



Det norske kontaktpunkt for  
OECDs retningslinjer for flernasjonale selskaper

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**Statement by the Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises concerning a complaint against Kongsberg Automotive for breach of the OECD Guidelines for Multinational Enterprises**

*On 25 November 2008, the Norwegian National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises received a complaint from The Norwegian United Federation of Trade Unions (Fellesforbundet), regarding Kongsberg Automotive's actions relating to its subsidiary Kongsberg Driveline System – Van Wert Facility, in Ohio, USA. Fellesforbundet submits that these actions are in breach of Chapter IV of the OECD Guidelines, inter alia paragraph 1a) on the right to engage in constructive negotiations. The complaint primarily concerns whether the hiring of alternative labour during a lockout, which was accepted by the parent company Kongsberg Automotive, is a breach of the OECD Guidelines.*

**Background:**

The OECD Guidelines for Multinational Enterprises are recommendations addressed by the governments of OECD member countries to multinational enterprises operating in or from adhering countries. They contain voluntary principles and standards for responsible business conduct in many different areas, and give guidance on how companies should proceed in the countries they are engaged in. The purpose of the Guidelines is to promote sustainable development by encouraging companies to respect human rights, take responsibility for the environment and social development, fight corruption, etc.

According to the Guidelines, adhering countries are to set up National Contact Points (NCPs), which are to promote the Guidelines, handle enquiries relating to the Guidelines and help to resolve issues submitted to them concerning compliance with the Guidelines. The NCPs may, for example, provide a forum for discussions between interested parties, discuss matters that are covered by the Guidelines and help to

resolve problems that may arise between companies and employees or in other areas covered by them.

The NCP in Norway is made up of representatives of the Ministry of Foreign Affairs, the Ministry of Trade and Industry, the Norwegian Confederation of Trade Unions and the Confederation of Norwegian Enterprise.

The recommendation in question in this case is Chapter IV of the OECD Guidelines, on *Employment and Industrial Relations*, paragraph 1a), where it is stated that enterprises should “respect the right of their employees to be represented by trade unions and other bona fide representatives of employees, and engage in constructive negotiations, either individually or through employers’ associations, with such representatives with a view to reaching agreements on employment conditions”. Other recommendations mentioned in the complaint from Fellesforbundet include Chapter IV, paragraph 2a), where it is stated that enterprises should “provide facilities to employee representatives as may be necessary to assist in the development of effective collective agreements”, and Chapter IV, paragraph 2b), which states that enterprises should “provide information to employee representatives which is needed for meaningful negotiations on conditions of employment”. Finally, mention is made of Chapter IV, paragraph 3, according to which enterprises should “provide information to employees and their representatives which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole”. The Norwegian NCP has limited its assessment to Fellesforbundet’s main submission, concerning the use of lockout in combination with hired labour.

The NCP has communicated by letter with Kongsberg Automotive and Fellesforbundet, and held a meeting with both parties on 25 March 2009 to discuss the complaint and assist the parties in resolving the issue.

#### **Kongsberg Automotive’s operations in Ohio, USA:**

Kongsberg Automotive acquired the company Van Wert Facility in Ohio at the turn of the year 2007–2008. The factory produces gearshift system components for the US automobile industry. At the time of the acquisition, there were ongoing negotiations at the factory concerning employment conditions and pay. During the negotiations, a number of demands were put forward, both by the employer and by the employees. After a while the negotiations deteriorated, leading to a labour dispute, which resulted in Kongsberg Driveline Systems – Van Wert Facility locking out its employees on 2 April 2008. During the lockout, the factory hired temporary labour in order to continue production.

Moreover, it was subsequently decided that production at the Van Wert Facility should be moved to Mexico. From August 2009, there will not be any operations in Ohio.

### **The parties' arguments:**

Fellesforbundet submits that the parent company Kongsberg Automotive's acceptance of the use of hired labour during a lockout is in breach of the OECD Guidelines for Multinational Enterprises. Fellesforbundet argues that the employees at the production plant have no remedies at their disposal if the enterprise can continue its operations during a lockout without this having consequences for production. In Fellesforbundet's view, this practice is therefore in breach of the right to collective bargaining, and thus also of core ILO conventions (ILO Conventions Nos. 87 and 98). Since Kongsberg Automotive's corporate management in Norway accepts responsibility for this situation, it is Fellesforbundet's view that the corporate management could also have contributed to achieving a different outcome.

Kongsberg Automotive points out that its dispute with the employees in Van Wert has been subject to a hearing by the National Labor Relations Board (NLRB) in Cleveland, Ohio. The claims and arguments being invoked by Fellesforbundet were largely also put to the NLRB. The complaint was rejected on 31 July 2008. The ruling was appealed to the Office of Appeals General Counsel of the NLRB, which rejected the appeal. The dispute must therefore be deemed to have been finally decided pursuant to the country's domestic laws, and should not be subject to a new hearing pursuant to the OECD's rules. Kongsberg Automotive therefore principally requests that the case should be dismissed.

Kongsberg Automotive refutes all of Fellesforbundet's allegations, and submits that the use of hired labour during a lockout is not in breach of the OECD Guidelines, nor is it contrary to Norwegian law. It calls attention to the provisions of the Norwegian Basic Agreement concerning employees' duty to contribute to increased productivity. There are no such agreements in the US. In Kongsberg Automotive's view, if a lockout is to be an effective tool, it must be combined with the use of hired labour.

### **The Norwegian NCP's assessment:**

In its assessment, the Norwegian NCP was split into a majority made up of representatives from the Ministry of Foreign Affairs, the Ministry of Trade and Industry and the Confederation of Norwegian Enterprise, and a minority consisting of the representative from the Norwegian Confederation of Trade Unions (LO).

The majority of the Norwegian NCP refers to the following passage in the OECD Guidelines: "When issues arise relating to implementation of the *Guidelines* in specific instances, the NCP is expected to help resolve them. Generally, issues will be dealt with by the NCP in whose country the issue has arisen."

In the light of the fact that the use of hired labour took place at Kongsberg Automotive's subsidiary in Ohio, the majority of the Norwegian NCP is of the view that the issue should have been dealt with by the US NCP. We have tried in vain on a number of occasions to contact the US NCP. Since no reply has been forthcoming from the US, we have chosen to consider the case on its merits.

The majority of the Norwegian NCP has considered its task to be to assess:

- 1) whether the fact that the dispute has been dealt with by the NLRB in the US should lead to the case being dismissed by the Norwegian NCP, and
- 2) Fellesforbundet's complaint that using hired labour during a lockout is in breach of Chapter IV, paragraph 1a), of the OECD Guidelines, on the right to engage in constructive negotiations.

Re: 1): The OECD Guidelines are to be regarded as recommendations to companies to operate in a sustainable and responsible manner. There is generally correspondence between the Guidelines and national legislation and/or practice, but not necessarily. The Norwegian NCP is therefore in principle of the view that complaints concerning breaches of the Guidelines must be considered independently, in the light of the wording and purpose of the Guidelines. Decisions made by national bodies are of course taken into account in the Norwegian NCP's assessment, but in principle they are not decisive. The Norwegian NCP has therefore chosen to deal with the case.

Re: 2): The OECD Guidelines are recommendations addressed by governments to multinational enterprises. They provide voluntary principles and standards for responsible business conduct in a range of areas, consistent with applicable laws and conventions.

The majority of the Norwegian NCP refers to the fact that the question of a lockout in combination with hired labour has been subject to judicial review in the US, and that a final ruling has been made whereby the practice has been found to be lawful. A lockout and the subsequent use of hired labour would also be lawful in Norway. However, this would not be in keeping with the Norwegian labour practices that have developed over many years.

The OECD Guidelines do not directly address the issue of lockout in combination with the hiring of alternative labour. The relevant recommendations in the Guidelines are based on core ILO Conventions Nos. 87 and 98, which Fellesforbundet refers to in its complaint. Neither of these says anything about the right to replace permanent employees with other workers in connection with a lockout. We have been unable to find any statements from ILO bodies that directly address this issue. However, a report drawn up by the ILO Committee of Experts at the request of the ILO Governing Body in 1994, *Freedom of Association and Collective Bargaining: The right to strike*, states the

following: “A special problem arises when legislation or practice allows enterprises to recruit workers to replace their own employees on legal strike. The difficulty is even more serious if, under legislative provisions or case-law, strikers do not, as of right, find their job waiting for them at the end of the dispute. The Committee considers that this type of provision or practice seriously impairs the right to strike and affects the free exercise of trade union rights.”

In a similar vein, Article 8 of ILO Private Employment Agencies Recommendation 188 states that: “Private employment agencies should not make workers available to a user enterprise to replace workers of that enterprise who are on strike.”

The statements quoted above concern workers who are on strike, not subject to a lockout. Nevertheless, the majority of the Norwegian NCP is of the view that replacing employees in a labour dispute with other workers is not in keeping with the intentions of the various ILO instruments. However, we have no grounds for saying that this is in breach of Conventions Nos. 87 and 98.

On this basis, the majority of the Norwegian NCP has found that Kongsberg Automotive’s conduct in connection with the dispute cannot be said to constitute a breach of the OECD Guidelines. Nonetheless, we question whether the company’s conduct in the case concerned was compatible with the concept of corporate social responsibility (CSR) that is gradually gaining international acceptance.

The Norwegian NCP notes that the concept of CSR is continuously evolving and changing, and refers in this context to Report No. 10 (2008–2009) to the Storting, on corporate social responsibility in a global economy. Society’s demands and expectations concerning business practices are different now from what they were when the OECD Guidelines were last revised, almost ten years ago. Kongsberg Automotive is a Norwegian company, rooted in Norwegian labour traditions, and its actions must be assessed in the light of how CSR is perceived in a Norwegian context. In the Norwegian NCP’s view, it has become part of Norwegian parent companies’ corporate social responsibility to encourage their foreign subsidiaries to observe Norwegian labour traditions insofar as is practicable. In Norway, using hired labour during a labour dispute would not be in keeping with Norwegian practices and traditions. The Norwegian NCP recommends that Kongsberg Automotive takes such considerations into account should a similar situation arise in the future.

The minority of the Norwegian NCP submits as follows: the representative from the Norwegian Confederation of Trade Unions (LO) interprets Fellesforbundet’s complaint as a complaint regarding the actions of the parent company Kongsberg Automotive’s corporate management in Norway. The complaint centres on the issue whether the Norwegian parent company Kongsberg Automotive has acted in breach of the OECD Guidelines by accepting responsibility for a plan to use lockout in combination with hired labour. The matter must therefore be dealt with by the NCP in Norway.

For the sake of clarity, the LO representative notes that the Norwegian NCP has dealt with three cases, one of which (Aker Kværner in 2005) involved a complaint against a wholly-owned US company. The matter was dealt with without reservation by the Norwegian NCP. CSR efforts in subsequent years, including on the responsibility of parent companies, have merely confirmed that this was the correct thing to do.

In the LO representative's view, it is important as a matter of principle to examine the scope of Norwegian parent companies' responsibility. As far as the OECD Guidelines are concerned, it is natural to start by looking at matters companies are able to influence. Responsibility can be most clearly attributed to companies for matters over which they have a decisive influence or control. The LO representative is of the view that there is no basis in the Guidelines for claiming that the actions of parent companies, including managing their subsidiaries, are not covered by the Guidelines and therefore cannot be appealed against to the NCP in the parent company's home country. Interpreting the OECD Guidelines as applying primarily to the actions of subsidiaries would, in the view of the LO representative, considerably restrict the scope of the Guidelines and undermine Norway's position in this area.

With regard to the question of whether the NLRB's handling of the case in the US should lead to dismissal by the Norwegian NCP, the LO representative would like to point out that the fact that the merits of the case have been considered by the NLRB and found not to be in breach of US domestic law is irrelevant in this context, since the US has not ratified ILO Conventions Nos. 87 and 98, which are fundamental to the complaint.

The LO representative refers to Report No. 10 to the Storting: "Several factors are decisive when an NCP handles complaints (known as "specific instances") regarding companies' compliance with the Guidelines. Among other things, it must consider how the complaint relates to national legislation, how corresponding complaints have been dealt with previously and whether the processing of the complaint contributes to implementation of the Guidelines." (p. 66 of the English translation)

The Guidelines presuppose respect not only for the law, but also for national rules in a broader sense, and aim to encourage the "positive contribution which multilateral enterprises can make to economic, social and environmental progress." (paragraph 2)

Thus, the fact that a lockout and the subsequent hiring of alternative labour is lawful in the US, and is not explicitly prohibited in Norway either, is not decisive. The use of hired labour in connection with a lockout is incompatible with the rules governing Norwegian labour relations, and this has been the case since the early 1930s. There is no question but that the discontinuation of such practices in Norway constituted social progress.

In the LO representative's view, the logical consequence of the 1994 statement of the ILO Committee of Experts and ILO Recommendation 188 is that the use of alternative labour in combination with a lockout undermines the rights set out in the ILO conventions to an even greater degree.

The LO representative concludes that the parent company Kongsberg Automotive's acceptance of a lockout of some 300 employees in connection with wage negotiations combined with the hiring of alternative labour is a breach of the OECD Guidelines in that it is a breach of non-statutory law and Norwegian tradition and culture in this area.

Yours faithfully

Norwegian Contact Point for the OECD Guidelines for Multinational Enterprises

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