

# National Contact Point of Switzerland

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## Initial Assessment

### **Specific Instance regarding Glencore International AG submitted by CNV Internationaal, Solifonds, Swiss Trade Union Confederation SGB and Andaychagua Mining and Metal Workers Union of Volcan Compañía Minera and of specialised, outsourcing and mediation services providers to Volcan Compañía Minera - Andaychagua**

Berne, 20 February 2024

## Executive summary

The Swiss NCP received on 26 May 2023 a written submission by the trade unions CNV Internationaal, Swiss Trade Union Confederation SGB and Andaychagua Mining and Metal Workers Union of Volcan Compañía Minera and of specialised, outsourcing and mediation services providers to Volcan Compañía Minera – Andaychagua (hereafter “the Union”) and the Swiss NGO Solifonds (hereafter “submitting Parties”) under the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (hereafter “OECD Guidelines”). It concerns Glencore plc and Glencore International AG headquartered in Switzerland (hereafter “responding Party” or “Glencore”). The submission is related to alleged violations of the OECD Guidelines by not having properly conducted due diligence related to its participation in the Peruvian company Compañía Minera Volcan S.A.A. (hereafter “Volcan”) alleged to have committed violations of labour rights. According to the submitting Parties, Volcan is violating the right of employees to negotiate their terms and conditions of employment and to form and join trade unions of their choice.

In view of the Swiss NCP, the issues raised in the submission are material and are substantiated in the sense that, based on the information submitted, they are plausible and relate to the application of the OECD Guidelines, in particular Chapter V (Employment and Industrial Relations). The NCP notes that no dialogue between the submitting Parties and Glencore has taken place and therefore accepts the specific instance and offers its good offices to the Parties for further consideration. The offer for mediation focuses on Glencore’s due diligence process including its engagement with Volcan. The Swiss NCP considers that by accepting this specific instance and offering a confidential mediation it could contribute to the dialogue between the Parties and help them reach a better mutual understanding of the issues raised and a mutually acceptable outcome. This decision is not based on conclusive research or fact-finding, nor does it represent a conclusion as to whether Glencore observed the OECD Guidelines or not.

## 1 Submission and alleged violations of the OECD Guidelines

On 26 May 2023, the Swiss NCP received a written submission to consider a specific instance under the OECD Guidelines regarding Glencore International AG, headquartered in Switzerland. This specific instance has been raised by the trade unions CNV Internationaal, Swiss Trade Union Confederation SGB and Andaychagua Mining and Metal Workers Union of Volcan Compañía Minera and of specialised, outsourcing and mediation services providers to Volcan Compañía Minera – Andaychagua (hereafter the “Union”) as well as the Swiss NGO

Solifonds. Volcan is a Peruvian-based and publicly listed company and one of the world's largest producers of zinc, copper and silver<sup>1</sup>. It has five mining operating units in different regions of the country. One of these is the Yauli Operating Unit, located in the central highlands of Peru (Junín Region), where the Andaychagua polymetallic mining unit is located. Glencore owns approximately 55% of Volcan's class A common shares, which represent approximately 63% of voting shares.

The submitting Parties claim that Glencore has not carried out its human rights due diligence with regard to its participation in Volcan. They argue that Glencore disregards its responsibility to prevent and address the adverse effects as they have informed Glencore of the alleged violations of labour rights by Volcan. According to the submitting Parties, Volcan refuses to enter into collective bargaining with the Union, pointing out that it is a minority organisation which is active in the same field as other organisations with a larger number of workers, such as the Mining and Metal Workers Federation of Volcan (representing all blue-collar workers of the company) or the United Union of Employees of the Volcan (representing all white-collar workers). In 2021, the Union has left the former to focus its work on addressing the specific issues of white and blue-collar (outsourced) workers at the mining unit Andaychagua. The submitting Parties state that the difficulties with Volcan began when it changed its statutes to cover outsourced workers as the number of outsourced workers at the local mining unit is high, so that collective bargaining would have a concrete impact. According to the submitting Parties, the Union is the only and thus the majority union in its scope as it affiliates both types of workers of one particular mining unit. Furthermore, they allege that the Peruvian law does not prohibit collective bargaining with minority unions. They claim that the law solely imposes the obligation to negotiate with the majority union, and, with respect to minority unions, leaves other (extra) negotiations at the discretion of the company. In their view, the Peruvian law prohibits that, when the company negotiates with a minority union, the benefits earned are extended to the other (non-affiliated) workers as this would constitute an anti-union act.

The submitting Parties claim that Volcan's behaviour violates the right of employees to form and join trade unions of their choice and therefore to negotiate their terms and conditions of employment. They state that based on the Peruvian legislation collective bargaining may take place at the levels of a sector, an enterprise or a plant and at different scopes, including with only one group of workers. According to the submitting Parties, Volcan's behaviour constitutes a violation of the Peruvian law as well as the ILO's Conventions on Freedom of Association and Protection of the Right to Organise (No. 87) and the Right to Organise and Collective Bargaining (No. 98).

According to the submitting Parties, Volcan is not taking any measures to prevent the continuity of impacts on the employees' rights, despite having received administrative and judicial orders to bargain collectively. They state that in February 2023, after the Civil Court of La Oroya granted an injunction in favour of the Union and ordered Volcan to start the collective bargaining, Volcan convened a meeting in March 2023 which was not carried out in good faith. The submitting Parties made the submission to the NCP to encourage Volcan and Glencore to resolve the conflict quicker than by going through legal proceedings. They believe that Glencore's participation in this process is essential since, as the parent company, it should ensure that its subsidiaries respect the OECD Guidelines.

In conclusion, the submitting Party claims the violation of the following recommendations of the OECD Guidelines (2011 edition) by the responding Party:

- Chapter I.2 (Concepts and Principles): Obeying domestic laws is the first obligation of enterprises.
- Chapter IV (Human Rights), para. IV.5: Carry out human rights due diligence.

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<sup>1</sup> <https://www.Volcán.com.pe/nosotros/>

- Chapter V (Employment and Industrial Relations), para. 1.a) and b): Respect the right of workers employed by the multinational enterprise to establish or join trade unions and representative organisations of their own choosing recognised for the purpose of collective bargaining, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on terms and conditions of employment.

The submitting Parties ask Glencore to take the necessary actions so that Volcan enters in a good-faith collective bargaining process with the Union. Furthermore, they propose a written commitment for the respect of the Union's fundamental rights and for not hampering any negotiations with the Union in the future. They ask for a dialogue among representatives from Glencore, Volcan, and the Union. Finally, they expect a monthly report on the progress of the collective bargaining between Volcan and the Union.

## 2 Statement of the responding Party

On 30 June 2023, Glencore submitted a written statement to the Swiss NCP concerning the issues raised in this specific instance. In its statement and further written information, Glencore claims that the NCP should not pursue the specific instance for the following reasons:

In 2021, Glencore indirectly owns approximately 55% of Volcan's class A common shares, which represents approximately 63% of voting shares (Glencore's total economic interest is approximately 23%). The responding Party sets out that even if it has a controlling interest in its subsidiary, Glencore is not involved in directing the actions of Volcan as they relate to this complaint. Such matters are left to the board of directors and management of Volcan. Glencore notes that the Union has submitted a materially identical complaint to the Peruvian NCP. In Glencore's view, the submission to the Swiss NCP fails to identify any specific action or omission of Glencore which is in breach of the OECD Guidelines apart from unsubstantiated allegations that Glencore has endorsed Volcan's actions.

Glencore furthermore states that the allegations that its subsidiary Volcan has failed to comply with Peruvian laws as well as with the Constitution of the ILO and its Convention No. 98 are without merit. Glencore rejects the allegation that Volcan's behaviour is in any way violating the right of employees to form and join trade unions of their choice. In Glencore's view, neither Glencore nor Volcan have taken any step to prohibit employees from forming or joining any trade union of their choosing nor has any such conduct been identified by the submitting Parties. In its opinion, Volcan has not interfered with the choice of any workers to establish and/or join the Union. In contrast, Glencore is confident that the position taken by Volcan to negotiate with the Mining and Metal Workers Federation of Volcan (hereafter: Federation) who holds the majority of members across the company and therefore the legal right to collectively bargain serves the purpose of strengthening the bargaining position of workers. The Federation affiliates unions from all of Volcan's workplaces in the Yauli Province, but also all other workers in the company.

In Glencore's opinion, it is the approach which Volcan is required to take under Peruvian law that grants exclusive collective bargaining rights to the majority union in a bargaining unit and precludes collective bargaining with any minority union in the same bargaining unit<sup>2</sup>. Glencore emphasizes that any negotiation Volcan undertakes with a minority union independently of the negotiations with the Federation, whilst the Federation holds a majority, would be in breach of Volcan's legal duties. According to Glencore, Peruvian law only allows companies to negotiate

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<sup>2</sup> Article 9 of the Single Revised Text of the Labor Collective Relations Law, approved by Supreme Decree No. 010-2003-TR: *"In terms of collective bargaining, the union that affiliates the absolute majority of the workers within its scope assumes the representation of all of them, even if they are not affiliated. (...)"*.

with a minority union when there is no majority union in scope (meaning in the bargaining unit) or when the majority union in scope renounces its representation over the relevant members in respect of whom the minority union wishes to negotiate. In Glencore's view, the Union's assertion that in Volcan's case, «Company» and «Mining Unit» are different levels of workers and that a majority must be held in each of them is incorrect as a matter of Peruvian law. It states that the law provides for many scopes, since each union can choose its own, but only provides for three levels: company, activity and trade. Glencore is of the opinion that the law does not provide for intra-company levels of negotiation, which is what the Union is seeking to create. It claims that even if intra-company levels were possible, Volcan would remain unable to agree with the Union's request because it would require Volcan to breach the Federation's constitutional rights. Furthermore, it mentions that the Federation has not renounced its right to represent the members that the Union seeks to represent. Glencore emphasises that Volcan has not at any point sought to prevent the Union from petitioning and/or coordinating with the Federation in relation to the collective bargaining process.

In the responding Party's view, the submission relates to a dispute between trade unions as to the application of Peruvian law and the issue of which organisation has the right to lead collective bargaining negotiations. In order to resolve this dispute, the Union has a constitutional right to take legal action against the Mining and Metal Workers Federation of Volcan. As far as Glencore is aware, the Union has not availed itself of the opportunity to resolve the dispute with the majority organisation in the Peruvian courts. The responding Party states that Peruvian law determines the levels at which collective bargaining negotiations should be carried out. The first requirement is that the employer and the relevant union agree on the level for negotiation. If the parties cannot agree, they must go through arbitration to decide the level. Where a level is already established, as is the case for Volcan where collective bargaining is done at a company level, in order to change that level, Volcan and the representatives of the employees must agree; it is not possible for any higher authority – including the administration or an arbitral tribunal – to change this.

Based on this, Glencore states that Volcan's position is also consistent in particular with Chapter V (Employment and Industrial Relations) of the OECD Guidelines which recommends that enterprises should act within the framework of applicable labour law and regulations. Thus, while the local legal proceedings are pending, it would be premature for the NCP to consider any allegation of breach of the OECD Guidelines. It states that the domestic process for resolution of the underlying legal disputes in Peru as well as Volcan's involvement in pending domestic legal proceedings would be prejudiced if the NCP involves itself in the matter. Furthermore, while Glencore would prefer that the dispute is resolved amicably, Glencore considers it as highly unlikely that the dispute will be resolved via mediation assisted by one or more NCPs. This is because the unresolved legal disputes between the parties and the Peruvian law leaves no room for Volcan (let alone Glencore) to agree to what the Union seeks, namely direct collective bargaining between the Union and Glencore. In Glencore's view any possible mediation would not be effective as it would require the Federation which is not a party to this specific instance to renounce its right to negotiate on behalf of the members that the Union seeks to represent. It states that any mediated outcome which purported to grant the Union the right to negotiate on behalf of the relevant members would be a breach of the Federation's rights, and place Volcan in breach of Peruvian law. Finally, it mentions that Glencore's human rights policy clearly states that they respect their workforce's right to the freedom of association and the right to collective bargaining.

### 3 The proceedings of the Swiss NCP up to date

Since the receipt of the submission on 26 May 2023 the NCP took the following steps:

31.5.2023	Acknowledgement of receipt letter to the submitting Parties, forwarding of the submission to the responding Party and information of the Swiss Embassy in Peru
1.+22.6.2023	Constitution and meeting of the ad hoc Working group including representatives from the State Secretariat for Economic Affairs, the Federal Department of Foreign Affairs according to the Specific Instances Procedure of the Swiss NCP <sup>3</sup>
23.6.2023	Exchange with NCP Peru regarding similar submission by the submitting Parties related to Volcan
27.6.2023	Virtual exchange of the ad hoc Working group with the submitting Parties to exchange on the procedure of the specific instance
30.6.2023	Receipt of a written statement of the responding Party, which was forwarded to the submitting Parties
3.8.2023	Exchange with the NCP Peru to clarify specific questions
8. and 10.8.2023	Virtual meeting with submitting Parties resp. Glencore to clarify specific questions
27.9.2023	Receipt of additional information by submitting Parties as a response to the statement of Glencore
9.10.2023	Receipt of additional information by Glencore as a response to the information provided by the submitting Parties
21.12.2023	Draft Report on Initial Assessment was sent to the Parties for comments on possible misrepresentations of factual information
15. and 24.1.2024	Receipt of written comments by the submitting Parties resp. Glencore

### 4 Considerations and decision of the Swiss NCP

Based on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (2023 edition) and the Specific Instances Procedures of the Swiss NCP, the NCP considers the following points in its initial assessment:

#### a) Identity of the party concerned and its interest in the matter

The Union is a workers' organisation registered to the Trade Union Registry ascribed to the Labour Authority in Peru. It is affiliated to the National Federation of Workers of Specialised and outsourcing companies of the mining and metal industries of Peru (FENTECAMP). The Federation is affiliated to Peru's Confederation of Autonomous Workers of Peru (CATP), which is in turn affiliated to the Trade Union Confederation of the Americas (TUAC) and to the International Trade Union Confederation (ITUC). Until 2021, the Union was affiliated to the Mining and Metal Workers Federation of Volcan. In August 2021, the Union left that Federation, after the general assembly decided to refocus its work towards addressing the specific issues of all workers at the mining unit Andaychagua. The Union has filed a complaint against Volcan for its breaches to Glencore's Code of Conduct in September 2021 under [Raising Concerns Programme](#) of Glencore. Glencore has confirmed that it received the complaint but in view of the ongoing legal proceedings between the Union and Volcan, Glencore has not responded to the complaint while those proceedings are pending. CNV Internationaal is a foundation created by the Dutch trade union confederation CNV. Its mission is to contribute to decent work in

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<sup>3</sup> [www.seco.admin.ch/ncp](http://www.seco.admin.ch/ncp)

developing countries. Swiss Trade Union Confederation and the NGO Solifonds<sup>4</sup> are institutions supporting the respect of human rights. Based on the information in the submission, the Swiss NCP comes to the conclusion that the submitting Parties have provided sufficient information on their identity and interest in the matter.

#### **b) Responsibility of the Swiss NCP**

As the OECD Guidelines are addressed by Adherent states to enterprises operating “*in or from*” their territory, NCPs may receive specific instances regarding issues taking place or concerning enterprises established in their country. Accordingly, certain specific instances may concern the NCPs of several Adherents, such as where a specific instance e.g. concerns the activities of an enterprise headquartered in one Adherent, having impacts in another Adherent. Also, the same or related specific instances (e.g. involving different enterprises active on the same project or in the same supply chain) could be submitted to several NCPs. In such situations, the NCPs that received the specific instances will inform and coordinate with the other concerned NCPs with the goal of designating the lead and supporting NCPs and adopting coordination arrangements. Generally, the NCP of the country in which the issues have arisen would be the lead NCP. However, in certain situations other criteria may be applied, e.g. when needed in order to contribute to the resolution of the issues raised.

The Union has submitted two separate submissions, i.e. one concerning Glencore addressed at the Swiss NCP and one regarding Volcan addressed at the Peruvian NCP<sup>5</sup>. The submission to the Swiss NCP is supported by CNV Internationaal, the Swiss Trade Union Confederation and the NGO Solifonds. The Swiss NCP is competent regarding the submission to the Swiss NCP relating to the due diligence of Glencore as a multinational enterprise headquartered in Switzerland and a shareholder of Volcan. However, the Peruvian NCP takes care of the submission addressed at Volcan which is based in Peru. The Swiss NCP has contacted the Peruvian NCP and both NCPs have decided to handle the submissions separately (i.e. both NCPs will conduct an initial assessment and possibly offer mediation).

#### **c) Scope of application of the OECD Guidelines and materiality of the specific instance**

Glencore is a company active in commodity trading and mining operations headquartered in Zug, Switzerland. It has a presence in around 35 countries and owns some of the major producers of zinc, copper and silver in the world.<sup>6</sup> Accordingly, Glencore is a multinational enterprise within the meaning of the OECD Guidelines.

Glencore approximately holds 63% of voting shares. The OECD Guidelines set out in Chapter IV.5 (Human Rights) that companies 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. They clarify that companies should avoid contributing to adverse human rights impacts and address such impacts when they occur. This means that due diligence also includes adverse impacts of operations by subsidiaries and affiliated companies. The rights to bargain collectively, to form trade unions and join them are enshrined in ILO Conventions No. 87 and 98 and referred to in the ILO Declaration on Fundamental Principles and Rights at Work, as well as in United Nations Universal Declaration of Human Rights. Accordingly, paragraphs 1 a) and b) of the Chapter V (Employment and Industrial Relations) set out the right of workers employed by the enterprise to establish or join trade unions and representative organisations of their own choosing recognised for the purpose of collective bargaining, and engage in constructive negotiations, either individually or through

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<sup>4</sup> Solifonds has been established by the Swiss Trade Union Confederation, the Socialist Party of Switzerland, Solidar Suisse and several development organizations.

<sup>5</sup> OECD Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Paragraph 24

<sup>6</sup> <https://www.glencore.com/who-we-are>

employers' associations, with such representatives with a view to reaching agreements on terms and conditions of employment. The OECD Guidelines however make clear that companies should act within the framework of applicable labour law and regulations.

The issues raised in the submission are material and substantiated in the sense that, based on the information submitted, they are plausible and related to the application of the OECD Guidelines, in particular Chapters IV (Human Rights) and V (Employment and Industrial Relations). The OECD Guidelines make clear that due diligence should be carried out including with regard to operations by subsidiaries and affiliated companies.

#### **d) Legal context and parallel proceedings**

The Swiss NCP will take into consideration ongoing parallel proceedings, including court rulings. According to the Specific Instances Procedures of the Swiss NCP, already concluded or ongoing parallel proceedings will not necessarily prevent the Swiss NCP from pursuing a specific instance. However, in each individual case the Swiss NCP assesses whether or not an offer to mediate would make a positive contribution to the resolution of the issues raised and/or the implementation of the OECD Guidelines or if it would create a serious prejudice for either of the Parties involved in other proceedings.

The Swiss NCP is aware of ongoing legal proceedings in Peru: 1) Volcan has contested the arbitral award issued by the labour administrative authority at the Judiciary. The Judiciary upheld the award and required Volcan to initiate negotiations at the establishment level for 2021–2022. Volcan has appealed the decision and the ruling has been suspended. 2) Volcan has brought proceedings to have a judge declare that it complied with the arbitral award by increasing salaries and extending other benefits requested in the list of claims 2021–2022 to all members of the Union in the extension of the collective agreement for the period 2021–2022 with the Federation of Mining Metallurgical Workers of Volcan Compañía Minera SAA. However, the judicial authority has dismissed Volcan's request, refusing to declare that the arbitral award has already been fulfilled by Volcan when negotiating with the Federation because (i) the arbitral award is in effect (until it is declared null) and (ii) the terms of the award are clear. The proceeding has ended without an order to comply with the award. 3) Judicial process initiated by the Union in March 2022 that seeks to protect the rights of citizens recognized in the Constitution such as freedom of association (so-called «amparo action»). Recently the 2<sup>nd</sup> instance has ordered that Volcan installs the Negotiating Committee 2021–2022 and initiates the stage of direct negotiations with the Union. Volcan has filed its own amparo action on 4 December 2023 against the decision in the amparo proceedings brought by the Union, but is implementing the order to install the required Negotiating Committee to start negotiations with the Union and meanwhile submitted its proposed wording for the installation act («acta de instalación»).

Even if the OECD Guidelines may go beyond what enterprises are legally required to comply with, they should not and are not intended to place an enterprise in a situation where it may face conflicting requirements. The question of whether and under what conditions a company can negotiate with a minority union under Peruvian law is the subject of ongoing legal proceedings in Peru and therefore cannot be assessed by the NCP in its initial assessment. This does not mean, however, that the NCP cannot accept the submission if there is a possibility that it may contribute to resolve the issues raised. As a non-judicial mechanism, the Swiss NCP has a different role from national courts. NCP proceedings provide an informal framework for discussing the OECD Guidelines and their practical implementation. However, when defining the topics of a possible mediation, the NCP, together with the parties, will ensure that the mediation does not interfere with ongoing parallel proceedings. Furthermore, the NCP will not comment on whether Peruvian law has been complied with. Thus, the NCP proceedings will have no prejudicial effect. Against this background, the Swiss NCP considers

that parallel proceedings do not prevent the NCP from accepting this specific instance and offering its good offices.

Finally, the Swiss NCP is also aware of a complaint by the submitting Parties to the European Union in the framework of the Free Trade Agreement between the European Union and Peru-Colombia-Ecuador in May 2022.<sup>7</sup> However, also this complaint procedure does not prevent the NCP from accepting this specific instance.

#### **e) Contribution to the purpose and effectiveness of the OECD Guidelines**

The role of the NCP is to offer a forum for discussion and to assist the Parties concerned to address the issues raised.

The Swiss NCP considers that by accepting this specific instance and offering a confidential mediation, it could contribute to the dialogue between the Parties and help them to reach a better mutual understanding of the issues raised and a mutually acceptable outcome. The NCP notes that no dialogue between the submitting Parties and Glencore, as requested by the submitting Party, has taken place so far. The NCP therefore considers that a mediation could provide an opportunity for the Parties to develop a better mutual understanding and to discuss issues relating to Glencore's due diligence process, including its engagement with Volcan. In particular, such mediation could address the question of what measures Glencore takes to avoid situations of alleged violations of the right of workers to form and join trade unions of their choice and therefore to negotiate their terms and conditions of employment.

#### **d) Conclusion**

The Swiss NCP accepts the specific instance and offers its good offices to the Parties for further consideration. The offer for mediation focuses on Glencore's due diligence process including its engagement with Volcan.

### **5 Next steps**

The Swiss NCP will offer its good offices to the Parties and ask them to confirm whether they are willing to accept this offer with the aim of reaching a mutually acceptable outcome.

If the Parties reach an agreement and find a solution to the issues raised, the Swiss NCP will make publicly available a final statement with the results of the proceedings. Information regarding the contents of the discussions and the agreement will only be published with the express consent of the Parties involved. If no agreement is reached or one of the Parties is not willing to take part in the proceedings, the Swiss NCP will also make this information publicly available in a final statement. The latter will include a summary of the reasons why no agreement was reached.

The Swiss NCP will draw up recommendations for implementation of the OECD Guidelines, which will also be included in the final statement. In addition, the NCP can envisage specific follow-up activities, for which the NCP will provide support following completion of the specific instance procedure. Final statements are published on the Swiss NCP website and are referenced in the OECD Database on Specific Instances for the OECD Guidelines. Before the statement is issued, the Swiss NCP provides the Parties with the opportunity to comment on a draft statement. If there is no agreement between the Swiss NCP and the Parties about the wording of the statement, the Swiss NCP makes the final decision.

In order to establish an atmosphere of trust, the Implementation Procedures of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct foresee that the

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<sup>7</sup> <https://www.cnvinternationaal.nl/en/topical/news/CNV-presents-SEP-complaint-EU-parliament>



parties may not disclose publicly or to a third party, during or after the proceedings, facts and arguments shared by the other parties or the NCP (including where relevant by an external mediator or conciliator) during and after the proceedings, unless the sharing party agrees to their disclosure, such facts and arguments are already in the public domain, or not disclosing would be contrary to the provisions of national law. To this end, special requirements concerning the treatment of confidential information can be agreed upon by the Parties involved in this specific instance.

The Swiss NCP will publish its report on the initial assessment on the Swiss NCP website.