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17 April 2020

Complaint to the NCP: Martin Linge Project Crane Accident (the Complaint)

We write further to the Draft Initial Assessment and your emails dated 25 March, 3 and 6 April 2020, respectively.

At the outset, we would like to reiterate Equinor's willingness to participate in the process, its commitment to furthering the effectiveness of the OECD Guidelines and our thanks to the NCP for its offer of good offices. Nothing in this letter should be read to suggest otherwise.

However, Equinor has a number of concerns relating to the Draft Initial Assessment and the procedure adopted by the NCP which we respectfully request are addressed and resolved prior to any publication of the final Initial Assessment.

In terms of the scope of the issues addressed in this response, your email dated 25 March notes that: *"We will, according to our procedures, provide ten working days for you to comment on any factual errors."* Similarly, on 6 April, you write *"We would like to remind you that Norwegian NCP opens for factual corrections only, that means if we have given incorrect account of the facts or statements in the case."* We note, however, that the relevant part of the Norwegian NCP Procedural Guidelines for Handling Specific Instances[1] (the "Norwegian Procedural Guidelines") does not limit respondents to commenting on "*factual errors*". Rather, it provides that:

> *"The draft initial assessment will be sent to the parties, and they will be invited to submit comments within ten working days. The NCP will decide at its own discretion whether or not to incorporate any comments received. The initial assessment will then be sent to the parties and published on the NCP's website."*

We have prepared the following comments on the Draft Initial Assessment in accordance with these Guidelines.

1. Misrepresentation of Equinor's position on disclosure

As currently drafted, the Draft Initial Assessment gives the impression that Equinor could disclose any documents relevant to the accident. This misrepresents our position and, in the context of a public statement, is prejudicial to Equinor. As stated in our letter dated 7 February 2020 and the appended opinion from Wiersholm dated 6 February 2020, the issue is that we have received legal advice that,

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1 https://nettsteder.regjeringen.no/ansvarlignaringsliv2/files/2013/12/FINAL_KPprosedyreregler_eng_godkj1.pdf

without express consent from all of the Respondents, we cannot do so without committing an actionable breach of Norwegian law. We should be grateful if you would reflect this point in the Initial Assessment and suggest below certain amendments which we consider more accurately reflect our position (additional wording underlined, deleted wording struck through):

Page 11, para 2, we propose an amendment as follows:

> *"With reference to disclosure of information about the accident, the complainants have by letter required an investigation report about the accident from the current operator Equinor~~, which the company is not willing to share~~. Equinor has informed the Norwegian NCP that it has been advised that it is prohibited from disclosing it unless all parties expressly consent to such disclosure with reference to confidentiality provisions in applicable contracts in the Martin Linge project."*

Page 13, para 4, we propose an amendment as follows:

> *"Norway NCP notes that the confidentiality obligations between the parties involved appear to be based on contracts only. Accordingly, they may be lifted by the involved parties, on the condition that all parties expressly consent to disclose any relevant documents."*

2. Reference to the Norwegian Petroleum Legislation

At pages 11 and 12 of the Draft Initial Assessment, the NCP makes specific reference to the "see to duty" under the Norwegian Petroleum Act and certain provisions of the Framework Regulations (the "**Norwegian Petroleum Legislation**") and states that these provisions "*in addition to the Guidelines*" are relevant to this specific instance. For the reasons set out below, we disagree and consider the reference to the Norwegian Petroleum Legislation in the Draft Initial Assessment to be irregular and beyond the jurisdictional competence of the NCP.

Part I of the Procedural Guidance in the OECD Guidelines states, inter alia, that:

> *"The role of National Contact Points (NCPs) is to further the effectiveness of the Guidelines. NCPs will operate in accordance with core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence."*
>
> *[…]*
>
> *"The National Contact Point will contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines. The NCP will offer a forum for discussion and assist the business community, worker organisations, other non-governmental organisations, and other interested parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law."*

The introduction to the OECD's Guide for National Contact Points on Recommendations and Determinations[2], states that:

> *"NCPs are mandated to further the effectiveness of the OECD Guidelines for Multinational Enterprises ('the Guidelines') by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances. The Guidelines do not provide a formal definition of 'specific instances', however the term is used to describe situations of alleged non-observance of the Guidelines brought to NCPs"*

[2] https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-Recommendations-and-Determinations.pdf

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In the Terms of Reference for the Norwegian National Contact Point set by the Ministry of Foreign Affairs, the section "Handling Complaints" notes that:

> *"The NCP is to handle enquiries and provide advice and guidance on the Guidelines and their application."* [3]

The Norwegian Procedural Guidelines state that:

> *"The NCP is intended to contribute to resolving issues relating to compliance with the Guidelines."*

These instruments make clear that the NCP is established to facilitate the resolution of issues which arise relating to the implementation of the OECD Guidelines in specific instances relating to non-compliance with the Guidelines. While the Implementation Procedures for the OECD Guidelines note that the NCP will take into account, inter alia, the relevance of "*applicable law and procedures*" this is where the applicable law has a direct impact on the interpretation and implementation of the OECD Guidelines, for example where it may be necessary to consider conflicting requirements under the OECD Guidelines and a particular provision of applicable domestic law. It does not provide a mandate for the NCP to bring in additional concepts or duties from ancillary sources of law or to set itself up as an alternative forum for adjudicating such issues. On this basis, as a matter of general principle, we consider that the NCP is not competent to raise and adjudicate these issues of domestic law and that the references to the Norwegian Petroleum Legislation in the Initial Assessment should be removed prior to publication.

If the NCP disagrees with this general principle, Equinor also considers that the reference to the Norwegian Petroleum Legislation for other reasons is not relevant to this specific instance and should be removed. In any event, the "see to duty" has no relevance with respect to disclosure of an investigation report, which we understand to be the nature of the Complaint against Equinor (as to which see further below).

3. Mischaracterisation of the complaint against Equinor

At pages 17 and 18 of the Complaint, the issues with respect to Equinor are framed as follows (emphasis added):

> *"Respondent 4 is a shareholder at the time of accident at the Martin Linge Project and the operator currently. **As it is explained above, the violation of the Guidelines by Respondent 4 depends on the exertion of the due diligence in the business relationship, especially whether Respondent 4 properly disclosed the information.***
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> *The OECD Guidelines for Multinational Enterprises stipulate that "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."*
>
> *Commentary for this chapter follows that the purpose of the OECD Guidelines to have the disclosure as an obligation is "to encourage improved understanding of the operations of multinational enterprises by shareholders and the financial community as well as other constituencies such as workers." Commentary also states that "to improve public understanding of enterprises and their interaction with society and the environment, enterprises should be transparent in their operations and responsive to the public's increasingly sophisticated demands for information."*
>
> *Thus, the Guidelines require Respondent 4 to operate the company transparently by disclosing relevant information in order to improve the understanding of the operations of the company by*

[3] https://www.responsiblebusiness.no/files/2019/01/EN-Mandat-Kontaktpunktet-2018.pdf

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workers; it must respond to the request to disclosure the information from the workers instead of disclosing information regarding operation of the company only to the shareholders.

Complainants expected Respondent 4 to fulfill the responsibility under the Guidelines as it is a Norwegian public entity with the great human rights standard. Thus, Complainants requested Respondent 4 to disclose the Accident Investigation Report regarding this event. It is known that after the accident was occurred, Martin Linge Project independently made a report on the investigation report on the accident, and the Complainants considered the disclosure of this report is important to reveal the cause of the accident. Furthermore, Respondent 4 as the current operator, it is reasonable to assume that Respondent 4 had received all the relevant documents from the Respondent 3 when the operation right was transferred. However, Respondent 4 not only rejected to disclose the report but also denied any further conversation on the issue any more.

Respondent 4's such attitude clearly constitutes the violation of the Guidelines. Though the information requested by the Complainants was necessary to reveal the truth of the accident as well as to provide the remedy to the victimized workers, Respondent 4 refused to disclose the information. The disclosure is not even excessive burden for the Respondent 4 for several reasons: since it is difficult to consider that the accident investigation report usually to contain the core trade secret of the company, the cost of the disclose of the report is not excessive, and the operation of the business would not be interfered as the construction of the module had been completed.

***In this regard**, Respondent 4 not only violated the disclosure chapter but also failed to exert the human rights due diligence. Thus, respondent 4 violated the OECD Guidelines for Multinational Enterprises (II) A.10, A.12, 13 and human rights policies (IV) 1 and 4."*

Given that: the reference to a due diligence failure in the first paragraph refers specifically to the failure to disclose; the following four paragraphs focus exclusively on the failure to disclose; and the first sentence of the final paragraph, which refers to due diligence, refers back to these preceding paragraphs, we understand the complaints about Equinor's due diligence failures to be made in the context of the disclosure issue; i.e. that a failure to disclose documents evidences a failure to carry out adequate due diligence and exercise leverage over the relevant third parties. We do not interpret the Complaint against Equinor as raising a stand-alone complaint about our failure to carry out due diligence on the shipyard; still less as an allegation that such a failure on behalf of Equinor contributed to the accident.

Admittedly, the wording is ambiguous; as we noted in correspondence with the NCP dated 5 December 2019 and 8 February 2020, the Complaint does not describe how Equinor failed to adhere to the principles relating to due diligence and human rights, still less refer to any original documents or first-hand accounts relevant to our alleged wrongdoing. However, as far as we are aware, the NCP has neither sought nor received further clarification from the Complainants on the nature of Equinor's alleged due diligence failures.

Nevertheless, the Draft Initial Assessment contains the following statement regarding the alleged failure by the Respondents, without distinction between them, to perform due diligence:

> At page 9 *"Firstly, the complainants assert that the enterprises have failed to conduct adequate due diligence to ensure that proper risk management and safety measures were in place prior to change of platform design and construction method, which allegedly could have prevented the accident from happening. Reference is made to Chapter II General Policies, paragraphs A10, A12 and A13. […]"*
>
> At page 2 *"The complainants assert that inadequate due diligence was a contributory cause to the crane accident, which resulted in deaths and injuries"*

With respect to Equinor, we see no support for these statements in the Complaint relating to due diligence and respectfully submit that these sections of the Initial Assessment mischaracterise the nature of the Complaint against us. The NCP's function is to facilitate in the resolution of issues of non-compliance between the Complainants and the Respondents; as such it is inappropriate unilaterally to adopt an interpretation of the Complaint which is not shared by either the Respondent or, on the basis of the information provided to date, the Complainant. In the circumstances, we would request that a caveat

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is inserted to both paragraphs to make clear that the nature of the due diligence complaint against Equinor is unclear and unsubstantiated and could be interpreted to refer solely to the disclosure of any relevant documents rather the conditions of work at the shipyard.

4. Failure to address substance of points contained in letter of 7 February re substantiation and materiality

In our letter to the NCP dated 7 February 2020, we set out a number of points explaining why we do not consider the Complaint against Equinor to meet the criteria of materiality or substantiation. We do not repeat the points here but, in particular, we explain that:

1. The Disclosure Complaint places Equinor in a situation in which it faces conflicting requirements, contrary to a Fundamental Principle of the Guidelines, meaning that the Complaint is not within the scope of the Guidelines nor sufficiently material to merit further consideration; and

2. The Due Diligence Complaint against Equinor comprises only a list of references to Articles in the Guidelines. Contrary to the Norwegian Procedural Guidance, it does not describe how Equinor failed to adhere to these principles, still less refer to any original documents or first-hand accounts relevant to our alleged non-compliance. Accordingly, we consider it to be insufficiently substantiated to merit further consideration.

In the Draft Initial Assessment, the NCP deems all of the Complaints against Equinor, as well as certain issues which were not raised by the Complainants, to merit further consideration. However, it does not address the substance of these points. We appreciate that the relevant procedural guidelines provide no opportunity to appeal the Initial Assessment. However, in accordance with the core criteria of visibility, accessibility, transparency and accountability which govern the NCP, the non-statutory principles of good case handling as well as the principles of natural justice and contradiction, Equinor respectfully requests that the NCP expressly addresses the points made in our letter dated 7 February 2020 in its Initial Assessment, explaining why it disagrees with Equinor's position.

In accordance with the same principles, Equinor accepts that our responses are made part of Appendix 4 to the Initial Assessment, as proposed in the Draft Initial Assessment.

Finally, we note the Norway NCP will lead the case in collaboration with the NCPs in France and UK. The Korea NCP will also handle the complaint regarding Samsung Heavy Industries Co., Ltd. As such, there are parallel specific instances. Without seeking to question the competence of the Norway NCP to handle this specific instance, we are concerned that there be appropriate coordination between the NCPs and that consideration be given to which issues are best addressed by the respective NCPs.

Yours sincerely,

Anders Opedal

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