

**Initial Assessment By The UK  
National Contact Point For  
The OECD Guidelines For  
Multinational Enterprises**

**COMPLAINT FROM UK AND US  
ORGANISATIONS AGAINST A  
COMPANY OPERATING IN THE UK**

**MAY 2014**

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## Summary of the UK NCP decision

- **The UK National Contact Point (UK NCP) for the OECD Guidelines for Multinational Enterprises (the Guidelines) has decided to reject the complaint.**

## Substance of the complaint

1. The complaint is made by a UK NGO and US labour organisation, and concerns the corporate taxation arrangements of a pharmaceutical sector multinational operating in the UK. The complainants allege that the company's corporate tax arrangements include related party transactions<sup>1</sup> that have unfairly reduced the tax it has paid in the UK, and that this resulted in adverse impacts on UK citizens. The complainants also allege that the company has failed to make sufficient disclosures about these transactions. The complainants want the company to publicly disclose and explain the tax implications of the relevant transactions, and to institute a company policy that prohibits similar transactions in future.
2. The company accepted an invitation from the UK NCP to respond to the complaint: it says that the complaint is baseless and discloses no grounds for further inquiry. The company says that some of the transactions referred to in the complaint did not involve the company and so are not for it to disclose. Transactions that did involve the company were disclosed to its directors and shareholders before being undertaken, and in its published and audited financial statements subsequently. The company says that that transactions concerned were on arm's length terms, and that it complies fully with all applicable tax laws and regulations of countries where it operates and has no inquiries or investigations pending by any tax authority into the matters raised by the complainants.

## Guidelines provisions cited

3. The complainant refers to the following provisions of the Guidelines:

### Chapter III - Disclosure

1. *Enterprises should ensure that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance. This information should*

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<sup>1</sup> Business transactions where the parties have a prior relationship: in this case the Chairman of the company in the complaint was also an owner of the businesses with which it transacted business.

*be disclosed for the enterprise as a whole, and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.*

*2. Disclosure policies of enterprises should include, but not be limited to, material information on:*

- a) the financial and operating results of the enterprise;*
- b) enterprise objectives;*
- c) major share ownership and voting rights, including the structure of a group of enterprises and intra-group relations, as well as control enhancing mechanisms;*
- d) remuneration policy for members of the board and key executives, an information about board members, including qualifications, the selection process, other enterprise directorships and whether each board member is regarded as independent by the board;*
- e) related party transactions;*
- f) foreseeable risk factors;*
- g) issues regarding workers and other stakeholders;*
- h) governance structures and policies, in particular, the content of any corporate governance code or policy and its implementation process.*

## **Chapter XI - Taxation**

*1. It is important that enterprises contribute to the public finances of host countries by making timely payment of their tax liabilities. In particular, enterprises should comply with both the letter and spirit of the tax laws and regulations of the countries in which they operate. Complying with the spirit of the law means discerning and following the intention of the legislature. It does not require an enterprise to make payment in excess of the amount legally required pursuant to such an interpretation. Tax compliance includes such measures as providing to the relevant authorities timely information that is relevant or required by law for purposes of the correct determination of taxes to be assessed in connection with their operations and conforming transfer pricing practices to the arm's length principle.*

*2. Enterprises should treat tax governance and tax compliance as important elements of their oversight and broader risk management systems. In particular, corporate boards should adopt tax risk management strategies to ensure that the financial, regulatory and reputational risks associated with taxation are fully identified and evaluated.*

4. The NCP notes that Chapter III Paragraph 2(e) referring to related party transactions was added when the Guidelines were updated in 2011. Provisions added at this time are applied by the UK NCP to actions of enterprises from 1<sup>st</sup> September 2011 and to unresolved risks or impacts known to the enterprise at 1<sup>st</sup> September 2011.

## The Initial Assessment process

5. The Initial Assessment process is usually a determination on whether the issues raised merit further examination. It does not determine whether the company has acted consistently with the Guidelines.
6. On receiving this complaint, the UK NCP believed it could be more appropriate for the Swiss NCP to consider it. Complainants can be informally re-directed by one NCP to another where both the NCPs and the complainant agree. In this case, however, the complainants had asked for UK NCP handling and the Swiss NCP was unwilling to act in the complaint. In these circumstances, the UK NCP's Steering Board has previously advised that the UK NCP should only refer a complainant to another NCP after setting out its reasons for doing so in an Initial Assessment.
7. In this case, therefore, the UK NCP has varied its standard Initial Assessment procedure so that the first consideration is whether UK NCP handling is appropriate. This is addressed under a separate heading below, but is regarded by the UK NCP as part of its broader consideration of whether the purpose and effectiveness of the Guidelines is served by considering the complaint.

## Handling process

- 8.

27/11/2013	UK NCP receives complaint
04/12/2013	UK NCP initial handling discussion with Swiss NCP
24/01/2014	UK NCP shares complaint with company and invites response.
25/02/2014	UK NCP receives company's response
26/02/2014	UK NCP shares response with complainants
09/04/2014	UK NCP shares draft Initial Assessment with parties
17/04/2014	UK NCP receives company's comments
24/04/2014	UK NCP receives complainants' comments

9. All documents submitted were shared with both parties. The UK NCP offered an initial meeting to each party to explain the complaints process. The complainants did not take up the offer. The company met the UK NCP on 7<sup>th</sup> February, and a note of this meeting was shared with the complainants.

## UK NCP decision

10. The UK NCP has decided that
  - a) There is a case for the complaint to be considered by the Swiss NCP; however, it is not inappropriate for the UK NCP to accept the complainants' request that it considers the complaint;
  - b) However, the UK NCP does not consider that the issues raised in the complaint are substantiated such that they merit further examination.

The UK NCP took the following points into account:

### **Whether the UK NCP is the appropriate NCP to handle this complaint**

11. The OECD Guidelines Commentary on Implementation Procedures says (in its Paragraph 23.) that *“generally issues will be dealt with by the NCP of the country in which the issues have arisen. Among adhering countries, such issues will first be discussed on the national level and, where appropriate, pursued at the bilateral level. The NCP of the host country should consult with the NCP of the home country in its efforts to assist the parties in resolving the issues. The NCP of the home country should strive to provide appropriate assistance in a timely manner when requested by the NCP of the host country.”*
12. The UK NCP believes that the intention of this paragraph of the Implementation Procedures is to support effective resolution of complaints in two ways: firstly by ensuring the company's actions are examined by the NCP with the best knowledge of the operating environment in which they took place, and secondly by facilitating mediation between the people affected by the actions and company representatives at the operational level controlling them.
13. The NCP handling a complaint determines the detailed process for dealing with the complaint, within a broader framework set out in the Guidelines. Significant details of procedure may vary according to which NCP handles a complaint, and so it is important to agree handling at the outset wherever possible.
14. In this case, the complainants say that their complaint *“centres on the company's actions in the UK and the resulting harm to the UK public”*. The people affected are therefore the UK public generally, but their representatives in any mediation may be presumed to be the complainants: NGOs based in the UK and the US and operating internationally.

15. With regard to the operational level of the company overseeing its corporate tax arrangements, the UK NCP notes that the Group's Director of Tax is UK-based, its corporate headquarters is in Switzerland, and its Directors are based in a number of countries.
16. With regard to the operating environment where actions took place, the UK NCP considers the relevant actions to be the related party transactions and disclosures about them. The information provided suggests that the debt to which the transactions relate arose while the company was headquartered in the UK, but the transactions themselves took place when it was headquartered in Switzerland, and were disclosed in financial statements prepared and audited according to Swiss law and internationally recognised accounting standards. The actions could therefore be considered to take place in Switzerland.
17. Taking into account all the considerations above, the UK NCP considers that the aims of the Implementation Procedures could be served by the Swiss NCP handling the complaint. It does not appear inappropriate for the UK NCP to handle it, however, and rather than cause further delay, the UK NCP has done so.

### **Identity of the complainants and their interest in the matter**

18. The complainants are a UK based NGO that aims to alleviate global poverty by addressing its causes, and a US organisation lobbying for the rights of working and middle class Americans. The complaint is made on behalf of (UK) citizens, and workers and consumers generally. The UK NCP accepts that both organisations have campaigned on global tax issues, and therefore have an interest in the tax issues they raise. The NCP makes some observations in Paragraphs 19. and 20. below about the nature of this interest, however.
19. The UK NCP notes that the link made by the complainants between increasing tax payments and alleviating poverty is not a direct link in so far as UK tax payments are concerned. The UK is a developed country and its taxes generally are not dedicated to meeting the needs of particular individuals or groups: increasing tax payments in the UK does not directly alleviate poverty. Because of this, the UK NCP considers that the interest the UK complainant has established in the issues raised is indirect.
20. Similarly, the UK NCP notes that a US company has an option to merge with the company named in the complaint, but does not consider that this establishes a direct interest of the US complainants in the UK tax issues raised.
21. With regard to the complainants' ability to provide information about the issues they raise, the UK NCP notes that the complaint largely relies

on financial and other information published by the companies concerned.

### **Whether the issue is material and substantiated**

22. In support of their claims, the complainants offer information from the company's annual reports and financial statements; information prepared in connection with changes in ownership of the company; commercially available database information about the company's corporate loans; and information about the ownership of the related party companies. The complainants provide their own financial analysis of these documents.
23. The company does not accept the analysis provided by the complainants, but does not dispute the authenticity or accuracy of the company documents it is based on. The company does not provide any additional documents in support of its response.
24. The UK NCP understands the main points of the complainants' analysis to be as follows:
  - a) Portions of bank loans taken out by the company to help finance a management buyout were subsequently bought by three companies owned by a Director who led the buyout;
  - b) The company then engaged in transactions with the related party companies: making interest payments on the loans, buying profit participation notes from two of the related party companies, and repurchasing the loans from all the related party companies;
  - c) The company did not fully disclose these related party transactions;
  - d) In the complainants' analysis, full disclosure, as well as having broader transparency benefits, would have been likely to show that the transactions benefitted the "related party" companies and reduced the tax paid by the company on its profits in the UK;
  - e) failure fully to disclose the transactions breaches the company's disclosure obligations under Chapter III of the Guidelines;
  - f) reduction of UK tax payments via the related party transactions breaches the company's tax obligations under Chapter XI of the Guidelines, and in particular its obligation to comply with the spirit of (UK) tax laws by "*discerning and following the intention of the legislature*". The complainants note in particular that commentary on how companies should interpret this provision says that "*transactions should not be structured in a way that will have tax results that are inconsistent with the underlying economic consequences of the transaction unless there exists specific legislation designed to give that result.*"



## Disclosure issue

25. With regard to disclosure, the UK NCP notes that the specific reference in Chapter III Paragraph 2(e) to related party transactions was added to the Guidelines from 2011. The complaint therefore focuses on disclosure of these transactions in the company's financial statements since 2011, although the transactions began in 2009-2010. The complainants also refer to disclosure of corporate governance structures and policies: the specific reference to these in Chapter III Paragraph 2(h) and pre-dates 2011.
26. The transactions are disclosed in the company's financial statements. The complainants consider the disclosures inadequate because they do not include a number of details about the transactions, for example income/profit received by the related party companies in the transactions, information about the terms of the transactions and the related party companies, and information about procedures for handling conflicts of interest with regard to board members and executives.
27. As the complainants note, Chapter III of the Guidelines cross-refers to the OECD Principles of Corporate Governance. Items listed in Chapter III, Paragraph 2 are based on items outlined in these principles. The focus is on disclosure to investors of "material information", defined in the Guidelines' commentary as *"information whose omission or misstatement could influence the economic decisions of its users"*.
28. The company's shareholders during the period concerned were a small number of professional or corporate investors. The company says that it made advance disclosure to shareholders of its related party transactions. It appears to the UK NCP highly unlikely that the investors were not fully aware of all material information relating to the transactions, and the UK NCP in any case does not understand the complaint to be made on behalf of these shareholders, who do not appear to be UK citizens.
29. The complainants claim that inadequate disclosure was made to "the public and stakeholders". The Guidelines encourage broader overall transparency *"to improve public understanding of enterprises and their interaction with society and the environment"*. The focus remains on disclosure of "material information", however. The UK NCP does not consider that the complainants have shown how the details not disclosed were material: the complainants do not offer information about economic decisions that may have been affected by disclosure (or that have subsequently been affected by the complainants' wider public campaign). The UK NCP also does not consider that the complainants have shown that disclosure would be likely to improve public understanding of the enterprise and its interaction with society.

## Taxation issue

30. The NCP notes that the obligations in Chapter XI of the Guidelines are described as obligations enterprises owe to the legislature and the tax authorities of the countries they operate in.
31. Chapter XI Paragraph 1 obliges enterprises to comply with the letter and spirit of tax laws in all the countries in which they operate. The complainants raise an issue about the company's obligations under UK tax law only, and the UK NCP has not considered the laws of other countries in which taxes relating to the transactions may have been paid or due (except to note that the company's accounts are prepared under Swiss law). The company notes, however, that neither it nor its subsidiaries has any pending tax inquiry or investigation from any tax authority into the matters the complainants raise.
32. The commentary on Chapter XI says that an enterprise complies with the spirit of the tax laws if it "*takes reasonable steps to determine the intention of the legislature and interprets those tax rules consistent with that intention in light of the statutory language and relevant contemporaneous legislative history.*" The UK NCP believes that "reasonable steps" will vary according to the state of development of tax arrangements in the country of operation. Where the tax law is not well developed or a tax authority lacks capacity, enterprises may need to take additional steps to ensure its compliance. Where tax arrangements are more developed, relying on the systems established by the legislature may be reasonable. The UK NCP believes that this interpretation is consistent with the international investment context of the Guidelines.
33. The commentary further advises – and the complainants ask the NCP to note - that transactions should not be structured "*in a way that will have tax results that are inconsistent with "the underlying economic consequences of the transaction".*" The UK NCP interprets this as meaning that, broadly speaking, companies should pay tax associated with its products or sales in the country where they made.
34. In this case, however, the NCP notes that the transactions concerned relate to the underlying financing of the company rather than to its operations or sales. The NCP considers that the economic consequences therefore relate to the company's structuring and profitability globally rather than to its position or sales in the UK. The NCP notes that the information provided appears to show that the company's taxable profits (including taxable profits in the UK) increased over the period during which the transactions took place.
35. As noted at Paragraph 19 above, the UK is a developed country. It has a well developed tax system with detailed tax legislation and regulation that may be considered as "*setting out the intention of the legislature*" and is updated where case law identifies specific omissions or issues.

Apart from a brief reference to a general anti-avoidance measure planned by the UK government, the complainants do not offer any information to suggest that the legislature has made specific statements of its intentions about transactions of the kind described in the UK tax code or UK tax cases relating to transactions of the kind they describe. Nor do the complainants appear to the UK NCP to offer any information to show enterprises may be obliged to take additional proactive measures to determine the intent of the UK legislature because the legislature lacks capacity to act.

36. The information offered by the complainants is based on public documents and it can be presumed that the UK tax authorities had access to it. The UK NCP notes that the UK tax authority employs a client relationship management approach to companies of the size of the company named in the complaint, aiming to address risks “in real time”. The UK NCP considers it reasonable to regard this process as allowing the legislature to make its intentions clear to companies with regard to specific risks.
37. Taking into account the above, the UK NCP considers that the complainants have failed to substantiate an issue with regard to the company’s obligations under Chapter XI. The UK NCP notes, however, that the document referred to at Paragraph 39. below suggests that the UK authorities (and others) may in the future set out publicly their intentions in the area raised in the complaint.

### **Relevance of applicable law and procedures, including court rulings**

38. The UK NCP is not aware of any related legal rulings.

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

39. The UK NCP is not aware of any other OECD MNE Guidelines cases relating to this issue. The complainants note that the OECD and the G8 are jointly supporting work to address similar issues, referring to the 2013 report and action plan “Addressing Base Erosion and Profit Shifting”. The UK NCP notes that the UK Government has issued alongside the 2014 Budget a document stating its priorities for this work going forward.

### **Whether the consideration of the specific issue would contribute to the purpose and effectiveness of the Guidelines**

40. The NCP's decision is based on its finding that the issues are not material and substantiated and not on any assessment of the likely outcome of any further consideration of the complaint.
41. The UK NCP also makes a general observation about the handling issues considered in Paragraphs 11-17: it is important for the purpose and effectiveness of the Guidelines that parties' decisions to use the NCP process consider the appropriateness of the process overall and are not unduly influenced by expectations of an individual NCP.

## **Next steps**

42. As the complaint has been rejected, this Initial Assessment concludes the complaint process under the Guidelines.

**19 May 2013**

**UK National Contact Point for the OECD Guidelines for Multinational Enterprises**

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