



National Contact Point for the OECD Guidelines for Multinational Enterprises

Initial Assessment

Milieudefensie/Friends of the Earth Netherlands, WALHI/Friends of the Earth Indonesia and SDI/Friends of the Earth Liberia versus ING

20 January 2020

ArgentinaAustraliaAustriaBelgiumBrazilCanadaChileColombiaCzechRepublicDenmarkEgyptEstoniaFinlandFranceGermanyGreeceHungaryIcelandIrelandIsraelItalyJapan

Notification and request for mediation to the Netherlands National Contact Point of Milieudefensie/Friends of the Earth Netherlands, WALHI/Friends of the Earth Indonesia and SDI/Friends of the Earth Liberia concerning an alleged violation of the OECD Guidelines for Multinational Enterprises by ING (5 July 2019)

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- the notifying parties are concerned parties with a legitimate interest in the issues raised in the notification;
- ING is a multinational enterprise in the sense of the Guidelines;
- the issues raised by complainants are material and *prima vista* substantiated;
- there is a link between ING's activities and the issues raised in the specific instance;
- the consideration of this specific instance may contribute to the Guidelines' objectives and effectiveness.

The decision to further examine this specific instance does not entail substantive research or fact-finding, nor does it entail a judgment on whether or not ING has violated the Guidelines.

In this initial assessment, the NCP explains its decision to offer parties 'its good offices' to come to a solution through dialogue, with reference to the Netherlands NCP Specific Instance Procedure for handling notifications¹ in the appendix.

In conformity with the Netherlands NCP's procedure, the draft initial assessment has been sent to the parties involved, inviting them to respond to the assessment in writing within a two weeks' notice, after which the initial assessment has been finalized, taking

1. Executive summary

On 5 July 2019 Milieudefensie/Friends of the Earth Netherlands, WALHI/Friends of the Earth Indonesia and SDI/Friends of the Earth Liberia notified a specific instance with the Netherlands National Contact Point with regard to an alleged violation of the OECD Guidelines for Multinational Enterprises (hereafter: the Guidelines) by ING.

The Netherlands NCP concludes that the notification merits further consideration based on the following criteria:

¹ <https://www.oecdguidelines.nl/notifications/specific-instance-procedure>

into account the parties' comments. This initial assessment was subsequently published on the NCP's website:
www.oecdguidelines.nl.

2. Summary of the notification

On 5 July 2019 the Netherlands NCP received a notification of Milieudefensie/Friends of the Earth Netherlands, WALHI/Friends of the Earth Indonesia and SDI/Friends of the Earth Liberia (hereinafter: Friends of the Earth) against ING. In this initial assessment, the NCP will not express an opinion on the correctness of the statements of Friends of the Earth.

In the notification complainants stated that *“ING has breached several provisions of the OECD Guidelines by contributing to specific adverse environmental, human rights, and labour rights impacts caused by subsidiaries of ING's clients Noble Group Ltd., Bollore Group/Socfin Group S.A., and Wilmar International Ltd. The complaint argues that ING was initially only directly linked to these specific impacts though the business relationship between ING and these three clients. However, due to the high degree of foreseeability of the harmful impacts caused by its clients and the failure of ING to take any action that actually mitigated or decreased the risk of impacts, an omission that made it easier for these clients to cause harm, ING – through its continued provision and renewal of loans of a substantial total amount to these clients- has come to be in a position of contributing substantially to the harmful impacts. The repeated loans by ING totaled a substantial amount, and given the general nature of corporate loans, it is likely that at least a portion of the proceeds would go to the activities that were known to be causing adverse impacts. Although the impacts were highly foreseeable, there are no indications ING made any efforts to prevent proceeds from being used to support the activity in question. The complainants assert that, as a contributor to the impacts, ING now has a heightened responsibility to cease its contribution and contribute to remedying the impacts.”*

The notification specifically concerns the alleged non-observance of OECD Guidelines and refers to the OECD Due diligence guidance for Responsible Business Conduct and the OECD guidance document on “Responsible Business Conduct for Institutional Investors”.

Complainants refer to the following Chapters of the Guidelines:

Direct linkage

- General Policies II.A.12: [Enterprises should] Seek to prevent or mitigate an adverse impact when the impact is nevertheless directly linked to their operations, products or services by a business relationship; and
- Human Rights IV.3: [Enterprises should] Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship; and
- With reference to the OECD guidance document on “Responsible Business Conduct for Institutional Investors”, which explains that investors, even those with minority

shareholdings, may be directly linked to adverse impacts caused or contributed to by investee companies as a result of their ownership in, or management of, shares in the company causing or contributing to certain social environmental impacts.

Due diligence to identify, prevent and mitigate adverse impacts

- Commentary 14: “Due diligence can help enterprises avoid the risk of... adverse impacts that are either caused or contributed to by the enterprise, or are directly linked to their operations, products or services by a business relationship”. The recommendations are as follows:
- 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.
- Human Rights 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.
- Commentary 45: “assessing... human rights impacts, integrating and acting upon the findings, tracking responses, as well as communicating how impacts are addressed”.

Contribution

- General Policies A.11: Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impact when they occur.
- Human Rights 2: Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
- Human Rights 6: 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.
- Commentary 42: “... an enterprise's activities that could cause or contribute to adverse human rights impacts “include both actions and omissions”

Transition from direct-linkage to contribution to adverse impacts

- With reference to the OECD Due Diligence Guidance; “[a]n enterprise's relationship to an adverse impact is not static. It may change, for example as situations evolve and depending upon the degree to which due diligence and steps taken to address identified risks and impacts decrease the risk of the impacts occurring”.
- Commentary 14: “For the purposes of this recommendation, ‘contributing to’ an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivizes another entity to cause an adverse impact and does not include minor or trivial contributions.”

In their notification the complainants request the following:

With regard to the Dutch NCP

“We respectfully request that the Netherlands NCP offers its good offices to facilitate mediation between ourselves and ING to resolve the OECD Guideline breaches discussed in this specific instance. [...]”

Should mediation fail, we expect that the NCP will examine the facts and make a determination as to whether or not ING has breached the Guidelines. We request the NCP to provide recommendations on what steps ING should take to address the harms to which it has contributed and on how ING can improve its due diligence in order to avoid contributing to further adverse impacts in the palm oil sector in the future. It would be useful if the NCP could elaborate on whether statements from (other) NCPs on the non-compliance of the OECD Guideline of investees should lead to divestment or other actions by their financiers.”

“We ask the NCP to discuss and put forward their arguments on what the government of the Netherlands should do to prevent further financing of abuses in the palm oil sector, including which elements should be included in binding regulation for the financial sector, such as but not limited to those forthcoming from the European Commission action plan on sustainable finance. [...]”

With regard to ING

“We hope that facilitated dialogue between the parties would result in the following:

- *ING’s immediate halting of its contribution to the ongoing harms mentioned in this complaint by responsibly divesting from the clients named in this complaint and – because the industrial palm oil sector and specifically;*
- *ING’s inclusion of improved sustainability criteria in its financing contracts, and also of a clause requiring clients to consent to ING’s disclosure of its relations with them to facilitate full communication of ING’s due diligence activities.*
- *ING’s public disclosure of its engagement with all of its clients regarding their environmental, social and human rights-related risks and impacts, including the nature of ING’s engagement and outcomes and timeframes demanded of clients by ING.*
- *ING’s development and publication of a new ESG risk averse investment model. For the agro-commodities sector, the model should prohibit investments in high-risk industries and support financing of a transition from industrial agricultural production to agro-ecology and community-based land and forest management.*
- *ING’s development and publication of due diligence methods that guarantee credible and timely information, including through use of local information sources and supply chain responsibility. In our understanding, financiers too often rely on commercial data providers to assess their portfolio and/or specific companies. Data is mainly based on annual reports, questionnaires, and a media scan. As a result, local and “real-time” information is absent, and risks in complex supply chains are not meaningfully analyzed. We call on ING to develop improved data collection procedures that improve its awareness of harms linked to its clients.*

- *ING’s development and publication of clear criteria and procedures on when and how it will divest responsibly from clients linked to harms, when ING’s engagement and leverage efforts have failed to resolve adverse impacts. Such procedures should lay out the trigger points and timelines that will guide ING’s systematic efforts to increase leverage, mitigate harms, and ultimately divest from harmful investments.*
- *ING’s participation, independently or with its clients and peer financial institutions, to contribute, to redress and remediation for communities and workers impacted [...]. And to ensure restoration of HCV and other environmental values [...].”*

3. Summary of the initial response of ING

On 11 October 2019, the Dutch NCP received an initial response of ING on the notification of Friends of the Earth. In this initial assessment, the NCP will not express an opinion on the correctness of response of ING.

ING is of the opinion it did perform a proper due diligence and did use its leverage where needed and possible. ING has therefore complied with the OECD Guidelines and not contributed to any harm. More specific, ING’s response to the notification is the following:

- **Disengagement from RSPO certified large-scale palm oil will in general not benefit the goal of sustainability.**
All three companies mentioned in this notification are large-scale palm oil producers and traders. All three are members of the Round Table on Sustainable Palm Oil (RSPO). In the Bumitama case², this NCP has already specifically stated that the “NCP respects the parties’ diverging views” regarding the desirability of large-scale palm oil”, as “both parties pursue the goal of sustainable palm oil but that each does so in its own way”. Furthermore, in the same case, this NCP concluded that the RSPO constitutes “good practice” for palm oil and that “disengagement of companies that adhere to the RSPO principles will in general not benefit the goal of sustainability”. It also stated “According to the Guidelines, the enterprise should also take into account potential social and economic adverse impacts relate(d) to the decision to disengage.”

As such, we consider ING’s policy not to disengage from its clients in the palm oil supply chain as they obtained-, or are in the process of obtaining RSPO certification, to be in line with the view from the NCP. It is also in line with the view of the Dutch government and other reputable parties, such as Solidaridad, the WWF and the International Union for Conservation of Nature (IUCN).

- **Does ING’s client relationship constitute “linked to” or “contributes to” according to the OECD Guidelines?**
The OECD is in the process of finalizing the guidance paper “Due Diligence for Responsible Corporate Lending and Securities Underwriting³” providing guidance on when a bank is “linked to” vs

² See: <https://www.oecdguidelines.nl/documents/publication/2016/1/15/fs-foe-milieudefensie-rabobank>

³ This document will be publicly available at the end of October. See footnote 12.

“contributes to” adverse impacts. This should be the leading document upon which any mediation is to be conducted. More specific to this case, ING opines it did perform a proper due diligence and used its leverage where needed and possible. As such ING considers its client relationship to be “linked to” the alleged adverse impacts. The OECD guidance paper states: “Where the bank is directly “linked to” an adverse impact through a client, but does not “cause” or “contribute to” it, the bank will not be responsible for remedying the impact.”⁴ As such, the bank opines there are no harms to which ING contributed, nor is the bank responsible to participate in redress or remediation.”

- **Develop and publish clear criteria:**

ING has clear ESR policies, which have been published.⁵ Our preference is engagement over disengaging which is compliant with the OECD Guidelines.⁶ Setting a simple rule for disengagement will be difficult, as it will be highly fact specific when we should conclude that our engagement has not been effective and the last resort tool of disengagement should be used.

- **Client confidentiality versus client due diligence disclosure.**

This topic has already been addressed in the Dutch Banking Sector Agreement on Human Rights. There is no reason to redo that general discussion in a case that is targeting ING specifically.

4. Initial assessment

In accordance with the OECD Guidelines and the Netherlands NCP Specific Instance Procedure, the Netherlands NCP concludes that, in light of the following considerations the notification merits further examination:

Is the Netherlands NCP the right entity to assess the alleged violation?

The Netherlands NCP is the right entity to assess the alleged violation by ING. The goal of the notification aims to affect change at ING headquarters in the Netherlands.

What is the identity of the reporting parties and their interest in the case?

Milieudefensie⁷ is the Dutch member of Friends of the Earth⁸, a large environmental justice network. Milieudefensie has been engaged in international and Dutch campaigns on palm oil and the financial sector since the late 1990s. Milieudefensie has a long-standing interest in reducing consumption of palm oil commodities and financing the palm oil industry. Milieudefensie states it targets Dutch actors – including the government, financial

institutions, and other companies – that play a key role in supporting the palm oil industry, to seek policy changes to reduce Dutch demand for palm oil commodities and reduce financial support for expansion of this industry. Milieudefensie points out they have, for almost two decades, conducted research on palm oil plantations linked to ING, and has engaged ING through direct communication as well as broad-based public campaigning to reform or end its support for the palm oil industry.

Friends of the Earth Netherlands works closely together with Friends of the Earth Indonesia (WALHI) and Friends of the Earth Liberia (Sustainable Development Institute/SDI) and represents these organizations in this case.

WALHI⁹ has been supporting communities that are impacted by the expansion of palm oil plantations and has advocated for a moratorium on the expansion of palm oil plantations. It joins the national and international advocacy on regulating financiers. WALHI has done research and supported communities impacted by Wilmar plantations, which is included in this specific instances.

SDI¹⁰ has been supporting communities that are impacted by the expansion of palm oil plantations. SDI has lobbied for the Land Rights Act and joins the international advocacy for rules for companies and rights for people, including regulating the financial sector. SDI is together with the Liberian Palm Oil Working group involved in supporting communities and workers impacted by the Wilmar (MOPP) oil palm plantation in Liberia, which is included in this specific instance.

NGO's in Europe that support the complaint are: ReAct, Fian Belgium, Brot fur alle, FERN and CNCD-11.11.11. These groups are actively supporting civil society organizations and communities in countries where Socfin operates oil plantations.

Is ING a multinational enterprise according to the Guidelines?

ING is a multinational enterprise according to the Guidelines. ING is a global bank with its headquarters based in The Netherlands. According to their website, they serve around 38.4 million customers, corporate clients and financial institutions in over 40 countries¹¹.

Are the issues raised by Friends of the Earth/Milieudefensie, WALHI and Liberia material and substantiated?

The issues raised are *prima vista* substantiated by documents and the notification refers to relevant provisions of the Guidelines. The notification concerns the alleged non-observance of OECD Guidelines Chapter II. General Policies, A. 10, 11, 12 and Commentary 14. Chapter IV. Human Rights, 2, 3, 5, 6 and Commentary 42, 45.

Furthermore, reference is made to the OECD Due Diligence Guidance for Responsible Business Conduct, the OECD Guidance

⁴ See nr 27 of the guidance paper Due Diligence for Responsible Corporate Lending and Securities Underwriting.

⁵ They can be found here: <https://www.ing.com/Sustainability/Sustainable-business/Environmental-and-social-risk-policies.htm>

⁶ See for more detail above at “This NCP has already advised that (financing) large scale palm oil industry is not incompatible with the OECD guidelines.”.

⁷ <https://www.foei.org/member-groups/europe/netherlands>

⁸ <https://www.foei.org/about-foei/organization>

⁹ <https://www.foei.org/member-groups/asia-pacific/indonesia>

¹⁰ <https://www.foei.org/member-groups/africa/liberia>

¹¹ <https://www.ing.com/About-us/Profile/ING-at-a-glance.htm>

document on Responsible Business Conduct for Institutional Investors and the Due Diligence Guidance for responsible corporate lending and securities underwriting¹².

Does there seem to be a link between ING's activities and the issues raised in the specific instance?

Parties do not dispute the provision of financial services by ING to the Noble Group Ltd. (until 2017), Bollore Group (Socfin Group S.A.) and Wilmar International Ltd. The notification concerns ING's responsibility to prevent or mitigate alleged negative impacts as a result of the activities of these companies through their business relationship "directly linked", which in the opinion of the complainants has shifted to "contributing to" specific adverse environmental, human rights and labour rights impacts.

What is the relevance of applicable legislation and procedures, including court rulings?

The following parallel proceedings are identified at this stage: In May 2019, a court case has been filed against Bollore/Socfin Group in France¹³.

The Belgian government is engaged to set up mediation between Socfin and other parties. The Belgium government is willing to do so but will first await the outcomes of a mediation process initiated by the President of Sierra Leone.

A complaint against Noble is pending at the Roundtable on Sustainable Palm Oil (RSPO). Wilmar is engaging with Amnesty International on a complaint filed in 2016 via Wilmar's grievance mechanism¹⁴.

The parallel proceedings concern the responsibilities and obligations of the before mentioned palm oil companies. The complaint filed at the Netherlands NCP is about ING's due diligence. In line with paragraph 26 of the OECD Guidelines Procedural Guidance, the Netherlands NCP is of the opinion that an offer of good offices could make a positive contribution to the resolution of the issues raised and would not create serious prejudice for either of the parties involved in these other proceedings or cause a contempt of court situation.

Would the consideration of this specific problem contribute to Guideline objectives and effectiveness?

Notifying parties state that the complaint is forward looking with the aim of improving ING's due diligence processes in the future. Furthermore they point out it would be helpful and relevant for the Guidelines if the NCP could help interpret the Due Diligence Guidance for responsible corporate lending and securities underwriting with regard to the aspect of "shifting" from the "directly linked" to the "contributing" category. The Netherlands NCP believes that dealing with this notification will contribute to

the purpose and effectiveness of the Guidelines in the sense that it will help clarify the due diligence recommendations for ING in this specific instance and the financial sector.

5. Conclusion

The NCP is of the opinion that this specific instance merits further consideration and will therefore, in accordance with the Netherlands NCP specific instance procedure, offer its good offices to facilitate a dialogue between the parties. The objective is to bring parties to agreement on possible improvements of ING's due diligence policies and practices regarding palm oil, and to assess the enterprise's involvement with the actual or potential adverse impacts identified, in order to determine the appropriate responses and specifically, assess whether the enterprise contributed (or would contribute) to the adverse impact; or whether the adverse impact is (or would be) directly linked to its services by the business relationships.

The NCP believes this may help clarify the OECD due diligence recommendations for ING and the financial sector.

Both parties accepted the NCP offer to engage in mediation. In accordance with the NCP procedure, mediation or further examination will be confidential while in progress.

The NCP will complete the procedure by issuing a final statement on the results of the procedure. The final statement will be published on the website of the NCP.

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 www.oecdguidelines.nl.

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¹² <https://www.oecd.org/fr/gouvernementdentreprise/due-diligence-for-responsible-corporate-lending-and-securities-underwriting.htm>

¹³ <https://www.asso-sherpa.org/palm-oil-in-cameroon-the-bollore-group-sued-by-ngos-in-an-unprecedented-legal-action>

¹⁴ <https://www.wilmar-international.com/sustainability/grievance-procedure>