



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

Initial Assessment by the Ireland National Contact Point for the OECD Guidelines for Multinational Enterprises

**Specific Instance Complaint from Global Legal Action
Network (GLAN) against the Electricity Supply Board
(ESB)**

Summary of the Ireland NCP Decision

1. The complaint is made by the Global Legal Action Network (GLAN) (hereinafter “the Notifier”), an NGO, 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”). The complaint is against the Electricity Supply Board (ESB) (hereinafter “the Corporation”) regarding their purchase of coal produced from the Cerrejón mine in La Guajira, Colombia.
2. The complaint relates to II (General Policies); Chapter III (Disclosure); Chapter IV (Human Rights) and Chapter VI (Environment). GLAN alleges that the Corporation has failed to meet its obligations related to due diligence, disclosure, human rights and environment, linked to the alleged adverse impacts experienced in Colombia.
3. The Corporation has disputed each of the claims presented in this specific instance, stating it has appropriately addressed the recommendations of the Guidelines through its membership of the “Bettercoal” initiative¹, including its participation in the Colombia Working Group². It states it has limited leverage by itself as a minor importer and has sought to cooperate with other coal purchasers to leverage collectively and exert influence, which they argue is consistent with the Guidelines.
4. The Ireland NCP has decided that the complaint merits further examination and will proceed to the offer of good offices to enable mediation between the parties. This relates solely to these issues in the context of the activities at the Irish Corporation and not to the day-to-day impacts at the mine in Colombia.
5. The Ireland NCP sets out the reasons for this decision in the interests of transparency and accountability. **The decision to offer the good offices does not determine whether the Corporation has acted consistently or inconsistently with the Guidelines.**

Object of the Complaint

6. The Ireland NCP received a complaint on 18 January 2021 from the Complainants against the Corporation, which was established in 1927 as a statutory corporation in the Republic of Ireland under the Electricity (Supply) Act 1927. The Corporation is majority owned by the Irish State.

¹ [Bettercoal](#) was established in 2012 by a group of major European coal buyers to promote the continuous improvement of sustainability performance in their coal supply chain, working towards a global responsible coal supply chain.

² The [Colombia Working Group](#) was created to facilitate a more coordinated approach to the monitoring of continuous improvement plans for suppliers as well as build knowledge and measure impact.

7. The Complainants allege several adverse impacts caused by the Cerrejón mine relating to human rights, public health and the environment based on the business relationship, i.e. the corporation purchased coal from the mine. Therefore, the Complainants argues that the corporation has acted inconsistently with the OECD Guidelines and claims it has not:
- Carried out adequate due diligence to identify, mitigate and prevent adverse impacts caused by the mine
 - Used its leverage to encourage Cerrejón to act in accordance with the Guidelines beyond its membership of Bettercoal, which they believe is flawed
 - Been sufficiently transparent about its relationship with Cerrejón, relying on Bettercoal assessments and failing to be transparent about its procurement activities
 - Adopted and implemented a human rights policy
8. The Complainants request that the Corporation terminate its relationship with Cerrejón; issue a public statement acknowledging the need for this termination and call on the parent companies of the mine to close it and remedy its impacts; compile and publish a human rights policy and issue a formal apology to the affected communities.
9. The Corporation rejects all allegations made, stating it has met the recommendations of the Guidelines by using its limited leverage as a “*very minor contractor*”³ with other purchasers collectively through the Bettercoal initiative which operates an assessment process to monitor the operation of this coal mine and others.
10. The Corporation notes that under the Bettercoal process, the mine is subject to independent assessments, in line the with the [Bettercoal Code](#) which the corporation states “*is consistent with the Guidelines and with the UN Guiding Principles on Business and Human Rights*”. It said following the assessment of Cerrejón, a Continuous Improvement Plan has been put in place, which is being implemented. It is monitored by the Colombia Working Group (part of Bettercoal), and the Corporation is a member of this group. The Corporation contends this process is what is envisaged under the recommendations of the Guidelines.
11. The Complainants simultaneously lodged a complaint against Anglo American plc, BHP Group Limited and Glencore International AG who equally own Cerrejón. The complaint was lodged with the NCPs of the home jurisdictions of these firms, the UK, Australia and Switzerland respectively. Since submission of the complaint, it was announced that Glencore International AG would acquire all the interests of Anglo American and BHP in the Cerrejón mine. The Complainants also lodged a complaint with the Ireland NCP against CMC Coal Marketing DAC, responsible for marketing and selling the coal.

³ The corporation states that between 2013-2018 they imported between 2.2%-3.5% of the total coal produced at the Cerrejón mine

Guidelines provisions cited by the Complainant

12. The Complainants refers to the following sections in the Guidelines:

Chapter II: General Policies

A.1: Enterprises should *“Contribute to economic, environmental and social progress with a view to achieving sustainable development.”*

A10: 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.”*

A12: Enterprises should *“Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.”*

A13: Enterprises should *“In addition to addressing adverse impacts in relation to matters covered by the Guidelines, encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines.”*

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.3: *“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, even if they do not contribute to those impacts.”*

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

A.5: *“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.”*

Chapter VI: Environment

A.1: *“Establish and maintain a system of environmental management appropriate to the enterprise, including:*

- a) *collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities;*
- b) *establishment of measurable objectives and, where appropriate, targets for improved environmental performance and resource utilisation, including periodically reviewing the continuing relevance of these objectives; where appropriate, targets should be consistent with relevant national policies and international environmental commitments; and*
- c) *regular monitoring and verification of progress”*

A.2: *“Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights:*

- a) *provide the public and workers with adequate, measureable and verifiable (where applicable) and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance; and*
- b) *engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.”*

A.3: “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.”

A.6: “Continually seek to improve corporate environmental performance, at the level of the enterprise and, where appropriate, of its supply chain, by encouraging such activities as:

a) adoption of technologies and operating procedures in all parts of the enterprise that reflect standards concerning environmental performance in the best performing part of the enterprise;

b) development and provision of products or services that have no undue environmental impacts; are safe in their intended use; reduce greenhouse gas emissions; are efficient in their consumption of energy and natural resources; can be reused, recycled, or disposed of safely;

c) promoting higher levels of awareness among customers of the environmental implications of using the products and services of the enterprise, including, by providing accurate information on their products (for example, on greenhouse gas emissions, biodiversity, resource efficiency, or other environmental issues); and

d) exploring and assessing ways of improving the environmental performance of the enterprise over the longer term, for instance by developing strategies for emission reduction, efficient resource utilisation and recycling, substitution or reduction of use of toxic substances, or strategies on biodiversity.”

The Initial Assessment Process

13. The purpose of the initial assessment is to determine if the issues raised in the complaint merit further examination by the Ireland NCP. It is not intended to be a detailed assessment/fact-finding analysis of the complaint, or a detailed assessment of the Corporation’s rebuttal of the complaint. **It does not determine whether the Corporation has acted consistently or inconsistently with the Guidelines.**

Ireland NCP Handling Process

18 January 2021	Complaint received by Ireland NCP from the Complainants
19 January 2021	Ireland NCP confirms receipt and commitment to review

28 January 2021	The Ireland NCP meets with representatives of the NCPs of Australia, Colombia, Switzerland and the UK to discuss coordination of the complaints received
9 February 2021	Letter issued by Ireland NCP to the Corporation copying complaint and Ireland NCP Procedures
25 February 2021	The Corporation requests an extension to submit its response which was accepted by the Ireland NCP
20 April 2021	The Corporation requests a further extension - two weeks granted
7 May 2021	Response received from the Corporation
19 May 2021	Ireland NCP seeks consent from the Corporation to share its response with the complainant
24 May 2021	Corporation seek clarification on the process and timelines of the Ireland NCP handling the complaint
31 May 2021	Ireland NCP clarifies the process and timelines
9 July 2021	Corporation consents to share its response with confidentiality provisions
22 July 2021	Ireland NCP issues the Corporation's response to the complainant on a confidential basis
6 October 2021 – 10 November 2021	Exchanges between Ireland NCP and the Corporation on consent to share their response with named parties, consent declined
27 January 2022	Ireland NCP completes draft initial assessment and issues to the parties
21 & 23 March 2022	Ireland receives comments on draft initial assessment from the Notifier and the Corporation
12 April 2022	Ireland NCP meets with the Notifier to discuss draft initial assessment
22 April 2022	Ireland NCP meets with OECD Secretariat who pointed to the Guide for National Contacts Points on the Initial Assessment of

	Specific Instances to confirm that NCPs are not expected to make finding at the initial assessment stage
27 April 2022	Ireland NCP meets with the Corporation to discuss draft initial assessment
6 May 2022	Ireland NCP issues revised draft initial assessment to both parties
25 May 2022	Ireland NCP informs parties of internal review of the draft initial assessment
3 June 2022	Ireland NCP issues revised draft initial assessment to the parties
22 June 2022	Ireland NCP discusses updated draft initial assessment with Corporation
7 July 2022	Ireland NCP issues the initial assessments for publication to parties
18 July 2022	Ireland NCP publishes initial assessment

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

14. The Corporation is an Irish State-Owned Enterprise (SOE), which has purchased coal from the Cerrejón mine for use at its Moneypoint powerplant (Co. Clare), which it owns and operates.
15. The Complainants note that *“the direct impact of Cerrejón’s activities is felt in Colombia, and the issue of ESB’s failure to comply with the MNE Guidelines arises in Ireland”*.
16. The Corporation acknowledges it is the NCP who will determine if it is the appropriate one to consider the complaint but does state that *“all of the matters raised in the complaint occur in Colombia”*.
17. The Procedural Guidance (Commentary, paragraph 23, page 82) within the Guidelines states that: *“Generally, issues will be dealt with by the NCP of the country in which the issues have arisen.”*
18. Initial assessments under the Guidelines can take account of decisions taken in the NCP’s jurisdiction which impact at a different point on the supply chain. Therefore, the Ireland NCP found it appropriate to undertake an Initial Assessment of the complaint.

Ireland NCP Decision

19. The Ireland NCP decides, based on the information provided by the Complainants and the response from the Corporation, that grounds exist for further examination and the use of its good offices will be offered to the parties to facilitate a discussion on the issues raised in the complaint relating to the activities of the Corporation. The Ireland NCP is obliged to set out the reasons for this decision in some detail in the interests of transparency and accountability. 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

20. 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*"⁴.
21. The Ireland NCP notes that the submission by the Notifier is supported by 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').
22. The Ireland NCP considers the Complainants have legitimate and bona fide interests in the issues raised in their complaint.

b) Whether the issue is material and substantiated

23. The Complainants have provided sufficient information to support their complaint for the Ireland NCP to consider that the issues outlined are material and substantiated related to specific provisions of Chapters II (General Policies), III (Disclosure), IV (Human Rights) and VI (Environment).
24. Based on the information provided from both parties, the Ireland NCP finds sufficient grounds to warrant further examination and the offer of the NCP's good offices.

c) Link between the enterprise's activities and the issues raised in the Specific Instance

25. The Ireland NCP notes that the complaint relates to the Corporation's role as a purchaser of coal from Cerrejón and its ability to exercise leverage over the mine, and not to the day-to-day operations of the mine.
26. The Corporation does not dispute that it has purchased coal from Cerrejón in the past but points out that historically it has been a very minor purchaser from Cerrejón and

⁴ [GLAN website](#)

has not taken delivery of any coal from Cerrejón since 2018. However, in light of the developments in Ukraine, the Corporation has placed orders for coal from Colombia to use over the coming months.

27. The Corporation claims that it is not in a position to exercise influence over Cerrejón's activities by itself as a minor purchaser but does so collectively with other purchasers through its membership of Bettercoal and the Colombian Working Group.
28. The Ireland NCP considers that there is a sufficient link between the Corporation's activities and the issues raised in this Specific Instance.

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

29. The Complainants in this case have presented extensive citations of rulings and orders made by the Colombian courts on the operations of the Cerrejón mine in order to demonstrate adverse impacts caused by the mine.
30. In addition, the Complainants reference several international instruments including the Convention on the Rights of the Child, the OECD Due Diligence Guidance for Responsible Business Conduct, OECD Guidelines on Corporate Governance of State-Owned Enterprises, International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Economic, Social and Cultural Rights, International Labor Organization Indigenous and Tribal Peoples Convention.

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

31. The Ireland NCP is aware of a parallel complaint lodged by the Complainants against a consortium of firms holding a substantial ownership interest in the Cerrejón mine, Anglo American plc, BHP Group Limited and Glencore International AG. This complaint was lodged with the NCPs of the home jurisdictions of these firms, the UK, Australia and Switzerland respectively. Since submission of the complaint, it was announced that Glencore International AG would acquire all the interests of Anglo American and BHP in the Cerrejón mine. The Ireland NCP is also handling a complaint against CMC Coal Marketing DAC, which is responsible for marketing and selling the coal from the Cerrejón mine.
32. The complaint references historical and ongoing court rulings in Colombia. However, the Guidelines note 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

33. The Ireland NCP has considered the information provided and believes that in relation to the complaint against the Corporation, and the operations carried out in Ireland, there is merit in further examination. This relates solely to these issues in the context of the activities at the Irish Corporation and not to the day-to-day impacts at the mine in Colombia.
34. Offering good offices could facilitate an exchange between the parties to help come to a resolution.

Next Steps

35. Following the issuing of the initial assessment to both parties to the complaint and publication of the initial assessment, the Ireland NCP will formally ask the parties whether they are willing to engage in mediation/conciliation with the aim of reaching a resolution regarding the issues raised in the complaint.
36. The offer of good offices is voluntary to both parties. Subject to their response, the Ireland NCP will liaise with the parties to arrange mediation/conciliation meetings. If these meetings achieve a resolution, the Ireland NCP will reflect this in a Final Statement without making a determination about the merits of the claim on whether the corporation acted consistently or inconsistently with the Guidelines.
37. If a mediated solution is not possible, the Ireland NCP will conduct an examination of the complaint and will reflect the outcome in a Final Statement that may include recommendations.

ENDS

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OECD Guidelines for Multinational Enterprises
Department of Enterprise, Trade and Employment**