



An Roinn Fiontar,
Trádála agus Fostaíochta
Department of Enterprise,
Trade and Employment

Statement by the Ireland National Contact Point under the OECD Guidelines for Multinational Enterprises

**Specific Instance Complaint against CMC Coal
Marketing DAC**

Summary of the Specific Instance

1. The specific instance was lodged by the Global Legal Action Network (GLAN), (hereafter “the Notifier”) in collaboration with Christian Aid, ABColombia, Arbeitsgruppe Schweiz Kolumbien (ask!), AIDA (the Interamerican Association for Environmental Defense), CINEP (Centro de Investigación y Educación), and CAJAR (Colectivo de Abogados ‘José Alvear Restrepo’) (hereinafter collectively referred to as “the Complainants”).
2. The specific instance was lodged against CMC Coal Marketing DAC (hereafter “the Company”), which at the time of the submission of the complaint was a Dublin-based firm set up exclusively to market coal produced in the Cerrejón mine in La Guajira, Colombia.
3. The complaint cited Chapter II (General Policies); Chapter III (Disclosure); Chapter IV (Human Rights); and Chapter VI (Environment) of the OECD Guidelines. The Complainants alleged that the Company failed to meet its due diligence obligations; that it failed to meet its disclosure obligations; that it failed in its obligation to develop a human rights policy; and that its operations were linked to adverse impacts felt in Colombia.
4. The Company accepted an invitation from the Ireland NCP to respond to the complaint. In its response, the Company denied all allegations made, arguing its sole purpose was to market and sell coal and it, therefore, could not be considered accountable for the issues raised in the complaint, which were properly addressed to Cerrejón directly. It stated that within the Cerrejón corporate structure, it was established as a sister company solely to market and sell the coal produced at the mine and it had no contractual right to information, did not have a right to audit and did not have the power, authority or sufficient influence to direct Cerrejón.
5. At the time of the submission of the complaint, the Company was registered in Dublin, Ireland, and was fully and equally owned by three multinational enterprises: Anglo American plc, BHP Group Limited and Glencore International AG (hereinafter “Glencore”), based respectively in the UK, Australia and Switzerland. In turn, these three companies formed the consortium that owned the Cerrejón mine in Colombia.
6. In the latter stages on the initial assessment process, it was announced that Glencore had acquired all the interests of Anglo American and BHP in the Cerrejón mine and as of 11 January 2022 the Company became 100% owned by Glencore. The Ireland NCP was then informed that the Company had novated its agency agreement with Cerrejón to Glencore effective from 1 March 2022. The NCP was further advised that the Company’s functions and contractual relationships would be absorbed by Glencore and it had therefore ceased operations.

7. Glencore noted the Company “*no longer engages in the conduct which forms the basis of the Complaint*” and did “*not regard it as feasible or useful for an entity that is in the process of being wound down to engage in a mediation process*”. In light of the fact that the Company has ceased trading and is no longer engaged in the activities that form the basis for the complaint, the NCP redrafted its statement and considered that an offer of good offices would not be practicable or contribute to the resolution of issues raised in this instance. This final statement therefore closes the specific instance.
8. In the interests of transparency and accountability, the Ireland NCP set out the reasons for its assessment of the complaint against the Company below.

Object of the Complaint

9. The Complainants alleged several adverse impacts caused by the Cerrejón mine pertaining to human rights, public health and the environment. They argued that as the marketer of Cerrejón coal in Europe, the Company was in breach of the Guidelines. The Complainants alleged that the Company:
 - Contributed to adverse impacts on human rights and the environment through its role of selling and marketing the coal produced from the mine
 - Downplayed its product’s environmental and human rights impacts, thereby breaching the disclosure requirements of the OECD Guidelines
 - Failed to meet due diligence obligations by not carrying out *ex ante* assessments of these impacts
 - Failed to have a policy commitment to human rights
10. The Complainants requested that the Company stop selling Cerrejón coal, co-operate in the remediation of human rights impacts caused by Cerrejón’s operations and make a statement on the matter.
11. The Company denied all allegations made, arguing its sole purpose was to market and sell coal and it could not, therefore, be considered accountable for the issues raised in the complaint, which it argued should be addressed to Cerrejón directly. It stated that within the Cerrejón corporate structure, it was established as a sister company solely to market and sell the coal produced at the mine and it had no contractual right to information, did not have a right to audit and did not have the power, authority or influence to direct Cerrejón.

12. In the latter stages of the initial assessment process, the Ireland NCP was informed that Glencore had become the sole owner of the Company and the Company had subsequently ceased trading as Glencore absorbed its functions. Therefore, Glencore noted the Company “no longer engages in the conduct which forms the basis of the Complaint” and did “not regard it as feasible or useful for an entity that is in the process of being wound down to engage in a mediation process”. Glencore also noted that it was engaging in mediation with the Complainants with the Swiss NCP on a separate complaint (see Para 27). This engagement continues at the time of publication of this statement.
13. The Complainants simultaneously lodged a complaint against Anglo American plc, BHP Group Limited and Glencore. This complaint was lodged with the NCPs of the home jurisdictions of these firms, the UK, Australia and Switzerland respectively. The Complainants also lodged a specific instance against Ireland’s state-owned electricity company, the Electricity Supply Board, concerning the purchase of Cerrejón coal.

Guidelines provisions cited by the Complainants

14. The Complainants referred to the following sections in the Guidelines:

Chapter II: General Policies

A.10: Enterprises should “Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation”.

II A.11: Enterprises should “Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur”.

Chapter III: Disclosure

A.1: “Enterprises should ensure that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance. This information should be disclosed for the enterprise as a whole, and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.”

A.3: “Enterprises are encouraged to communicate additional information that could include:

a) value statements or statements of business conduct intended for public disclosure including, depending on its relevance for the enterprise’s activities, information on the enterprise’s policies relating to matters covered by the Guidelines;

- b) policies and other codes of conduct to which the enterprise subscribes, their date of adoption and the countries and entities to which such statements apply;*
- c) its performance in relation to these statements and codes;*
- d) information on internal audit, risk management and legal compliance systems;*
- e) information on relationships with workers and other stakeholders.”*

A.4: Enterprises should “*Apply high quality standards for accounting, and financial as well as non-financial disclosure, including environmental and social reporting where they exist. The standards or policies under which information is compiled and published should be reported. An annual audit should be conducted by an independent, competent and qualified auditor in order to provide an external and objective assurance to the board and shareholders that the financial statements fairly represent the financial position and performance of the enterprise in all material respects*”.

Chapter IV: Human Rights

A.2: Enterprises should “*Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur*”.

A.4: Enterprises should “*Have a policy commitment to respect human rights*”.

A.5: Enterprises should “*Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts*”.

A.6: Enterprises should “*Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts*”.

Chapter VI: Environment

A.3: Enterprises should “*Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle with a view to avoiding or, when unavoidable, mitigating them. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment*”.

The Initial Assessment (IA) Process

15. As per the Implementation Procedures for the OECD Guidelines, the Ireland NCP undertook an initial assessment to determine if the issues raised in the complaint merited further examination. **It does not determine whether the Company acted consistently or inconsistently with the Guidelines.**

Ireland NCP Handling Process

18 January 2021	Complaint was received by Ireland NCP from the Complainants
28 January 2021	The Ireland NCP met with representatives of the NCPs of Australia, Colombia, Switzerland and the UK to discuss coordination about the complaints received
12 February 2021	The Ireland NCP contacted the Company to provide notification of the complaint and receipt is acknowledged
25 February 2021	The Ireland NCP contacted the Company requesting further information about the company's operations to help determine NCP jurisdiction
04 March 2021	The Company provided information on its operations and submits that the complaint is a matter for the Colombia NCP
20 April 2021	The Ireland NCP wrote to the Company confirming that it has jurisdiction over the complaint and inviting a response
03 June 2021	The Ireland NCP received a detailed response to the complaint from the Company
17 June 2021	The Ireland NCP shared the Company's response with the Notifier with the agreement of the Company
19 July 2021	The Notifier wrote to the Ireland NCP disputing aspects of the Company's response and requested permission to share the response with partner organisations
July - October 2021	The Ireland NCP repeatedly requested permission to share the Company's response, or a version thereof, with the Notifier's partner organisations but this request was declined
11 January 2022	The Company informed the Ireland NCP that it is 100% owned by Glencore
18 January 2022	The NCP completed the draft initial assessment and issued to both parties

15 March 2022	The Company informed the NCP that its functions had been transferred to Glencore; comments on the draft initial assessment were also submitted
21 March 2022	The Notifier submitted comments on the draft initial assessment to the NCP
11 April 2022	The NCP informed the Notifier that the Company had ceased trading, with functions transferring to Glencore
12 April 2022	The NCP met with the Notifier to discuss procedure in its ongoing specific instance complaints against the Company
7 July 2022	Glencore noted that it was engaging in mediation with the Complainants on a separate complaint through the Swiss NCP and that it would not be feasible to mediate with an entity which had ceased trading
9 August 2022	The NCP issued a revised draft statement to the Notifier and Glencore
8 September 2022	The NCP published the statement on its website

Is the Ireland NCP the right entity to assess the Specific Instance Complaint?

16. At the time the complaint was submitted, the Company was based in Dublin and marketed and sold coal from the Cerrejón coal mine in La Guajira, Colombia. At this time, it was wholly owned by the three companies who also held a one-third shareholding in the Cerrejón mine, Anglo American plc, BHP Group Limited and Glencore. However, from 11 January 2022, the Company became a 100%-owned subsidiary of Glencore and subsequently the Company novated its agency agreement with Cerrejón to Glencore, effective from 1 March 2022, with all remaining transactional activities to be undertaken by Glencore from 1 April 2022.
17. As the Company was based in Ireland and the CEO and management claimed to be direct its affairs independently, the Ireland NCP found it appropriate to undertake an Initial Assessment of the complaint before the changes outlined above. However, as the Company has ceased trading and is no longer undertaking the activities which form the basis of the complaint, it is not feasible for the Ireland NCP to facilitate mediation. For this reason, the Ireland NCP will not proceed to an offer of good offices.

Ireland NCP Decision

18. The Ireland NCP decided not to accept this specific instance as the Company has ceased trading and no longer engages in the activities that formed the basis for the complaint. An offer of good offices would not be feasible or contribute to the resolution of issues raised in this instance. The Ireland NCP took the following points into consideration in arriving at this decision:

a) Identity of the Complainants and their interest in the matter

19. The Notifier is a charitable organisation registered in England and Wales. The organisation's stated aim is to pursue "*innovative legal actions across borders, challenging states and other powerful actors involved with human rights violations*"¹.

20. The Ireland NCP noted that the Notifier worked in partnership with Christian Aid, ABColombia, Arbeitsgruppe Schweiz Kolumbien (ask!), AIDA (the Interamerican Association for Environmental Defense), CINEP (Centro de Investigación y Educación), and CAJAR (Colectivo de Abogados 'José Alvear Restrepo').

21. The Ireland NCP considered the Complainants to have legitimate and bona fide interests in the issues raised in the complaint.

b) Whether the issue is material and substantiated

22. The Complainants provided information to support the issues raised in the complaint. However, these issues can no longer be considered by the Ireland NCP as the Company is no longer involved in the activities that formed the basis for the complaint.

c) Link between the enterprise's activities and the issues raised in the specific interest

23. The Complainants argued that the Company's marketing activities contributed to Cerrejón's adverse impacts according to the standard outlined in the commentary on Chapter II of the Guidelines and the OECD Due Diligence Guidance for Responsible Business Conduct.

24. In the early initial draft statement, the Ireland NCP took the view that the Company's activities could reasonably be considered as increasing the risk of alleged adverse

¹ [GLAN website](#)

impacts linked to Cerrejón's operations. However, as the Company has ceased trading, a link no longer exists between the Company and the issues raised in the complaint as it does not engage in the activities any longer.

d) Relevance of applicable law and procedures, including court rulings

25. The Complainants presented extensive citations of rulings and orders made by the Colombian courts on the operations of the Cerrejón mine to demonstrate adverse impacts caused by the mine.
26. In addition, the Complainants referenced several international instruments including the Convention on the Rights of the Child, the OECD Due Diligence Guidance for Responsible Business Conduct, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the International Labor Organization Indigenous and Tribal Peoples Convention.

e) How similar issues have been, or are being, treated in other domestic or international Complaints

27. As noted, the Ireland NCP was aware of parallel complaints lodged by the Complainants in this case against the consortium of firms which at the time of submission held a substantial ownership interest in the Cerrejón mine; Anglo American plc, BHP Group Limited and Glencore. This complaint was lodged with the NCPs of the home jurisdictions of these firms, the UK, Australia and Switzerland respectively. While separate initial assessments were issued by each of the NCPs, it was agreed that the Swiss NCP would lead on joint mediation given Glencore's acquisition of the other two firms' shares in Cerrejón.
28. The complaint referenced historical and ongoing court proceedings in Colombia. However, the Guidelines note that in these instances an NCP can proceed to evaluate whether an offer of good offices could make a positive contribution and would not create serious prejudice for either of the parties involved in other proceedings.

f) Whether the consideration of the Specific Instance contributes to the purpose and effectiveness of the Guidelines

29. The Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises states that the role of the NCP is to further the effectiveness of the Guidelines by "*contributing to the resolution of issues that arise relating to the implementation of the Guidelines*". The Ireland NCP considered that facilitating

mediation between the Complainants and the Company, which ceased trading, would not contribute to the resolution of issues.

Conclusion

The Ireland NCP has determined that pursuing this specific instance further cannot contribute to the resolution of the issues raised as it would not be feasible to conduct mediation with the Company as it has ceased trading and is therefore no longer engaged in the activities that formed the basis for the complaint. It therefore closes the specific instance with this statement.

ENDS

**Ireland National Contact Point
OECD Guidelines for Multinational Enterprises
Department of Enterprise, Trade and Employment**