



**OECD GUIDELINES  
FOR MULTINATIONAL  
ENTERPRISES**

National Contact Point  
for Responsible Business  
Conduct Norway

Oslo, 21 June 2021

**INITIAL ASSESSMENT**

**THE INTERNATIONAL UNION OF FOOD, AGRICULTURAL, HOTEL, RESTAURANT, CATERING, TOBACCO AND ALLIED WORKERS' ASSOCIATIONS (IUF), THE EUROPEAN FEDERATION OF FOOD, AGRICULTURE AND TOURISM TRADE UNIONS (EFFAT-IUF), THE SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU) AND THE UNIÃO GERAL DOS TRABALHADORES (UGT)**

**VS.**

**NORGES BANK INVESTMENT MANAGEMENT (NBIM)**

The objective of an initial assessment under the Procedural Guidelines is to determine whether the issues raised in the specific instance merit further examination. If so, the NCP will offer or facilitate access to consensual and non-adversarial procedures, such as dialogue or mediation ('good offices') to the parties. The NCP has at this stage made no determination as to whether the company has acted consistently with the OECD Guidelines. As specific instances are not legal cases and NCPs are not judicial bodies, NCPs cannot impose sanctions, directly provide compensation nor compel parties to participate in a mediation process.

**EXECUTIVE SUMMARY**

On 18 May 2020 the Dutch National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises received a notification of a specific instance from four trade unions: the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF), the European Federation of Food, Agriculture and Tourism Trade Unions (EFFAT-IUF), the Service Employees International Union (SEIU) and the União Geral dos Trabalhadores (UGT) with regards to alleged non-observance of the OECD Guidelines for Multinational Enterprises (the OECD Guidelines) by McDonald's.

The issues raised are gender-based violence and harassment (GBVH) in the global operations of McDonald's and related due diligence by two institutional investors: APG Asset Management (APG) and Norges Bank Investment Management (NBIM). The issues raised involve conduct at McDonald's operations in, but not limited to, Australia, Brazil, Chile, Colombia, France, the United Kingdom and the United States. The issues raised in the submission relate to the OECD Guidelines' Chapter II (General Policies), Chapter IV (Human Rights) and Chapter V (Employment and Industrial Relations).

Following coordination meetings between June and October 2020, the Dutch, US and Norwegian NCPs agreed that the US NCP will handle the part of the specific instance concerning McDonald's, with the support of the Dutch NCP. The Dutch NCP will handle the issues concerning APG. The Norwegian NCP will handle the issues concerning NBIM. The Dutch and the Norwegian NCPs agreed to coordinate on the issues concerning the investors.

This initial assessment concerns the issues raised relating to NBIM. The submitters allege that NBIM has failed to exercise due diligence or leverage in relation to GBVH at McDonald's in line with Chapters II and IV of the OECD Guidelines. Chapter II of the OECD Guidelines sets forth the expectation that enterprises should "Carry out risk-based due diligence [...] to identify, prevent and mitigate actual and potential adverse impacts [...], and account for how these impacts are addressed"; and "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".

The Norwegian NCP has determined that the issues raised in the submission from the trade unions relating to due diligence and leverage in NBIM merit further consideration and will offer its good offices with a view to facilitating dialogue between the parties.

## SUBSTANCE OF THE SUBMISSION

On 18 May 2020, the Dutch NCP received a notification concerning GBVH by McDonald's, a multinational enterprise with headquarters in Chicago, Illinois, USA, and related due diligence by investors APG (headquartered in the Netherlands) and NBIM (headquartered in Norway). The submitters are the four trade unions IUF, EFFAT-IUF (Europe), SEIU (USA) and UGT (Brazil).

The submitters allege that McDonald's conduct on GBVH issues is inconsistent with the recommendations in the OECD Guidelines Chapter IV (Human Rights) and Chapter V (Employment and Industrial Relations).<sup>1</sup> In their supplemental submission, the trade unions allege that APG and NBIM breached Chapter II (General Policies) and Chapter IV (Human Rights) of the OECD Guidelines in failing to exercise due diligence or leverage as it relates to GBVH at McDonald's. In

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<sup>1</sup> The submission also refers to ILO Conventions no. 111 Discrimination (Employment and Occupation) and no. 190 Violence and Harassment Convention and OECD (2018), OECD Due Diligence Guidance for Responsible Business Conduct.

addition to the OECD Guidelines, the submitters refer to the OECD Guidance Responsible business conduct for institutional investors (2017).<sup>2</sup>

The trade unions state that the two institutional investors have highly developed Responsible Business Conduct (RBC) programs and policies. However, they claim that these investment funds' programs and policies should address the global problem of GBVH at McDonald's under the OECD Guidelines and the investors' social responsibility commitments.<sup>3</sup>

The trade unions refer to NBIM's expectations of companies in which it invests with respect to human rights and labour rights with particular reference to the OECD Guidelines, and that these expectations extend to those companies' supply chains and other business relationships.<sup>4</sup> They point to an NIBIM report on responsible investment from 2019, which states that "We constantly monitor the companies in our portfolio in order to pick up incidents that might indicate failures in the management of environmental, social and governance risks".<sup>5</sup>

The submitters recognise that the investors are invested in thousands of companies and cannot be expected to have intimate, up-to-date knowledge of every company's conduct. Still, they claim that they "fell short" regarding GBVH abuses in McDonald's. They state that "GBVH problems at McDonald's should have come to the investors' attention through their normal due diligence operations".<sup>6</sup>

The trade unions refer to widespread media attention in 2018-19 concerning worker protests and class-action sexual harassment lawsuits against McDonald's in the US and other countries, and the dismissal of McDonald's CEO in 2019 for a sexual relationship with a subordinate, among other things. The documentation of sexual harassment dates to 2012. The submitters argue that internal and external monitoring systems should have alerted NBIM to the growing problem of sexual harassment in the company.<sup>7</sup>

The trade unions call for the following actions on the part of the investors, APG and NBIM, with a view to advancing effective implementation of the OECD Guidelines:<sup>8</sup>

- 1) Tailor their due diligence approaches by applying a comprehensive gender-lens to their investment activities in order to better identify, and thus mitigate and prevent adverse impacts, such as those occurring at McDonald's;
- 2) Participation by APG and NBIM in a mediation process with McDonald's and the submitters; and

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<sup>2</sup> Supplemental submission from trade unions (28 January 2021), p. 2 - 6.

<sup>3</sup> Submission from trade unions (18 May 2020), p. 23.

<sup>4</sup> Submission from trade unions, p. 24 – 25.

<sup>5</sup> Submission from trade unions, p. 26, with reference to NBIM (2019), Responsible investment: Government Pension Fund Global, p. 78.

<sup>6</sup> Submission from trade unions, p. 26.

<sup>7</sup> Submission from trade unions, p. 26 – 27.

<sup>8</sup> Supplemental submission from trade unions, p. 9 – 10.

- 3) By the weight of APG's and NBIM's leverage, urge McDonald's to accept the offers of good offices from the Dutch, Norwegian and US NCPs to mediate with the purpose of effectively addressing the mitigation and prevention of adverse impacts against female workers at McDonald's.

## RESPONSE FROM THE COMPANY

On 11 December 2020, the Norwegian NCP held an information meeting with NBIM, informing them of the coordination between the Dutch, US, and Norwegian NCPs. On 17 December 2020, NBIM was invited to respond to the complaint from the trade unions. On 15 January 2021, NBIM submitted a response to the NCP regarding the submission. After receiving additional information from the submitters, NBIM submitted a supplementary response to the NCP. NBIM's initial response and supplemental response to the submission are summarised below.

In responding to the submission, NBIM provides an overview of responsible investments and due diligence under the OECD Guidelines. NBIM manages the Government Pension Fund Global according to the mandate set by the Ministry of Finance. As required by the mandate, the Executive Board has established principles for the responsible management of the investment portfolio, which reference the OECD Guidelines. NBIM supports the OECD NCP mechanism and participated in the multi-stakeholder advisory group that provided input to the 2017 OECD Guidance Responsible business conduct for institutional investors. NBIM's expectations to companies and follow-up on human rights are based on the OECD Guidelines and the UN Guiding Principles on Business and Human Rights (UNGPs), and the OECD Guidelines are integrated into NBIM's due diligence processes.<sup>9</sup>

NBIM claims that there is no formal allegation of non-observance of the OECD Guidelines. Further to this, NBIM asserts that the case such as it pertains to NBIM does not merit further examination and should be dismissed by the Norwegian NCP for the additional reasons outlined below.

Firstly, they claim that the Norwegian NCP is not the correct entity to assess the complaint since the alleged misconduct did not take place in Norway and in view of the goal of functional equivalence of NCPs. It would be more in line with established procedures for this complaint to be considered by the US NCP.<sup>10</sup>

Secondly, NBIM claims that the information provided by the trade unions is not what is meant to constitute a material and substantiated issue under the OECD Guidelines. NBIM asserts that the complainants seem to base the case mainly on the fact that there is an alleged issue of GBVH problems at McDonald's and that the submitters have no concrete knowledge of the investors' ownership efforts in this respect.<sup>11</sup> Considering the 2017 OECD guidance Responsible business

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<sup>9</sup> Initial response from NBIM (15 January 2021), p. 1 – 2, supplemental response from NBIM (10 March 2021), p. 2.

<sup>10</sup> Initial response from NBIM, p. 4.

<sup>11</sup> Supplemental response from NBIM, p. 7.

conduct for institutional investors, NBIM claims that it seems reasonable to expect that institutional investors have adequate processes for monitoring and prioritising companies for follow-up on the basis of their risk exposure and potential contribution to environmental and social risks. Referencing the same sector guidance, NBIM asserts that lack of public evidence of specific follow-up of a single business relationship where an investor may be directly linked to a potential norm violation by a minority shareholding is not a bona fide breach of the Guidelines.<sup>12</sup>

Thirdly, when it comes to the link between the enterprise's activities and the issues raised in the specific instance, NBIM claims that "there must be a causality between Norges Bank's "activities" and the alleged adverse impact in McDonalds".<sup>13</sup> NBIM claims that this is meant to be something more than the general criterion of "directly linked by a business relationship". According to NBIM, the holding of shares in a company that is allegedly tied to an adverse impact is not on its own enough for the NCP to accept a complaint. NBIM underlines that it is up to the financial institution to determine how to best apply the different responsible investment tools.<sup>14</sup> Where they do decide to follow up an issue with a company based on their due diligence, it will be through a direct interaction between NBIM as a shareholder and the company. The concept of institutional investors participating in the NCP mediation between complainant and a company does not follow from the OECD Guidelines. Such matters should be handled by the entity contributing to or responsible for a potential RBC risk.<sup>15</sup>

Fourthly, NBIM claims that accepting the submission for further examination would not constitute a meaningful contribution towards the purposes and effectiveness of the OECD Guidelines. With the publication of the OECD Guidance Responsible business conduct for institutional investors in 2017, the expectations of institutional investors have been further clarified. Further to this, the mediation role sought for the institutional investors by the complainants in the parallel complaint against McDonald's is not one envisaged under the Guidelines.<sup>16</sup> They find that the purpose of involving NBIM seemingly is to get access to the Norwegian NCP's good offices and thereby get NBIM to the mediation table. NBIM underlines that the OECD Guidelines and the NCP system were not set up with the purpose of targeting a few multinational enterprises regarded as "best in class".<sup>17</sup>

In their supplemental response to the submissions from the trade unions, NBIM notes that they invest in more than 9,000 companies in 69 countries. They refer to their annual report on responsible investments in 2020, in which they describe changes to their expectation documents, including clarified "expectations for diversity and inclusion, which concern gender-related matters among others".<sup>18</sup> For some issues, such as shareholder voting, they are able to provide full,

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<sup>12</sup> Supplemental response from NBIM, p. 8.

<sup>13</sup> Supplemental response from NBIM, p. 8.

<sup>14</sup> Supplemental response from NBIM, p. 7 – 8.

<sup>15</sup> Initial response from NBIM, p. 5.

<sup>16</sup> Initial response from NBIM, p. 6.

<sup>17</sup> Supplemental response from NBIM, p. 1.

<sup>18</sup> Supplemental response from NBIM, p. 9.

company-level transparency, including on shareholder proposals concerning GBVH-related issues. NBIM has regular contact with McDonald's in meetings, covering various topics of interest. Human rights related matters and this specific complaint have been raised in such interaction. While NBIM does not express a view of the allegations themselves, this is in line with the NBIM expectation document, which makes clear that companies should engage transparently and responsibly on human rights, including through grievance mechanisms.<sup>19</sup>

NBIM states that they benefit from receiving environmental, social, and governance-related information about the companies in which they invest. While they consider that this case does not merit further consideration by the Norwegian NCP, they encourage the complainants to reach out to them outside of the NCP mechanism with information they would like to share. NBIM offers at the same time to present their mechanisms for RBC due diligence in greater detail to the complainants.

## PROCEEDINGS OF THE NCP TO DATE

In their submission of 18 May 2020, the trade unions requested the Dutch NCP to take a lead role in the specific instance, working in conjunction with NCPs in other countries where GBVH issues have arisen, and with respect to NBIM, with the Norwegian NCP.<sup>20</sup>

Generally, issues will be dealt with by the NCP of the country in which the issues have arisen. When issues arise from an enterprise's activity that takes place in several adhering countries or from the activity of a group of enterprises based in different adhering countries, the NCPs involved consult with a view to agreeing on which NCP will take the lead in assisting the parties, as outlined in the OECD Guidelines.<sup>21</sup> Between June and October 2020, the NCPs of the Netherlands, the US, and Norway coordinated on handling the submission from the trade unions.

Specific instances or parts of specific instances relating to financial institutions are regularly handed by the NCPs in which the institution is domiciled.<sup>22</sup> The OECD Guide for National Contact Points on coordination when handling specific instances (2019) furthermore stipulates that where the issues raised in a specific instance concern several NCPs, care should be taken to ensure that decisions made on coordination should "maximize the potential for the NCPs to contribute to the resolution of issues".<sup>23</sup> The Guide addresses situations where the conduct of various corporate entities related to the same impact is at issue:

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<sup>19</sup> Supplemental response from NBIM, p. 10.

<sup>20</sup> See submission from trade unions, p. 4 – 13.

<sup>21</sup> OECD Guidelines (2011), Procedural Guidance (Commentary para. 23 – 24).

<sup>22</sup> See for instance [Crédit Suisse and Society for Threatened Peoples Switzerland \(North Dakota Access Pipeline\)](#) and [Natixis and Natixis Global Asset Management and the trade union Unite Here Local 11](#), which were handled by the Swiss and French NCPs respectively. In other submissions concerning NBIM, the Norwegian NCP has considered that it was the correct entity to handle the complaint given that it was directed at a Norwegian company's internal guidelines, due diligence and follow-up. See [United Steel Workers and Birlesik Metal IS vs. NBIM](#), p. 7.

<sup>23</sup> OECD (2019), Guide for National Contact Points on Coordination when handling specific instances, p. 7. Available at: [Guide for National Contact Points on Coordination when handling Specific Instances \(oecd.org\)](#).

In these cases appointment of a lead NCP may not be necessary and the separate (but related) specific instances *may be considered by several NCPs in parallel in order to correctly address the different issues raised* (e.g. the activity of an enterprise causing a negative impact and the question of remediation on the one hand, and, on the other hand, the question of due diligence measures or RBC policy at a higher level in the value chain where an enterprise might be directly linked to an adverse impact).<sup>24</sup>

On this basis, the Dutch NCP presented a proposal for coordination between the three NCPs. On 27 October 2020, the Dutch, US, and Norwegian NCPs agreed to handle the separate, yet related issues concerning on the one hand GBVH in McDonald’s, and on the other, related due diligence by APG and NBIM. It was decided that the US NCP will handle the part of the specific instance concerning Mc Donald’s, with the support of the Dutch NCP.

The investors named in the submission are headquartered in the Netherlands and in Norway respectively, and the Dutch and Norwegian NCPs are therefore the correct entities to handle the parts of the submission relating to these investors’ due diligence. The Dutch NCP will handle the issues concerning APG, the Norwegian NCP will handle the issues relating to NBIM and these NCPs agreed to coordinate regarding the issues raised concerning the investors. The Dutch, US and Norwegian NCPs are of the view that handling the specific instance in this manner allows for correctly addressing the different issues raised and contributing to a resolution.

The Dutch NCP informed the submitters of the coordination. Following this, McDonald’s, APG and NBIM were informed. As the submission also refers to McDonald’s operations in, but not limited to, Australia, Brazil, Chile, Colombia, France and the United Kingdom, the NCPs in these countries were informed of the submission and NCP coordination.

Following this, the Norwegian NCP received the following documents from the parties:

15 January 2021	Initial response from NBIM to the submission
28 January 2021	Supplemental submission from trade unions
22 February	Clarification on interpretation of “inculpate” from trade unions
10 March 2021	Supplemental response from NBIM
26 March 2021	Trade unions comment NBIM’s supplemental response
14 April 2021	NBIM comments response from trade unions
30 April 2021	Draft initial assessment shared with parties
18 May 2021	NBIM comments draft initial assessment

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<sup>24</sup> OECD (2019), Guide for National Contact Points on Coordination when handling specific instances, p. 7. Text italicized by the Norwegian NCP. The Guide refers to a specific instance in 2011 which was handled by the NCPs of Korea, Norway and the Netherlands. Although stemming from the same underlying impact, the submission dealt with the activities of three separate enterprises, POSCO, NBIM and APG, and therefore raised three separate sets of issues (i.e. the activities of POSCO resulting in human rights impacts, and the due diligence approaches of NBIM and APG respectively). As such the NCPs of Korea, Norway and the Netherlands each handled the specific instance with respect to the issues raised involving the enterprise from their jurisdiction.

The documents have been shared with the parties and are published on the website of the NCP. The Norwegian NCP acknowledges that in this case the indicative timeline for the initial assessment was not met, mainly due to the coordination activities between the NCPs. On 20 May 2021, the Dutch NCP concluded that the aspects of the submission relating to APG merit further examination and offered its good offices to the parties, which they have accepted.<sup>25</sup>

## INITIAL ASSESSMENT BY THE NCP

The Norwegian NCP has decided to accept the submission relating to due diligence and leverage in NBIM. This decision has been taken following an elaboration of the six criteria below, as outlined in the commentary to the OECD Guidelines' Procedural Guidance, para 25 and the Procedural Guidelines for handling specific instances of the Norwegian NCP.<sup>26</sup> In doing so, the NCP has sought to determine whether the issues are "bona fide", in other words real or authentic, and relevant to the implementation of the OECD Guidelines.<sup>27</sup>

### 1. WHAT IS THE IDENTITY OF THE PARTY CONCERNED AND WHAT IS THEIR INTEREST IN THE MATTER?

The trade unions IUF, EFFAT-IUF, SEIU and UGT submitted the specific instance concerning GBVH in McDonald's and related due diligence by investors APG and NBIM.

The IUF is a global union federation composed of 423 affiliated unions representing more than 10 million workers in 127 countries in food-related sectors, including fast-food restaurants. The EFFAT-IUF is the European regional organization of the IUF that brings together 120 national trade unions in those sectors throughout Europe, including in the fast-food industry. The SEIU is a US and Canadian trade union organizing and representing workers in multiple service sectors, including fast-food workers. The UGT is a Brazilian trade union centre with affiliated unions representing thousands of workers in the fast-food sector.<sup>28</sup>

The trade unions state that their interest in the specific instance lies in their mandate to represent workers in the fast-food sector, and their commitment to making elimination of sexual harassment one of their priority areas of work. The submitters have members working in McDonald's in their affiliates, like SEIU and UGT.<sup>29</sup> The submitters are not acting as representatives of individual workers or a group of workers.

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<sup>25</sup> See the initial assessment by the Dutch NCP of 20 May 2021: [4 trade unions vs. APG Asset Management](#).

<sup>26</sup> National Contact Point Norway (2014), [Procedural Guidelines for Handling Specific Instances – NCP Norway](#).

<sup>27</sup> OECD (2019), Guide for National Contact Points on Coordination when handling specific instances, p. 5.

<sup>28</sup> Submission from trade unions, p. 2.

<sup>29</sup> Supplemental submission from trade unions, p. 6.



It is common that NCPs accept submissions filed by NGOs, trade unions or other organisations that concern causes they defend, and the complaint is otherwise deemed admissible.<sup>30</sup> The OECD Guide for National Contact Points on the initial assessment of specific instances addresses this:

Organisations with mandates or objectives related to certain RBC themes may also have an interest in issues touching on those themes (i.e. instances of environmental harm, forced labour etc.). An NCP may consider the *mandate of an organisation as well as its stated objectives in submitting a specific instance in considering the legitimacy of its interest in a matter.*<sup>31</sup>

The NCP finds that the submitters' interest in this specific instance is legitimate. It lies in causes they defend in their mandate as trade unions representing workers in the fast-food sector, and the commitments the trade unions have made in Congress decisions to make elimination of sexual harassment and gender-based violence one of their priority areas of work.<sup>32</sup>

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## 2. ARE THE ISSUES RAISED MATERIAL AND SUBSTANTIATED?

The NCP interprets “material and substantiated” to mean that, based on the information submitted, the issues raised are plausible and related to the application of the OECD Guidelines. This furthermore refers to the significance of an issue raised and the extent to which it has been authenticated. The assessment at this stage is meant to be initial, and the question is whether the issue raised is material and substantiated to the extent that it merits further examination with a view to facilitating dialogue between the parties.<sup>33</sup>

The submission is material when it comes to NBIM in the sense that it refers to alleged non-observance of provisions concerning due diligence and leverage in Chapter II (General Policies) and Chapter IV (Human Rights) of the OECD Guidelines. The submission also refers to the OECD guidance Responsible business conduct for institutional investors (2017).<sup>34</sup>

Chapter II of the OECD Guidelines provides that enterprises should “Carry out risk-based due diligence [...] to identify, prevent and mitigate actual and potential adverse impacts as described

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<sup>30</sup> See for instance [FIVAS vs. Norconsult AS](#) (2015; handled by the Norwegian NCP) and [NGOs vs. ING](#) (2017; handled by the Dutch NCP). In FIVAS vs. Norconsult AS, the Norwegian NCP considered that the issues raised were material and substantiated. Part of the complaint concerned whether the companies in question had carried out sufficient risk-based, human rights due diligence in two projects.

<sup>31</sup> OECD (2019), Guide for National Contact Points on the initial assessment of specific instances, p. 6. Available at: <https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-the-Initial-Assessment-of-Specific-Instances.pdf>. Text italicized by the Norwegian NCP.

<sup>32</sup> Supplemental submission from trade unions, p. 6. IUF has made prevention and tackling of gender-based violence in all its forms a priority for the years 2017-2022. See [Congress Mandate](#). IUF-EFFAT has a [policy of zero tolerance for sexual harassment and violence at the workplace](#).

<sup>33</sup> See OECD (2019), Guide for National Contact Points on the Initial Assessment of specific instances, p. 7.

<sup>34</sup> The issues raised related directly to McDonald's when it comes to alleged breaches of Chapters IV and V of the OECD Guidelines are not addressed here.

in paragraphs 11 and 12, and account for how these impacts are addressed”; and “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.” Chapter II, Commentary 20 elaborates that this would entail an enterprise, “acting alone or in cooperation with other entities, as appropriate, to use its leverage to influence the entity causing the adverse impact to prevent or mitigate that impact.”

The OECD guidance Responsible business conduct for institutional investors (2017) highlights that due diligence with respect to institutional investors will involve a number of practical steps as well as supporting measures to ensure due diligence is effective. It involves:

- embedding RBC into relevant policies and management systems *for investors*;
- identifying actual and potential adverse impacts *within investment portfolios and potential investments*;
- as appropriate, *using leverage to influence investee companies* causing an adverse impact to prevent or mitigate that impact and;
- accounting for how adverse impacts are addressed, by (a) tracking performance *of the investor’s own performance in managing RBC risks and impacts in its portfolio* and (b) communicating results, as appropriate;
- having processes in place to enable remediation in instances where an investor has caused or contributed to an adverse impact.<sup>35</sup>

The submitters state that NBIM has a USD 1.3 billion stake in the company and is the 8th largest single investor in McDonald’s, behind institutional investors that include Vanguard and Black Rock.<sup>36</sup> The submitters refer to NBIM’s expectations of companies, and that they reach those companies’ supply chains and other business relationships. NBIM expects investee companies to engage employees in identifying risks of negative impacts and to consult and engage with their workers and their representatives on human rights issues.<sup>37</sup>

The trade unions note that NBIM engaged with 1,826 companies in 2018 on responsible business issues but made “no mention of gender-based violence and harassment as a subject matter for such engagement.”<sup>38</sup> They refer to the thematic focus areas dealing with human rights issues in NBIM but find “no indication of how gender-based violence and harassment in the workplace is incorporated” into the Norges Bank’s due diligence mechanisms.<sup>39</sup>

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<sup>35</sup> OECD (2017), [Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises](#), p. 17.

<sup>36</sup> Submission from trade unions, p. 22. As of 23 March 2021, NBIM had a USD 1,5 billion stake in McDonald’s, and was thus the 7<sup>th</sup> largest single investor. See: [MCD - McDonald's Corp Shareholders - CNNMoney.com](#).

<sup>37</sup> Submission from trade unions, p. 24 – 25.

<sup>38</sup> Submission from trade unions, p. 27.

<sup>39</sup> Supplemental Submission from trade unions, p. 3.

The submission and supplemental submission contain extensive information relating to GBVH at McDonald's dating back to 2012. With respect to NBIM, the submission refers to NBIM's expectation documents and alleged lack of policy and engagement with investees when it comes to GBVH. The NCP considers that issues raised regarding due diligence and leverage in NBIM are material and substantiated sufficiently for the purposes of an initial assessment.

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### 3. DOES THERE SEEM TO BE A LINK BETWEEN THE ACTIVITIES OF THE ENTERPRISE AND THE ISSUES RAISED?

Under the OECD Guidelines, an enterprise can be linked to issues that arise by i) causing adverse impact, ii) contributing to the impact, or iii) being directly linked to an adverse impact.<sup>40</sup> Chapter II of the OECD Guidelines sets out that enterprises should:

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 an adverse impact to the enterprise with which it has a business relationship (Chapter II, para. 12).<sup>41</sup>

The OECD Guidance Responsible business conduct for institutional investors was published in 2017. It affirms that the OECD Guidelines apply across all sectors, including the financial sector. Prior to this publication, the OECD issued interpretation papers concerning business relationships and due diligence in the financial sector. The OECD interpretation paper on the Scope and application of 'business relationships' in the financial sector under the OECD Guidelines for Multinational Enterprises (2014) sets forth that:

Although observance of the Guidelines by enterprises is voluntary and not legally enforceable, this does not reduce the expectations that the Guidelines should be observed. Financial institutions should consider the appropriate manner in which observance of the OECD Guidelines could successfully be implemented in their business strategies.

The interpretation paper states that a relationship between an investor and investee company, including a minority shareholding, can in principle be considered a "business relationship" under the OECD Guidelines. When it comes to financial institutions in their role as minority shareholders, including sovereign wealth funds, the paper underscores that "due regard must be paid to the sector-specific characteristics and practical and legal concerns and restrictions".<sup>42</sup>

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<sup>40</sup> For a full overview of "cause", "contribute" and "directly linked" impacts, see question 29 of OECD (2018), [Due Diligence Guidance for Responsible Conduct](#).

<sup>41</sup> Text italicized by the Norwegian NCP.

<sup>42</sup> See [Scope and application of 'business relationships' in the financial sector under the OECD Guidelines for Multinational Enterprises](#), p. 6.

The link between an enterprise and an adverse impact is not limited to causal relationships.<sup>43</sup> The OECD Guidance for institutional investors (2017) notes that in the context of adverse impacts arising from investee companies, investors will in most instances not cause or contribute to, “but only be directly linked to the adverse impact.”<sup>44</sup> Investors, even those with minority shareholdings, may be directly linked to adverse impacts caused or contributed to by investee companies as a result of their ownership in, or management of, shares in the company causing or contributing to certain social or environmental impacts. The Guidance states that:

the existence of RBC risks (potential impacts) or actual RBC impacts in an investor’s own portfolio means, in the vast majority of cases there is a «direct linkage» to its operations, products or services through this business relationship with the investee company.<sup>45</sup>

The 2017 Guidance indicates that investors are expected to consider RBC risks throughout their investment process and use their leverage with companies they invest in to influence those investee companies to prevent or mitigate adverse impacts. It underlines that investors are not responsible for addressing those adverse impacts themselves. The approaches investors can employ to use their leverage to influence companies they invest in are “broad in scope”, and what is appropriate will vary according to the characteristics of an investor, the investment strategy and relevant regulatory obligations. The Guidance underlines the importance of exercising such leverage within the framework of good corporate governance.<sup>46</sup>

The trade unions underscore that they do not inculcate APG and NBIM for their failure to act on sexual harassment at McDonald’s. At the same time, the trade unions contend that the investors “have not sufficiently exercised due diligence to prevent these violations.”<sup>47</sup> In response to a question of clarification from the Norwegian NCP of how to interpret the submitters wish not to “inculcate” the investors, the submitters explain:

We use «inculcate» to indicate that we do not blame NBIM for the sexual harassment that took place in McDonald’s. The blame has to be laid squarely at the door of McDonald’s for failing to prevent the harassment and protect the harassed. However, we hold NBIM responsible for ensuring that it complies with its due diligence obligations, and concerning

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<sup>43</sup> See OECD (2014), [Due Diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship](#), p. 5 - 6. The paper takes as a starting point that “causality is not a factor for determining the linkage,” and refers to how this terminology has been misinterpreted in the financial sector in the past. Due diligence is ongoing and should be applied proactively, through establishment of systematic measures to identify risk and prevent or mitigate potential adverse impacts, as well as through on-going monitoring of business relationships and related operations.

<sup>44</sup> OECD (2017), Responsible business conduct for institutional investors, p. 49.

<sup>45</sup> OECD (2017), Responsible business conduct for institutional investors, p. 13.

<sup>46</sup> Ibid., p. 13 – 15. See also [G20/OECD Principles of Corporate Governance - OECD](#). The degree of leverage the enterprise has over its business relationship with the entity causing the adverse impact is useful in considering what it can do to persuade that entity to take action, “but is not relevant to considering whether it should carry out due diligence and exercise any leverage it may have. It should.” See OECD (2014) Due Diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship, p. 8.

<sup>47</sup> Submission from trade unions, p. 27.

its investments in McDonald's it has, to date, failed to do so. Specifically, it has failed to take into consideration and act on information in the public domain showing the seriousness, frequency and extent of sexual harassment in McDonald's.<sup>48</sup>

In conclusion, the issues raised in this specific instance concern the due diligence and leverage of an investor, NBIM, in relation to adverse impact allegedly caused by a minority shareholding, McDonald's. The NCP finds that there seems to be a link between the investor, NBIM, and the issues raised regarding due diligence with respect to GBVH issues in McDonald's. The NCP has made no determination as to whether the OECD Guidelines have been observed.

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#### 4. WHAT IS THE RELEVANCE OF APPLICABLE LAW AND PROCEDURES, INCLUDING COURT RULINGS?

Existing legislation and procedures and international standards provide useful orientations for the NCP in reviewing the submission. The documentation from the submitters includes media reports and lawsuits relating to GBVH and McDonald's in various jurisdictions. Since 2016, workers have filed multiple complaints against McDonald's in state and federal courts and administrative agencies in the United States. In 2017, a French tribunal found a McDonald's manager liable for sexual and moral harassment against five female workers at a McDonald's store. In Brazil, the public prosecutor found "serious indications of practice of moral harassment, sexual harassment and discrimination" in 2019 in complaints by McDonald's workers.<sup>49</sup>

The NCP recalls that the OECD Guidelines refer to internationally recognized human rights, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which contain guarantees of non-discrimination, health and safety in employment and the right to privacy. GBVH constitutes a violation of these rights. The OECD Guidelines refer to the ILO conventions that are recognized as fundamental, including ILO Convention no. 111 on non-discrimination. In June 2019, the ILO adopted convention no. 190 on gender-based violence and harassment, which is to be read in conjunction with ILO Convention no. 111. The OECD Guidelines furthermore recommend enterprises to take adequate steps to ensure occupational health and safety in their operations (see Chapter V, 4. c)).

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#### 5. HOW HAVE SIMILAR ISSUES BEEN, OR ARE BEING, TREATED IN OTHER DOMESTIC OR INTERNATIONAL PROCEEDINGS?

According to the Procedural Guidance of the OECD Guidelines, NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned. Key questions are whether an offer of good offices from the NCP could make a positive contribution to resolving the issues raised and would

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<sup>48</sup> E-mail from Sue Longley, General Secretary of the IUF, to the Norwegian NCP Team, 22 February 2021.

<sup>49</sup> See submission from trade unions p. 14 – 21, and the annexes to the supplemental submission.

not create serious prejudice for either of the parties involved in the other proceedings or cause a contempt of court situation.<sup>50</sup>

As noted above, the US NCP is handling the issues raised in the submission against McDonald's. Proceedings when it comes to GBVH in McDonald's do not preclude the Norwegian NCP from handling the issues raised concerning due diligence and leverage in NBIM. While relevant, this is not the same issue as is being handled by the US NCP nor the ongoing lawsuits filed by workers in McDonald's. This has also been the procedure in other specific instances concerning different issues in enterprises that are domiciled in different countries.<sup>51</sup>

An offer of good offices from the Norwegian NCP to the parties may allow for resolving the issues raised with respect to due diligence and leverage in NBIM concerning GBVH in McDonald's. While treating the issues raised in the submission as three separate specific instances, the NCPs have agreed to coordinate in handling them (see section above on NCP proceedings to date). As noted, the NCPs are of the view that handling the specific instance in this manner provides the best prospects for resolving all the issues raised by the trade unions in their submissions.

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## 6. WOULD CONSIDERING THIS SUBMISSION CONTRIBUTE TO THE PURPOSE AND EFFECTIVENESS OF THE GUIDELINES?

The questions for the NCP to consider here is whether accepting the specific instance would contribute to the purpose and the effectiveness of the OECD Guidelines. With regards to purpose, the Guidelines aim, among other things, to promote positive contributions by enterprises to economic, environmental and social progress worldwide. The Guidelines also seek to minimise and resolve difficulties to which MNEs various operations may give rise.<sup>52</sup> According to the OECD Guidance for institutional investors (2017), carrying out due diligence may enable investors not only to avoid negative impacts of their investments on society and the environment, but also avoid financial and reputational risks, respond to expectations of their clients and beneficiaries and contribute to global goals on climate and sustainable development.<sup>53</sup>

The NCP is of the view that the issues raised in this complaint differ in terms of substance from issues raised in previous complaints relating to NBIM. Each complaint must be assessed individually, and the NCP must assess the prospect of contributing to the purpose and effectiveness of the OECD Guidelines in each submission.

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<sup>50</sup> OECD Guidelines (2011), Procedural Guidance (Commentary, para. 26).

<sup>51</sup> In the initial assessment of [Korean Transnational Corporations Watch and Samsung Heavy Industries Martin Linge Project Crane Accident Workers Support Team vs. Samsung Heavy Industries Co., Ltd., TechnicFMC PLC, Total SA, Total E & P Norge AS and Equinor ASA](#), the Norwegian NCP considered that the specific instance covered "a broader area with other issues beside the court proceedings". See p. 14.

<sup>52</sup> OECD Guidelines (2011), Foreword, Preface and Declaration on International Investment.

<sup>53</sup> OECD (2017), Responsible business conduct for institutional investors, p. 14.

In responding to the complaint, NBIM questions the purpose of raising a complaint against NBIM. NBIM notes that they are the only two of many OECD-based, institutional investors in McDonald's that are being singled out and that they, and the Norwegian NCP, have been selected because they are believed to be the "most promising avenues for access to remedy".<sup>54</sup>

The aim of NCPs is to contribute to the resolution of issues that arise in relation to implementing the OECD Guidelines. Functional equivalence is important to this end, and entails operating in a manner that is visible, accessible, transparent and accountable.<sup>55</sup> The NCP is aware that the complexity of some specific instances can in some cases lead to forum shopping.<sup>56</sup> The Business Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC), official stakeholders to the OECD have addressed this issue on several occasions.<sup>57</sup> OECD Watch has furthermore raised concerns about "an overly high standard of proof required by many NCPs at the initial assessment stage that shuts the door to valuable dialogue".<sup>58</sup>

As NCPs are called on "to handle specific instances in an impartial manner, reaching conclusions on the motivations of parties may be especially delicate".<sup>59</sup> In this case, the trade unions openly describe different reasons for submitting the complaint against the investors and with the Dutch and Norwegian NCPs. There is no indication that the submission is not in good faith (*bona fide*). As noted above, the Norwegian NCP is the correct entity to consider the issues raised relating to NBIM. An offer of good offices could facilitate a dialogue between the trade unions and NBIM on the expectations and scope of due diligence for institutional investors, keeping in mind the purposes of the OECD Guidelines. It may further clarify the recommendations of the OECD Guidance Responsible business conduct for institutional investors (2017).

## CONCLUSION

The NCP is of the view that this submission merits further consideration based on the above criteria. The trade unions have a legitimate interest in the issues raised in their submission. The issues raised relating to due diligence and leverage in NBIM are material to the OECD Guidelines and *prima facie* substantiated. There seems to be a link between the activities of the enterprise and the issues raised. Ongoing procedures relating to McDonald's do not preclude the NCP from handling the issues raised in relation to NBIM. The NCP finds that an offer of good offices may

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<sup>54</sup> Supplemental response from NBIM, p. 5. See also supplemental response from the trade unions, p. 7.

<sup>55</sup> OECD Guidelines (2011), Commentary on the Procedural Guidance for NCPs, p. 79.

<sup>56</sup> OECD (2019), Guide for National Contact Points on Coordination when handling specific instances, p. 5. The OECD report (2020), [Providing access to remedy: 20 years and the road ahead](#), addresses strategies to foster functional equivalence.

<sup>57</sup> BIAC has noted that turning automatically to the NCP that seems most active is not in the interest of a global level playing field and is not conducive to a global improvement of NCPs. TUAC finds that the reasons trade unions may prefer to file a specific instance at one NCP, rather than another, vary and may include the need to engage investors. See OECD (2019), Guide for National Contact Points on Coordination when handling specific instances, p. 24

<sup>58</sup> Annual Report on the OECD Guidelines for Multinational Enterprises 2019, p. 84.

<sup>59</sup> OECD (2019), Guide for National Contact Points on the initial assessment of specific instances, p. 12.

facilitate a dialogue between the trade unions and NBIM on the expectations and scope of due diligence and thereby contribute to the purpose and effectiveness of the OECD Guidelines.

The conclusion of the NCP in this initial assessment is based on the information received from both parties. The NCP has not hereby expressed any view as to the correctness of the statements or the validity of the documentation provided, nor on their possible impact on the issues raised in the specific instance. Neither has the NCP made any determination as to whether the OECD Guidelines have been observed.

#### NEXT STEPS

The NCP finds that this submission merits further consideration and offers its good offices to the trade unions and NBIM. The NCP will ask the parties whether they are willing to engage in a dialogue or mediation process. The NCP will inform the OECD Secretariat and the initial assessment statement will be added to the OECD Database of specific instances.