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ECCHR Evaluation

**The OECD procedures regarding surveillance technology against Gamma and Trovicor
and regarding working conditions in Asia against KiK, C&A and Karl Rieker**

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Introduction

The UN Guiding Principles on Business and Human Rights require states to ensure access to effective remedies. In the event that companies are responsible for human rights violations, the state must ensure access to complaints procedures and effective remedies as a result of its duty to protect which is established under international law. Victims of human rights violations should have the ability to require effective mechanisms for dispute resolution and redress. This can be reached both through judicial and non-judicial mechanisms.¹ The Guiding Principles define certain criteria to ensure quality, efficiency and transparency of these instruments.²

While the legal requirements for judicial redress procedures at the international level have yet to be created, the OECD Guidelines for Multinational Enterprises (hereinafter “OECD Guidelines”) with their complaint mechanism on government level offer a soft law approach. Although this mechanism is one of the most important instruments to promote responsible corporate management, the current practice does not meet the requirements of the UN Guiding Principle regarding legitimacy, predictability, equitability and transparency. Thus, a procedure, which can even out the structural imbalances between companies and stakeholders, is crucial to create a platform for constructive discussion regarding the interests of the plaintiffs and those of the company.

In this paper, ECCHR evaluates the OECD procedures against the companies Gamma (United Kingdom) and Trovicor, KiK, C&A and Karl Rieker (Germany) regarding their trade in surveillance technique.³ We outline how the respective issues are regulated through the OECD Guidelines as well as through the procedural rules that are formulated by the National Contact Points for the handling of complaints in their country and how they are implemented in practice. The main criteria for the evaluation shall be the principles of transparency, impartiality and predictability.⁴

The German and the UK NCP established the following procedural guidelines which are published on their website:

¹ UN Guiding Principles on Business and Human Rights, Principles 27 and 28.

² UN Guiding Principles on Business and Human Rights, Principle 31.

³ We build on ECCHR’s position paper “[A Comparison of National Contact Points - Best Practices in OECD Complaints Procedures](#)” of November 2011, in which we evaluated the procedures on forced child labor in Uzbekistan against European cotton traders.

⁴ The OECD Guidelines state that the NCP will 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*. (p. 72).

- Procedural Notes for Specific Instances (“Complaints”) of the German National Contact Point for the OECD Guidelines for Multinational Enterprises⁵ – hereinafter: procedural guidelines of the German NCP. The German procedural guidelines have been revised in December 2014. This paper however refers to the former version as it was applicable for the Trovicor and KiK procedure.
- UK NCP Procedures for Dealing with Complaints brought under the OECD Guidelines for Multinational Enterprises⁶ – hereinafter: UK NCP procedural guidelines.

Terminology

- National Contact Point (NCP) – Government office responsible for promoting adherence to the OECD Guidelines and for dealings with complaints.
- Initial Assessment – NCPs decision on the acceptance/rejection on the complaint
- Final Agreement – Agreed concluding statement of the parties of the procedure
- Final Statement – Concluding statement of the NCP

The cases

Delivery and Maintenance of surveillance technology to Bahrain

The Munich based company Trovicor and the British-German company Gamma International produce surveillance software that can be used by authoritarian states to commit human rights violations. During the Arab Spring, the use of systematic telecommunications surveillance has become a common problem as a tool to repress peaceful protest movements. Since the start of the mass protests in February 2011, the Arab Gulf State of Bahrain has used information obtained through intercepted telephone and internet connections to secure arrests of, and extract confessions from dissidents. Such actions are facilitated by high-performance technologies, the use of which could only be justified if strictly bound by the highest rule of law standards. There is evidence to suggest that Trovicor maintained software in Bahrain, among other places, which allows security authorities and secret services to intercept, record and analyze large amounts of telephone and computer data. According to publicly accessible

⁵ <http://www.bmwi.de/English/Redaktion/Pdf/oeacd-procedural-notes-for-specific-instances-complaints,property=pdf,bereich=bmwi2012,sprache=en,rwb=true.pdf>.

⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270577/bis-14-518-procedural-guidance.pdf.

documents, Gamma has provided a so-called ‘trojan’, a hacking program called FinFisher to Bahrain and provided technical support for its use. Gamma’s FinFisher was found on the computers of Bahraini oppositionists.

Together with Privacy International, Reporters Without Borders, the Bahrain Center for Human Rights (BCHR) and Bahrain Watch (BW), ECCHR has lodged an OECD complaint against both companies in February 2013. The complaint against the Gamma Group was accepted for consideration by the British NCP in June 2013 but mediation failed to result in an agreement. The NCP names specific violations in particular against human rights obligations under the OECD Guidelines and asks the company to implement effective standards for the protection of human rights in its Final Statement of February 2015. The German NCP in November 2013 has rejected the complaint regarding Trovicor’s responsibility in Bahrain and has only accepted the parts of the complaint relating to the company’s risk management procedures. In its Final Statement of May 2014, the German NCP neither identifies violations of the company nor does it include recommendations to help the company make its conduct consistent with the Guidelines.

The responsibility of fashion retailers for the fire in the Tazreen factory in Bangladesh

The fashion retailers KiK Textilien und Non-Food GmbH, C&A Mode GmbH & Co, and Karl Rieker GmbH & Co. KG, all sourced textiles from the Tazreen factory in Bangladesh, although serious security hazards in the factory had been identified. On November 24, 2012 at least 112 people were killed in a factory fire. This was due to massive and obvious fire protection safety issues.⁷ The factory had been audited by the Business Social Compliance Initiative (BSCI) in 2011 and had been classified as unsuitable for safe production. In May 2013, Uwe Kekeritz, member of the German parliament (Alliance '90/The Greens) filed an OECD complaint with the support of ECCHR and Medico International against the three German companies for their partial responsibility concerning the fire in the Tazreen factory.

As part of the Initial Assessment by the German NCP KiK and Karl Rieker declared that at the time of the fire the company had already ceased to source from the factory.

Regarding KiK and Karl Rieker the German NCP has rejected the complaint insofar as it concerned the responsibility for the fire. Subject of the procedure was only the breach of duties of care with regard to the safety measures in the factory of Tazreen Fashion in general.

After mediation negotiations Karl Rieker and the complainant agreed on a Final Statement. Regarding KiK, mediation failed to result in an agreement. In November 2014, the NCP

⁷ Throughout the factory building there were neither emergency exits nor fire escape staircases. The windows were barred. Only three of the nine floors were permitted for use by the building inspection authority. The single central ground floor exit was too narrow for the more than 1000 occupant workers in the factory. In addition, this exit was blocked through the fire. Raw materials were stored in close proximity to high voltage transformers on the ground floor leading to a rapid expansion of the fire. Existing fire extinguishers did not function or were entirely absent. Only 40 out of the 120 workers in the factory were informed about fire safety regulations.

issued a Final Statement including recommendations to the company to comply with the OECD Guidelines.⁸

The complaint against C&A was referred to the Brazilian NCP, since at the time of the fire C&A Brazil was in contract with the Tazreen factory. To the knowledge of the complainant, the Brazil NCP after one and a half years has not taken any steps to initiate the procedure.

Requirements of the OECD Guidelines in an impartial, transparent and predictable process

- **Impartiality**

The OECD Guidelines provide that NCPs will be composed and organised such that they create an effective basis for dealing with the broad range of issues covered by the OECD Guidelines and enable the NCP to operate in an impartial manner.⁹ In particular, NCPs should ensure impartiality in the resolution of specific instances.¹⁰ This includes that NCPs are willing to use the options provided by the OECD Guidelines, to take the procedure serious as a tool to address human rights impacts and to decide on a case by case basis as to which approach will bring the case forward. NCPs however act partially in favor of companies if their handling of cases show that they are determined in advance to primarily take measures which do not or very little emphasize the company's responsibility. This can for example be the case if NCPs only restrictively accept complaints or if they are reluctant to name violations of the OECD Guidelines and to make recommendations to the company.

It has to be noted that in individual cases a mild approach may be appropriate and impartial. An impartial procedure can only be assumed if it appears that an NCP continuously and systematically only takes the mildest steps for the company.

- **Transparency**

The OECD Guidelines stress the importance of transparency with respect to its contribution to the accountability of the NCP and in gaining the confidence of the general public.¹¹ Outcomes will be handled transparently unless preserving confidentiality is in the best interests of effective implementation of the OECD Guidelines.¹² The transparent handling of the outcomes contributes significantly to the effectiveness of the procedure, especially if the NCP expresses recommendations toward the company and if these are publicly available. However, the NCP is required to ensure a transparent procedure toward the parties as well.

⁸ <http://www.bmwi.de/English/Redaktion/Pdf/oecd-ac-final-statement-kik,property=pdf,bereich=bmwi2012,sprache=en,rwb=true.pdf>

⁹ OECD Guidelines for Multinational Enterprises, p. 71.

¹⁰ OECD Guidelines for Multinational Enterprises, p. 82.

¹¹ OECD Guidelines for Multinational Enterprises, p. 79.

¹² OECD Guidelines for Multinational Enterprises, p. 79.

- **Predictability**

The OECD Guidelines require that NCPs should ensure predictability by providing clear and publicly available information on their role in the resolution of specific instances, including the provision of good offices, the stages of the specific instance process including indicative timeframes.¹³

1. Evaluation of the procedure against Gamma in the UK

- **Impartiality**

The British NCP accepted the complaint because “the evidence provided suggested that the company’s product may have been used against Bahraini activists although it found that direct evidence had not been provided. The NCP considers that evidence provided substantiates the issues in respect of the company’s obligations to do appropriate due diligence and to address impacts.”¹⁴ On the computers of several Bahraini human rights activists, malware programs had been identified, that had features similar to those advertised for Gamma’s products.

With this decision, the UK NCP met the requirement of the UK NCP procedural guidelines which state that the issues raised have to be “material and substantiated”.¹⁵ Moreover it has demonstrated that the complaints procedure can be used effectively even if the company - as is often the case - denies or does not confirm the challenged activities.

With the Final Statement, the NCP has further taken advantage of the opportunities provided by the OECD-Guidelines: it has identified and named clear violations and outlined appropriate recommendations although it remains in its assessment that no direct evidence for the business with Bahrain was provided: Regarding the FinFisher software, the company has not acted consistently according to provisions of the OECD Guidelines requiring enterprises to respect human rights, to exercise due diligence and to have a policy commitment to respect human rights. In addition, the NCP stated that the company’s overall engagement with the NCP process was unsatisfactory. The NCP asks Gamma - explicitly the wider Gamma group - to implement effective standards for the protection of human rights. It has hereby contributed significantly to the effectiveness of the OECD Guidelines.

- **Transparency**

¹³ OECD Guidelines for Multinational Enterprises, p. 82.

¹⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/208112/bis-13-947-complaint-from-privacy-international-and-others-against-gamma-international-uk-ltd.pdf, p. 7.

Procedural Guidelines of the UK NCP, p. 11.

The UK NCP has complied with the requirements of the UK procedural guidelines, which ensure the publication of all procedural outcomes as well as the identified violations of the OECD Guidelines.

The NCP routinely shared information with all parties, as it is provided by the procedural guidelines.¹⁶ The complainants were informed about the relevant communication with the company. Thus, it was ensured that parties were able to comment on statements by the other party at any time. The upcoming procedural steps were also described in the Initial Assessment in detail and made publicly available.¹⁷

➤ **Predictability**

The NCP did not stick to the procedurally foreseen timeframe¹⁸ for both, the Initial Assessment and the Final Statement. It neither provided an alternative schedule that would have enabled the parties to adapt to the course of the process.

2. Evaluation of the procedure against Trovicor in Germany

➤ **Impartiality**

The German NCP has not shown impartiality in deciding whether to accept the complaint, as it has not exhausted the possibilities offered by the OECD Guidelines. It has rejected the major part of the complaint regarding the responsibility of the company for the human rights abuses in Bahrain on the grounds that the complaints did not provide sufficient evidence for the company's contribution to the abuses. The complainants' accusation however was sufficiently substantiated. Involvement in Bahrain was admitted by a spokesman for Trovicor's predecessor Nokia Siemens Networks in 2009, has been confirmed by employees in 2011, and has never been denied by Trovicor despite numerous requests.¹⁹

The OECD Guidelines however require solely that the NCP will take into account (...) whether the issue is material and substantiated".²⁰ According to the German NCP's procedural guidance, it is sufficient for the accusations to be credible. Unlike in a court, there is no requirement for strict evidence.²¹ The UK NCP has shown in the similar case against Gamma, that it would have been justified to accept the complaint.

¹⁶ Procedural Guidelines of the UK NCP, p. 7.

¹⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/208112/bis-13-947-complaint-from-privacy-international-and-others-against-gamma-international-uk-ltd.pdf.

¹⁸ Procedural Guidelines of the UK NCP, p. 6.

¹⁹ With this decision, the NCP follows a clear trend: More and more NCPs seem to reject complaints on the grounds of lacking evidence, OECD Watch Submission to the 2014 Annual Meeting of the National Contact Points, http://oecdwatch.org/publications-en/Publication_4090/, p. 3.

²⁰ OECD Guidelines for Multinational Enterprises, p. 83.

²¹ Procedural Guidelines of the German NCP, p. 3.

This more flexible standard on the burden of proof is appropriate as it meets the characteristics of the procedure: The OECD procedure is a soft law mechanism with voluntary participation and without sanctions, its main aim being mediation. Furthermore, for human rights violations by companies, direct evidence is difficult to obtain. This is reflected in the OECD complaints procedure with its less stringent requirements.

The requirement that parties engage in the procedure under the principle of good faith is interpreted incoherently by the NCP. After the company's refusal to provide information about the trade relations with Bahrain and after the rejection of the relevant part of the complaint, the complainants have repeatedly explained their decision not to negotiate with the company solely on its human rights policy. The complainants are of the opinion that mediation can be useful only if both parties are willing to talk openly about central allegations. However, an abstract discussion of the human rights policy of the company is not the purpose of the OECD complaint procedure which focuses on tackling concrete grievances. Nevertheless, in the Final Statement the NCP declares its regret about this issue and thus, at least indirectly, has certified non-cooperation to the complainants.

In addition, the NCP has not expressed recommendations to the company in the Final Statement with regard to the accepted part of the complaint. Merely on the grounds that the procedure is voluntary and aligned solely on mediation. According to the German procedural guidance, however, a recommendation shall be expressed if the NCP determines a violation of the OECD Guidelines which the company in question does not recognize and with respect to which the company is not ready to change its behavior.²² However, the NCP did not take this possibility into consideration.

➤ **Transparency**

Regarding a transparent management of the procedure, the German NCP's procedural guidelines stipulate that the NCP stays in contact with the parties for the duration of the procedure and discuss the state of the process and possible future steps with the parties.²³ The NCP has not met these requirements in several respects. Only after specific request it informed the complainants that the company had replied to the accusations in the complaint and first refused to hand over the company's response. It is to be noted that the NCP agreed on handling this issue in a transparent way in the future.²⁴

²² Procedural Guidelines of the German NCP, p. 4.

²³ Procedural Guidelines of the German NCP, p. 4.

²⁴ The revised guideline now contains the following wording (p. 2): The company has the possibility to submit its answer within six weeks in general. The NCP informs the company in writing that the submitted answer will be shared with the complainant. Business and trade secrets should be reported separately. These will only be forwarded if the claimant agrees. The company concerned is free to comment on the complaint.

Regarding transparency toward the public, the German NCP has not met the requirements of its procedural guidelines which stipulate that the NCP publishes relevant procedural steps²⁵ on its website. The NCP did not publish the Initial Assessment, although this would have been possible without a violation of the principle of confidentiality.

➤ **Predictability**

The German NCP has exceeded the given timeframe²⁶ by six months. In spite of the significant delay, the NCP did not inform the complainants about a revised timeframe and explained the delay only very vaguely. Thus, the NCP has left the complainants in the dark about the prospects of success of the complaint, which is unacceptable in particular for the affected persons within the Bahraini organizations, for whom the procedure can have serious practical impact.²⁷

3. Evaluation of the procedure against KiK, C&A und Karl Rieker in Germany

➤ **Impartiality**

The NCP has not exhausted the possibilities offered by the OECD Guidelines in this case either. Rather than address the responsibility of the companies involved, the NCP tries to downplay their role. This applies in particular to the published press release.²⁸ Although the NCP expresses recommendations to KiK to implement its duty of care in their Final Statement, which shows that a violation of the OECD Guidelines has been identified, KiK is only certified significant progress in the press release.

In the Final Statement, the NCP identifies measures that “can help to ensure effective fire safety” as a “basis for an agreement”. It is difficult to identify these measures as recommendations by the NCP in the sense of the OECD Guidelines. Hereby, the NCP further weakens the process result in favor of the company.

However, the recommendations to the company are insufficient also with regard to content: they are very vague and at least partially formulated only as a suggestion.²⁹ It remains unclear how the implementation of such general points is being followed up by the NCP.

²⁵ Procedural guidelines of the German NCP, p.4.: The revised guideline contains comparable provisions. The following procedural steps shall be published: a summary of the main reasons for the rejection, the results of an agreement, recommendations in case a violation of the OECD Guidelines is not recognized and respected by the company and to which the company has not announced a change in behavior.

²⁶ Procedural Guidelines of the German NCP, p. 10.

²⁷ This point, however, was taken up in the revised procedural guidelines: “If this proves necessary, the parties will be informed about this fact and the reasons, and they will be issued with an amended schedule.”

²⁸ <http://www.bmwi.de/DE/Presse/pressemitteilungen,did=669342.html>.

²⁹ e.g.: „The use of contracting agencies and of sub-contractors by manufacturers should therefore be avoided as far as possible.“

Similar to the case against Trovicor, the NCP identifies the complainant as responsible for the failed mediation, even though it concedes that “it would have been desirable for KiK to have made the measures more specific.”³⁰

Conclusions

In the two procedures the German NCP has shown on a set of examples that it is not prepared to exploit the opportunities offered by the OECD Guidelines in order to demonstrate corporate responsibility. From the overall view of the results - not from the individual decisions – it appears that the decisions of the NCP have a tendency to favoring companies. They also contain no clear distinction between acceptable and unacceptable business activities and do not go far enough. Especially in comparison to the Gamma case in the UK it is clear that the NCP would have been able to act more decisively.

This indicates an appearance of partiality of the NCP. This is the central point of criticism in this evaluation. The weak process results reflect badly on the complaints mechanism and do not contribute to encourage victims of corporate wrong to make use of it.

In fact, several representatives of civil society have already expressed their concern about the German procedure. In a position paper on regulatory needs for surveillance technologies, the French organization FIDH refers to the Trovicor decision and concludes that “NCPs’ ability to provide effective remedies in cases of human rights violations resulting from the sale of surveillance technologies can indeed be seriously questioned.”³¹

Also other stakeholders have repeatedly reported that due to the weaknesses of the German proceeding they had decided not to file OECD complaints.

In terms of transparency and predictability, the procedure with the German NCP has improved significantly. It is welcomed that the procedural guidelines were revised with the involvement of the stakeholders.

There are far fewer concerns about the impartiality of the NCP in the UK. Although it is located in the Department for Business, Innovation & Skills, the supervision by the Steering Board consisting of representatives of ministries and business, trade unions and non-governmental organizations, ensures that all interests are balanced.

³⁰ <http://www.bmwi.de/English/Redaktion/Pdf/oecd-ac-final-statement-kik.property=pdf.bereich=bmwi2012.sprache=en.rwb=true.pdf>, p.10.

³¹ FIDH Position Paper, Surveillance Technologies “Made in Europe”; Regulation Needed to Prevent Human Rights Abuses: https://www.fidh.org/IMG/pdf/surveillance_technologies_made_in_europe-1-2.pdf, p. 27: More specifically, they are criticised by both rights-holders and supportive civil society organisations for their lack of ability to investigate, their lack of independence, and their restrictive interpretation of the admissibility criteria (as illustrated above with the case of Trovicor in Germany) and the Guidelines, etc. NCPs’ ability to provide effective remedies in cases of human rights violations resulting from the sale of surveillance technologies can indeed be seriously questioned.

Recommendations to the German NCP:

The German NCP should

- introduce an independent structure of the NCP; alternatively, install an oversight body to ensure participation of civil society;
- adjust the requested standards of proof in light of the purpose of a voluntary mediation procedure;
- inform parties about the state of the procedure routinely according to the revised procedural guideline;
- ensure more transparency, in particular by publishing the Initial Assessment
- publish clear recommendations to the company in case violations of the Guidelines were stated but mediation did not take place or failed;