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Decision

## **Initial Assessment: Lawyers for Palestinian Human Rights complaint to UK NCP about JCB**

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This statement was published on 12 October 2020 by UK National Contact Point (UK NCP) for the OECD Guidelines for Multinational Enterprises.

## Summary of the UK NCP decision

The complainant is Lawyers for Palestinian Human Rights (LPHR).

The complainant claims that JCB's products and construction machinery was used in the demolition of Palestinian property and settlement-related construction that have adverse human rights impacts.

The UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (the Guidelines) has decided that:

- the claims related to JCB's human rights due diligence processes, the claims regarding its business relationships that they are directly linked to and their human rights policy commitments merit further examination
- the claims related to JCB contributing to abuses of human rights does not merit further examination

This initial assessment decision is made on the basis of the information offered by both parties. The decision to accept aspects of the complaint for further examination is not a finding against JCB and does not mean that the NCP considers that JCB has acted inconsistently with the Guidelines.

The NCP will now offer the parties an opportunity to mediate. If the parties do not want to mediate or cannot reach an agreement, the NCP will examine further the claim about whether JCB's actions and policies are consistent with the OECD Guidelines.

## Substance of the complaint

1.

The complaint is made by LPHR, an organisation of UK lawyers working on legal issues focused on protecting and promoting Palestinian human rights.

2.

The complaint is about J.C. Bamford Excavators Limited (JCB), a private limited company incorporated and headquartered in the United Kingdom.

3.

The complainant claims that JCB is not operating in line with the OECD Guidelines as their products and construction machinery were used in the demolition of Palestinian property and settlement-related construction. They claim JCB is in breach of the Guidelines by:

- contributing to adverse human rights impacts by selling products that facilitates another entity to cause harms
- failing to stop the sales of products that facilitates another entity to cause adverse impacts once there is knowledge of these harms occurring
- failing to seek ways to prevent and mitigate human rights impacts that are directly linked to their business operations and products
- failing to have a human rights policy in place

- failing to carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks

4.

LPHR's stated objectives in bringing this complaint are to ensure that JCB complies with the requirements of the OECD Guidelines to prevent further involvement in adverse impacts on the human rights of Palestinians.

5.

JCB accepted an invitation from the UK NCP to respond to the complaint. They reject the allegations that they are associated with any adverse human rights impacts and stated that they do not condone human rights abuses in any form.

## OECD Multinational Enterprises Guidelines provisions cited

The complainant refers to the following provisions of the Guidelines:

### Chapter IV Human Rights

States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

- 1, Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
- 2, Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
- 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.
- 4, Have a policy commitment to respect human rights.
- 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. [...]

## The initial assessment process

6.

The initial assessment process is to determine whether the issues raised merit further examination. It does not determine whether JCB has acted consistently with the Guidelines.

7.

The OECD procedural guidance for NCPs state that complaints are generally dealt with by the NCP of the country in which the claimed issues have arisen. The claimed issues raised are about decisions made in JCB headquarters which is based in the UK. The complainant is a UK based

NGO registered with the UK Charity Commission. The UK NCP is therefore the appropriate NCP to lead on this complaint.

8.

However, the UK NCP also notes that some of the claimed issues in this complaint relate to Israel and the Occupied Palestinian Territories (OPTs). Israel, is an OECD member and adheres to the Guidelines. The UK NCP therefore informed the Israeli NCP about the complaint and provided it the opportunity to act as a supporting NCP in line with the OECD Guide for NCPs on coordinating when handling specific instances. The UK NCP shared the complaint and response with the Israeli NCP to enable it to assist the UK NCP where necessary. The Israeli NCP asked the UK NCP to note the wider political context of the complaint.

## **UK NCP handling process**

10 December 2019	The <u>UK NCP</u> receives complaint
17 December 2019	The <u>UK NCP</u> acknowledges receipt of the complaint by return of email to the complainant
19 December 2019	The <u>UK NCP</u> contacts <u>JCB</u> to inform them of the complaint
23 December 2019	The <u>UK NCP</u> confirms UK handling to the complainant
20 January 2020	The <u>UK NCP</u> spoke with Israel NCP about the handling of the complaint
22 January 2020	The <u>UK NCP</u> met with representatives of <u>LPHR</u> to explain the complaint process
28 January 2020	The <u>UK NCP</u> spoke with representatives of <u>JCB</u> to explain the complaint process
3 February 2020	The <u>UK NCP</u> receives an email from <u>JCB</u> in response to the complaint
18 February 2020	The <u>UK NCP</u> shares <u>JCB</u> 's response with <u>LPHR</u>
1 April 2020	The <u>UK NCP</u> notified both parties there may be delays due to Covid-19
14 July 2020	The <u>UK NCP</u> issues draft initial assessment to the parties
17 August 2020	The <u>UK NCP</u> receives comments back from <u>LPHR</u>
28 August 2020	The <u>UK NCP</u> receives comments back from <u>JCB</u>

9.

All documents provided by the complainant and the company were shared with both parties.

10.

The NCP offered LPHR and JCB a meeting to explain the process. The offer to speak with the NCP was taken up by both parties. In line with the NCP's procedures minutes of meetings were shared with both parties.

## **UK NCP decision**

11.

The UK NCP has decided to accept the complaint for further examination on the issues related to JCB's obligation under Chapter IV, paragraphs 3, 4 and 5. The UK NCP has decided not to accept the complaint for further examination related JCB's obligations under Chapter IV, paragraphs 1 and 2.

12.

The UK NCP took the following criteria, as set out in the Guidelines implementation procedures, into account when considering whether the complainant's concerns merited further consideration:

## **Identity of the complainant and its interest in the matter**

13.

LPHR is an NGO based in the UK and registered as a charity with the UK Charity Commission. LPHR works on a range of projects with the aim of protecting and promoting Palestinian human rights. The UK NCP is therefore satisfied that they have a valid interest in the issues raised.

14.

The UK NCP notes that the complaint appears to be made on behalf of this community generally rather than on behalf of a specific individual or group. The UK NCP notes the information provided by LPHR in the complaint was provided by three other organisations B'Tselem, Al-Haq and EyeWitness to Atrocities.

## **Whether the issues are material and substantiated and whether there seems to be a link between the enterprise's activities and the issues raised**

15.

The complainant claims that JCB contributes and is directly linked to adverse impacts through their business operations by virtue of the use of their machinery by Israeli authorities (and/or private contractors), that they are linked to via a supply chain.

16.

LPHR states that they recognise that JCB does not itself cause the human rights adverse impacts outlined in chapter 4, paragraph 2 of the Guidelines but they claim that JCB contributes to the impacts through the selling of products that facilitate another to cause adverse impacts and by failing to stop the sale of goods that facilitate harm once there is knowledge of the harm occurring.

17.

To support their claim that JCB's heavy machinery vehicles are used in demolition and displacement incidents of villages and of the establishment of settlements and its associated infrastructure, the complainant provides information, from third parties (B'Tselem, Al-Haq and EyeWitness to

Atrocities), including videos and photographs supported by short written reports and witness statements.

18.

The complainant provides links to JCB's website including to its sustainability information and to locate the dealer in Israel, Comasco. The complainant provides links to Comasco's website which show that it supplies JCB machinery and equipment, amongst other machinery providers. The complainant notes, and provides information suggesting that Israeli authorities and private contractors are reliant on using imported heavy machinery.

19.

In their response, JCB confirmed that all of the products they supply to Israel are via a third-party independent distributor, Comasco. They state that they have not sold any machinery directly to the Israeli authorities. They state that once products have been sold to Comasco, JCB has no legal ownership of them and they claim, therefore, they cannot stipulate to whom their products can or cannot be sold to.

20.

In their response JCB notes, and provides information, that there is an established second-hand market in Israel for their products. They therefore challenge the complainant's assertion that the only route for Israeli authorities, or privately contracted companies, to obtain JCB machinery is through purchasing it directly from Comasco. JCB also highlights they sell products throughout neighbouring countries, which could subsequently be transported into Israel.

21.

JCB claims that without knowing the serial numbers of the machinery in question it is not possible to confirm their origin and whether or not they originated from Comasco or whether they were purchased second hand or provided via a lease.

22.

In light of all the above, JCB maintains that no meaningful link can be made between JCB and the alleged adverse impacts. JCB state that any link between the two, by virtue of machines manufactured by JCB being used, is minor.

23.

The complainant provides contextual information to the complaint, including the UK Government's guidance on Overseas Business Risk for the OPT and United Nations (UN) documents including Humanitarian Bulletins published by the UN Office for the Coordination of Humanitarian Affairs from 2016.

24.

The complainant provided evidence of a letter they sent to JCB to raise the issue of potential future harms related to the proposed demolition of Khan al-Ahmar, which they claim JCB did not respond to. The complainant states that the letter demonstrates the degree of foreseeability JCB had of the issues. In response to this evidence, JCB claims that the complainant widely publicised the letter it sent and it therefore claims it cannot have been seen to have been sent in good faith. LPHR argued in response that they published the letter online to try to obtain a reply from JCB.

25.

JCB claim from the information provided that their products are only associated with a small number of the incidents of demolitions that LPHR raise in the complaint. They also note that the complainant's information shows equipment from other providers being used in demolitions. JCB therefore argues that if they were to cease supplying their machinery as the complainant request, the demolitions would not be affected in any way. JCB also argues that any attempt to stop the supply of their machinery to Israel would also prevent such machinery being used for entirely peaceful purposes, for example the construction of hospitals, roads and schools and to restrict the sale of machines in Israel would impact the peoples' ability to build essential amenities which would promote their human rights. The complainant states that JCB have been silent in their response on the issue of their involvement in settlement-related construction.

26.

The complainant claims that JCB does not appear to have a policy commitment to respect human rights or one that is publicly available or publicly available information about the use of its machinery in the OPTs.

27.

The UK NCP does not consider that the information provided by the complainant demonstrates that JCB has caused or contributed to the issues raised. The UK NCP does, however, consider that the information demonstrates that there may be a link between JCB and the issues raised through its supply chain and business relationships.

28.

The UK NCP considers that as stated in the Guidelines, it is appropriate for NCPs to consider allegations regarding issues that are linked to a company's operations, products or services by a business relationship. As the Guidelines state, this is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.

29.

The UK NCP considers that mediation and/or further examination would be useful to understand the nature of human rights due diligence that is relevant to JCB's specific operations, namely to its relationship with suppliers of its products. The UK NCP affirms that any mediation and/or further examination would only focus on issues related to JCB's actions and policies in line with the chapters and paragraphs of the Guidelines the UK NCP has accepted.

## **Relevance of applicable law and procedures, including court rulings**

30.

In addition to the Guidelines the complaint includes references to several international instruments including the International Covenant on Economic, Social and Cultural Rights and the UN Convention on the Rights of the Child. The complainant refers to the Fourth Geneva Convention and to the UN Security Council Resolution 2334 passed in December 2016.

## **How similar issues have been, or are being, treated in other domestic or international proceedings**

31.

The complainant references a previous complaint the UK NCP handled from them, 'Lawyers for Palestinian Human Rights against G4S PLC', which similarly related to a UK company's involvement in adverse impacts occurring in Israel and the OPTs. The UK NCP accepted that case for further



examination in its initial assessment. The complainant also distinguish the present complaint from a previous complaint which was not accepted for further examination on the grounds that the issues raised could not be substantiated. The complainant notes that the present complaint is different in nature and in the type of evidence that has been provided.

32.

The UK NCP notes the previous complaints and considers each complaint on its individual merits. The material facts of those complaints are different to this complaint and therefore any direct comparisons are inappropriate. However, in considering this initial assessment, the UK NCP has sought to ensure that it has been consistent with the approach taken in previous complaints filed with the UK NCP.

## **Whether the consideration of the specific issue would contribute to the purpose and effectiveness of the Guidelines**

33.

The complainant provided evidence that they had written to JCB regarding this subject previously and had not received a reply from JCB. The UK NCP considers that it would contribute to the purpose and effectiveness of the Guidelines to provide its good offices to help resolve those issues that the UK NCP has accepted for further examination.

34.

JCB stated that accepting the complaint would not contribute to the purpose and effectiveness of the Guidelines as the Guidelines are not designed to stifle business for its own sake or to impose burdens on business. The UK NCP considers that on the information it has received it would contribute to purpose and effectiveness of the Guidelines to take forward aspects of the complaint that relate to how the Guidelines can support companies like JCB whose products may be associated with alleged harms or used in high risk contexts.

35.

The Preface to the Guidelines describes them as “recommendations addressed by governments to multinational enterprises”. The complaint relates to the supply chain/business relationship of a company with links to an adhering government to the Guidelines. The Guidelines commentary on provisions relating to business relationships clearly states that these include relationships with State entities. The UK NCP does not believe, however, that these provisions are intended to encourage or empower NCPs to make findings about the actions of governments themselves. The UK NCP affirms that it does not examine the actions of any party (company or government) other than JCB, the named party to the complaint. The UK NCP further considers that it would not be within its remit to examine the actions of third parties, nor would doing so contribute to the purpose and effectiveness of the Guidelines. The UK NCP considers that it would not contribute to the purpose and effectiveness of the Guidelines to take forward paragraphs 1 to 2 of Chapter IV of the Guidelines.

36.

For the avoidance of doubt, the UK NCP also reiterates that accepting issues for further examination does not mean that the UK NCP considers that JCB has acted inconsistently with the Guidelines.

## **Next steps**

37.

The UK NCP will formally ask the parties whether they are willing to engage in mediation. Subject to their responses, the UK NCP will liaise with the parties to arrange mediation meetings.

38.

If these meetings achieve an agreement, the UK NCP will reflect this in a Final Statement without making a determination on whether JCB acted inconsistently with the Guidelines.

39.

If a mediated agreement is not possible, the UK NCP will conduct a further examination into the issues and will reflect the outcome in a Final Statement that will include a determination on whether JCB acted inconsistently with the Guidelines.