



**Department
for Business
Innovation & Skills**

**INITIAL ASSESSMENT BY THE UK
NATIONAL CONTACT POINT FOR
THE OECD GUIDELINES FOR
MULTINATIONAL ENTERPRISES:**

**Complaint from Privacy
International and Others against
Gamma International UK Ltd**

JUNE 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 that the issues raised in the complaint merit further examination and has accepted the complaint. This does not mean that the NCP considers the company has acted inconsistently with the Guidelines.**

The complaint and response

The complaint

1. On 1st February 2013, Privacy International wrote to the UK National Contact Point (NCP) raising concerns under the Guidelines about the alleged use of surveillance equipment produced by Gamma International UK Limited (“Gamma”) against activists in Bahrain.
2. The complainants say there is evidence to suggest that Gamma supplied to the Bahrain authorities “malware” products which allowed them to hear/see and record private conversations, correspondence and other records (e.g. address books) of individuals involved in pro-democracy activities in Bahrain. The complainants say that on the basis of information obtained by this surveillance, these individuals, who had not committed any criminal offences under Bahrain law, were subsequently detained and in some cases tortured by the Bahrain security forces.
3. The complainants also say that at the time of the alleged supply Gamma did not have in place a human rights policy adequate to ensure that the equipment it provided – which is marketed for use in criminal investigations - was used in accordance with international human rights standards. In the case of Bahrain, the complainants say that Gamma knew or should have known that its product was likely to be used inconsistently with international human rights laws and standards.
4. The complainants claim that the product requires follow-up support to update it in response to countermeasures developed by computer security providers. They suggest that Gamma has provided this support and has not taken the opportunity available to it to address human rights risk by withdrawing these services and rendering the product ineffective.

Guidelines provisions cited

5. The complainant refers to the following provisions of the 2011 Guidelines:

Chapter II General Policies

Paragraph 2 *[Enterprises should...]* Respect the internationally recognised human rights of those affected by their activities.

Paragraph 10 *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 11 *Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.*

Paragraph 12 *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 and adverse impact to the enterprise with which it has a business relationship.*

Paragraph 13 *In addition to addressing adverse impacts in relation to matters covered by the Guidelines, encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines.*

Chapter IV Human Rights

Paragraph 1 *[Enterprises should...]* Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

Paragraph 2. *Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.*

Paragraph 3. *Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.*

Paragraph 4. *Have a policy commitment to respect human rights.*

Paragraph 5. *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.*

Paragraph 6 *Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts*

6. Provisions in Chapter IV, and those in Chapter II Paragraphs 10-12 were added when the Guidelines were updated in 2011. They are applied by the UK NCP to actions of enterprises from 1st September 2011 and to unresolved risks or impacts known to the enterprise at 1st September 2011.
7. The complaint also refers to the following provisions of the 2000 Guidelines, which applied prior to the 2011 update:

2000 Guidelines

Chapter II

Paragraph 2 [Enterprises should.....] Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.

Paragraph 10 ...Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.

Chapter III

Paragraph 5 Enterprises are encouraged to communicate additional information that could include:

- a. Value statements or statements of business conduct intended for public disclosure including information on the social, ethical and environmental policies of the enterprise and other codes of conduct to which the company subscribes. In addition, the date of adoption, the countries and entities to which such statements apply and its performance in relation to these statements may be communicated.*
- b. Information on systems for managing risks and complying with laws, and on statements or codes of business conduct*
- c. Information on relationships with employees and other stakeholders.*

The NCP notes that this last provision (Chapter III, Paragraph 5) is not an obligation but an action enterprises are encouraged to take.

The company's response

8. Gamma responded through its legal representatives on 14th March 2013. The company notes that it only supplies the product that is the subject of the complaint to the police and security forces of sovereign states. Customer governments have included in their contracts with Gamma a condition that their identities will be kept confidential, and the company will not therefore confirm or deny which countries are its customers.
9. Gamma says that it has been considering publishing a civil rights policy but is not yet certain that it could successfully implement such a policy. The company states that it would not supply the product identified in the complaint in a situation where it believed it would be used for the purpose of repressing civil rights. It considers that a wider policy preventing sales to any country whose human rights record has been criticised would not be practicable, however, and notes that the UK Government co-operates in crime and security matters with countries that have been the subject of such criticism. Gamma also says that it would not be practical to enable a surveillance system to be remotely and unilaterally closed down by the supplier should human rights concerns arise, as no customer would purchase a system so enabled.
10. Gamma states that it wishes to engage with the NCP, but notes that it has been advised that it should limit its engagement with the complainants because of the risk to the company's personnel and interests from other (legal) actions it believes the complainants to be pursuing in parallel to the complaint, some of which include exchanges with the UK Department for Business - in which the NCP is also based.

Further responses

11. In a further letter from legal representatives received by the NCP on 24th April, Gamma said it understood that the complainants had commenced Judicial Review proceedings against the Department for Business in connection with an issue related to the complaint and asked whether it was appropriate for the UK NCP to consider the complaint whilst these proceedings were ongoing.
12. Gamma's legal representatives made further representations in comments on the draft initial assessment on 31st May: noting that Gamma International UK Limited stopped exporting the surveillance system referred to in the complaint in April 2012, and submitting to the NCP a copy of a draft human rights policy for the Gamma Group supplied to Gamma International UK in 2012 by another part of the Gamma Group.

The UK NCP process so far

13. The complainants met the UK NCP on 1st February 2013 and submitted the complaint and supporting evidence later that day.
14. The NCP forwarded details of the complaint to the company on 11th February and invited the company to respond. The NCP received the company's response on 14th March 2013.
15. On 24th April, the NCP received a further letter from the company's representatives enquiring about the effect of parallel proceedings on the UK NCP's consideration of the complaint. The NCP responded on 15th May (see paragraphs 31 and 32). In line with UK NCP procedure, a draft of the initial assessment statement was circulated to parties and minor changes have been made to reflect comments received from parties on 31st May.
16. All documents received by the NCP have been shared with both parties.
17. The NCP offered an initial meeting to each party to explain the complaints process. The company did not take up the offer. The NCP explained the complaints process to the complainants at the 1st February meeting and provided some further clarification in a telephone call on 22nd February.

UK NCP decision

18. The UK NCP has decided to accept the complaint for further consideration. 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. Privacy International is an NGO campaigning internationally to defend privacy and fight intrusions into private life by governments and corporations. Its co-complainants are also NGOs: the European Centre for Constitutional and Human Rights (ECCHR), Reporters Without Borders, the Bahrain Centre for Human Rights and Bahrain Watch.
20. The NCP is satisfied that the complainants have a close interest in the issues they raise and that they are able to supply information about them. The complainants do not appear to have direct links to the activists whose detention by the Bahrain security forces is reported in the complaint; however, a member of one of the complainant organisations received the malware to which the complaint relates, and

another member of this organisation undertook the analysis submitted in support of the complaint.

Whether the issue is material and substantiated

21. The analysis submitted by the complainants of the malware sent to Bahraini activists establishes that it had features similar to those advertised for Gamma's product and links to trade names and sites registered to Gamma. Activists report that the malware was sent to them in April-May 2012. The analysts report that it appears still to be active and that the server appears to be receiving regular updates that they consider are likely to be from Gamma.
22. Other evidence submitted by the complainants, including information on findings of the Bahrain Independent Commission of Inquiry and statements from individuals about their detention, supports the complainants' allegations about the risks to human rights in Bahrain and that these risks would be known to Gamma.
23. Gamma says that for commercial reasons it is not willing to confirm or deny what countries it supplies. The NCP notes that press articles submitted by the complainants report that the Managing Director of Gamma International GMBH (another branch of the Gamma Group) stated that the company had not sold the product to Bahrain, and suggested that the product sent to the activists could be a stolen copy of a demonstration version of Gamma's product.
24. Gamma has provided a copy of a draft human rights policy for the Gamma Group which it says has been under review for a number of months and was copied to a third party in November 2012). Gamma is not yet convinced that the policy could be implemented, but says that it would not sell its product in a situation where it would be used to repress civil rights. This appears to substantiate an issue in respect of the requirement in Chapter IV Paragraph IV to have a policy commitment to respect human rights.
25. The NCP concludes that while neither party has provided direct evidence about a supply by Gamma to Bahrain, the evidence provided suggests that the company's product may have been used against Bahraini activists. The NCP considers that this substantiates the issues in respect of the company's obligations to do appropriate due diligence and to address impacts.
26. The NCP considers that the evidence also substantiates issues in respect of Gamma's obligations under Chapter II and Chapter IV provisions to address impacts. These provisions contemplate a number of different relationships that an enterprise may have to impacts: it may be generally involved with them, cause or contribute to them, or be linked to them by a business relationship. It appears to the NCP that the complainants have provided evidence that there may be a

relationship between Gamma and the impacts in Bahrain (although its nature is not clear at this point), and the company has not offered any evidence clarifying the nature of its relationship. The NCP therefore considers that its further examination should not rule out any of these relationships. Consequently, the NCP accepts for further examination the issues in respect of all the provisions relating to impacts.

Relevance of applicable law and procedures, including court rulings

27. The NCP notes that the UN Guiding Principles on Business and Human Rights make distinctions between the responsibilities of states and businesses that will be particularly relevant in a case where a State is the customer of a business. The NCP does not consider that these distinctions affect its Initial Assessment decision, but will consider them as part of any further examination of the issues.

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

28. The UK NCP is based within the UK Government Department for Business, Innovation and Skills (BIS). However, it operates independently of BIS Ministers, reporting instead to a Steering Board made up of representatives from five Government departments, and four external representatives of UK businesses, trade unions and non-governmental organisations.
29. Evidence submitted by the complainants includes their correspondence with officials in the Export Controls section of BIS. In this correspondence, BIS indicates that Gamma separately contacted BIS's Export Controls section in June 2012 to ask for advice on the classification of certain of its products, that BIS advised Gamma in August 2012 that it considers certain products to be classified as requiring a licence for export outside the EU, and that at 11 September 2012 no licence had been sought by Gamma. In its response to the complaint, Gamma notes that it has challenged the validity of the Export Control rating.
30. Enforcement of export licensing is the responsibility of a separate UK Government department - Her Majesty's Revenue and Customs (HMRC). On 16th April 2013, the complainants began Judicial Review proceedings against HMRC in respect of an alleged refusal by HMRC to reveal to the complainants whether it is investigating any unlicensed exports by Gamma.
31. The UK NCP is not privy to any details of HMRC's investigations in relation to exports. The OECD's guidance is that NCPs should not decide that issues do not merit further consideration solely because parallel proceedings are underway, but should consider whether it

could make a positive contribution to resolving the issues raised and avoid creating serious prejudice to either party involved in parallel proceedings or causing a contempt of court situation. The UK NCP does not consider that the parallel proceedings noted above affect its ability to make this Initial Assessment or its decision to accept the complaint for further examination.

32. The UK NCP's procedures allow for parties to request a suspension of the NCP's proceedings where they consider there is a risk of serious prejudice, and the NCP will consider any applications of this kind.
33. Separately to these issues above, the UK NCP notes that the complainants have made a parallel complaint to the German NCP about alleged activities of a German enterprise (this enterprise is not part of the Gamma Group). The UK NCP has discussed with the German NCP general issues raised by the complaints, but each NCP has based its finding on the individual circumstances presented to it.

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

34. OECD Guidance says that NCPs should "*offer a forum for discussion and assist the business community, worker organisations, other non-governmental organisations, and other interested parties concerned to deal with the issues raised*". The UK NCP considers that it could offer that forum and help the parties to find a solution in respect of issues raised in this complaint. The NCP notes that successful conclusion of the NCP process depends on the parties' willingness to engage in good faith to the best of their ability.
35. The Guidelines apply to all multinationals including those whose products, business partners or countries carry a higher risk of abuse. Because of their broad application, the Guidelines are general in character, but the OECD is working to support the development of sector specific guidance to assist enterprises in meeting their obligations. The UK NCP notes that the Voluntary Principles on Security and Human Rights developed by the extractives sector include some guidance about the supply of security equipment.

Next steps

36. The UK NCP will formally ask Privacy International and Gamma whether they are willing to engage in mediation/conciliation with the aim of reaching a settlement. Subject to their response, the UK NCP will liaise with the parties to arrange mediation meetings. If a mediated solution is possible, the UK NCP will reflect the outcome in its Final Statement without making a determination as to whether the company acted inconsistently with the Guidelines.

37. If a mediated/conciliated solution is not possible, or the parties do not wish to engage in mediation, the UK NCP will conduct a separate examination into the complaint and will reflect its findings in a Final Statement. If the Final Statement determines that the company acted inconsistently with the Guidelines, the NCP will make recommendations as to how the company may make its conduct more consistent with the Guidelines in future.

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UK National Contact Point for the OECD Guidelines for Multinational Enterprises

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