



18 June 2014

INITIAL ASSESSMENT ANONYMOUS NOTIFIER VS NORWEGIAN COMPANY

EXECUTIVE SUMMARY, INCLUDING CONCLUSION:

The Norwegian OECD National Contact Point (NCP) received an anonymous notification on 7 March 2014 regarding an enterprise group headquartered in Norway (hereafter “the Company”¹) with operations in a non-adhering country (hereafter “Country Y”). The notifier claims that the local management of a subsidiary of the Company in Country Y has been engaged in “*wrongful practices of corruption and bribery*”. The notifier also alleges that the Company has failed to react to the notifier’s similar complaint filed through the enterprise’s whistleblower channel. The notifier’s request to the NCP is primarily to conduct an investigation with the aim to penalize the local management of the Company in Country Y.

According to Chapter VI of the Guidelines “Enterprises should not, directly or indirectly, offer, promise, give or demand a bribe or other undue advantage to obtain or retain business or other improper advantage.” The notification therefore falls within the scope of the Guidelines.

The NCP has however decided to reject the notification on the following grounds: First, the allegations have not been supported by sufficient documentation and have therefore not been substantiated. In addition, the notifier has repeatedly insisted on concealing his or her identity and not followed the advice to appoint a third party representative, such as the national chapter of Transparency International. The NCP understands there may be legitimate reasons; especially fear of retaliation, to wish to be anonymous in this case, but remaining anonymous means that the NCP cannot establish that the notifier has sufficient legitimate interest in the matter. Furthermore, the NCP is a non-judicial grievance mechanism with the aim to facilitate dialogue to resolve issues relating to the implementation of the Guidelines. The NCP does not have legal investigative powers or legal sanction opportunities. Without a representative of the notifier to relate to, the NCP will not be able to facilitate a meaningful dialogue between the notifier and the Company on the issues raised.

This Initial Assessment concludes the notification process under the Guidelines in this case.

¹ In accordance with our Procedural Guidelines, the Initial Assessment will normally include the names of the parties. The Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Commentary 32 however state that when the specific instance is to be rejected, the NCP can make exceptions: “...If the NCP believes that, based on the results of its initial assessment, it would be unfair to publicly identify a party in a statement on its decision, it may draft the statement so as to protect the identity of the party.” A similar exception is found in our Procedural Guidelines. In this instance, the complainant is anonymous and can therefore not be named. The Company has requested confidentiality, and due to the reasoning behind the rejection of this instance, the NCP has decided not to disclose the Company’s name.

OBSERVATIONS AND RECOMMENDATIONS

By rejecting the case at this early stage, the NCP has not assessed whether the allegations made may be valid or not. The NCP has however made some observations and recommendations regarding the issue of bribery and whistleblower channels; and related to this specific case.

The Guidelines state that “Enterprises should carry out risk-based due diligence”², understood as “the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts”³. Several tools⁴ exist to assist enterprises in developing anti-bribery programmes that focus on effectively countering the risk of bribery. *“Risk exposure may vary among different industries and specific companies, but no enterprise can be certain that it will be free of risk. Not only does an effective anti-bribery programme help mitigate this risk, it also strengthens reputation, builds the respect of employees, raises credibility with key stakeholders and supports an enterprise’s commitment to honest and responsible behaviour.”*⁵

In this specific instance, the Company provided the NCP with information about its general corporate governance policies, its Code of Conduct and its whistleblower channel. The Company also shared specifics on how it, with assistance from an external consultant, is handling the issues raised in this case. Based on this information, and on consultations with Transparency International Norway, the NCP has the following observations and recommendations:

The NCP has not assessed the Company’s anti-bribery programme in detail, but it seems to cover aspects of identifying, preventing, mitigating and acting upon matters related to bribery. The Company has established an online whistleblower channel that has been used by the notifier in this case. The NCP believes that the Company should be given the possibility to examine the matter internally⁶ and if possible to report to the notifier on any measures taken. If the notifier is unsatisfied with the outcome and believes that illegalities are taking place, the NCP believes the matter should again be brought to the attention of authorities with investigative powers. If the internal investigations strengthen any suspicions regarding corrupt practices, the Company should consider sharing findings with relevant authorities, and/or taking other transparency measures in accordance with UN Guiding Principles’ Effectiveness Criteria for Non-Judicial Grievance Mechanisms (Principle 31).

Furthermore, the Company should improve awareness of and compliance with such programmes/measures through appropriate dissemination and through training programmes and disciplinary procedures.⁷ The risks the Company faces and the effectiveness of its procedures may change over time. It can therefore be useful to monitor and review the situation after some time.

THE COMPLAINT

On 7 March 2014, the Norwegian NCP received an anonymous notification against the Company for “*wrongful practices of corruption and bribery*” by local management of a subsidiary in Country Y.

² OECD Guidelines for Multinational Enterprises 2011, Chapter II, General Policies, Section 12

³ Op cit, Commentary 14

⁴ <http://www.business-anti-corruption.com/resources/anti-corruption-tools-inventory.aspx>

<http://www.oecd.org/corruption/anti-corruption-ethics-and-compliance-handbook-for-business.htm>

⁵ Business Principles for Countering Bribery, Transparency International, 2013

⁶ In this process, the Company may also seek guidance from “Protect your Business Handbook”, Transparency International; “Say no to corruption – it pays”, Norwegian Ministry of Foreign Affairs, 2008 and material from U4 Anti-corruption Resource Centre (www.u4.no)

⁷ OECD Guidelines for Multinational Enterprises, Chapter VII. Combating Bribery, Bribe Solicitation and Extortion, for instance Section 2 and 6. See also Commentaries.

Prior to this (1 March 2014), a similar notification had been sent by e-mail to a Norwegian anti-corruption resource centre where the notifier stated that *“By reporting the following to yourselves we wish to let the laws on corruption and bribery be re-instated and (the Company) be penalised accordingly.”* Several recipients were copied in on this e-mail; such as the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (Økokrim), the Secretary General of Transparency International Norway and some at the OECD in Paris. The e-mail referred to and included a report sent to the whistleblower channel of the Company. The concern was that the local management of the subsidiary in Country Y was offering *“gifts to be given to our employees”* during a certain event and that he/she had *“news that some of our higher ranked employees were approached at their respective residences (those of whom could be of strategic importance to The Company) and some tad expensive gifts were also distributed”*.

On 6 March 2014, the Secretary General of Transparency International Norway who had received a copy of the e-mail 1 March, suggested to the notifier that he/she could contact the Norwegian NCP as a possible way forward. The following day, the e-mail of 1 March and its trail of communication was forwarded to the NCP from the anonymous notifier with the ending remarks that, *“We look forward to your needful intervention decisively. You may make a independent assessment of whatever we have re-iterated in our trailing e-mails.”* The notification did not refer to the OECD Guidelines.

The content from the initial notification was reiterated through other e-mails from the notifier, see Annex 1 for details.

THE COMPANY’S RESPONSE TO THE COMPLAINT

The Company was informed about the complaint and replied 26 March 2014 with information about its general Corporate Governance policies and procedures, including a Code of Conduct and a whistleblower channel. It also referred to the specific complaint and stated that it *“has taken steps to investigate the case further according to the (...) Code of Conduct with no risk for disclosing the employee’s identity or any attempt to identify the anonymous disclosures.”* Furthermore, the company notes that *“[d]ue to confidentiality concerns we regretfully cannot disclose further information of the status of the investigation without compromising the rules and procedures according to the [Company] Code of Conduct and other applicable rules and regulations.”* The company also notes that *“We can however, assure the NCP that we remain committed to complying with the laws of the countries in which we operate, and to conform to good corporate citizenship. As such, we view any complaint or concern suggesting infringement(s) of [the Company’s] Corporate Governance policies and procedures or the guidelines set forth in the Code of Conduct, as well as any kind of unethical or illegal activities with the utmost seriousness.”* The Company has subsequently upon request from the NCP, elaborated on some of the specific investigative steps it was taking.

THE INITIAL ASSESSMENT PROCESS

In the Initial Assessment process, the NCP has contacted the notifier and the Company by e-mail several times, see details in Annex 1.

In addition, the NCP informed the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (Økokrim) about the notification and asked whether our handling it would interfere with any investigations or proceedings undertaken by them. This was not the case, so we proceeded. Since the notifier had copied correspondence with Transparency

International Norway (TI Norway), the correspondence revealed that TI Norway had advised the notifier to alert the NCP and since the notifier had copied TI Norway in the notification e-mail, the NCP Secretariat consulted with TI Norway as experts on bribery on how to proceed.

THE NCP'S ASSESSMENT

The Initial Assessment process is to determine whether the issues raised in the complaint merit further examination. It does not determine whether the Company has acted consistently with the Guidelines. In accordance with the OECD Guidelines for handling notifications, the NCP has considered the following criteria:

- Which NCP is the right entity to assess the alleged violation?

The Norwegian NCP received the notification. The allegations concern business practices of a 100 per cent owned subsidiary to a company listed on the Oslo Stock Exchange with headquarters in Norway. The subsidiary is in a non-adhering country. According to the Guidelines, issues will generally be dealt with where they have arisen. If issues arise in non-adhering countries, NCPs shall "take steps to develop an understanding of the issues involved, and follow the procedures where relevant and practicable."⁸ The Norwegian NCP is the right NCP to assess the notification.

- Is the Company a multinational enterprise according to the OECD Guidelines?⁹

The Company is headquartered in Norway, listed on the Oslo Stock Exchange, is headquartered in Norway and according to its own Annual Report for 2013 wholly owns or has majority ownership in more than 40 subsidiaries in more than 30 countries. The Company qualifies as a multinational enterprise according to the OECD Guidelines.

- Has the notifier a legitimate interest in the matter submitted to the NCP?

In this case, the notifier has insisted on remaining anonymous. The NCP understands there may be legitimate reasons; especially fear of retaliation, to wish to be anonymous in this case. However, to take on a case, the NCP needs to establish that the notifier has a legitimate interest in the matter. The NCP therefore suggested several times that the notifier could appoint a representative (for instance the national chapter of Transparency International in Country Y) to act on his/ her behalf and to relate to the NCP. The notifier rejected this. Without knowing the notifier's identity, the NCP finds there are not sufficient grounds to conclude that the notifier has a legitimate interest in the matter.

- Is the notification material and substantiated?¹⁰

The notification is material in the sense that it refers to alleged non-observance of the Guidelines and the Company's Code of Conduct related to bribery. According to Chapter VI of the Guidelines "Enterprises should not, directly or indirectly, offer, promise, give or demand a bribe or other undue advantage to obtain or retain business or other improper advantage." The notification includes a

⁸ II. Implementation Procedures of the OECD Guidelines for Multinational Enterprises, C.5.

⁹ I. OECD Guidelines for Multinational Enterprises. I. 4: "A precise definition of multinational enterprises is not required for the purposes of the Guidelines. These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. (...) The Guidelines are addressed to all the entities within the multinational enterprise (parent companies and/or local entities)."

¹⁰ According to the Norwegian NCP Procedural Guidelines, materiality is understood as a fact that is significant to the issue at hand. Substantiation concerns the extent to which the complaint is supported by proof or evidence.

copy of a report sent to the Company's whistleblower channel with a rather general description of alleged bribery by local management, and a short description of related claims without further substantiation. Taking into account that bribery in general is a covert action and often difficult to substantiate, the NCP believes the threshold should be low for notifying NCPs about potentially irresponsible business practices. The NCP did however explain to the notifier that it needed additional information to allow for a proper assessment and requested this from him/her without receiving it. In lack of such information, the NCP finds that the allegations have not been supported by sufficient documentation and therefore have not been substantiated.

- Does there seem to be a link between the enterprise's activities and the issue raised in the specific instance?

The notifier claims that the Company has failed to react to his/her complaint to the Company sent through its online whistleblower channel. The Company acknowledges that they have received what they believe to be the same, identical complaint. Thus, the NCP deems there to be a link between the enterprise's activities and the issue raised.

- What is the relevance of applicable law and procedures, including court rulings?

The notification refers to bribery and corruption. Several Norwegian laws and international treaties are relevant but we mention only:

- The Norwegian General Civil Penal Code § 276
- UN Convention Against Corruption
- OECD Bribery Convention

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

The NCP is not aware of parallel court proceedings in this case. After receiving the notification, the NCP contacted the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (Økokrim) since they had received the similar information by e-mail (copied in on e-mail of 1 March). They confirmed the receipt of the information, but added that they had not acted upon it, nor were they likely to do so under the current circumstances.

The NCP has however received information from the Company that it is investigating the issues raised. This could be seen as a "parallel proceeding". According to the Guidelines, NCPs should not decide that issues do not merit further consideration solely because parallel proceedings are under way or are available to the parties concerned. NCPs should evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised without creating serious prejudice for either of the parties involved in these other proceedings or cause a contempt of court situation.¹¹

The NCP believes that the Company should be given the possibility to examine the matters reported through its whistle blowing mechanism internally to report to the notifier on any measures taken. If the notifier is unsatisfied with the outcome of the internal company mechanism, and believes that illegalities are taking place or if the Company finds indications of illegal practices, the NCP believes the matter should again be brought to the attention of the correct authorities who have investigative powers.

- Would the consideration of the specific instance contribute to the purposes and effectiveness of the Guidelines?

¹¹ Implementation procedures of the OECD Guidelines for Multinational Enterprises, Commentary 26

The purpose of the NCP is to contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines.

The notifier's main request to The Company is to take punitive action against its local management. The notifier's request to the NCP is primarily to conduct an investigation of facts with the aim to penalize the local management of The Company.

The NCP has explained to the notifier that it does not have the means to investigate claims and facts as if we were a court or a branch of the police. We said that establishing whether bribery has taken place and determining the appropriate penalty is a legal matter and should be handled by competent authorities, including the police and the courts. Neither internal investigations nor court cases preclude the NCP from handling certain issues related to bribery and to offer our good offices to the parties involved if this is deemed meaningful. In this instance, the outcome of dialogue could for instance be to identify good practices to implement enterprise group policies to prevent bribery in local subsidiaries and to look at certain aspects of the use of whistle blower channels.

However, such a procedure requires that both parties are willing to engage or to participate in good faith and in a transparent manner. This was not the case in this instance, and the NCP therefore finds that an offer of good offices would not make a positive contribution to the resolution of these issues.

THE NCP'S DECISION AND RECOMMENDATIONS

The NCP has decided to reject the notification because the allegations made have not been supported by sufficient documentation and therefore have not been substantiated. Furthermore, due to notifier's insistence on remaining anonymous, the NCP cannot establish that the notifier has sufficient legitimate interest in the matter.

OTHER OBSERVATIONS AND RECOMMENDATIONS

By rejecting the case at this early stage, the NCP has not assessed whether the allegations made may be valid or not. Establishing whether bribery has taken place and determining the appropriate penalty is a legal matter and should be handled by competent authorities, including the police and the courts.

The NCP has however made some observations and recommendations regarding the issue of bribery and whistleblower channels; and related to this specific case.

The Guidelines state that "Enterprises should carry out risk-based due diligence"¹², understood as "the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts"¹³. Several tools exist to assist enterprises in developing anti-bribery programmes that focus on effectively countering the risk of bribery. "Risk exposure may vary among different industries and specific companies, but no enterprise can be certain that it will be free of risk. Not only does an effective anti-bribery programme help mitigate this risk, it also strengthens reputation, builds the respect of employees, raises credibility with key stakeholders and supports an enterprise's commitment to honest and responsible behaviour."¹⁴

¹² OECD Guidelines for Multinational Enterprises 2011, Chapter II, General Policies, Section 12

¹³ Op cit, Commentary 14

¹⁴ Business Principles for Countering Bribery, Transparency International, 2013

Companies are advised to have whistleblower channels as part of their risk management programmes and to act upon information received through such channels. However, if the internal investigations lead the company to suspect illegal practices, competent organizations such as Transparency International, recommend the company to notify competent authorities.

In this specific instance, the Company provided the NCP with information about its general corporate governance policies, its Code of Conduct and its whistleblower channel. The Company also shared specifics on how it, with assistance from an external consultant, is handling the issues raised in this case. Based on this information, and on consultations with Transparency International Norway, the NCP has the following observations and recommendations:

The NCP has not assessed the Company's anti-bribery programme in detail, but it seems to cover aspects of identifying, preventing, mitigating and acting upon matters related to bribery. The Company has established a whistleblower channel available online and with detailed procedures that has been used by the notifier in this case. The NCP believes that the Company should be given the possibility to examine the matter internally¹⁵ and to report to the notifier on any measures taken. If the notifier is unsatisfied with the outcome of the internal company mechanism, and believes that illegalities are taking place, the NCP believes the matter should again be brought to the attention of authorities with investigative powers. The NCP also believes that the Company should consider sharing its findings with relevant authorities and/or other transparency measures in accordance with UN Guiding Principles' Effectiveness Criteria for Non-Judicial Grievance Mechanisms (Principle 31).

Should the Company's internal investigation strengthen its suspicions that bribery/corrupt practices have taken place, the NCP believes that the Company, in accordance with the OECD Guidelines, should take steps to develop further its internal controls, ethics and compliance programmes/measures for preventing and detecting bribery. Furthermore, the Company should improve awareness of and compliance with such programmes/measures through appropriate dissemination and through training programmes and disciplinary procedures.¹⁶ The risks the Company faces and the effectiveness of its procedures may also change over time. It can therefore be useful to monitor and review the situation after some time.

NEXT STEPS

This Initial Assessment concludes the notification process under the Guidelines.

ATTACHMENTS

Details of the NCP process in this Specific Instance
Information about the OECD NCPs and the OECD Guidelines

¹⁵ In this process, the Company may also seek guidance from "Protect your Business Handbook", Transparency International; "Say no to corruption – it pays", Norwegian Ministry of Foreign Affairs, 2008 and material from U4 Anti-corruption Resource Centre (www.u4.no)

¹⁶ OECD Guidelines for Multinational Enterprises, Chapter VII. Combating Bribery, Bribe Solicitation and Extortion, for instance Section 2 and 6. See also Commentaries.

ANNEX 1: DETAILS OF THE NCP PROCESS IN THIS SPECIFIC INSTANCE

The NCP received the complaint on 7 March 2014 and replied the same day with further information about the OECD Guidelines, the NCP's mandate and the conflict-solving role of the NCP. The notifier was asked to provide more information and to consider revealing his/her identity in order for the NCP to assess his/her legitimate interest in the matter.

The notifier replied by e-mail on 9 March saying that he/she will not provide any more information but said the NCP should ask The Company for details. The notifier also added that, *"It's not a question of mediation but to take punitive action against the concern."*

The e-mail trail was forwarded to the Company on 12 March together with an invitation to comment upon the complaint. On 26 March, the company shared its preliminary views on the complaint. The Company gave information about its general Corporate Governance policies and procedures, including a Code of Conduct and a whistleblower channel, but also its knowledge of the specific complaint. The company stated that it *"has taken steps to investigate the case further according to the (...) Code of Conduct with no risk for disclosing the employee's identity or any attempt to identify the anonymous disclosures."* Furthermore, the company notes that *"[d]ue to confidentiality concerns we regretfully cannot disclose further information of the status of the investigation without compromising the rules and procedures according to the [Company] Code of Conduct and other applicable rules and regulations."* The company also notes that *"We can however, assure the NCP that we remain committed to complying with the laws of the countries in which we operate, and to conform to good corporate citizenship. As such, we view any complaint or concern suggesting infringement(s) of [The Company] Corporate Governance policies and procedures or the guidelines set forth in the Code of Conduct, as well as any kind of unethical or illegal activities with the utmost seriousness."*

The NCP sent a second e-mail to the notifier on 11 April elaborating why the NCP needed someone identifiable to relate to if the case was to be taken up by the NCP. The NCP suggested that the notifier found a known party, like an NGO or a lawyer, who could act on his/her behalf and present facts to the NCP. It was reiterated that the NCP was probably not the right for a/venue for his/her complaint if he/she insisted upon remaining anonymous.

No response was received, so the NCP followed up with yet another e-mail dated 28 April explaining that the case would be rejected if we were not presented with an identifiable representative. We asked comments to our e-mail by 5 May.

The notifier replied on 4 May that *"Even if you assure me of confidentiality, I won't reveal my name ..."*. The notifier reiterated that we check with headquarters of the Company regarding the *"numerous complaints piling against"* its local management in Country Y. This e-mail was forwarded to the Company on 5 May. Prior to this, the NCP had telephone contact with the Company where we were given more information regarding its ongoing and planned investigations. The NCP agreed that there was merit in the Company's suggestions on how to proceed, including on its attempts to get more information regarding the allegations made. The internal investigation covers the following topics:

1. Compliance with the Company's policy on offering and acceptance of gifts to/from clients both on a Group level and Local Company level
2. Compliance with international laws, including Norwegian penal code, UK Bribery Act and U.S. FCPA, local Company's companies' applicable laws, as well as OECD guidelines
3. Review of how the Company's policy on gifts is carried out in practice in Country Y

The NCPs sent a shared draft initial assessment to the complainants and the Company on 2 June for factual corrections and the draft press release on 12 June with information that it would be published on Wednesday 18 June.

ANNEX 2: GENERAL INFORMATION ABOUT THE GUIDELINES

APPLICATION OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

The initial assessment is based on the 2011 version of the Guidelines as the complaint was submitted after the updated OECD Guidelines for Responsible Business Conduct. The Guidelines comprise a set of principles and standards for responsible business conduct in areas including general policies, human rights, disclosure, employment and industrial relations, environment, combating bribery, consumer interests, science and technology, competition and taxation. 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, while taking into account the particular circumstances of each host country.

The Guidelines are implemented in adhering countries by OECD National Contact Points (NCPs), which are charged with raising awareness of the Guidelines amongst businesses and civil society. NCPs are also responsible for dealing with complaints concerning allegations multinational enterprises operating in or from their territories have failed to observe the Guidelines.

THE NCP PROCEDURE

The NCP 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 NCP uses this information to decide whether the complaint warrants further consideration.
- 2) *Conciliation/mediation OR examination* – If a case is accepted, the NCP offers 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, the NCP will examine the complaint in order to assess whether it is justified. The NCP may commission fact-finding or other services to support the processing of the case if deemed necessary.
- 3) *Final statement* – If a mediated solution has been reached, the NCP will publish a final statement with details of the agreement and on the procedure followed. If conciliation/mediation is refused or fails to achieve an agreement, the NCP will examine the complaint and publish a final statement on whether or not the Guidelines have been observed and, if appropriate, recommendations to the company for future conduct.
- 4) *Follow-up* - If a mediated solution has been reached, the “parties may agree to seek the assistance of the NCP in the following-up on the implementation of the agreement and the NC may do so on terms agreed between the parties and the NCP¹⁷”.

¹⁷ Implementation procedures of the OECD Guidelines for Multinational Enterprises, Commentary 34

