Commentary


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Introduction

On 22 February 2021, the Dutch National Contact Point (NCP) for the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (the Guidelines) received a notification of a specific instance from the Netherlands Trade Union Confederation (FNV) with regard to an alleged violation of the OECD Guidelines by Just Eat Takeaway.com N.V., based in the Netherlands, and 10bis Ltd., based in Israel.1 10bis Ltd.—or Scoober, according to Just Eat Takeaway.com—is the Israeli subsidiary of Just Eat Takeaway.com N.V. The complaint is twofold. According to FNV, 10bis Ltd. is violating Articles 1a and 1b of Chapter V of the Guidelines because it does not want to engage in a constructive dialogue and negotiations with the General Federation of Labour (Histadrut), an Israeli trade union. In addition, FNV alleges that 10bis Ltd. management tries to interrupt the unionizing process.

Two identical complaints have been submitted: one to the Dutch NCP by FNV and one to the NCP of Israel by Histadrut. The Dutch and Israeli NCP

agreed that the Dutch NCP would handle the specific instance in coordination with the Israeli NCP.

After various meetings with all stakeholders, the Dutch NCP concluded that the notification concerning Just Eat Takeaway merits further consideration and offered its good offices to the parties. The good offices were accepted by FNV but not by Just Eat Takeaway. Subsequently, the NCP conducted an independent further examination resulting in a final statement of March 22, 2023.

Analysis

Israeli law requires that a trade union has a specified number of members among the workers of a company in order to be recognized as the legitimate trade union to represent those workers. FNV alleges that although Histadrut has the required number, 10bis Ltd./Scoober does not want to engage in a meaningful, constructive dialogue and negotiations with Histadrut. Furthermore, according to FNV, the management of 10bis Ltd./Scoober tries to interrupt the unionizing process. Because 10bis Ltd./Scoober is a subsidiary of Just Eat Takeaway, Just Eat Takeaway has due diligence responsibilities as a parent company and can be expected to exercise its leverage to prevent and mitigate the (potential) adverse impact.2

FNV alleges that the activities of 10bis Ltd./Scoober are inconsistent with several provisions of the Guidelines. Specifically, it alleges a breach of Chapter V, Articles 1a, 1b, 2a, and 7. In sum, these articles stipulate that a company respects the right of workers to establish or join a trade union and takes a constructive stance toward the right to collective bargaining, provides facilities necessary to develop collective agreements, and not threatens to transfer the enterprise or its workers across the border.3

FNV further alleges that Just Eat Takeaway is in breach of Chapter 1, para 4., and Chapter II, para 20., stipulating that the Guidelines are addressed to all entities within the multinational and require an enterprise to use its leverage to influence the entity causing the adverse impact to prevent or mitigate that impact.4

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2 Final statement, FNV v. Just Eat Takeaway.com, 22 March 2023, p. 4.
3 Ibid., p. 5.
4 Ibid., p. 5.
Finally, FNV refers to Chapter IV, para. 38, which stipulates that companies should do their best to comply with human rights, also if the country in which the company is based falls short in this respect, although a company cannot be required to violate national laws.5

First, Just Eat Takeaway takes a formal position. Formally, it asserts that the Dutch NCP has no role because whether Histadrut is the legitimate representative of the Israeli subsidiary and whether employees have been intimidated are local Israeli matters to be evaluated on the basis of Israeli law. In addition, the disputed issues are subject to proceedings before the Israeli courts and no final judgment has yet been given. FNV is not an interested party in a local Israeli matter. Just Eat Takeaway does not see how FNV’s involvement would make a positive contribution to the issue raised. According to the company, it is for the Israeli court to decide the matter.6

In addition, from a substantive point of view, Just Eat Takeaway states that only one incident has been reported. The company and its Israeli subsidiary have taken that incident seriously and immediate steps were taken. Furthermore, Israeli staff has been trained on how to deal with unions and their members. Just Eat Takeaway concludes that its Israeli subsidiary acts in line with Israeli law and have not breached the Guidelines.

From a procedural point of view, Just Eat Takeaway asserts that the Dutch NCP should evaluate whether it would not create serious prejudice for either of the parties involved in the ongoing legal proceedings in the Israeli court or cause contempt of court.7

Conclusion

Because its good offices were not accepted by Just Eat Takeaway, the NCP contacted both parties and the Israeli NCP to gather information in order to draft a final statement. Meanwhile, the Israeli National Labour Court published its final decision on appeal on 19 June 2022, finding that the manner in which the telephone registration for Histadrut membership was done did not meet the relevant requirements of Israeli law. The 10bis Ltd./Scoober employees who joined by telephone should therefore not be considered as members of Histadrut. Accordingly, the court found that Histadrut did not meet the

5 Ibid., p. 6.
6 Ibid., p. 6.
7 Ibid., p. 6.
requirement of one-third of the company’s workers as set by Israeli law for a union to be deemed a representative workers’ organization.⁸

On 22 March 2023, the Dutch NCP published its Final Statement, its overall finding being that Just Eat Takeaway acted in a manner not consistent with the OECD Guidelines.

First, Just Eat Takeaway as a parent company is expected to carry out risk-based due diligence throughout its corporate group with the aim to ensure alignment with the Guidelines by group entities as well as business partners. Reference to engaging with Histadrut as a local issue not relevant for the parent company and to the existence of ongoing local legal proceedings are, according to the OECD Due Diligence Guidance for Responsible Business Conduct,⁹ not valid reasons to refuse such engagement.¹⁰

According to the Dutch NCP, the outcome of the Israeli National Labour Court proceedings is not relevant to the extent to which 10bis Ltd./Scoober should have been open to accepting Histadrut’s right as a trade union to engage with labor issues pertaining to employees of 10bis Ltd./Scoober that they represent.¹¹

The Dutch NCP emphasizes that what is expected of companies under the OECD Guidelines may go beyond what is required of them under domestic law and regulations. According to Israeli law, the threshold is relatively high on the requirement that at least one-third of a company’s workforce should be organized in a trade union for that union to be recognized as a representative union for collective bargaining. According to the ILO’s Committee of Experts, that threshold is relatively high and could impair the development of free and voluntary collective bargaining.¹² The question of whether Histadrut has met the threshold—employees who became member after a phone call were not considered “real” members of Histadrut—should therefore not have been a determining factor for Just Eat Takeaway to consider engaging in a meaningful dialogue with Histadrut. Finally, the Dutch NCP admonishes Just Eat Takeaway for refusing to participate in the NCP proceedings, thus once again failing to act in accordance with OECD Guidelines.

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⁸ Ibid., p. 7.
¹⁰ Ibid., p. 10.
¹¹ Ibid., p. 10.
To support observance of the Guidelines going forward, the NCP makes three recommendations. First is that Just Eat Takeaway ensures that 10bis Ltd./Scoober enters into meaningful social dialogue with Histadrut. Second is that Just Eat Takeaway together with 10bis Ltd./Scoober communicates to all workers of 10bis Ltd./Scoober that they can join a trade union of their choosing without having to fear negative consequences regarding their job or position. Third is that Just Eat Takeaway enters into dialogue with FNV regarding its due diligence responsibilities as the parent company. In addition, Just Eat Takeaway should review its policies and procedures, in particular as they relate to risk-based responsibilities throughout the corporate group. The NCP will follow up this specific instance with the parties in writing to evaluate the recommendations one year after the final statement is published.

Several items stand out. First is Just Eat Takeaway’s refusal to participate in the NCP proceedings. Despite this, in accordance with the procedural rules, a final statement is made based on the information gathered by the NCP through one-to-one interviews with all stakeholders.

Second is that the NCP distances itself from the Israeli National Labour Court ruling, which confirms that Histadrut does not meet the requirements to be admitted to collective bargaining on behalf of the employees of 10bis Ltd/Scoober. According to the NCP, that is not related to the question whether Histadrut should be recognized “to engage with labour issues pertaining to employees of 10bis Ltd/Scoober that they represent.”

Finally, the NCP makes a number of recommendations, on which it will follow up with Just Eat Takeaway. Just Eat Takeaway having refused to participate in the NCP proceedings, it remains to be seen to what extent the company will follow these recommendations. That the follow-up proceedings will be published on the NCP website will generate some pressure to do so.

13 OECD Due Diligence Guidance, p. 11.