

Newsletter **ESG Update**

Human Rights Due Diligence – Navigating the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct

A recent case before the National Contact Point involving a Swiss bank underscores the importance of maintaining robust human rights due diligence systems in line with international guidance

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A New Test Case for Human Rights Due Diligence under the OECD Guidelines



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Due diligence is the cornerstone of responsible business conduct concerning human rights and environmental protection under the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. A recent submission filed with the Swiss National Contact Point concerning a Swiss bank highlights the need to understand how the Guidelines work and how to avoid pitfalls when dealing with procedures before the Swiss NCP.

I. Introduction

Although not formally binding for companies, the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (the **Guidelines**) are an international benchmark for business responsibility. Endorsed by 51 adhering governments and covering a wide range of topics including human rights, labour rights, environmental protection, anti-bribery, consumer interests, disclosure, science and technology, competition, as well as taxation, the Guidelines are the only multilaterally agreed and comprehensive instrument for responsible business conduct (**RBC**).

A unique feature of the Guidelines is their non-judicial grievance mechanism, the National Contact Points (**NCPs**) that each government adhering to the Guidelines is required to establish. Any individual or organisation with a legitimate interest can submit a case to an NCP (or several NCPs), alleging that a multinational enterprise operating in or from the territory of the respective State is not observing the Guidelines (so-called **Specific Instance**). In addition to raising awareness of the Guidelines and promoting their implementation, the main function of the NCPs is to offer their good offices with a view to facilitating a mutually acceptable outcome through mediation or conciliation.

The Swiss NCP, which is located at the State Secretariat for Economic Affairs (SECO), has dealt with a large number of

Specific Instances involving enterprises from a variety of sectors including finance, raw materials, pharmaceuticals, and sports. In addition to procedures before the Swiss NCP, Swiss companies have been involved in a number of Specific Instances handled by foreign NCPs (for example, the U.S. NCP).

II. Navigating Procedures before NCPs

In many respects, procedures before the Swiss NCP (and NCPs generally) differ substantially from traditional proceedings before state courts or arbitral tribunals. Moreover, the interpretation of specific points in the Guidelines may vary from one NCP to another. Accordingly, navigating safely through a Specific Instance requires special expertise. Key points to consider include the following:

Know-How: Operating at the intersection of international law and corporate responsibility, advising on Specific Instances requires in-depth knowledge of the Guidelines and an understanding of how international RBC standards function. It also requires familiarity with transnational regulatory developments (for instance, emerging due diligence regimes).

Strategy: The parameters, expectations, and nuances of NCP procedures call for a tailored strategic approach, which is generally more collaborative than in a court setting and based on a thorough understanding of the Guidelines.

Publicity: Participation in NCP procedures is voluntary. NCPs do not have the authority to impose remedies. However, the publicity of NCP procedures can have a significant impact on the reputation of the involved parties. While sensitive information must be kept confidential, the identity of the parties and a summary of the case, including a summary of the parties' arguments, are published on the Swiss NCP's website. In addition, regardless of the outcome of a Specific Instance, NCPs may make public recommendations to a company involved regarding its observance of the Guidelines. A careful balance must be struck between transparency and confidentiality, for example with respect to the protection of sensitive commercial information.

NCPs' Interpretation: In the absence of an appeal body, NCPs may develop different interpretations of key points in the Guidelines. For example, the answer to the key question of what constitutes a relevant business relationship (see below, Section III) can differ from one NCP to another. It is therefore crucial to understand the respective NCP's approach to interpreting the Guidelines.

Resources and Timeline: Specific Instances are resource-intensive and time-critical. NCPs do not have the capacity or the authority to conduct their own investigations. For the company involved, this typically calls for an extensive fact-finding exercise, which may require liaising with various internal stakeholders across business units and country entities. NCPs are expected to conclude their procedure within 12 months of receiving of a submission. However, this timeframe can be extended if warranted by the circumstances.

III. Pending Case before the Swiss NCP

On 5 April 2023, the International Union of Food, Agricultural, Hotel, Restaurant,

Catering, Tobacco and Allied' Workers Associations (IUF) lodged a submission with the Swiss NCP alleging that a Swiss bank (the **Bank**) had failed to comply with the Guidelines. Specifically, IUF alleged that the Bank failed to carry out adequate human rights due diligence (HRDD) in relation to an investment in NagaCorp Ltd (**Naga Corp**), an investment holding company that operates and manages NagaWorld, a large hotel and entertainment complex in Phnom Penh, Cambodia. According to IUF, Naga Corp has infringed fundamental labour rights in connection with the dismissal of a union leader and union members, the detention of strikers, and violence and threats. IUF calls on the Swiss NCP to facilitate a dialogue with a view to mitigating the alleged adverse impacts linked to the Bank's investment in Naga Corp, using the Bank's leverage, or, alternatively, by divesting from Naga Corp.

In the NCP's Initial Assessment published on 12 July 2023, the relevant investment is described as follows: the Bank itself does not hold senior notes (a type of bond that takes precedence over other debts in the event of bankruptcy) in Naga Corp. Rather, the senior notes in question are held by an investment fund (undertaking for the collective investment in transferable securities (UCITS)), for which a non-Swiss affiliate company of the Bank acts as management Company.

At the core of the matter are two questions: i) does the Bank's investment in Naga Corp constitute a business relationship within the meaning of the Guidelines, and, in this context, can the alleged adverse human rights impacts be said to be 'directly linked' to the Bank?, and ii) did the Bank carry out adequate HRDD in relation to the alleged adverse human rights impacts?

Based on the Swiss NCP's Initial Assessment, several preliminary observations can be made:

Business Relationship: The Bank asserted that it did not take any part in the management of the investment fund and did not exercise any control or influence over the fund's investments. However, reiterating the broad interpretation of the concept of 'business relationship' in the Guidelines, the Swiss NCP stated that a business relationship with the Bank can be assumed in the present case. It noted that '(t)he fact that bonds without voting rights are involved is not relevant to determine whether a business relationship exists under the OECD Guidelines, but it may influence the degree of possible leverage'.

Direct Link: Where a business relationship within the meaning of the Guidelines exists, the next question is whether the alleged adverse human rights impacts are 'directly linked' to the Bank's operations, products or services. Although the specifics of this concept remain somewhat ambiguous in practice, 'directly linked' is the lowest level of involvement captured by the Guidelines (a lower level of involvement than 'causing' or 'contributing to' an adverse impact). Nevertheless, a direct link triggers an expectation that the company will respond adequately to the adverse impact. What is adequate depends mainly on the degree of leverage the company has in the circumstances of the specific matter. Here, the Swiss NCP took the view that the mere fact that an entity managed by an affiliate of the bank holds non-voting bonds of Naga Corp was sufficient to establish a direct link between the Bank's activity and the alleged adverse impacts.

Due Diligence: The Guidelines expect companies to conduct risk-based HRDD to identify, prevent and mitigate actual and potential adverse impacts, and to account for how these impacts are addressed. The Bank stated that it had conducted extensive due diligence in respect of Naga Corp (including by

directly engaging with Naga Corp) and concluded that the controversy at hand was relatively minor. In its Initial Assessment, the Swiss NCP did not comment on the adequacy of the Bank's due diligence efforts but indicated that this issue would be a key aspect in the further course of the proceedings.

Based on its Initial Assessment that a business relationship and a direct link between the Bank's activities and the alleged adverse impacts had been sufficiently substantiated, the Swiss NCP accepted the Specific Instance. It offered its good offices with the aim of reaching a mutually acceptable resolution of the matter through a confidential mediation.

IV. Discussion

The case is a reminder that it is essential to be aware of the ever-developing RBC landscape. In this context, the Guidelines are a key reference point, which is underlined not least by the continued emergence of 'hard law' regulations drawing on or even referring to the Guidelines (and other international standards such as the UN Guiding Principles) both in Switzerland (see, for instance, Art. 964b para. 3, 964j para. 4, 964k para. 4 Swiss Code of Obligations) and at the EU level (in particular, see the Proposal for a Corporate Sustainability and Due Diligence Directive, [CSDDD](#)). Navigating the pitfalls of a Specific Instance requires special knowledge and a tailor-made strategy.

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