

National Contact Point of Switzerland

Initial Assessment

Specific Instance regarding UBS Group AG submitted by the Society for Threatened Peoples Switzerland

Berne, January 20, 2021

Executive summary

The Swiss NCP received a submission by the non-governmental organization Society for Threatened Peoples to consider a specific instance under the OECD Guidelines regarding UBS Group AG (hereafter “UBS”) related to an alleged business relationship with the Chinese company Hikvision. The Swiss NCP comes to the conclusion that a business relationship according to the OECD Guidelines between UBS and Hikvision and a direct link between UBS’s products and services and the alleged human rights violations could not be excluded with regard to the UBS fund sold by UBS. However, in relation to UBS’s role as custodian for Hikvision shares on behalf of clients, the Swiss NCP concludes that no business relationship between UBS and Hikvision exists.

Therefore, the Swiss NCP partially accepts this specific instance for further consideration. The Swiss NCP considers that by accepting this specific instance and offering its good offices to the parties even after the exclusion of Hikvision shares from the UBS fund on 5 January 2021, 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 UBS observed the OECD Guidelines or not.

1 Submission and alleged violations of the OECD Guidelines

The Swiss NCP received a written submission on 22 June 2020 to consider a specific instance under the OECD Guidelines regarding UBS Group AG (hereafter “UBS”), a bank headquartered in Zurich, Switzerland. This specific instance has been raised by the non-governmental organization Society for Threatened Peoples (hereafter “STP”).

The submission is related to possible human rights violations in the context of an alleged business relationship with the Chinese company *Hangzhou Hikvision Digital Technology Co. Ltd* (hereafter “Hikvision”). According to the submitting party, this company manufactures technology used for surveillance of the Uyghurs and other Turkic minorities living in the Xinjiang Uyghur Autonomous Region in China. On the grounds of its involvement in the crackdown on ethnic minority communities in the region, Hikvision, together with 27 other entities, was blacklisted by the United States (hereafter “US”) in October 2019¹.

The STP claims that UBS is directly linked to the repression and oppression of the Uyghur and other Turkic minorities. According to its view, it has failed to fulfil its corporate social responsibility and to implement the OECD Guidelines and other international principles on business and human rights. Moreover, it has not complied with its own policies and commitments, particularly its Code of Conduct, which requires the bank to monitor and

¹ See www.reuters.com/article/us-usa-trade-china-exclusive-idUSKBN1WM25M

manage any negative impact of its activities on human rights. By having entered and maintained a business relationship with Hikvision, the STP contends that UBS has neither fulfilled its duties regarding due diligence, i.e. avoided infringing on the rights of the ethnic minorities living in Xinjiang, nor sought ways to prevent or mitigate, i.e. address, the adverse human rights impacts despite being directly linked to them through its products and services.

On the initiative of STP, an initial meeting between STP, the Uyghur World Congress and UBS was held on 28 January 2020 to discuss the human rights situation in Xinjiang and, relatedly, UBS's business relationship with Hikvision.

In conclusion, STP claims the violation of the following recommendations of the OECD Guidelines' chapters II (General Policies) and IV (Human Rights)²:

1. Carry out risk-based and human rights due diligence (II.10 and IV.5).
2. Respect internationally recognized human rights, i.e. avoid infringing on human rights of others and address adverse impacts with which they are involved (II.2 and IV.1).
3. Prevent or mitigate adverse human rights impact when it is directly linked to its operations, products or services by a business relationship (II.12 and IV.3).

2 Expectations of the submitting party regarding the Swiss NCP proceedings

The submitting party invites the NCP to mediate an agreement to solve the issues raised. STP expects the NCP to enable a dialogue which will create insight within UBS that the bank is directly linked to the adverse human rights impacts contributed to by Hikvision. Based on this, STP would like to discuss the following demands addressed at UBS:

1. To withdraw from all financial transactions, products and services related to Hikvision.
2. To adapt its internal policies:
 - To ensure that its entire equity business is covered by the bank's human rights due diligence processes in order to pre-empt the bank's involvement in adverse human rights impacts in the future.
 - To incorporate clear exit clauses in its contractual agreements so as to allow the bank to withdraw from business relationships at any point should these directly link UBS to adverse human rights impacts in the future.
 - Especially with regard to passive investments, to adjust its due diligence mechanisms, both prior and ongoing, by improving the prioritization of cases and sectors for risk assessment as well as by establishing procedures to verify that due diligence processes have been implemented.
3. To increase transparency by accounting for how the adverse human rights impacts, both potential and actual, to which UBS is linked are addressed by the bank, at the relevant level of detail.

Finally, the STP also hopes that the present case may serve as a basis for a debate on the applicability of the Guidelines specifically to institutional investors holding nominee shares and be utile in reaching a conclusive interpretation.

3 Statement of the responding party

On 24 August 2020, UBS submitted a written statement to the Swiss NCP concerning the issues raised in this specific instance. In its statement, UBS requests the NCP not to proceed with the specific instance in particular due to the following reasons:

² See full text of provisions in the <https://mneguidelines.oecd.org/mneguidelines>, 2011

1. UBS is not a shareholder of Hikvision but only a custodian for shares held by clients. UBS states that it does not hold any shares of Hikvision for its own account and, therefore, is neither an investor nor a (majority or minority) shareholder of Hikvision. UBS – like most financial institutions worldwide – offers its clients the opportunity to invest into publicly traded shares. The Hikvision *A-shares* are publically traded and free from regulatory or legal restrictions. Furthermore UBS does not actively advise their clients on these shares. For operational reasons, the shares of Hikvision can be held in so-called omnibus accounts under the name of the custodian, which can be a UBS entity. However, they economically belong to the clients of UBS, who are the beneficial owners.
2. The US trade blacklist of October 2019 mentioned in the submission of STP does not restrict transactions by either US or foreign persons in the shares of Hikvision. This measure directed at exports makes Hikvision subject of US export control and technology transfer regulations administered by the US Department of Commerce that prohibit, in particular, the exportation, or re-exportation of goods and technologies of US origin to blacklisted companies.
3. Furthermore, according to UBS no direct link between UBS's products and services and the alleged human rights violations exists, as the alleged violations are committed by the state of China and not Hikvision. As UBS is not an investor in the company, no business relationship exists which would be the basis for a direct link. Additionally according to the responding party, Hikvision is a world leading IoT ("Internet of Things") solution provider whose products include, amongst others, network products such as commercial displays, monitors, video cameras and recorder or intelligent traffic products.
4. UBS further specifies that the OECD Guidelines do not foresee a concept of indirect linkage. An enterprise's services, products or operations are either "directly linked to an adverse impact through a business relationship or not linked at all". The term "directly" was included in the text of the Guidelines in order to ensure that extremely loosely connected associations would cause a responsibility to apply.
5. UBS submits that an expansive interpretation of the OECD Guidelines as stated in the submission would not contribute to their purpose and effectiveness because it would result in unmanageable responsibilities of financial institutions and exclusion of potentially entire industry sectors from public finance. Furthermore as other banks hold more shares of Hikvision as custodians than UBS, the choice of UBS by STP is entirely arbitrary. Therefore the questions STP would like to discuss do not relate to UBS but are much more fundamental and are of political nature and concern the entire financial industry in Switzerland and abroad. Consequently industry wide discussions, for instance initiated by the Principles for Responsible Investment would be needed. As a consequence the alleged violations cannot be remediated by way of an NCP mediation proceedings.

On 7 December 2020, UBS submitted an additional written statement providing information on the fund UBS ETF MSCI China ESG. UBS explains that this fund is passively managed tracking the MSCI China ESG Universal 5% Issuer Capped Index. Furthermore, UBS clarifies, that this fund is a Société d'investissement à capital variable (Sicav), an investment fund in the form of a joint-stock company with variable capital and its own shareholders, the respective investors. UBS is a mere service provider to the fund and does not own Hikvision shares. These shares are owned by the fund UBS ETF MSCI ESG which is owned by its shareholders. According to UBS, this does not result in a business relationship between UBS and Hikvision and consequently no direct link between UBS and the alleged human rights violations exists.

On 17 December 2020, UBS informed the NCP regarding MSCI's decision to delete securities of Chinese companies referenced in the U.S. Executive Order 13599, including Hikvision, from its global investable market indices as of the close of business of 5 January 2021.³

4 The proceedings of the Swiss NCP up to date

Since the receipt of the submission on 22 June 2020 the NCP took the following steps:

22.6.2020	Confirmation to acknowledge receipt of the submission to the submitting party Submission was forwarded to the responding party
6.7.2020	Information of the Swiss Embassy in China Constitution of an ad hoc working group including representatives from the State Secretariat for Economic Affairs and the Federal Department of Foreign Affairs according to the Specific Instances Procedure of the Swiss NCP ⁴
7.7.2020	Meeting of the ad hoc working group with the responding party to inform them about the procedure of the specific instance. The submitting party renounced to take part in such a meeting with the NCP as it is aware of the procedure due to previous experiences with the Swiss NCP.
24.8.2020	Receipt of a written statement by the responding party
12.10.2020	Hearing with UBS and ad hoc working group
27.10.2020	Hearing with STP and ad hoc working group
16.11.2020	Report of draft initial assessment was sent to the STP and UBS for comments on possible misrepresentations of factual information
30.11.2020	Receipt of written comments by the submitting party
7.12.2020	Receipt of written comments by the responding party
17.12.2020	Receipt of additional information by both parties

5 Considerations and decision of the Swiss NCP

Based on the Procedural Guidance for the OECD Guidelines 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 Swiss NCP comes to the conclusion that the submitting party has provided sufficient information regarding its interest in the issues raised. STP is a Swiss based international human rights organisation working for the protection of persecuted minorities and indigenous people. STP has a long-standing campaign on the issue of surveillance of minorities within China and especially of their diaspora abroad by the Chinese government and its international representations. It works very closely with the diaspora communities as well as with their organisations, the World Uyghur Congress in the case of this specific instance.

³ Financial times: [MSCI drops seven Chinese companies from indices | Financial Times \(ft.com\)](https://www.ft.com/content/17-dec-2020/msci-drops-seven-chinese-companies-from-indices)

⁴ www.seco.admin.ch/nkp

b) Responsibility of the Swiss NCP

According to the Procedural Guidance for the OECD Guidelines, a specific instance must be raised in the country in which the alleged breach occurred. If this country is not a signatory of the Guidelines and therefore has no NCP, the issue should be raised in the country where the multinational company has its headquarters. The Swiss NCP is responsible for this specific instance regarding the issues in China because this country is not a signatory state of the OECD Guidelines and UBS has its headquarters in Switzerland⁵. Furthermore, the Swiss NCP is also competent as the responsibility for elaborating, implementing and monitoring UBS group human rights policies lays within the UBS management at its headquarters in Switzerland.

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.⁶ Accordingly, UBS is a multinational enterprise within the meaning of the OECD Guidelines.

Business relationship

The OECD Guidelines apply to enterprises of all sectors⁷, including the financial sector⁸. They distinguish between impacts on matters covered by the OECD Guidelines, including human rights, through own activities⁹ of the concerned enterprise and adverse impacts directly linked to the operations, products or services of the enterprise by a business relationship¹⁰. 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 services¹¹. 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 applicability¹². 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 relationships¹³.

⁵ OECD Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Paragraph 24

⁶ See [website of UBS](#)

⁷ OECD Guidelines, I. Concepts and Principles, Paragraph 4

⁸ 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, p. 7, <http://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>

⁹ OECD Guidelines, Chapter II, Paragraph 11 and Chapter IV, Paragraph 2

¹⁰ OECD Guidelines, Chapter II, Paragraph 12 and Chapter IV, Paragraph 3

¹¹ OECD Guidelines, Chapter II, Commentary on General Policies, paragraph 14

¹² 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>

¹³ 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>.

Business relationship: acting as a custodian

Based on the information received from UBS, the Swiss NCP concludes that UBS is not an investor in Hikvision, but acts as a custodian of Hikvision shares on behalf of its clients and does not actively advise clients to buy Hikvision shares. The mere management of clients' shares as a custodian implies a business relationship between the bank and its clients, but not with Hikvision. This does not change even if, for operational reasons, UBS holds the client shares in so-called omnibus accounts in its own name, as the owners of the shares are the clients of the bank.

Business relationship: UBS Fund

UBS ETF, Sicav, an investment company under Luxembourg law, offers funds, such as the UBS ETF MSCI China ESG (hereafter: the UBS Fund) to clients. The investment objective of the UBS Fund is to replicate the price and return performance of the MSCI China ESG Universal 5% Issuer Capped Index. The UBS Fund is passively managed and the underlying index¹⁴ is composed and provided to UBS by MSCI, Inc. This fund has contained shares of Hangzhou Hikvision Digital Technology - Class A (e.g. 4,400 shares for an amount of USD 20,682 in 2019 which corresponds to 0.25% of the UBS Funds' net assets¹⁵). Those shares, like all investments for and on behalf of investors, do not appear on any UBS balance sheet. According to an information by MSCI from 12 December 2020, the securities of Chinese companies referenced in the U.S. Executive Order 1359, including Hikvision, will be deleted from its global investable market indices as of the close of business of 5 January 2021.

According to the Annual Report 2019 of UBS ETF, Sicav¹⁶, the management company of the UBS Fund is to a considerable extent governed by UBS staff¹⁷. This could allow the conclusion, that UBS through the management company has a certain leverage on the composition of the fund. Furthermore, as it is an ESG fund, an enhanced due diligence on responsible business conduct, taking in account possible human rights violations through products of Hikvision, could be expected by investors.

The NCP notes that there is no agreement on whether a business relationship within the meaning of the OECD Guidelines exists in the present case. There is currently no OECD guidance directly applicable to this issue. However, there is a certain analogy to a supply chain, as Hikvision shares were part of an UBS product sold to clients. A certain analogy could also be drawn to activities of institutional investors and therefore the respective OECD guidance¹⁸ could be used as a reference. In conclusion, given the uncertainties, it cannot be excluded that a business relationship according to the OECD Guidelines related the UBS fund existed until 5 January 2021, when Hikvision shares were part of the fund, or could be established again in the future, should Hikvision be placed on the MSCI Index again.

¹⁴ MSCI describes its index as follows: "MSCI China ESG Universal 5% Issuer Capped Index is based on MSCI China Index, and includes large and mid-cap securities of the Chinese equity markets. The maximum weight of an issuer is capped at 5%. The index strategy seeks to gain exposure to companies that have both a robust ESG profile and a positive trend in improving that profile. To a small extent, some companies are also excluded from the MSCI China Index". See www.ubs.com/ch/de/asset-management/etf-institutional/etf-products/etf-product-detail.ch.de.lu1953188833.indexbaseinfo.html

¹⁵ UBS Annual report 2019 Investment company under Luxembourg Law (SICAV) UBS ETF (SICAV), www.ubs.com/2/e/files/lux_etf_ar2019e.pdf p. 428

¹⁶ Annual report 2019 of UBS ETF, Investment company under Luxembourg Law (SICAV), www.ubs.com/2/e/files/lux_etf_ar2019e.pdf p. 4

¹⁷ E.g. four out of five Board directors are UBS staff

¹⁸ <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>

Direct link

If a business relationship as defined by the OECD Guidelines exists, the next question to be answered is if the alleged human rights violations are directly linked to the operations, products or services of UBS. According to the Swiss NCP's assessment, Hikvision is a global Chinese technology company that provides amongst many others products and services in the field of surveillance technology. STP has credibly demonstrated that Hikvision products could be used in the mass surveillance in the Xinjiang region of China by the state of China. It is not within the competence of the Swiss NCP to investigate such allegations. But based on a recommendation of the renowned Ethic Council of the Norwegian Pension Fund regarding Hikvision shares¹⁹, the Swiss NCP must assume the existence of at least potential risks related to the products of the company. By investing in shares of Hikvision, the UBS fund contributes to the funding of Hikvision. As the state of China is an important shareholder of Hikvision, the NCP assumes, that a direct link between the UBS Fund and the alleged human rights violations could not be excluded, when Hikvision shares were part of the fund.

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).

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 or if it would prejudice either of the parties involved in other proceedings. The NCP is not aware of parallel proceedings in relation to UBS.

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 submitting party has engaged in an exchange with the responding party since January 2020. The Swiss NCP considers that by accepting this specific instance and offering a confidential mediation even after the exclusion of Hikvision shares from the UBS fund on 5 January 2021 it could help the parties to reach a better mutual understanding of the issues raised (e.g. existence and nature of business relationship, due diligence process in place regarding the services and products offered by UBS, etc.) and a mutually acceptable outcome. The Swiss NCP also believes that this offer of mediation could foster the continuation of this previous exchange between the responding and the submitting party and contribute to a better mutual understanding, despite UBS' position, that the issue does not concern only UBS and therefore should be discussed on an industry wide level.

f) Conclusion

The Swiss NCP concludes that a business relationship according to the OECD Guidelines between UBS and Hikvision and a direct link between UBS' products and services and the alleged human rights violations could not be excluded with regard to the UBS Fund.

¹⁹ "... to exclude shares of Hangzhou Hikvision Digital Technology Co Ltd from investment by the Government Pension Fund Global due to an unacceptable risk that the company is contributing to serious human rights violations..."; <https://etikkradet.no/hangzhou-hikvision-digital-technology-co-ltd-2/>

However, UBS' role as custodian for Hikvision shares on behalf of its clients does not lead to a business relationship with Hikvision. Therefore, the Swiss NCP partially accepts the specific instance and offers its good offices to the parties for further consideration.

6 Next steps

The Swiss NCP will offer its good offices to the parties and ask them for confirmation 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 for the raised questions, 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 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 gives the parties 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.

The Swiss NCP requests that the parties agree to maintain confidentiality during the further proceedings. In order to establish an atmosphere of trust, the OECD Guidelines foresee that no information regarding the content of the proceedings may be shared with third parties or supporters of the submission. If sensitive business information is provided or discussed during the meetings of the Swiss NCP, special requirements concerning the treatment of confidential information can be agreed upon by the parties involved in this specific instance. The NCP informs the parties that it reserves the right to stop the proceedings if one or the other of the parties does not respect this confidentiality. Even after the proceedings have been concluded, parties concerned remain committed to treat information received during the proceedings in a confidential way unless the other party agrees to their disclosure.

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