



Final statement

NCP Specific Instance ATUMA vs Unilever

Date: 7 May 2024

In accordance with the Procedural Guidance to the OECD Guidelines for Multinational Enterprises, following conclusion of a specific instance and after consultation with the Parties involved, the NCP will make the results of the procedures publicly available.

This Final statement describes the issues raised and the procedures initiated by the NCP to assist the Parties. It also describes the conclusions and recommendations of the NCP.

As specific instances are not legal cases and NCPs are not judicial bodies, NCPs cannot directly order compensation nor compel Parties to participate in a conciliation or mediation process.

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Executive summary

On 12 April 2018, the Dutch NCP (NCP) and UK NCP received a specific instance regarding an alleged violation of the OECD Guidelines for Multinational Enterprises (hereinafter: the Guidelines) from Association des Ex-Travailleurs Unilever Marsavco/PHC au Congo (hereinafter: ATUMA), a group of former workers of Unilever-Marsavco/PHC in the Democratic Republic of the Congo (DRC) that was filed against Unilever NV (Rotterdam, NL) and Unilever PLC (London, UK). The Dutch NCP consulted with the UK NCP and it was agreed that the Dutch NCP would take the lead, with an advisory role of the UK NCP.

In the submission, ATUMA alleged that in 2001, Unilever-Marsavco/PHC unjustifiably dismissed 802 employees and then failed to provide them a complete legal severance package, including full final salary and bonus as well as allowances for housing, transportation, food, and dependents and other benefits.

In its Initial Assessment of 16 April 2020, the NCP determined that the issues raised against Unilever merited further consideration on the basis of the criteria laid out in the commentary to the Procedural Guidance for NCPs, para 25, and offered its good offices to the Parties. Both Parties accepted the good offices of the NCP.

The NCPs good offices started in April 2020 and ended on 27 September 2023 with a last joint mediation session between the Parties and an external mediator.

The Parties, assisted by the NCP, have drafted the Terms of Reference (ToR) for the dialogue, to be originally facilitated by the Netherlands NCP.

There was an agreement in principle reached on 1 April 2021 on these ToR.

However, the ToR have never been signed, due to complications during the dialogue phase. The ToR of April 2021 described the objective of the dialogue, which was to resolve the specific instance notification through mutual discussion and agreement between the Parties.

Unilever requested that an external mediator would facilitate the mediation process/dialogue.

Furthermore, it was agreed between the Parties and the NCP that a neutral evaluation of legal documents about the dispute and legal procedures conducted in the DRC would be carried out by an independent expert in Congolese labour law, as the Parties had different views on the legal interpretation of documents and on the outcomes of legal proceedings in the DRC.

In October 2021 the Parties agreed on engaging an external mediator.

In the meantime, in November 2021 Unilever PLC Global Headquarters left the Netherlands and moved to London. After coordination with the NCP of the UK it was decided that the Dutch NCP remained the lead NCP for this specific instance.

In March 2022, Unilever and ATUMA agreed upon the choice of the legal expert.

In June 2022 an external mediator of CEDR was appointed by the NCP.

Between June 2022 and December 2022 several joint and separate mediation sessions of the Parties with the external mediator took place.

Between December 2022 and August 2023 the mediation was suspended, as the assignment for the legal expert had to be agreed upon first.

The estimated costs of the legal expert exceeded the budget the NCP had available. The NCP made several attempts to draft a letter of instruction that both Parties could agree on, while at the same time reducing the predicted costs of the legal review. In the end this did not succeed. As a substantial financial contribution by the Parties turned out not to be an option either, the legal review in the end could not be carried out.

The NCP then proposed the Parties to have a last joint mediation session with the external mediator in order to explore if there were further ways of resolving the issues raised in the specific instance. Both Parties accepted to have this last joint session, that was held on 27 of September 2023. The Parties were not able to reach a mediated agreement. It was agreed with all participants that the mediation would terminate.

The good offices ended after the conclusion of the mediation meeting of 27 September. The external mediator drafted the mediation report and the NCP started to prepare its Final Statement.

In this Final Statement, the NCP describes its findings and conclusions on good faith engagement and on the issues raised in this Specific Instance, as well as recommendations to Unilever.

The NCP concludes on the basis of the Guidelines 2011 that:

- The legalistic approach by Unilever of the NCP specific instance process is contrary to the spirit of the OECD Guidelines, which specifically ask from companies that they look beyond what the law requires;
- Good faith engagement in the NCP procedure means: ... “genuinely engaging in the procedures with a view to finding a solution to the issues raised in accordance with the Guidelines.”;
- Looking back on the entire NCP process, the NCP sees a pattern of hurdles created by Unilever which cannot be considered as engaging in good faith in the NCP procedure as described in the Guidelines 2011.

The NCP concludes on the basis of the Guidelines 2000 that:

- it cannot establish if and to what extent there may have been a breach of the Guidelines 2000 by Marsavco as the fully owned daughter company of Unilever at the time of the dismissals. This also means that the NCP cannot establish if and to what extent there may have been by extension a breach of the Guidelines 2000 by Unilever at the time of the dismissals;
- it cannot establish if and to which extent there may have been a breach of the Guidelines 2000 by Unilever in its responsibility to encourage Marsavco as a business partner to apply, where practicable, principles of corporate conduct compatible with the Guidelines after the transfer in 2002.

The NCP recommends that Unilever:

- evaluates and where necessary updates its policies and practices on responsible disengagement to reflect the strengthened expectations of the Guidelines 2023 as well as related documents of the OECD [Multi-Stakeholder Initiatives and Responsible Business Conduct \(oecd.org\)](https://www.oecd.org/corporate/multi-stakeholder-initiatives-and-responsible-business-conduct/);
- evaluates and where necessary updates its policies and practices on good faith engagement in the NCP procedure to reflect the strengthened expectations of the Guidelines 2023.

In May 2025, one year after the publication of this Final statement, the NCP will follow-up with the Parties in writing and/or in person. The outcomes of the Follow-up will be published on the NCP's website.

Substance of the submission and the enterprise's initial response

On 12 April 2018, the Dutch NCP and UK NCP received a specific instance from ATUMA, a group claiming to consist of and be authorized to represent former workers of Unilever-Marsavco/PHC in the Democratic Republic of the Congo (DRC), which was filed against Unilever NV (Rotterdam, NL) and Unilever PLC (London, UK). In the specific instance, ATUMA alleged that in 2001, Unilever-Marsavco/PHC unjustifiably dismissed 802 employees and then failed to provide them a complete legal severance package, including full final salary and bonus as well as allowances for housing, transportation, food, and dependents (person who relies on another for financial support) and other benefits. ATUMA alleged that in 2002, 686 of the workers raised a complaint with the Congolese General Inspector for Labour to recover their unpaid severance packages. The complaint was brought to the attention of Congolese authorities at various levels (Judiciary, ministries, and the Office of the President of the Republic). Since the early 2000s, ATUMA postulated that several judicial and administrative rulings have supported the workers' claim for compensation.

According to ATUMA, to settle the dispute, Unilever PLC had made several financial transfers to Marsavco and its owners over the past decade for the compensation of the group of former workers. According to ATUMA, Unilever had failed to monitor the financial transactions to ensure the money was actually paid to workers and as a result, none had been received. ATUMA further claimed that Unilever made payments direct to the owners of Marsavco and alleged misappropriation through corruption. ATUMA postulated that the money owed to workers was estimated by the DRC Labour Inspectorate and courts to total more than \$45 million USD.

Relevant provisions of the OECD Guidelines

The notification concerned the alleged breach of OECD Guideline's 2011 Chapter I (Concept and principles), Chapter II (General policies), Chapter III (Disclosure), Chapter IV (Human Rights), Chapter V (Employment and Industrial Relations) and Chapter VII (Combating Bribery, Bribe solicitation and Extortion).

The issues raised in the notification date back as far as 2001. This is well before the current 2023 Guidelines as well as the 2011 Guidelines were adopted, which was done in May 2011 at the annual OECD Ministerial Council Meeting. In their notification, the notifying parties based the issues they raised on the 2011 Guidelines. In principle, however, the NCP can only consider the issues raised in light of the 2000 Guidelines, taking into account that the events addressed in the specific instance took place in 2001 and 2002.

The first reaction of Unilever

Unilever, in its first reaction during the Initial Assessment phase, regarded this notification as a matter for ATUMA to resolve with Marsavco and its current owners, and not with Unilever. Unilever regarded its policy and actions in respect to this matter as fully consistent with the OECD guidelines, specifically the relevant chapters in the Guidelines, I. Concepts and Principles, II. General Policies and V. Employment and Industrial relations.

Unilever did not regard itself as having responsibility for any liability to former employees in the DRC nor in any legal proceedings that may have been brought by those former employees against Marsavco after it had ceased to be a Unilever company.

According to Unilever, Marsavco was fully responsible for any liability to former employees. Unilever had no direct liability nor, following the sale, did it have any indirect liability to Marsavco or Beltexco (owners of Marsavco) in this regard.

Since legal proceedings were brought by the former employees in the DRC against Marsavco after it had ceased to be a Unilever company, Unilever was not a party to any proceedings and had not been involved with these employees, directly or indirectly, neither during those proceedings nor subsequently. Unilever stated that even if a complete and verified set of the relevant legal papers would have been available, which is far from the case in this instance, it was never and would not now be able to get involved, nor could it form any view or comment in the context of the Specific Instance on the validity, quantum, or outcome of those proceedings.

Initial assessment by the NCP

The NCP decided that the submission merited further consideration based on the following:

- “The notifying party seemed to be a concerned party with a legitimate interest in the issues raised in the notification.
- Unilever is a multinational enterprise within the meaning of the Guidelines.
- The issues raised by the notifying party seemed to be material and prima facie substantiated.
- There seemed to be a link between the multinational’s activities and the issues raised in the specific instance.
- The relevance of applicable law and procedures, including court rulings.
- The consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines.”

In the Initial Assessment, the NCP explained how the questions that needed clarification during the next stage of the procedure, relate to the different editions of the Guidelines applicable. This was summarized as follows:

“First, there needs to be clarity on the question if and to what extent there is a responsibility of Unilever regarding the dismissal process and possible unsatisfactory outcomes for the workers concerned when Marsavco was still fully owned by Unilever. The NCP indicated in its Initial Assessment that with regard to this question, it will in principle apply the 2000 Guidelines.

Second, the question is if there exists, since the transfer in 2002, a supply-chain responsibility for Unilever which requires, according to the 2000 Guidelines, that Unilever should have encouraged Marsavco to apply principles of corporate conduct compatible with the Guidelines, and/or – in the terms of the 2011 Guidelines - due diligence, taking into account that to date, there is a business relationship between Marsavco and Unilever”.

With regard to this second question, the NCP in its Initial Assessment drew attention to the fact that Article 10 of Chapter 2 of the OECD Guidelines 2000 mentions that an MNE should encourage, where practicable, business partners, including suppliers and subcontractors, to apply principles or corporate conduct compatible with the Guidelines. This principle has been further elaborated in articles 10 and 13 of Chapter 2 of the 2011 edition of the Guidelines, regarding due diligence.

The NCP offered its good offices to the Parties and asked both Parties whether they were willing to engage in a mediation/conciliation process, with the aim of agreeing how the issues can be successfully addressed. The Parties accepted the NCP's good offices. The IA was published on the NCP's website on 16 April 2020.

The proceedings of the NCP

Below is a chronological overview of what the NCP has done since receiving the submission.

| Date | Action that occurred |
|-----------------------------------|--|
| | Receipt and initial assessment of the specific instance |
| 12 April 2018 | Submission against Unilever received by the Dutch NCP |
| 5 July 2018 | First meeting NCP with Unilever NV |
| 27 August 2018 | First meeting NCP with Unilever PLC |
| 30 August 2018 | First meeting NCP with ATUMA |
| April 2019 | Draft Initial Assessment (IA) was shared with the Parties for their comments within 14 days |
| August 2019 | Second meeting NCP with Unilever to further explain the IA |
| February 2020 | Revised IA was sent to the Parties for their comments within 7 days |
| 16 April 2020 | Publication of the IA |
| | Phase of good offices and mediation action |
| October 2020 | NCP sent the Parties a draft Terms of Reference (ToR) for the mediation |
| November 2020 - April 2021 | Parties worked on a ToR for the mediation; Parties agreed that an external mediator would be appointed, upon request of Unilever; the Parties and the NCP agreed that a neutral evaluation of legal documents about the dispute would be carried out by an independent expert in Congolese labour law |
| 18 November 2020 | Unilever PLC Global Headquarters left the Netherlands and moved to London |
| 18 December 2020 | Unilever agreed with the draft ToR for the mediation |

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| January 2021 | Dutch NCP coordinated with NCP of the UK on the further handling of the case; Dutch NCP remained the lead NCP |
| 19 March 2021 | Meeting between the NCP and ATUMA on the draft ToR |
| 1 April 2021 | Agreement in principle reached between the Parties on the ToR for the mediation |
| April – August 2021 | Pause in the process of searching an external mediator and a legal expert due to procedural issues, including questions by Unilever regarding the alleged partiality of one of the NCP members handling the case, which was rejected by the NCP |
| 18 August 2021 | Unilever agreed with the proposal of the NCP about the further handling of the procedure; the procedure continued |
| September 2021 – May 2023 | Period of exchanges between the NCP and the Parties on the legal review and the letter of instruction for the legal reviewer |
| 22 September 2021 | Meeting between the NCP and Unilever on the hiring of a legal expert in Congolese law; the NCP explained the procedure for working with an external mediator |
| 6 October 2021 | Meeting between the NCP and ATUMA on the hiring of a legal expert in Congolese law; the NCP explained the procedure for working with an external mediator |
| October 2021 | The NCP started preparing a letter of instruction for a legal expert (questions to be answered, scope and number of documents to be reviewed) within the available budget of the NCP |
| October 2021 | Agreement on engaging with an external mediator by ATUMA and Unilever. Unilever proposed several candidates. ATUMA also proposed candidates |
| 13 December 2021 | Joint meeting between the NCP, ATUMA, Unilever about candidates for legal expert and candidates for external mediator |

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| March 2022 | Unilever and ATUMA agreed upon the choice of a legal expert and an external mediator of CEDR |
| 16 June 2022 | External mediator of CEDR was appointed |
| June 2022 – December 2022 | Period of joint and individual mediation sessions of the Parties with the external mediator |
| 22 June 2022 | Joint mediation session with both parties and external mediator, NCP-secretariat present |
| 28 July 2022 | Individual meeting between ATUMA, mediator, NCP-secretariat |
| 12 August 2022 | Individual meeting between Unilever, mediator, NCP-secretariat |
| 6 October 2022 | Individual mediation meeting between ATUMA, mediator, NCP-secretariat |
| November 2022 | NCP informed ATUMA that the mediation process was stalled due to questions around the letter of instruction for the legal reviewer in relation to the potential costs of the legal review |
| 25 November 2022 | Individual meeting ATUMA with external mediator, NCP-secretariat (follow up meeting to discuss further negotiation) |
| 5 December 2022 | Individual meeting between Unilever, mediator, NCP-secretariat (follow up meeting to discuss further negotiation) |
| December 2022 – August 2023 | Period during which the mediation was paused pending agreement on the letter of instruction for the legal expert as well as on the potential costs involved |
| 10 January 2023 | Revised proposal of Unilever for questions to the legal reviewer with the intention to limit the scope was received by the NCP; however the revised proposal would not lead to less work according to the legal expert as it kept all initial questions. |

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| 17 January 2023 | ATUMA was informed that Unilever insisted on the legal review to be conducted. The revised letter of instruction with proposals for revised questions to the legal reviewer was shared with ATUMA |
| 6 March 2023 | Meeting between ATUMA, NCP-member, NCP-secretariat on the legal review and proposal to pause the mediation during the legal review |
| 5 April 2023 | Meeting between the NCP and Unilever on the scope of the legal review; last attempt of the NCP to have a letter of instruction that both Parties can agree on, while reducing the costs; Unilever offered to clarify some questions to that objective |
| 22 May 2023 | Clarifications provided by Unilever on some of the questions of the legal review |
| 9 June 2023 | NCP asked Unilever (by email), if they were ready to contribute a substantive amount to the legal review, taking into account their insistence to keep a broad scope for the review |
| 23 June 2023 | Written response of Unilever that it will not contribute to the costs of a legal review |
| 29 June 2023 | Individual meeting between ATUMA and the NCP on the legal review, the costs and the position of Unilever |
| 6 July 2023 | Written follow-up of ATUMA on funding and the Unilever position |
| August 2023 – 27 September | Individual mediation sessions of the Parties with the external mediator and last joint meeting |
| 9 August 2023 | NCP proposed the Parties to have a last joint mediation session with the external mediator |
| 21 August 2023 | Individual mediation session ATUMA, external mediator, NCP-secretariat, preparing the joint mediation session |
| 25 September 2023 | Individual mediation session Unilever, external mediator, NCP secretariat |

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| 27 September 2023 | Last joint online mediation session ATUMA, Unilever, external mediator, NCP-secretariat; ATUMA delegates participated from the Dutch Embassy in Kinshasa |
| | Conclusion of the specific instance |
| 26 February 2024 | The draft Final statement and the mediator's report were shared with the Parties for comments within 14 days. |
| 7 May 2024 | Publication of the Final statement |

The NCP regrets it has not been able to meet the indicative timelines due, among others, to the complexity of the case, the conditions set by the Parties, and procedural issues before the start of and during the good offices phase, as well as the workload of the NCP and some changes in the NCP staff.

The good offices

After the IA of 16 April 2020, the NCPs good offices started. The phase of the good offices ended after the last joint mediation meeting of 27 September 2023 between the Parties and the external mediator. The good offices were carried out by independent members of the NCP, the external mediator and a senior officer of the NCP secretariat.

The Parties have not been able to reach an agreement on the issues raised by the submitting party.

The Parties, assisted by the NCP, have first elaborated the Terms of Reference (ToR) for the dialogue, originally to be facilitated by the Netherlands NCP as a mediator.

There was an agreement in principle reached on 1 April 2021 on these ToR. However, the ToR have never been signed, due to complications during the dialogue phase. The ToR of April 2021 described the objective of the dialogue, which was to resolve the specific instance notification through mutual discussion and agreement between the parties.

Unilever requested that an external mediator would facilitate the mediation process/dialogue.

From the outset of the mediation process, part of the dialogue concerned the legal interpretation of procedures conducted in DRC and documentation on Congolese labour law. As the Parties had different views on the exact meaning of the outcomes of the DRC proceedings, it was agreed that an external legal review by an expert who should be independent could be helpful to establish common ground on the legal background of the submission.

ATUMA first indicated that in their view an evaluation of legal documents was not necessary, but nevertheless agreed with the proposal of the NCP to hire an independent legal expert to advise the parties and the NCP.

Between April and August 2021 there was a pause in the process of searching an external mediator and a legal expert, due to other procedural issues. In October 2021 the Parties agreed on engaging an external mediator.

In the meantime, in November 2021 Unilever PLC Global Headquarters left the Netherlands and moved to London. In December 2021 the Dutch NCP coordinated with the NCP of the UK on the further handling of the case. It was decided that the Dutch NCP remained the lead NCP for this specific instance.

Between September 2021 and May 2023 there were numerous exchanges between the NCP and the Parties on the legal review and the letter of instruction for a legal reviewer.

In March 2022, Unilever and ATUMA agreed upon the choice of the legal expert and the engagement of an external mediator of CEDR.

In June 2022 an external mediator of CEDR was appointed by the NCP.

Between June 2022 and December 2022 several joint and separate mediation sessions of the Parties with the external mediator took place.

Between December 2022 and August 2023 the mediation was suspended, until the letter of instruction for the legal expert would be agreed upon, as well as further details on the costs of the legal expert.

In Winter 2022 and Spring 2023 the NCP made several attempts to draft a letter of instruction that both Parties could agree on, while at the same time reducing the predicted costs of the legal expert that were too high for the NCP to bear, including through proposing to reduce the number of questions to be put to the legal expert, and/or the number of documents to be reviewed. In May 2023, this turned out to be unsuccessful.

The estimated costs exceeded the reasonable budget the NCP had available, and remained unproportional to the overall budget of the entire mediation process. The NCP then asked Unilever plc and ATUMA if they would be willing to contribute to the legal review costs. ATUMA agreed to contribute a small amount. As the review was of great importance to Unilever, the NCP asked Unilever if it would be prepared to pay a substantial amount of the costs of the legal review. Unilever indicated it could not contribute such a substantial amount, mainly as it felt this could affect the perceived impartiality of the legal expert, and the authority of his opinion. In the end the legal review in the end could not be carried out.

This led to the end of the mediation as for Unilever carrying out the legal review over time became a precondition for further cooperation in the mediation.

The NCP then proposed the Parties to have a last joint mediation session with the external mediator in order to explore if there were further ways of resolving the issues raised in the specific instance. Both Parties accepted to have this last joint session.

Between August and 27 September 2023 several separate preparatory mediation sessions of the Parties with the external mediator took place and a last joint meeting was held on 27 of September. The Parties were not able to reach a mediated agreement. It was agreed with all participants that the mediation would be terminated.

The good offices ended after the conclusion of the mediation meeting of 27 September. The external mediator drafted the mediation report and the NCP started to prepare its Final Statement.

The draft of the Final statement was shared with the Parties on 26 February 2024 for comments within 14 days, together with the mediators' report.

Findings and conclusions

Findings on good faith engagement

The NCP notes that from the start the NCP process has been dominated by a disagreement between the Parties regarding the legal situation at the time of the events giving rise to the notification in the DRC. Both parties put forward opposing views on the legal situation as, in their view, demonstrated by legal documents from DRC courts and administrative authorities. At the time, the Parties and the NCP assumed that this situation could be resolved by seeking expert legal advice that would provide the NCP and the Parties with a common starting point from which to look at the outstanding issues. This turned out to be illusory.

Good faith engagement in the NCP procedure

The NCP also notes that after the publication of the Initial Assessment in 2020, Unilever has accepted the good offices of the NCP. The OECD Guidelines 2011 explain in the Commentary on the Procedural Guidance for NCPs (commentary 21) what should be understood by ‘good faith behaviour’ of the parties involved in the NCP procedure:

“Good faith behaviour in this context means responding in a timely fashion, maintaining confidentiality where appropriate, refraining from misrepresenting the process and from threatening or taking reprisals against parties involved in the procedure, and genuinely engaging in the procedures with a view to finding a solution to the issues raised in accordance with the Guidelines.”

In the Procedural Guidance for NCPs of the updated OECD Guidelines 2023 ‘good faith engagement’ is explained in even more detail.

Legalization of the procedure

From the start, the Unilever position in this case has been that Unilever did legally fulfil its obligation to pay the former workers everything they were due, and that all existing evidence pointed in that direction. This position was challenged by ATUMA. In the end, it was this particular legal issue that, remaining unresolved, resulted in the mediation not succeeding.

This is unfortunate, as the NCP OECD specific instance procedure is not a legal procedure; it is not about proof or about liability nor does it result in a binding decision on the interpretation of (conflicting) legal standards. Instead, it is about clarifying the responsibility of a company under the OECD Guidelines in a specific situation and is focused on assisting the Parties to jointly reach a solution of the issues raised that is in conformity with the Guidelines.

Although legal research can be part of the NCP good offices phase or a dialogue, in order to get more clarity on certain aspects, the NCP wants to underline that a dialogue on the basis of the OECD Guidelines should be possible *without* doing research into the relevant legal aspects and/or conclusively determining the facts of the case. The OECD Guidelines do not ask for judicial proof. Moreover, the OECD Guidelines 2011 outline recommendations on responsible business conduct that may go beyond what enterprises are legally required to comply with.

The updated Guidelines 2023 in the Preface par. 5 further clarify that: “..the recommendation from governments that enterprises observe the Guidelines is distinct from matters of legal liability and enforcement.”

The role of external lawyers

The NCP finds that Unilever, in this specific instance, has chosen to letting its lawyers take the lead in the handling of the case rather than taking the lead in the NCP procedure itself. Although the NCP understands Unilever's choice to have support from lawyers with the necessary specialist knowledge because of the legal aspects of the specific instance, the leading role of the lawyers does not relate well to the role the NCP procedure plays within the context of the OECD Guidelines as a procedure aimed at improvement of operational processes, restoring of good relationships between the parties, fostering of responsible business conduct, the prevention, mitigation and/or accounting for a company's negative impacts, and reaching forward-looking solutions.

Regarding the role of external lawyers, the Dutch NCPs' specific instance procedure stipulates: "The NCP points out to all parties that its complaint mechanism is extrajudicial and that a procedure is very likely to become overly juridical if a party engages an external lawyer to represent it in the procedure. The NCP therefore advises against this."

The NCP is of the opinion that external lawyers assisting and advising a company can have an added value in a non-judicial procedure like the NCP procedure if they are open to exchanges on access to remedy and remediation apart from and beyond the legal aspects of the case.

Strict conditions to the mediation

In the autumn of 2020, Unilever requested for an external mediator to mediate between the Parties.

Regular practice of the Dutch NCP is that the NCP members act as mediators. Engaging an external mediator is an option in the procedures of the Dutch NCP and a party may ask for it; however this tends to add an extra layer of complexity in the procedure and may lead to delays.

In April 2021, Unilever raised an objection to the handling of the Specific Instance by one of the members of the independent NCP who was a program manager until March 2014, i.e. more than a decade ago, of the NGO currently advising ATUMA in this specific instance, for reasons of alleged partiality. The NCP did not agree with Unilever's objections, as the situation in the view of the NCP neither qualified as a situation in which a conflict of interest must be assumed to exist, nor as a situation in which a potential or perceived conflict of interest may seem to exist.

The NCP responded to this incident by clarifying the diverse composition of the NCP, which is based on a document adopted by the Dutch Parliament, and how this composition and the NCP's functioning are safeguarding its independence and integrity, drawing attention notably to the following elements:

- All four members of the Dutch NCP have a different background, in business, in science or politics, in trade union organizations and in NGOs respectively, but are expected to act as independent members.
- The NCP decides for each case which two members handle the case from day-to-day and act as mediators, and prepare it for decision making by the full NCP.
- The full NCP decides with consensus on the acceptance of a case, on the adoption of the Initial Assessment and the Final Statement and on any other important steps to be taken during the procedure.

The NCP also decided to publish a note describing more in detail how it deals with impartiality and integrity of the NCP members [[Impartiality and Integrity of the Netherlands NCP](#)] on its website.

Over the course of the procedure, the agreement between the Parties and the NCP to have an external legal review carried out, in order to help the NCP and the parties to find common ground on the legal background of the submission in the course of the process, was increasingly treated by Unilever as a precondition to the mediation. As a consequence, it became an obstacle especially when it turned out that the questions that Unilever required to be resolved by the legal expert were so extensive that the costs of resolving them far exceeded the budget of the NCP for such matters. When so requested by the NCP, Unilever refused to either limit the scope of the legal review or contribute financially.

Conclusions on good faith engagement

Concluding, the NCP regrets that Unilever has not allowed for sufficient space during the course of the NCP proceedings to engage with the NCP and/or the notifiers on the responsibility of the company under the OECD Guidelines apart from the legal aspects and especially liability issues. The NCP concludes that the legalistic approach of the NCP proceedings by Unilever is contrary to the spirit of the OECD Guidelines, which specifically ask from companies that they look beyond what the law requires.

The NCP furthermore regrets the decision of Unilever not to contribute substantially to the costs of the legal review. Although a party, whether it is a company or a complainant, can never be obliged to contribute to an investigation or (legal) review as part of an NCP procedure, the NCP is of the opinion that when a big multinational like Unilever insists on an extensive investigation or legal review during an NCP procedure as a precondition to fully engage with and finalize the mediation, it should also be willing to contribute to the costs.

The NCP is also of the opinion that a substantial contribution to the funding of the legal review by Unilever would not have endangered the perceived impartiality of the review, as the NCP remained the contractor and would also itself contribute a substantial amount. The notifiers were also ready to provide for a contribution in line with their very limited means. In addition, both Unilever and ATUMA were already involved in the drafting of the letter of instruction with the questions for the legal expert, and agreement of both Parties as well as the NCP with the draft letter of instruction for the legal research had in principle already been achieved, with the sole matter to be further resolved how to limit the scope of the legal review to accommodate the limited resources available.

It is clear that in the Guidelines 2011, good faith engagement of a party means being open to finding solutions that relate to the Guidelines ('guidelines compatible' or 'in accordance with the Guidelines').

The NCP concludes that, although Unilever accepted the NCP's good offices and cooperated in the procedure, its attitude towards the NCP procedure has been a major impediment to achieving meaningful and material progress.

The NCP, looking back on the entire procedure, sees a pattern of hurdles created by Unilever (such as: the legalization of the procedure, the emphasis on the role of the external lawyers, the insistence on an external mediator, the objection to the handling of the case by one of the NCP members, and its position on the legal review as explained above), which cannot be considered as engaging in good faith in the NCP procedure as described in the Guidelines.

Findings on the issues raised

The timeline and the applicable versions of the Guidelines

The NCP notes that the issues raised in the Specific Instance have arisen a long time ago, in 2001. This makes it very difficult to reconstruct what exactly happened at the time.

In 2001, when the issues arose, the Guidelines 2000 applied. In its 2018 notification, the notifying party based its complaint on the 2011 version of the Guidelines. Since June 2023, the updated Guidelines 2023 apply.

The OECD has given guidance to NCPs on how to work with these different versions of the Guidelines when drafting a Final Statement and making recommendations or determinations on the issues raised.

When the NCP decides to make a determination on whether the company complied with the Guidelines, the rule for NCPs is that companies can only be held accountable according to provisions of the version of the Guidelines that was in force at the time when the conduct of the company took place. The company must have had the possibility to know these guidelines at the time. The issues in this specific instance arose in 2001/2002, when the Guidelines 2000 applied.

This is reflected in the NCP's Initial Assessment. The NCP indicated that with regard to the first question, if and to what extent there is a responsibility of Unilever regarding the dismissal process and possible unsatisfactory outcomes for the workers concerned when Marsavco was still fully owned by Unilever, it would in principle apply the 2000 Guidelines.

The second question is if there exists, since the transfer in 2002, a supply-chain responsibility for Unilever which requires, according to the 2000 Guidelines, that Unilever should have encouraged Marsavco to apply principles of corporate conduct compatible with the Guidelines, and/or – in the terms of the 2011 Guidelines, due diligence, taking into account that to date, there is a business relationship between Marsavco and Unilever.

The Parties' statements regarding the issues raised

ATUMA alleges that in 2001, Marsavco, a company whose shareholders are 7 Unilever entities, unjustifiably dismissed 802 employees and then failed to provide them a complete legal severance package, including full final salary and bonus as well as allowances for housing, transportation, food, and dependents and other benefits. ATUMA also alleges that Marsavco did not cease to be a Unilever company in February 2002 and that therefore, Unilever remained responsible. ATUMA alleged that in 2002, 686 of the workers raised a complaint with the Congolese General Inspector for Labour to recover their unpaid severance packages. The complaint was brought to the attention of Congolese authorities at various levels (Judiciary, ministries, and the Office of the President of the Republic). Since the early 2000s, ATUMA postulated that several judicial and administrative rulings have supported the workers' claim for compensation.

Unilever states that: "As Unilever wanted to close down the business activities of Marsavco and sell the shares, Marsavco implemented a retrenchment process prior to the sale, although there was no legal obligation for Unilever to undertake a severance process prior to the sale of its subsidiary. Unilever chose to do so voluntarily precisely to guarantee that all workers received full and proper severance payments in accordance with DRC law. In November 2001, an agreement terminating all employment contracts and fixing the amount of the retrenchment package was signed between Marsavco and the trade union representing employees."

Unilever also states: “Marsavco paid the agreed retrenchment packages and a transactional protocol for the individual amicable termination of employment contracts was signed by all Marsavco workers. The Unilever companies warranted the process that it had carried out in relation to the termination and payment of the employees in the Share Purchase Agreement of 15 February 2002 between Unilever and Beltexco SARL, a Congolese company.”

Unilever states that there were no indications that Marsavco had breached DRC law and no claim was ever made by Beltexco for breach of that warranty.

Unilever also states: “Unilever does not hold complete archives of its former DRC operations and has no obligation to do so. Relevant records from that time were not only held in hard copy files but also passed to the new owners on sale completion. ATUMA refer to court judgments and political documents dating many years later to which Unilever was never a party and of the existence of which Unilever only became aware in 2015.”

The NCP’s findings concerning the issues raised

The NCP notes that during the handling of the specific instance, ATUMA shared with the NCP over a hundred documents, including numerous documents of court cases and court decisions in the DRC. All these documents have also been shared with Unilever. Unilever, at the same time, indicates that many documents relating to the dismissals by Unilever before the selling of the company to Marsavco and the legal severance package got lost during a fire in the premises at the time. This means that there are probably also documents missing that are relevant to the issues at stake in this specific instance.

The NCP also notes that since the outset of the NCP procedure the Parties have had a fundamental difference of opinion on the interpretation of court rulings of different courts in the DRC, as well as on the outcomes of the administrative procedures and other legal procedures carried out in the DRC over time as reflected in the still existing documents. In response to the notification, Unilever has taken the position that Marsavco in 2000-2001, when still a fully owned daughter of Unilever, obeyed local labour law in the DRC on the dismissal procedure, and has adopted a strictly legal point of view in its consideration of the issues raised.

It was agreed between the Parties and the NCP to conduct an independent legal review in the hope of establishing common ground on the legal background of the submission. Getting clarity on the legal aspects over time became a precondition for Unilever to have a dialogue on the substance of the matter. Although for ATUMA a legal review was not a precondition to mediate, it agreed with having a legal review carried out by an independent expert.

In the end, a prisoners’ dilemma about the costs of the legal review put an end to the mediation.

As it has not been possible for the NCP to generate findings on the legal situation, in other ways, the fundamental difference of opinion between the Parties on the legal situation was not resolved.

The NCP finds that on the basis of the information and documentation available to the NCP it cannot establish what the facts and circumstances were relating to the dismissal and subsequent compensation of the Marsavco employees in 2001.

The NCP concludes that in this case it has not been possible for the NCP to establish a situation where both Parties agree on what should be the starting point of a dialogue on the substance of the submission. The Parties have not been able to reach any common understanding on the documents and information exchanged between the submitting party and Unilever.

The NCP regrets that a real dialogue between the Parties on the responsibilities of Unilever under the OECD Guidelines (the Guidelines version 2000 that applied at the time of the dismissals, or forward looking, the Guidelines versions 2011/ 2023) has not taken place.

Conclusions on the issues raised

The first substantive question (as already identified in the Initial Assessment) to be addressed in this Final Statement is if and to what extent there was a responsibility of Unilever under the OECD Guidelines 2000 regarding the dismissal process and possible unsatisfactory outcomes for the workers concerned when Marsavco was still fully owned by Unilever.

Regarding this question, the OECD Guidelines 2000 Chapter I concepts and principles 3 and 4 apply:

“The Guidelines are addressed to all the entities within the multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the Guidelines.”

On operations which would have major effects upon the livelihood of employees, and dismissals can be considered having major effects, the Guidelines 2000 Chapter IV Employment and Industrial Relations in article 6 state: “Enterprises should... in considering changes in their operations which would have major effects upon the livelihood of their employees, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of their employees, and, where appropriate, to the relevant governmental authorities, and co-operate with the employee representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects.”

Based on this, Unilever, being the parent company, carried a responsibility in cooperating with or assisting Marsavco in its actions with regards to the dismissal process in order to ensure that these were in line with the Guidelines.

The NCP, taking into account the information and documentation available to the NCP, concludes that it cannot establish if and to what extent there may have been a breach of the Guidelines 2000 by Marsavco as the fully owned daughter company of Unilever at the time of the dismissals. This also means that the NCP cannot establish if and to what extent there may have been by extension a breach of the Guidelines 2000 by Unilever at the time of the dismissals.

The second substantive question is, according to the IA, if there exists, since the sale and transfer of the company from Unilever to Marsavco in 2002, a supply-chain responsibility for Unilever, taking into account that to date there is a business relationship between Marsavco and Unilever.

Article 10 of Chapter 2 of the OECD Guidelines 2000 states: “An MNE should encourage, where practicable, business partners, including suppliers and subcontractors, to apply principles of corporate conduct compatible with the Guidelines.” Though the concept of supply chain due diligence as such was not yet included in the Guidelines 2000, this article shows that there was already an expectation of ‘encouragement of business partners where practicable’.

The principle of supply chain due diligence has been further elaborated in articles 10 and 13 of Chapter 2 of the 2011 edition of the Guidelines.

Based on this the NCP concludes that after the transfer in 2002 Unilever still had a supply-chain responsibility to encourage its business partner Marsavco, where practicable, to apply principles of corporate conduct compatible with the Guidelines.

In the period after the transfer, Unilever’s business partner Marsavco was supposed to implement the outcomes of the dismissal process by paying the former employees as agreed and by that apply principles of corporate conduct compatible with the Guidelines. Unilever, in its position, was supposed to encourage Marsavco to do so.

Taking into account the information and documentation available to the NCP, which include no information of Marsavco acting in breach of the Guidelines and/or Unilever being aware of any such breach on the part of Marsavco, the NCP concludes that it cannot establish if and to which extent there may have been a breach of the Guidelines 2000 by Unilever in its responsibility to encourage Marsavco as a business partner to apply, where practicable, principles of corporate conduct compatible with the Guidelines after the transfer in 2002.

However, the NCP underlines that what is expected of companies under the OECD Guidelines may go beyond what is required of them under domestic law and regulations. Where these conflict with the Guidelines, enterprises “are expected to seek ways to honour the Guidelines to the fullest extent possible” (OECD Guidelines 2011 and 2023, Chapter I Concepts and Principles art. 2). The NCP notes that in this Specific Instance the company has merely considered the issues at stake from a legal point of view, arguing that Unilever/Marsavco in 2000-2002 obeyed local labour law in the DRC, and that there was no responsibility for the company beyond that. The NCP concludes that Unilever by taking this point of view, Unilever has demonstrated to not be willing to look at what the OECD Guidelines may expect beyond what the law requires.

Recommendations

Recommendations of the NCP in a Final Statement have a forward looking character, they recommend the company to improve or change their policies or practices in relation to RBC in their international business activities. When making recommendations the NCP applies the latest edition of the Guidelines, in this case the updated Guidelines of June 2023.

The OECD Guidelines have developed a lot over time. The Guidelines 2023 are far more comprehensive and specific than the Guidelines 2011 on various topics and give more guidance for companies on how to improve their RBC policies and practices. The NCP notes that there are updated provisions in the 2023 Guidelines that are relevant for several of the issues in this specific instance. These include: responsible disengagement of a company and good faith engagement in the NCP procedure.

Responsible disengagement

Unilever indicates to have sold Marsavco shares because “in June 2001, having identified its operations in the DRC as non-core and no longer economically viable following the long period of civil war, Unilever announced a strategic review and subsequently invited offers for the purchase of the Marsavco shares.”

Responsible disengagement in the Guidelines relates to performing a risk assessment of relevant RBC risks before selling a company or shares/ownership and acting on the findings. Whether or not Unilever at the time had identified risks related to the sale of the company in relation to the civil war and possible human rights violations in the DRC, the NCP cannot establish. The fact remains that Unilever sold its shares in a conflict affected area with severe consequences/impacts on the workers of the company.

The updated Guidelines of 2023 are more specific on responsible disengagement. Companies should act responsibly when considering disengaging from a business relationship.

This includes meaningfully consulting rightsholders and addressing potential adverse impacts related to disengagement.

The Guidelines 2023, Chapter 2, commentary 25:

“Appropriate responses with regard to the business relationship may include continuation of the relationship throughout the course of risk mitigation efforts; temporary suspension of the relationship while pursuing ongoing risk mitigation; or, as a last resort, disengagement from a business relationship either after failed attempts at mitigation, or where the enterprise deems mitigation not feasible, or because of the severity of the adverse impact. Where it is possible for enterprises to continue the relationship and demonstrate a realistic prospect of, or actual improvement over time, such an approach will often be preferable to disengagement. The enterprise should also take into account potential social, environmental and economic adverse impacts related to the decision to disengage. *When deciding to disengage, enterprises should do so responsibly including by seeking meaningful consultation with relevant stakeholders in a timely manner and where possible, by taking reasonable and appropriate measures to prevent or mitigate adverse impacts related to their disengagement.*”

The NCP recommends that Unilever evaluates and where necessary updates its policies and practices on responsible disengagement to reflect the strengthened expectations of the Guidelines 2023 as well as related documents of the OECD [Multi-Stakeholder Initiatives and Responsible Business Conduct \(oecd.org\)](https://www.oecd.org/business-conduct/).

Good faith engagement in the NCP procedure

The NCP has drawn conclusions on good faith engagement on the basis of the 2011 version of the Guidelines. It has concluded that given the fact that the Guidelines are non-binding, provide principles of good practice and therefore often go beyond the law, the legalistic approach by Unilever of the NCP proceedings is contrary to the spirit of the OECD Guidelines.

The NCP has also concluded on the basis of what should be understood by ‘good faith behaviour’ of the parties involved in the NCP procedure, which is ‘genuinely engaging in the procedures with a view to finding a solution to the issues raised in accordance with the Guidelines’, that Unilever’s attitude towards the NCP procedure has been a major impediment to achieving meaningful and material progress. The NCP has seen, looking back on the entire procedure, a pattern of hurdles created by Unilever which cannot be considered as engaging in good faith in the NCP procedure.

The updated Guidelines 2023 also detail that good faith engagement of a party in the NCP procedure means being open to finding solutions that relate to the Guidelines, in the sense of being ‘Guidelines compatible’ or ‘in accordance with the Guidelines’.

In the Implementation Procedures of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, in article 26 (and 44) of the Commentary on the Procedures for NCPs, it is explained in more detail what good faith engagement of a party entails:

“26. The specific instance process is voluntary. The good faith engagement by all parties involved in the proceedings is expected. Good faith engagement in this context means responding in a timely fashion, maintaining confidentiality where appropriate and consistent with the NCP’s case-handling procedures, refraining from misrepresenting the issues and the process, notably in public communications, and from threatening or taking reprisals against parties involved in the procedure, or against the NCP itself, and genuinely engaging in the proceedings with a view to finding a

Guidelines-compatible solution to the issues raised, including giving serious consideration to any offer of good offices made by the NCP.”

The NCP recommends that Unilever evaluates and where necessary updates its policies and practices on good faith engagement in the NCP procedure to reflect the strengthened expectations of the Guidelines 2023.

Follow up (Evaluation)

The NCP recommends that an evaluation be conducted in May 2025, one year after the publication of this Final statement. The NCP will follow-up with the Parties in writing and/or in person. The outcomes of the Follow-up will be published on the NCP’s website.

The NCP thanks the Embassy of the Netherlands in DRC, Kinshasa and Goma, for their willingness to facilitate several meetings in their premises with IT facilities allowing the complainants to participate online in several meetings with the NCP and the mediator.

The role of National Contact Points (NCPs) is to further the effectiveness of the OECD Guidelines. The Dutch government has chosen to establish an independent NCP, which is responsible for its own procedures and decisions, in accordance with the Procedural Guidance section of the Guidelines. In line with this, the Dutch NCP consists of four independent members, supported by four advisory government officials from the most relevant ministries. The NCP Secretariat is hosted by the Ministry of Foreign Affairs. The Minister for Foreign Trade and Development Cooperation is politically responsible for the functioning of the Dutch NCP. More information on the OECD Guidelines and the NCP can be found on the [NCP Website](#)

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