf - visited on 10 December 2010).

instruments, the Malaysian Code and the Malaysian Government's publication "Harmony at the workplace", and should be a regular process which enables workers and employers (either directly or through their representatives) to consider together issues of mutual concern; in order to be meaningful, such process should take place before the final decisions affecting employees have been taken.

Should consultation with the BATEU have taken place? Was the BATEU adequately consulted (if at all) before and during the restructuring? Did BATM harass union members into applying for the reclassified non-unionised positions?

35. The UK NCP examined the allegation from the MTUC under paragraph 8(d) above. In particular, the UK NCP examined three key issues: A) whether consultation with the BATEU should have taken place; B) whether the BATEU was adequately consulted (if at all) before and during the restructuring; and C) whether BATM harassed union members into applying for the reclassified non-unionised positions.

A. Should consultation with the BATEU have taken place?

36. By BATM's own admission, the BATEU was, up to 29 October 2007, the union representing all relevant BATM employees. On 28 January 2008, British American Tobacco PLC stated that: *"After the merger in November 1999 [of Rothmans of Pall Mall Malaysia and the Malaysian Tobacco Corporation into BATM], upon application by BATEU, the Director General of Trade Union (DGTU) approved BATEU as BATM's in-house union, representing the unionised employees of BATM, Tobacco Importer and Manufacturers Sdn. Bhd (TIM) and Commercial Marketers and Distributors Sdn. Bhd (CMD), respectively. BATM worked with BATEU on all matters involving unionised employees of BATM and its subsidiaries".*
37. On 6 September 2010, BATM stated that both BATEU's constitution and Article 13 of the BATEU-BATM collective agreement prevent the BATEU from representing employees in managerial, executive and confidential capacities. Therefore, BATM argued that it was under no legal obligation to consult the BATEU regarding the establishment of the managerial positions of process specialists, TMRs and SDRs.
38. The UK NCP has not seen BATEU's constitution. On 21 January 2011, BATM confirmed that Article 13 of the collective agreement states that *"This Agreement shall cover all employees employed by the Company except for the following categories of employees: a) Directors and Managers b) Executives (including Trainee Executives and Executives on probation) c) Confidential Secretaries d) Confidential Staff e) Security Staff f) Temporary Staff g) Employees on first probation"*; and that Article 11.1 of the collective agreement states that *"The Company recognizes the British American Tobacco (Malaysia) Berhad*

Employees Union as the sole collective bargaining body in respect of salaries, wages and other terms and conditions of employment covered in this Agreement for all employees except for those excluded under Article 13 of this Agreement". On 8 February 2011, the MTUC drew the UK NCP's attention to Article 7.2 of the collective agreement which states that: *"Company" means British American Tobacco (Malaysia) Berhad or any other name by which the Company is called arising from a change of name and all subsidiaries involved in the manufacture, sale, import and distribution of tobacco products*". The parties clearly dispute these issues. It would be outside of the remit of the UK NCP to make a determination on whether consultation with the in-house union is mandatory in all circumstances under Malaysian law.

39. The UK NCP, however, noted that Chapter IV(8) of the Guidelines recommends enterprises to *"allow the parties [that is, authorised representatives of the employees] to consult on matters of mutual concern with representatives of management who are authorised to take decisions on these matters"*. The BATEU was the in-house union at the time, and there was no other union representing the newly created positions of process specialists, TMRs and SDRs. The creation of the new positions can be considered a matter of mutual concern since it was likely to affect (and did affect) both the BATEU and BATM.
40. As outlined above, the Malaysian Code reflects the host country's expected employment and industrial standards, and does recommend that workers' views are sought on existing practices and on proposed changes which would affect workers. The UK NCP considered that the re-classifications are an example of a proposed change affecting BATM's employees.
41. In light of the above, the UK NCP concluded that, although BATM may not have been under a legal obligation in Malaysia to consult the BATEU over the re-classifications, the Guidelines, supported by Malaysia's own voluntary standards of employment and industrial relations, did require such consultation. Therefore, the BATEU should have been adequately consulted on the re-classifications. The UK Government encourages UK registered companies operating abroad to abide by the standards set out in the Guidelines as well as to obey the host country's laws.

B. Was the BATEU adequately consulted (if at all) by BATM before and during the restructuring?

42. BATM stated in its letter to the UK NCP of 6 September 2010 that: *"BAT Malaysia (BATM) held consultations with BATEU throughout the period August 2006 and January 2007, despite the fact that there was no legal requirement under local law and regulation for us to consult BATEU either before, during or after the restructuring [...]. Our*

engagement with BATEU reflects our commitment to good employment practices as set out in our Group Employment Principles”.

43. BATM also attached a “chronological timeline of consultation” related to the establishment of the new positions. The UK NCP understood from BATM that the “process specialist” role was advertised to staff on 25 August 2006 and was established from 18 September 2006, and that the TMR and SDR roles were established from 1 January 2007. The UK NCP examined BATM’s chronology of events and could find some evidence of BATM informing the BATEU about the creation of the new roles. In particular:
- a) On 25 August 2006, BATM advertised the new “process specialist” role in the internal notice boards. According to the MTUC, on 28 August 2006, the process specialist role was also advertised via BATM’s internal e-mail as management positions.
 - b) On 30 August 2006, BATM met the BATEU to explain the “process specialist” role.
 - c) On 1 September 2006, BATM provided more detailed information to the BATEU on the “process specialist” role.
 - d) On 5 September 2006, BATM discussed with the BATEU the union’s concerns over the “process specialist” role, particularly it being a managerial role.
 - e) On 6 September 2006, the BATEU wrote to BATM expressing concerns over the “process specialist” role. On 11 September 2006, BATM confirmed that the “process specialist” role was a managerial role.
 - f) On 8 January 2007, BATM held a briefing session with the BATEU on the created posts of TMRs and SDRs.
44. With the exceptions highlighted in paragraph 43, all of the meetings and correspondence between BATM, the BATEU and the MTUC in the period after the establishment of the new positions, appeared to be related to the complaint filed on 3 October 2006 by the BATEU with the DGIR alleging “union busting” behaviour on the part of BATM, and the Malaysian Ministry of Human Resources’ decisions, on 14 December 2006, that TMRs and SDRs were correctly defined as managerial posts, and, on 8 March 2007, that process specialists were correctly defined as managerial posts. As a result of these events, the UK NCP took into account that the relationship between BATM and the BATEU might have deteriorated and that, under these circumstances, BATM might have been discouraged from engaging the BATEU in respect of the establishment of the new positions.
45. However, in its complaint of 11 December 2007, the MTUC stated that *“Despite the existence of a collective agreement, the Union [the BATEU] was not notified of any job creations”*. The MTUC also acknowledged in the complaint that *“on 1 September 2006 Company made a feeble attempt to justify the action”*. On 25 November 2010, the MTUC clarified that BATM did not consult the BATEU before taking the final decision to create the new positions, and before advertising the

new role of process specialist on 25 August 2006, and establishing the new roles of TDRs and SDRs from January 2007. On 6 December 2010, BATM confirmed that it did not consult the BATEU on the creation of the new positions before 25 August 2006.

46. The UK NCP could find no evidence of consultation with the BATEU before BATM finalised its decision to create the new positions and advertised the new role of process specialist on 25 August 2006. All of the evidence seen by the UK NCP showed that BATM made attempts to inform the BATEU about the re-classifications after advertising the roles, but there is no evidence of BATM seeking BATEU's views on the re-classifications before BATM finalised its decision to carry them out and advertised the new positions.
47. For the reasons set out in paragraph 41 above, the UK NCP did not accept that the lack of consultation with the BATEU could be justified by the fact that Malaysian law might not make consultation with the BATEU mandatory in all circumstances.
48. In light of the above, the UK NCP concluded that BATM failed to uphold the standards on employment and industrial relations reflected through Chapter IV(8) of the Guidelines because it failed adequately to consult the BATEU about the re-classifications before finalising the decision to carry them out and to advertise the new positions.
49. Although the UK NCP could ascertain the expected and recommended standards on employment and industrial relations in Malaysia, it could not reliably determine whether BATM's practices in this instance were consistent with the standards of employment and industrial relations actually observed by comparable employers in Malaysia in similar situations. Therefore, the UK NCP has insufficient evidence to determine whether or not BATM acted consistently with Chapter IV(4)(a) of the Guidelines.

C. Did BATM harass union members into applying for the reclassified non-unionised positions?

50. In the evidence submitted by the MTUC on 29 February 2008, the MTUC included an undated letter to the General Secretary of the BATEU, allegedly signed by 163 of BATEU's members which states that: *"we [BATM's employees] were given a "new contract" and was forced to sign without giving any option to accept or reject the new contract. We as employees strongly feel that we should be given an option to exercise our "rights". We were not even given time to think over the new offer or discuss this matter with our Union officials"*. In a letter dated 15 January 2007 from the BATEU to BATM, which the UK NCP has seen, the BATEU stated that: *"Our members were forced to sign a new contract [in relation to the new roles of TMRs and SDRs] when they are already covered by the existing terms and conditions of*

the Collective Agreement. Our members were also not given any option to accept or reject the new contract. Our members were also denied their rights to seek advice, clarifications or given sufficient time to consider the new contract". BATM denied these allegations.

51. The UK NCP had no means to verify the information above and therefore concluded that there was insufficient evidence to find that BATM harassed its employees into accepting the newly created positions.

CONCLUSIONS

52. On the basis of the analysis of the evidence outlined above, the UK NCP draws the following conclusions:
 - a) That, as the UK NCP did not examine the allegations under paragraphs 8(a), 8(b), 8(c) and 8(e) above, it cannot reach any conclusion as to whether BATM breached Chapter IV(1)(a) of the Guidelines.
 - b) That "adequate consultation" should follow the approach reflected in, amongst other instruments, the Malaysian Code and the Malaysian Government's publication "Harmony at the workplace", and should be a regular process which enables workers and employers (either directly or through their representatives) to consider together issues of mutual concern; in order to be meaningful, such process should take place before the final decisions affecting employees have been taken.
 - c) That, although BATM may not have been under a legal obligation in Malaysia to consult the BATEU over the re-classifications, the Guidelines, supported by Malaysia's own voluntary standards of employment and industrial relations, set a higher standard than what may have been required under domestic law. Therefore, the BATEU should have been adequately consulted on the re-classifications.
 - d) That BATM failed to uphold the higher standards on employment and industrial relations reflected through Chapter IV(8) of the Guidelines because it failed adequately to consult the BATEU about the re-classifications before finalising the decision to carry them out and to advertise the new positions. However, the UK NCP had insufficient evidence to determine whether BATM acted inconsistently with Chapter IV(4)(a) of the Guidelines.
 - e) That there is insufficient evidence to find that BATM harassed its employees into accepting the newly created positions.
53. In light of the above, the UK NCP concludes that BATM breached Chapter IV(8) of the Guidelines. The UK NCP cannot reach any conclusion on whether BATM complied with Chapters IV(1)(a) and IV(4)(a) of the Guidelines.

EXAMPLES OF GOOD COMPANY PRACTICE

54. British American Tobacco PLC's corporate responsibility measures are accessible through the company's web portal. The UK NCP has reviewed British American Tobacco PLC's initiatives on employment and industrial relations. In particular, the UK NCP notes the following measures taken by British American Tobacco PLC which are of particular significance in relation to Chapter IV(8) of the Guidelines.
55. The "Statement of employment principles"²³ (the Statement) clearly indicates that British American Tobacco PLC expects and encourages its subsidiaries to implement the principles set out in the Statement. In particular:
- a) Paragraph 2.1.2 states: *"We respect both freedom of association and freedom of non-association. We acknowledge the right of employees to be represented by local company recognised Trades Unions, or other bona fide representatives, and for these, where appropriate, to consult with the relevant company – within the framework of applicable law, regulations, the prevailing labour relations and practices, and company procedures. We acknowledge the activities of recognised worker representative bodies such as Trades Unions (where such activities are practiced in accordance with national law) and we ensure that they are able to carry out their representative activities within agreed procedures"*.
 - b) Paragraph 3.1.3 states: *"BAT [British American Tobacco] undertakes restructuring in a responsible manner. Any of our global Operating Companies involved in restructuring will explain the initiatives that make change necessary to its employees and all appropriate groups and bodies, in accordance with local laws and regulations"*.
56. British American Tobacco PLC has published its approach towards supply chain companies, which states that: *"supply partners should expect the following from their relationship with us: [...] A joint approach to pursuing improvements in the supply chain, through education, training and the sharing of good practice. Group companies will uphold British American Tobacco policies and will encourage, and where appropriate, help supply partners to embrace them"*²⁴. It further clarifies that: *"we – and our supply partners – need to uphold and demonstrate high standards of integrity, accountability and business practice [...] We believe that, as a responsible business, we should do*

²³ British American Tobacco PLC, *Statement of employment principles* (available at [http://www.bat.com/group/sites/uk_3mnfen.nsf/vwPagesWebLive/DO725ECW/\\$FILE/medMD623F3V.pdf?openelement](http://www.bat.com/group/sites/uk_3mnfen.nsf/vwPagesWebLive/DO725ECW/$FILE/medMD623F3V.pdf?openelement) – visited on 10 December 2010).

²⁴ British American Tobacco PLC, *Our philosophy of supplier partnerships*, p. 4 (available at [http://www.bat.com/group/sites/uk_3mnfen.nsf/vwPagesWebLive/DO725ECW/\\$FILE/medMD6RWDFDFF.pdf?openelement](http://www.bat.com/group/sites/uk_3mnfen.nsf/vwPagesWebLive/DO725ECW/$FILE/medMD6RWDFDFF.pdf?openelement) – visited on 10 December 2010).

more than ensure that we exhibit best practice in the workplace; we should also use our influence to raise standards, secure product integrity and spread best practice in our supply chain and in the tobacco industry overall. We hope that our supply chain partners will assist us in this regard”²⁵.

RECOMMENDATIONS TO THE COMPANY AND FOLLOW UP

57. Where appropriate, the UK NCP may make specific recommendations to a company so that its future conduct may be brought into line with the Guidelines. In considering whether to make any recommendations, the UK NCP has taken into account that BATM was found to have breached the Guidelines, and that consulting the BATEU on the re-classifications would not be useful at this stage because the new positions have now been established.
58. The UK NCP however considers that BATM risks breaching the Guidelines again in the future unless it changes its approach in consulting employees (and their representatives). To this effect, the UK NCP recommends that British American Tobacco PLC should encourage BATM to establish a permanent and regular process to consult and inform its employees on issues of mutual concern before key decisions of mutual concern are taken by management. Such process should be endorsed by both management and employees (and their representatives, where they exist).
59. Both parties are asked to provide the UK NCP with a substantiated update by 6 June 2011 on measurable progress towards BATM’s implementation of the recommendation in paragraph 58 above. The UK NCP will then prepare a Follow Up Statement reflecting the parties’ response and, where appropriate, the UK NCP’s conclusions thereon. The substantiated update should be sent to the UK NCP in writing to the following address:

UK National Contact Point for the OECD Guidelines for Multinational Enterprises
Department for Business, Innovation and Skills
Victoria 3.1 – 3rd floor
1, Victoria Street
London SW1H 0ET
United Kingdom
e-mail: uk.ncp@bis.gsi.gov.uk

4 March 2011

UK National Contact Point for the OECD Guidelines for Multinational Enterprises

Nick Van Benschoten, Sergio Moreno

²⁵ *Our philosophy of supplier partnerships*, op. cit, pp. 4-5.