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NATIONAL CONTACT POINTS: WHAT ARE THEY AND WHY SHOULD I CARE?

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INTRODUCTION

Multinational companies are facing increased pressure to ensure that they have adequate ESG-related policies in place and (more importantly) that they are implementing those policies in practice within both their business and associated supply chains via appropriate systems and controls. Companies that are found not to have implemented or adhered to those policies face increased legal and reputational risk which has the potential to have a materially negative impact on their business.

Although there are various formal legal routes through which a company that is found to have failed to implement or adhere to ESG-related policies can be held to account, National Contact Points ("**NCPs**") are increasingly being used as a means of holding companies' "*feet to the fire*" regarding their ESG non-compliance.

Companies that are subject to an adverse NCP finding, or publicly known complaint, may expose themselves to additional risks, including reputational damage and follow-on civil litigation. This article will explain what NCPs are, why they are becoming increasingly relevant and what businesses should be doing to minimise their exposure to an NCP complaint.

WHAT ARE NCPS?

NCPs are agencies established by governments that adhere to the OECD Guidelines for Multinational Enterprises (the "**Guidelines**").

The Guidelines are non-binding recommendations for responsible business conduct to multinational companies on key areas of business responsibility, such as human rights, employment and industrial relations, and the environment. All governments adhering to the Guidelines have a legal obligation to set up an NCP. As at the date of writing, 51 countries (including the UK) adhere to the Guidelines and therefore have a connected NCP.

The UK NCP falls within the remit of the Department for Business and Trade, whilst the US NCP is under State Department jurisdiction. An NCP's mandate is two-fold:

1. to promote the Guidelines and related due diligence; and
2. to handle complaints in relation to alleged failures to comply with the Guidelines.

WHAT POWERS DO NCPS HAVE?

NCPs are not courts - part of their mandate is to serve as a "*non-judicial grievance mechanism*".¹ This means that their findings are not binding and cannot be directly enforced in local courts.

Upon receiving and accepting a complaint, an NCP can:

1. seek to facilitate an agreement between the complainant and the company through non-adversarial methods such as mediation or conciliation;
2. regardless of whether an agreement is reached, make recommendations to the respondent company to better align the company with the Guidelines; and/or
3. make explicit (non-binding) determinations as to whether or not a respondent company has observed the Guidelines in the complaint brought by the complainant.

Participating in the NCP process is ultimately voluntary for the respondent company, and any decision reached is non-binding. However, as set out below, the reputational and legal risks associated with a respondent company either refusing to engage in the process itself or failing to abide by any determination made by an NCP are growing as stakeholders increasingly seek to leverage the NCP procedure for the purposes of wider advocacy campaigns.

WHY ARE NCPS IMPORTANT AND WHY ARE THEY BECOMING INCREASINGLY RELEVANT?

There are broadly two main reasons why NCPs have become increasingly relevant in recent years:

1. the mandate of NCPs was significantly strengthened when the OECD revised its Guidelines in June 2023. Under the original Guidelines, the mandate was simply to promote the Guidelines and respond to enquiries. When the OECD issued its revised Guidelines in June 2023, the mandate was bolstered to give NCPs more visibility and increased powers. For more information on the key changes implemented by the 2023 amendments, see Mayer Brown's [Eye on ESG article](#); and
2. the shift in public discourse about ESG-related factors and the increased appetite of stakeholders, including NGOs and activist shareholders, to hold multinationals to account for environmental and human rights-related failings. For the majority of jurisdictions, NCPs have to date been the primary venue for such stakeholders to seek access to recourse or remedy, particularly in light of the limited scope to bring such claims through national courts.

Generally speaking, an NCP's findings are published on the website of the investigating NCP and are therefore a matter of public record. This is important because businesses which claim to follow specific policies in order to demonstrate compliance with the Guidelines and/or businesses which make regulatory disclosures in relation to the same may be susceptible to allegations that their claims and/or disclosures are not, in fact, accurate as a result of an adverse NCP finding.

Although NCPs do not have the power to issue binding rulings or to compel a company to take particular action, they have been able to facilitate remedies including monetary compensation, in-kind reparation and changes in company policy. Furthermore, businesses are now paying closer attention to NCPs given:

1. the potential reputational damage that could arise as a consequence of a negative NCP determination; and
2. a finding by an NCP that a company has breached the Guidelines may be used by the complainant or other third parties in follow-on civil proceedings against that company. In particular, stakeholders now see NCPs as a means of holding companies to account in respect of any conduct/behaviour that might

constitute a breach of the Guidelines and a route through which to extract information that could potentially be deployed later in follow-on civil proceedings in relation to those breaches.

These risks are now amplified following the introduction of the raft of sustainability-related legislation in the EU² and at the national level in Europe, through which stakeholders may be able to bring claims before national courts. NCPs are therefore used by NGOs and other stakeholders as the central element of multi-pronged advocacy campaigns from which to drive public awareness of certain issues, force a response from target companies, and ultimately to pursue formal civil actions (including class actions) in any appropriate jurisdiction.

Compliance with the Guidelines is also a component of EU Taxonomy alignment, and for in-scope businesses the benefits of compliance are multi-faceted. Conversely, in-scope businesses who do not comply with the Guidelines may be unable to claim any EU Taxonomy alignment in their public disclosures, and thereby expose themselves to NCP-related risk. For more information on the EU Taxonomy Regulation, see our [October 2023](#) and [June 2024](#) articles.

COULD MY COMPANY BE ON THE RECEIVING END OF AN NCP COMPLAINT?

The short answer is: yes. NCPs have a very broad remit:

1. the scope of potential complainants is extremely wide. Any individual or organisation with a "*legitimate interest*" in the matter in question can submit a case to an NCP. The majority of complainants are NGOs, but they can range from trade unions and civil society organisations, to indigenous communities, individuals and businesses.
2. the scope of potential respondent companies is extremely wide. A complaint can be made about an enterprise operating in or from a Guidelines-adherent country. By way of illustration of this broad reach, NCPs have, to date, heard complaints in over 100 countries and territories, including over 50 that are not adherents to the Guidelines.³ Moreover, NCPs will hear complaints against companies regardless of whether they have committed to implement the Guidelines or not.
3. NCPs hear complaints not only concerning companies themselves, but also their supply chains.

It is therefore clear that the scope for complaints to NCPs is vast and all companies should be alive to this issue and the risks that arise as a result. This risk is not just restricted to companies with operations in the UK and EU. On 25 March 2024, the Biden-Harris Administration released its updated National Action Plan on Responsible Business Conduct ("**NAP**"). One of the key foci of the NAP was strengthening the US NCP.⁴ Companies operating in or from the US should therefore be aware of the risk of an increase of complaints made to the US NCP and the associated risk of follow-on stakeholder and claimant firm litigation.

WHAT ACTION(S) SHOULD MY COMPANY BE TAKING?

Ultimately, the message is a simple one: to avoid being on the receiving end of an NCP complaint, companies should:

1. return to the Guidelines (as updated in June 2023) and ensure that their policies and working practices align as closely as possible with the Guidelines; and
2. take proactive steps to ensure that those policies and practices are being implemented both throughout the business itself (which includes foreign subsidiaries) and its supply chain more generally. This is particularly important given that NCPs have shown an increased willingness to hear complaints regarding companies' supply chains as well as the companies themselves.

As a matter of best practice, companies should obtain proper legal advice in order to better understand how they can take steps to bring their policies and working practices into compliance with the Guidelines with a view to reducing the risk of a complaint being made to an NCP and/or to be able to demonstrate compliance with the Guidelines in circumstances where a complaint is made to an NCP.

¹ <https://mneguidelines.oecd.org/ncps/>

² For example, the Corporate Sustainability Reporting Directive, the Corporate Sustainability Due Diligence Directive and, at the national level, the German Supply Chain Due Diligence Act.

³ <https://mneguidelines.oecd.org/ncps/how-do-ncps-handle-cases.htm>

⁴ [2024 United States Government National Action Plan on Responsible Business Conduct](#)

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[2024 United States Government National Action Plan on Responsible Business Conduct](#)

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