

National Contact Point of Switzerland

Initial Assessment

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

Berne, May 12, 2020

1 Conclusion

This report on the initial assessment by the Swiss National Contact Point (hereafter “Swiss NCP”) concludes that the issues raised in this submission merit further consideration. The Swiss NCP therefore accepts the specific instance and offers its good offices to the parties. This conclusion should not be construed as a judgment of whether or not the corporate behaviour or actions in question were consistent with the OECD Guidelines for Multinational Enterprises (hereafter “OECD Guidelines”) and should not be equated with a determination on the merits of the issues raised in the submission.

2 Submission and alleged violations of the OECD Guidelines

The Swiss NCP received a written submission on 16 January 2020 to consider a specific instance under the OECD Guidelines regarding BKW Group (hereafter “BKW” or “responding party”), an energy company which is headquartered in Berne, Switzerland. The specific instance has been raised by the non-governmental organization Society for Threatened Peoples Switzerland (hereafter “STP” or “submitting party”).

The submission is related to BKW’s financial investment in the consortium Nordic Wind Power DA which holds 40 percent of Fosen Vind DA power plant in Norway.¹ According to STP, the largest of the six wind power plants to be operated by Fosen Vind DA situated in the mountain area called “Storheia” affects the indigenous communities of the Sami reindeer herding community making it impossible to utilize some 44 percent of their winter pasture. According to the STP, this will force the Sami people to reduce the size of their herds and lead to such a reduction in income that one of the three remaining families will have to give up their traditional herding activities. The STP raises the question whether the remaining two families will be able to continue, as the collective work burden remains the same in spite of reduced herds.

The STP claims the failure of BKW either directly or indirectly through Nordic Wind Power DA to encourage Fosen Vind DA to prevent or mitigate adverse impacts on the affected communities. Therefore, it alleges that BKW has not fulfilled its due diligence. According to the STP, the indigenous Sami community has not been sufficiently and adequately informed and consulted in different phases of the project. This could represent a violation of the UN Declaration on the Rights of Indigenous Peoples and of the principle of Free, Prior and Informed Consent (FPIC).

¹ BKW holds 28.1% of the Consortium Nordic Wind Power DA which holds 40 percent of Fosen Vind DA. This results in an indirect share of 11.2% by BKW of Fosen Vind DA. The majority shareholder of Fosen Vind DA is Statkraft, an energy company owned by the Norwegian state.

In December 2018, STP together with representatives of the Sami community had a meeting with BKW when they informed about the impacts of the Fosen Vind DA on the Sami community.

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

- Carry out risk-based and human rights due diligence (II.10 and IV.5)
- Encourage business partners to act in accordance with the Guidelines (II.13)
- Prevent or mitigate adverse human rights impacts (IV.3)

3 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. In particular, STP expects the NCP to enable a direct engagement with a representative of BKW in a decision-making position and facilitate communication between the parties. It would like to discuss the following demands addressed at BKW:

- Change internal policies to include a robust due diligence mandate regarding human rights to fully comply with international standards such as the OECD Guidelines and the UN Guiding Principles for Business and Human Rights.
- Issue a public statement wherein the company commits to adhering to the principle of Free, Prior and Informed Consent (FPIC) in line with UN Declaration on the Rights of Indigenous Peoples and ILO Convention no. 169 in all business relationships (incl. corporate lending) in order to avoid being directly linked to harm in the future.
- To use its leverage to influence investee companies to respect human rights and environment and establish monitoring mechanisms.
- Conduct ongoing risk assessments and establish exit clauses in financial contracts to allow BKW to dissolve contracts if business partners are involved in human rights violations and environmental damages or if they do not follow the company's internal policies.
- Create a grievance mechanism based on the criteria set out in the UN Guiding Principles on Business and Human Rights and a trust fund to deal with future adverse impacts when they occur.
- Retroactively remedy adverse impacts on the Aarjel Fovsen Njaarke Sijte through compensation in the case of an agreement on land use rights through benefit sharing.
- Publicly address the adverse impacts on the Aarjel Fovsen Njaarke Sijte through acknowledgment, apologies and guarantees of non-repetition.

4 Statement of the responding party

On 24 February 2020, BKW submitted a written statement to the Swiss NCP concerning the issues raised in this specific instance. In the opinion of BKW, issues regarding the wind energy project "Fosen Vind" in Norway should be dealt with by the Norwegian NCP. BKW however confirms its openness for a dialogue regarding its policies on Corporate Social Responsibility. Furthermore, it appreciates the Swiss NCP's promotion of the OECD Guidelines and support to solve potential conflicts. According to BKW, a possible dialogue should refer to the OECD Guidelines and not to any other international agreements mentioned by STP in its submission.

BKW claims that it had carried out a comprehensive due diligence and risk assessment before deciding to invest in the project. Thereby it had also taken into account the findings of a detailed legal due diligence report established by a renowned Norwegian law firm. This report

² See full text of provisions in the [OECD Guidelines for Multinational Enterprises](#), 2011

concluded that the construction and operating permits for the grid connection and construction of the wind farms granted by the licensing authorities were legally in force and final. Furthermore, environmental impact studies have been elaborated for the six subprojects. According to BKW, the planning and approval process took place over a period of a decade with the participation and taking into account the interests of the Sami community. Due to its concerns, the project was reduced in size and further wind park projects in the area of Storheia were abandoned.

The local Sami have filed a lawsuit against the validity of the construction and operation permits issued on the basis of their special right of use for winter grazing land in the project area. In doing so, according to BKW, they ignored the fact that several compensation agreements had already been concluded between the Sami groups and Fosen Vind DA. The validity of the project concessions granted by the licensing authorities was subsequently repeatedly confirmed in court. The competent courts have also determined that the affected Sami communities must be compensated for the negative consequences of the construction and operation phases. These compensations have already been paid for the construction phase; for the operating phase they are still partly subject to ongoing negotiations. BKW recognises the fundamental right of the Sami to compensation payments. A court of competent jurisdiction has yet to decide on the amount. At the request of the Sami, compensation payments from the wind farm company included the financing of a mobile slaughterhouse, which the reindeer herders had been needed for a long time, and financial resources for feed, fences and vehicles. The Sami's legal costs for their dispute with the wind farm company were also compensated.

BKW confirms that it is aware of its corporate social responsibility which it also communicates publicly. Its approach is set out in the Code of Conduct of the BKW Group which has been adopted by the Board of Directors and is based on the following principles:

- Actions and decisions are based on all national and international legal provisions relevant to its activities. In addition to compliance with laws and regulations, value-based conduct is a key factor in BKW's corporate and social contribution.
- All BKW Group employees are bound by the Code of Conduct and trained in its content. They take personal responsibility for implementing the code throughout the company and to comply with all legal and regulatory requirements.
- Employees are supported by a professional compliance organisation. Observations or possible violations can be reported to a confidential compliance reporting office.

Agents, consultants and suppliers of BKW are expected to comply with all applicable laws and regulations, its Code of Conduct and contracts. Therefore, the Supplier Code of Conduct as well as the general purchasing conditions are based on international standards.

In the context of energy projects, BKW also attaches importance to a balanced consideration of economic, ecological and social impacts. To this end, BKW works together with various stakeholders in an open dialogue.

5 The proceedings of the Swiss NCP up to date

Since the receipt of the submission on 16 January 2020 the NCP took the following steps:

16.1.2020	Confirmation to acknowledge receipt of the submission to the submitting party
	Submission was forwarded to the responding party
21.1.2020	Information of the Swiss Embassy in Norway
22.1.2020	Information of the Norwegian NCP regarding the submission

29.1.2020	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 Instance Procedure of the Swiss NCP ³
11.2.2020	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.
24.2.2020	Receipt of a written statement by the responding party
14.5.2020	Report of draft initial assessment was sent to the STP and BKW for comments on possible misrepresentations of factual information
5./6.5.2020	Receipt of written comments by the submitting resp. the responding party

6 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. The issues raised in the submission are based on communication with the affected southern Sami community, the Åarjel Fovsen Njaarke Sijte, and STP has been engaging with the responding party since 2018 in this regard.

b) Responsibility of the Swiss NCP

According to the Procedural Guidance for the OECD Guidelines, issues should primarily be dealt with by the NCP of the country in which the issues have arisen. If a specific instance relates to business activities that take place in several adhering countries, the NCPs involved consult each other and agree on which NCP will take the lead in assisting the parties⁴. BKW has its headquarters in Switzerland⁵. According to the expectations of the submitting party (see above, section 3), the main issues to be discussed relate to the coherence between BKW's internal policies regarding corporate responsibility (e.g. its Code of Conduct⁶) and international standards such as the OECD Guidelines and other international standards implicitly referenced therein and their implementation in practice. For the discussion of BKW's internal policies and their implementation, the Swiss NCP is therefore competent. For this reason, the Swiss and Norwegian NCP have agreed that the Swiss NCP will take the lead in assisting the parties.

The Norwegian NCP will support the Swiss NCP, as appropriate, e.g. providing guidance on the local context. The submission in particular also refers to activities of enterprises such as Statkraft and Trondenergi, a state owned and a regional power company which are registered and domiciled in Norway⁷. Possible discussions regarding their activities would not fall within the mandate of the Swiss NCP.

³ Available on www.seco.admin.ch/ncp

⁴ OECD Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Paragraph 24

⁵ See Commercial Register Office of the Canton of Berne:

<https://www.zefix.ch/de/search/entity/list/firm/1011599?name=BKW%20AG&searchType=exact>

⁶ See [BKW Group Code of Conduct](#)

⁷ The STP states that these entities hold 52.1 percent respectively 7.9 percent of the Fosen Vind DA and that Statkraft is responsible for the execution of the project.

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

The BKW Group is a multinational enterprise providing international energy and infrastructure services based in Berne, Switzerland. It has subsidiaries in Austria, France, Germany, Italy and Norway.⁸ The majority shareholder of the BKW Group is the Canton of Berne with 52.54 percent of the shares.⁹

The submission is material in the sense that it refers to alleged breaches of specific provisions of Chapters II (General Policies) and IV (Human Rights) of the OECD Guidelines. The submitting party has substantiated its submission by providing the necessary information for the NCP to consider the issues raised.

d) Legal context and parallel proceedings

The NCP is aware of legal procedures in relation with the Fosen Vind DA. The Aarjel Fovsen Njaarke Sijte appealed against the expropriation of the land including the withdrawal of the reindeer herders' user rights. According to them this constitutes a violation of the UN Covenant on Civil and Political Rights, the Protocol of European Court of Human Rights and the ILO Convention no. 169. The proceedings are pending, a verdict of the Frostrating Court of Appeal is expected soon. The Aarjel Fovsen Njaarke Sijte's appeal against the permission to start construction without awaiting the outcome of the above mentioned proceedings has been discarded by the Supreme Court.

Furthermore, the Sami Council¹⁰ has filed a complaint on the behalf of the Aarjel Fovsen Njaarke Sijte with the UN Committee on the Elimination of Racial Discrimination (CERD) in 2018. They consider the construction of the wind power plant on land traditionally used by them a violation of their rights under the International Convention on the Elimination of All Forms of Racial Discrimination. The final decision of the CERD on the matter is still pending.

In 2012, the Jijnjevaerie Saami village made a submission regarding Statkraft to the Swedish and Norwegian NCPs concerning the meaningful engagement with the Saami community when building a wind power plant on reindeer herding ground in Jämtland, Sweden. In its final statement in 2016, the NCPs did not find grounds that Statkraft has failed to comply with the OECD Guidelines, but provided recommendations to further the promotion of indigenous people's rights by the company.¹¹

As the proceedings regarding matters related to Norway respectively Sweden are not directly related to the parties of the present submission, they do not prevent the Swiss NCP to pursue 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 for which the Swiss NCP is competent (cf. section 6b). The submitting party has engaged in an exchange with the responding party since 2018. The Swiss NCP considers that by accepting this specific instance and offering a confidential mediation, it could help the parties reach a mutually acceptable outcome concerning the issues raised. 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.

⁸ See [website of BKW Group](#)

⁹ See [Annual Report of BKW Group 2018, p. 98 ff](#)

¹⁰ A transnational NGO functioning as an umbrella for different Sami organizations advocating the rights of the Sami peoples in Norway, Sweden, Finland and Russia.

¹¹ See <http://mneguidelines.oecd.org/database/instances/se0004.htm>. The final statement referred to the Guidelines before their revision in 2011, which led to recommendations with regard to human rights due diligence.

7 Further proceedings

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 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.