

# National Contact Point of Switzerland

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## Initial Assessment

### **Specific Instance regarding Swiss National Bank, UBS, Barclays and HSBC submitted by Coalition for Immigrant Freedom, Worth Rises and BankTrack**

### **Report concerning UBS**

Berne, 28 August 2024

#### **Executive summary**

The National Contact Points for Responsible Business Conduct (NCP) of Switzerland and the United Kingdom (UK) received a written submission to consider a specific instance under the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct regarding the UBS Group AG, the Swiss National Bank, Barclays and HSBC. The specific instance has been raised by the three NGOs BankTrack, Coalition for Immigrant Freedom and Worth Rises. The submission relates to the human rights' due diligence of the four financial institutions regarding investments in the US based companies CoreCivic and GEO Group. The companies operate private prisons in the USA where, according to the submitting NGOs, human rights violations including forced labour occur.

According to the agreement with the UK NCP, the Swiss NCP will publish two separate reports on the Initial Assessments regarding the UBS Group AG and the Swiss National Bank while the UK NCP elaborates the reports concerning Barclays and HSBC. This report concerns UBS Group AG.

In the view of the Swiss NCP, 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 II (General Policies) and IV (Human Rights). The Swiss NCP considers that by accepting this specific instance and offering its good offices to the Parties, it could help them to reach a better common understanding on the issues raised in the submission. This decision is not based on conclusive research or fact-finding, nor does it represent a conclusion as to whether the UBS Group AG observed the OECD Guidelines or not.

#### **1 Submission and alleged violations of the OECD Guidelines**

The Swiss NCP received a written submission on 16 January 2024 to consider a specific instance under the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (hereafter "OECD Guidelines") regarding UBS Group AG (hereafter "UBS" or responding Party), the Swiss National Bank, Barclays and HSBC (hereafter "responding Parties"). This specific instance has been raised by the three NGOs BankTrack, Coalition for Immigrant Freedom and Worth Rises (hereafter "submitting Parties"). The submission was also filed to the UK NCP.

According to the agreement with the UK NCP (see section 4), the Swiss NCP will publish two separate reports on the Initial Assessment regarding UBS and the Swiss National Bank. This report concerns UBS.

The submission relates to the human rights' due diligence of the responding Parties regarding specific investments in the US based companies CoreCivic and GEO Group (hereafter "the Companies"). According to the submitting Parties, the Companies are the largest private prisons corporations contracting with the United States Department of Homeland Security, which oversees immigration and customs enforcement, including immigration detention. The submitting Parties claim human rights violations and abuses by CoreCivic and GEO Group against the migrants and others they detain or transport. According to the submission, they often, for example, force detained migrants to perform uncompensated or undercompensated labour under threat of solitary confinement, physical restraint, suspension of attorney and family visitation, deprivation of necessities like food, water and hygiene products and negative interference with ongoing asylum cases. The submitting Parties based their allegations on numerous public reports regarding the alleged abuses.

According to the submitting Parties, the responding Parties have business relationships with the Companies on different levels, including investments, trading, financing and advisory services. According to the submitting Parties, the responding Parties' investments have been made on a proprietary basis, using the firm's own capital, or on a nominee basis, on behalf of clients, passively or actively managed including through index and mutual funds run by internal or external portfolio managers. Regarding trading, the submitting Parties refer to the activities of sales traders buying and selling securities at the request of clients collecting commission on the execution of those trades generating benefits for the responding Parties. Regarding financing, the submission refers to an example by Barclays having provided CoreCivic and GEO Group with direct loans and revolving credit lines. Finally, the submission refers to advisory services by the responding Parties provided to CoreCivic and GEO Group regarding capital raising and mergers and acquisitions.

The submitting Parties claim that previous engagement with the responding Parties has not led to action by them to influence CoreCivic and GEO Group to prevent or mitigate the impacts on human rights in line with the banks' due diligence responsibility. As part of the NCP proceeding, they expect a dialogue in good faith regarding the scope of due diligence and use of the banks' individual and collective leverage toward the Companies. Furthermore, a dialogue may also further clarify the recommendations of the OECD relating to institutional investors in regard to passive investments in mutual funds, including index funds.

## **2 Statement of UBS**

On 8 March 2024, UBS submitted a written statement to the Swiss NCP concerning the issues raised in this specific instance. In its statement, UBS submits that the Swiss NCP should decline to offer its good offices for mediation for the following reasons:

UBS refers to its previous engagement with the submitting Parties and claims a lack of good faith engagement by the submitting Parties including disregard for confidentiality that has fundamentally impaired the trust required for an effective mediation. In particular, UBS refers to the publication of the submission to the NCP on the website of BankTrack including naming five individual UBS employees, who had participated in previous engagement with the submitting Parties.

Furthermore, UBS claims that the submission does not substantiate a breach of the OECD Guidelines by UBS as there is no direct link between UBS' products or services and the alleged impacts. According to UBS, the OECD Guidance on Responsible Business Conduct for

Institutional Investors<sup>1</sup> (hereafter “OECD Investor Guidance”) recognizes that there is generally a direct linkage between an investor and investee company in an investor’s own portfolio. However, an overly expansive interpretation of the OECD Guidelines to entail a direct link between a financial institution and actual or potential adverse human rights impacts of constituents of passively managed funds would result in unmanageable responsibilities of financial institutions. UBS also emphasized that its risk-based human rights due diligence is in line with the OECD Guidelines. The OECD Investor Guidance expressly recognizes that different approaches are likely to be appropriate based on a range of factors including the asset class, characteristics of an investor, investment strategy (e.g. active vs. passive investments), and relevant regulatory obligations. A note by OHCHR prepared to a request of clarification by BankTrack<sup>2</sup> also recognizes the need for due diligence to be proportionate and risk-based.

UBS also refers to its limited leverage regarding wrongful practices of constituents of a passive fund. According to UBS, it has no decision-making-power with respect to which constituents are part of the funds. UBS is not the index provider for the tracked indices and consequently has no say about whether the companies form part of the indices or not. The index providers decide independently, based on their index methodologies, which companies to include in their indices. The tracked indices are available not only to UBS but in equal form to the entire financial industry. As only the index providers ultimately decide which companies to include in indices, UBS does not have the ability to exercise leverage by removing, or threatening to remove, the companies from the relevant indices. Furthermore, UBS has legally committed to replicate the tracked indices and has contractual and fiduciary obligations to the fund investors to track the indices as precisely as possible. If UBS were to unilaterally remove the Companies from the Funds’ portfolios, the performance of the funds would deviate from the performance of the indices it had committed to track.

According to UBS, it conducts tailored and proportionate human rights due diligence, by, inter alia, taking some of the measures that the submitting Parties purportedly seek to achieve via a mediation procedure. Specifically, UBS engages with index providers on a regular basis and this engagement often includes reinforcing UBS’ expectations with respect to human rights in the context of ESG indices. UBS also engages in collective action, where appropriate. Specifically with respect to passive investment funds, UBS participated in a consultation led by the Principles of Responsible Investment (PRI) regarding ESG and passive investment strategies. UBS takes steps to exercise further leverage in contexts where it has more significant leverage. For example, in the context of actively managed fixed income and equities funds, UBS applies “controversial behavior” exclusions and excludes constituents on the basis of certain adverse human rights impacts, among other indicators.

For the reasons mentioned above, UBS is of the opinion that an offer of good offices for mediation by the NCP would not contribute to the effectiveness of the OECD Guidelines.

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

Since the receipt of the submission on 16 January 2024 the NCP took the following steps:

17.1.2024	Confirmation to acknowledge receipt of the submission to the submitting Parties.
18.1.2024	Start of coordination with the UK NCP.
18.1.2024	Submission was forwarded to the UBS and SNB.

<sup>1</sup> Responsible Business conduct for Institutional Investors, Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises, 2017; p.13.<https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>

<sup>2</sup> OHCHR response to request from BankTrack and OECD Watch for advice regarding the application of the UN Guiding Principles on Business and Human Rights where private sector banks act as nominee shareholders August 30, 2021; [www.ohchr.org/sites/default/files/Documents/Issues/Business/finance-2021-response-nominee-shareholders.pdf](http://www.ohchr.org/sites/default/files/Documents/Issues/Business/finance-2021-response-nominee-shareholders.pdf)

18.1.2024	Start of coordination with the US NCP.
24.1.2024	Information of the Swiss Embassy in Washington with a request on further information regarding the issues related to the US.
1.2.2024	Constitution of an 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> .
1.2.2024	Virtual Exchange with UBS on procedural issues.
4.3.2024	Coordination Exchange with the US and the UK NCP.
5.3.2024	Virtual exchange of the ad hoc working group with the submitting Parties regarding the procedure of the specific instance.
8.3.2024	Receipt of a written statement by UBS, which was forwarded to the submitting Parties.
23.4.2024	Receipt of comments in form of an Email by the submitting Parties regarding a few issues raised in the statement by UBS. The Email was forwarded to the responding Parties.
19.6.2024	Draft Report on Initial Assessment sent to the Parties for comments on possible misrepresentations of factual information.
8./9.7.2024	Receipt of written comments by submitting Parties resp. responding Parties.

#### 4 Considerations and decision of the Swiss NCP

Based on the Specific Instances Procedure of the Swiss NCP<sup>4</sup>, the NCP considers the following points in its Initial Assessment:

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

The Swiss NCP comes to the conclusion that the submitting Parties have provided sufficient information regarding their interest in the issues raised. BankTrack is a non-profit civil society organization founded in 2003 to track and campaign on private sector commercial banks and the activities they finance. The Coalition for Immigrant Freedom is a non-profit organization whose mission is to educate, defend, and protect the rights of all immigrants. Worth Rises is a non-profit advocacy organization to address the prison industry's exploitation of incarcerated people and their loved ones.

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

As the specific instance is addressed to the Swiss NCP and the UK NCP and relates to four financial institutions, both NCP have consulted how to handle the specific instance. They agreed that the Swiss NCP will prepare two separate reports on the Initial Assessment for the Swiss based institutions (UBS and Swiss National Bank) and the UK NCP will likewise elaborate the reports for the UK based institutions (Barclays and HSBC).

Furthermore, the Swiss NCP and the UK NCP coordinated with the US NCP as the specific instance is related to alleged human rights violations of the US based companies CoreCivic and GEO Group. The OECD Guidelines say that a specific instance should be generally raised in the country in which the alleged issues arise.<sup>5</sup> According to the expectations of the

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

<sup>4</sup> At the time of the elaboration of this Initial Assessment, the revised Specific Instances Procedure of the Swiss NCP was not published. Therefore, this report is based on the version of 2014.

<sup>5</sup> OECD Guidelines for multinational enterprises on responsible business conduct (2023), Commentary on the Implementation Procedures, para. 30

submitting Parties (see section 2), the main issues to be discussed concern the due diligence of the financial institutions regarding alleged links to alleged human rights violations by the US based companies. Regarding UBS, the process of due diligence is governed under the responsibility of UBS Group AG, which is headquartered in Zürich, Switzerland. For the discussion on such processes, the Swiss NCP is therefore competent. For this reason, the Swiss NCP and the US NCP have consulted and agreed that the Swiss NCP will take the lead in assisting the Parties regarding the discussion related to UBS' due diligence practices. The US NCP will support the Swiss NCP, as appropriate.

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

UBS is a leading Swiss bank headquartered in Zurich, Switzerland. Besides private banking, UBS offers international wealth and asset management as well as investment banking services for private, corporate, and institutional clients. It also provides securities services such as fund administration and third-party fund management. The bank has a presence in all major financial centers and offices in over 50 countries.<sup>6</sup> Accordingly, UBS is a multinational enterprise within the meaning of the OECD Guidelines.

#### Business relationship

The OECD Guidelines apply to enterprises of all sectors, including the financial sector<sup>7</sup>. They distinguish between impacts on matters covered by the OECD Guidelines, including human rights, through own activities of the concerned enterprise and adverse impacts directly linked to the operations, products or services of the enterprise by a business relationship. The term 'business relationship' includes relationships with business partners, entities in the supply chain and any other non-State or State entities directly linked to its business operations, products or services.<sup>8</sup> The use of the word 'includes' indicates that this is a non-exhaustive and illustrative list of examples; hence business relationships can go beyond the examples given. It is precisely because the OECD Guidelines are recommendations and not legally enforceable that open-ended descriptions of what is meant by business relations can be used. A legally binding character would require much more precision with regard to their scope and applicability<sup>9</sup>. This expansive reading is also applicable in terms of business relationships in the financial sector. According to an OECD reference document, for the financial sector business relationships include, for example, suppliers, clients, customers and investee companies, including a minority shareholding. The same may apply with respect to investments through index funds despite the multiple tiers of business relationships<sup>10</sup>.

The passively managed funds relevant to this specific instance replicate indices such as MSCI<sup>11</sup> and FTSE Russel<sup>12</sup>. According to UBS, the indices in scope of this instances are non-ESG indices and the US based companies CoreCivic and GEO Group are two of many constituent companies included in those indices<sup>13</sup>

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<sup>6</sup> [www.ubs.com/global/de/our-firm/locations.html](http://www.ubs.com/global/de/our-firm/locations.html)

<sup>7</sup> Scope and application of 'business relationships' in the financial sector under the OECD Guidelines, OECD 2014, p. 6, <https://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-2.pdf> ; Responsible business conduct for institutional investors, Key considerations for due diligence under OECD Guidelines for Multinational Enterprises, OECD 2017

<sup>8</sup> OECD Guidelines for Multinational Enterprises for Responsible Business Conduct (2023), Chapter II, Commentary on General Policies, paragraph 17

<sup>9</sup> Scope and application of 'business relationship' in the financial sector under the OECD Guidelines for Multinational Enterprises, OECD 2014, p. 3, <https://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-2.pdf>

<sup>10</sup> Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship, OECD 2014, p. 10 and 11, <https://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-1.pdf> ; Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises, OECD 2017, p. 35, <http://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>.

<sup>11</sup> [www.msci.com](http://www.msci.com)

<sup>12</sup> [www.lseg.com/en/ftse-russell](http://www.lseg.com/en/ftse-russell)

<sup>13</sup> For example, MSCI USA Small Cap Index hat 1'782 constituents as at 29 February 2024.

The OECD Investor Guidance (“Responsible business conduct for institutional investors”)<sup>14</sup> recognises the challenges in obtaining detailed information for in-depth investigations on some passive investments prior to investment. However, it nevertheless assumes that a business relationship exists and therefore also recommends including passive investments in a bank’s general risk screening to identify areas where responsible business risk is most significant. That a business relationship may exist in the case of passive investment can also be justified by the fact that, according to the OECD Investor Guidance, financial institutions can reduce ESG risks by adjusting index constituent weights.<sup>15</sup>

#### Direct link

If a business relationship as defined by the OECD Guidelines may exist, the next question to be answered is if the alleged human rights violations can be directly linked to the operations, products or services of UBS. According to the Swiss NCP’s assessment, the submitting Parties have credibly substantiated that CoreCivic and GEO Group could contribute to alleged human rights violations against migrants and others detained in immigration detention facilities and private prisons operated by them in the USA. It is not within the competence of the Swiss NCP to investigate such allegations. However, based on publicly available information, the Swiss NCP must assume the existence of at least potential risks related to the services of the companies. For example, CoreCivic has been subject of several audits by the federal and state governments as well as investigations by individual authorities on issues of violence and sexual harassment and forced labour.<sup>16</sup> A lawsuit against GEO alleged that incarcerated individuals were forced to work for GEO for USD 1 per day as part of a so-called “voluntary work program”, in violation of California’s minimum wage laws<sup>17</sup>.

The NCP is aware of UBS’ limited leverage in relation to the passively managed funds relevant to this specific instance. Also, the OECD Investor Guidance acknowledges those challenges in obtaining detailed information for in-depth investigations on some passive investments prior to investment, but still recommends investors to include passive investments in their general risk screening to identify areas where RBC risk is most significant and to inform potential action. Therefore, by holding shares of CoreCivic and GEO Group as part of passively managed funds, the NCP assumes that a direct link between the UBS products and services and the alleged human rights violations cannot be excluded. This view is not based on conclusive research or fact-finding but mainly based on the written submission by the submitting Parties and internet research, and does not represent a conclusion as to whether these allegations are true or not or whether UBS observed the OECD Guidelines or not.

Based on the explanations set out above in section 5c, the issues raised in the submission are therefore 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 II (General Policies) and IV (Human Rights).

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<sup>14</sup> Responsible business conduct for institutional investors, Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises, OECD 2017, p.13 : <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>

<sup>15</sup> Responsible business conduct for institutional investors, Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises, OECD 2017, p. 23: <http://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>

<sup>16</sup> [Article](#) by Kansas News Service (2019): Prisons are understaffed, which leads to difficulties in dealing with inmates; In 2009, Hawaii removed 168 women from a Kentucky prison operated by CoreCivic after reports of sexual assault by guards surfaced. In 2018, a man reported abuse by his cellmate and sued CoreCivic because the company allegedly knew about it but failed to take action. [Article](#) by Tennessee Lookout (2023): Since September 2020, CoreCivic has been fined USD 17.74 million. It was stated that the number of deaths was too high compared to other state-run prisons. [Article](#) in the Tennessean: In 2021, a lawsuit was filed after the death of an inmate on the grounds that there were too few staff. CoreCivic reached a settlement with the plaintiff, which led to the lawsuit being withdrawn. [Article](#) in azcentral.: Complaint regarding forced labour at a private immigration control centre: CoreCivic was accused of forcing inmates to work under threat of punishment if they refused. A settlement was reached and the lawsuit was withdrawn.

<sup>17</sup> <https://rbgg.com/detained-immigrant-workers-request-federal-judge-to-affirm-findings-against-ice-geo-group> RBGG (2023)

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

The Swiss NCP takes into consideration ongoing parallel proceedings, including court rulings. According to the Specific Instances Procedure of the Swiss NCP, already concluded or ongoing parallel proceedings do 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 or if it would prejudice either of the Parties involved in other proceedings.

The Swiss NCP is aware of ongoing legal proceedings in the USA against CoreCivic and GEO Group.<sup>18</sup> These legal proceedings do not involve UBS. As the scope of the submission refers to the due diligence of UBS, the Swiss NCP considers that these parallel legal proceedings are not relevant here and do not prevent the NCP from accepting this specific instance and offering its good offices.

#### **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 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 reach a better mutual understanding of the issues raised and a mutually acceptable outcome.

In the view of the NCP, a dialogue may lead to a better understanding of UBS' ongoing engagement with index providers and due diligence possibilities and limitations regarding index-based funds.

#### **f) Conclusion**

The Swiss NCP accepts the specific instance and offers its good offices to the Parties for further consideration.

### **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 may draw up recommendations for implementation of the OECD Guidelines, which will also be included in the final statement. In addition, the NCP may 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 parties may not disclose publicly or to a third party, during or after the proceedings, facts and

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<sup>18</sup> Beispiele: <https://eu.azcentral.com/story/news/politics/border-issues/2023/10/19/private-detention-company-corecivic-settles-forced-labor-lawsuit/71234146007/> ; <https://www.geoadelantoclassaction.com/>

arguments shared by the other parties or the NCP (including where relevant by an external mediator) 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