Joint final statement by the German National Contact Point for the OECD Guidelines for Multinational enterprises (NCP), UNI Global Union (UNI) and International Transport Workers´ Federation (ITF) and Deutsche Post DHL (DP-DHL) on the complaint by UNI/ITF against DP-DHL/Bonn

On November 21st, 2012, UNI Global Union (UNI) and International Transport Workers´ Federation (ITF) (hereinafter "the complainants") submitted a complaint against Deutsche Post DHL (hereinafter "the respondent") to the German National Contact Point for the OECD Guidelines for Multinational enterprises (hereinafter "NCP").

The OECD Guidelines for Multinational Enterprises, as part of the OECD Declaration on International Investment and Multinational Enterprises, are recommendations for responsible corporate conduct for enterprises acting internationally. The governments of the OECD Member Countries and other participating countries have committed themselves to promote, by their National Contact Points, the implementation of this voluntary code of conduct and to helping to resolve issues related to the OECD Guidelines raised by complaints in a confidential mediation with relevant partners.

I. Content of the complaint

The main assertion of the complaint is that the respondent has not respected the rights of workers to establish and join trade unions in several countries it is operating in and that its due diligence procedures were insufficient to respect these rights. Furthermore the complaint alleged that the respondent had systematically discriminated against African-American and Hispanic employees in its US activities. The complaint also alleges that the respondent had deployed agency workers excessively in several countries in order to avoid having to pay regular wages and employment of workers that could be active in a union. Furthermore the complaint reproaches the respondent of having used polygraph testing towards their employees in several countries.

The complainants made the following demands on the respondent:

1. to engage in dialogue with the complainants to negotiate an agreement to avoid violations of the OECD Guidelines and improve the implementation of the due diligence procedures and the respect of workers´ rights;

2. to apply the same standards to all its employees worldwide and respect the workers´ rights to establish and join trade unions.

In case such an agreement cannot be reached the complainants demanded that the NCP declares whether the OECD Guidelines have been respected by the respondents or not.

II. Initial Evaluation

Following a thorough examination – taking into account additional information from the complainants and comments both from the respondent and from federal ministries -, the German NCP accepted the complaint for a more in-depth examination on 18 June 2013 as regards the alleged violation of trade union rights in Turkey, India, Colombia, Indonesia and Vietnam.

As for the alleged violation of trade union rights in Bahrain, Guatemala, Hong Kong, South Africa, Panama, Malawi, USA and Norway the NCP did not accept the complaint as it considered the allegations to be not sufficiently specific or referring to cases already resolved which took place several years before the complaint was raised. The NCP did not consider that these cases gave rise to concerns of ongoing or future violations of trade union rights. In Norway, the dismissal of a trade union activist had been resolved in court, with no indication that the dismissal was made because of trade-union activities.

Two cases of alleged violation of trade union rights in the USA in 2006 and 2007 had been discussed at the National Labour Relations Board, with the respondent accepting the decision of the National Labour Relations Board. As for another case of alleged violation of trade union rights in the USA, the case was pending at the National Labour Relations Board. Regarding this case, the NCP consulted with the US NCP. The NCP considered that there was no reason to assume that the respondent would not accept the outcome of the proceedings at the National Labour Relations Board. Therefore the NCP saw no additional value in a mediation.

As for the alleged discrimination against African-American and Hispanic employees in two cases in the USA the NCP took note that both cases had been brought before

the Equal Employment Opportunity Commission. In one case a settlement had been agreed in November 2012 that the respondent had accepted. In the other case, that is still pending, the respondent had declared that it would accept the outcome of the proceedings. After consultations with the US NCP, the NCP considered that there was no concern of ongoing or future violations of the OECD Guidelines in this respect.

As for the alleged deployment of agency workers, the NCP considered that the deployment of agency workers does not represent a direct violation of the OECD Guidelines or other internationally applicable standards. Deployment of agency workers is not expressly prohibited under the OECD Guidelines, nor is its extent regulated. Similarly, the internationally recognised human rights and the International Labour Organisation Declaration on Fundamental Principles and Rights at Work of 1998 (core labour standards) do not contain any provisions in this regard. Convention 181 on Private Employment Agencies, which covers the deployment of agency workers, has not been ratified by Germany or the majority of ILO member states. Even this Convention, however, does not prohibit or quantitatively restrict the employment of agency workers. To the NCP there were no hints to a widespread use of agency workers – and thus an intention to refuse regular pay or avoid trade union rights, either. Therefore, the NCP did not accept the complaint for further evaluation on this account.

As for the use of polygraph testing, the NCP noted that the use of lie detectors can only represent a violation of the OECD Guidelines if the OECD Guidelines or international human rights standards prohibit their use at work. The NCP considered that there is no internationally recognised principle which prohibits the proportionate use of lie detectors by companies at work. The recommendations in the Code of Practice on the Protection of Workers' Personal Data adopted by an expert group at the International Labour Office in Geneva in 1996 cited by the complainants are not part of the core labour standards embraced by the OECD Guidelines. For this reason, failure to comply with the recommendation of the Code of Practice not to use lie detectors in the collection of employee data cannot on its own serve as grounds for a violation of the OECD Guidelines. Thus, to the NCP the OECD Guidelines do not expressly require the respondent to refrain from the use of lie detectors. Furthermore, the NCP did not consider itself to be in a position to assess the extent

to which the use of lie detectors is permissible under the national legal system of the respective country. The OECD complaint procedure does not assess national legal systems or ensure compliance with them.

III. Mediation

Following partial acceptance of the complaint regarding possible disrespect of the workers´ rights to establish and join trade unions in Turkey, India, Colombia, Indonesia and Vietnam the NCP prepared for the mediation, contacting both the Colombian and the Turkish NCP for comments. The German embassies in Turkey and India were also involved. Mediation meetings with both the complainants and the respondent were held on September 12th and December 11th, 2013, as well as bilateral discussions with the respondent on November 4th and the complainants on November 5th, 2013. Both sides had been given the opportunity to present their views on the issues in written comments.

On the basis of a constructive dialogue in the discussions on September 12th and December 11th, 2013 considerable progress was made:

1. Turkey

   The complaint of possible disrespect of the workers´ rights to establish and join trade unions in Turkey was based on the alleged dismissal of 37 employees because of union activity as well as the allegations that the respondent refused to recognize Tümtis as a union and had exerted pressure on employees to resign from Tümtis. As of September 2013, in four cases, in which employees challenged their dismissals before Turkish Labour Courts, the Appeal Court had maintained the decision of the Court of first instance that the dismissals were unlawful because they were based on union activity.

   In September 2013 the respondent announced that it would not object to the recognition of Tümtis by the competent Turkish authorities. On November 6th, 2013, DP DHL started negotiations with Tümtis on working conditions, wages as well as settlement in the cases of employees that were dismissed because of alleged union activity. The respondent and Tümtis are aiming to conclude the negotiations within the period of 60 days set out by Turkish law.

The NCP is confident that with the recognition of Tümtis and the start of negotiations with Tümtis considerable progress has been made to respect the workers´ rights to establish and join trade unions as recognized by section V 1 a of the OECD-Guidelines.

2. India

The alleged disrespect of the workers´ rights to establish and join trade unions in the respondent´s subsidiary in India, DHL Express India Pvt Limited (hereinafter DHL Express) was based on several reproaches:

- the dismissal of three employees because of union activity, two of which in 2001 and one in 2003;
- the transfer of seven employees from Kolkata to Delhi in 2004 and the refusal to retransfer them to Kolkata unless they disassociated themselves from the union; out of the seven employees transferred to Delhi in 2004 three had allegedly been retransferred to Kolkata after giving up union activity;
- suspension of two employees at Kolkata for four days in 2013 because of reading union sponsored material during work;
- wide application of a “Hay Grading system” even to workers that do not meet the requirements for Hay Grading (i.e. managerial or administrative tasks) in order to avoid that Hay grade workers are represented by unions and that agreements by unions are applicable to them.

The respondent pointed out that:

- The two dismissals in 2001 occurred at a time when DHL Express had not yet taken over activities from the previous owner of the subsidiary, so that DHL Express was not responsible for these cases; in the other case the dismissal was due to alleged pilferages, two labour court instances having confirmed that the respondent was not required to reinstate the employee while a claim at a different division of the labour court of second instance was still pending.
- The transfers did not occur because of union activity and were not contested in court by the employees in 2004. However, a claim brought by union representing employees transferred from Mumbai to Delhi had been rejected by a court. DHL Express had transferred back 3 persons from Delhi to Kolkata, the latest in May 2013 when vacant position had become available.

DHL Express had not transferred the remaining 4 persons back, as there were no vacant posts in Kolkata. DHL Express, however, was prepared to offer posts that would become vacant in Kolkata due to retirements resignations or other reasons.

- Suspensions occurred because of a slanderous letter concerning the manager of the site and use of the subsidiary´s photocopier to copy union material during working hours in violation of local law; however, to enhance goodwill, the respondent was ready to reduce suspension to two days if employees would excuse themselves personally to the manager.
- Employees had applied to be put into Hay Grades voluntarily as they wanted to assume additional responsibilities and get higher wages that go with the supervisory, administrative and organisational tasks of Hay Grade jobs.

To the NCP the two dismissals that occurred when the respondent´s subsidiary had not yet taken over the company need not be considered further in this specific instance as the dismissals cannot be attributed to the respondent or its subsidiary.

As for the other dismissal in 2003 the NCP took note that the High Court of Judicature at Madras, in 2012, had confirmed an earlier decision of the Labour Court of Chennai. This court had held that the order of discharge was invalid as the subsidiary did not carry out an enquiry into the alleged cases of pilferage before the dismissal. However, the court also considered that confidence of the subsidiary in the employee had been lost due to incidences of pilferage. Therefore the court had not obliged the subsidiary to reinstate the employee, but had confirmed the termination of the employee´s contract and awarded him compensation. In the mediation the complainants underlined that the former employee does not primarily seek reemployment but a declaration of the respondent´s subsidiary to confirm that the dismissal was not based on penal offenses. As an appeal against the Decision of the High Court of Judicature at Madras at another Division of the High Court of Judicature of Madras is still pending the parties agreed that they would await the outcome of this decision and try to reach an agreement for a settlement at local level then.

As for the four employees transferred to Delhi in 2004 the NCP noted that their contracts contained a clause in which they agreed to work at other locations of the respondent´s subsidiary if the subsidiary considered this necessary. The NCP considered the respondent´s explanations credible that there was no sufficient number of contractual employees at Kolkata the contracts of which could be suspended in order to enable the employees to return to Kolkata at short notice. The NCP took note of the respondent´s commitment to offer the employees any job that would become vacant in the future.

As for the suspensions there was agreement of the parties that the issue would be settled with the reduction of the suspension to two days and personal apologies of the employees to the manager of the site. As the 4 days suspensions have already taken place, the employees will get 2 days extra paid leave in 2014.

As for Hay Grades, the NCP recalled that the OECD-Guidelines recommend that the workers´ right to establish or join trade unions and to have trade unions of their own choosing be recognised for the purpose of collective bargaining, section V 1 a and b of the OECD-Guidelines is respected. It was noted that Hay Grades were introduced more than 7 years ago and not challenged in court by employees. Both parties agreed that by adhering to a Hay Grade, employees are not prohibited from being a member or being active in a union pursuant to applicable Indian law. Thus, Hay Grade employees are entitled to form and join a union of their choice representing Hay Grade employees and engage in collective bargaining with their employers. It was clear, too, that benefits agreed to in collective bargaining relating to workmen at present do not apply to Hay Grade employees with supervisory and managerial tasks. However, it was not clear whether under Indian Industrial Labour Law unions representing workmen are prohibited from also representing Hay Grade employees. It appears that currently there is a case pending by the local union on this issue with the Labour Commissioner at Chennai.

The respondent agreed that it would again inform its Hay Grade employees of their right to be members of a union and of the possibility of collective bargaining by the unions for Hay Grade employees. The respondent confirmed that DHL

Express will negotiate with a union that is held to be legally representing Hay Grades pursuant to Indian law. The respondent will respect the outcome of the proceedings currently pending at the Labour Commission at Chennai once it has become legally binding.

The respondent also agreed that it will conduct a further internal industrial relations assessment in India in 2014 that relates to DHL Express´ activities in India. This assessment will include meetings with relevant stakeholders as well as local union representatives in India. The NCP will receive a report on the outcome of the internal assessment. This will be shared with the complainants on the basis that it will be kept confidential and not be used directly or indirectly in the public domain. However, its content can be shared with local unions under the conditions mentioned above.

3. Colombia

The allegation that the workers´ rights to establish and join trade unions is not respected was based on the reproach that:

- One worker had been suspended because of informing other employees about workers´ rights by posting information on the company´s bulletin board.
- Two workers had been dismissed because of exerting workers´ rights: One worker was allegedly dismissed because of underlining the need to discuss working conditions to a superior, another worker after making a video showing poor working conditions resulting from increased workload.
- A workers´ representation could not be set up because the workers are extremely scared and afraid of dismissal because of union membership.

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- The respondent ought to improve the atmosphere at DHL Express Colombia in order not to discourage union activity.

According to the respondent:

- The suspension was due to a violation of the employees´ duties, not because of Union activities.
- The two workers were dismissed because of bad work. This decision was upheld by the court and there is no adverse finding against the respondent.

- The respondent considers examining Colombia in the course of its internal industrial relations risk assessment in 2014.

The Colombian NCP informed the NCP that in case of the suspension and the two dismissals it saw no violation of Colombian labour law. The case of the suspension had been brought before the Ministry of Labour. The Ministry of Labour, after a review of the allegations and evidence presented, had decided not to sanction the respondent. However, the Colombian NCP saw an opportunity to improve the atmosphere at DHL Express Colombia in order not to discourage workers from joining and being active in a union. The Colombian NCP offered its assistance in possible talks by the respondent with the employees at DHL Express Colombia and is ready to support the parties' efforts to improve the industrial relations at DHL Express Colombia by accompanying the parties and presenting best practices in accordance with the Guidelines.

To the NCP the suspension and the dismissals did not seem to violate the OECD Guidelines. In September 2013, an agreement between the local union and DHL Express Colombia to use the bulletin board for announcements was concluded. However, the NCP sees the opportunity for further efforts by the respondent to alleviate any existing fears of DHL Express Colombia´s employees of negative consequences of joining and being active in a union. To this effect, the respondent agreed to carry out an industrial relations assessment in Colombia at short term that refers to all of the respondent´s activities in Colombia. This assessment should comprise talks with employees and separate meetings with relevant stakeholders and the complainants, as well as with the Colombian NCP. The Colombian NCP has expressed its support to the arrangement and has informed the NCP that its participation in further work will by no means compromise its ability to review specific instances regarding any of the parties. The NCP will receive a report on the outcome of the internal assessment. This will be shared with the complainants on the basis that it will be kept confidential and not be used directly or indirectly in the public domain. However, its content can be shared with local unions under the conditions mentioned above.

4. Indonesia

The complaint reproached the respondent of not accepting a union founded at the respondent´s subsidiary, although all legal requirements were met.

The respondent denied that the material and formal requirements for acceptance as a union, i.e. support by 50 per cent of the employees, were met. Once the requirements were met the respondent would accept the union.

In the mediation it became clear that there was uncertainty whether the Indonesian Ministry of Manpower had recognized the union this summer or not. The respondent confirmed that DHL Express, represented by the legal entity PT Birotika Semesta, will start collective bargaining negotiations expeditiously with the union, if the Ministry of Manpower has verified that the legally required union membership of 50% + 1 is met and requests that it does so. Both parties provide the Ministry of Manpower with the current data on employees and union membership.

5. Vietnam

According to the complaint the respondent refused to accept a union, as the respondent refused to organise an election for union representatives necessary according to Vietnamese law for the union to become officially accepted.

The respondent asserts that the union activists did not manage to nominate sufficient workers to form the Permanent Labor Union Executive Committee when calling for interested employees to put down their candidatures. However, the respondent declared that it was ready to give union activists the opportunity to call for nominations again and that on December 6th it had called once again for nominations.

In the mediation the parties agreed that therefore the issue had been settled.

6. Due Diligence

The complainants consider the current fora for the complainants to raise and discuss industrial relations issues of concern with the respondent to be insufficient. They acknowledge that the respondent met regularly with the

complainants to discuss general subjects of industrial relations until May 2012. However, the complainants criticise that these talks do not lead to concrete results and that the respondent´s Code of Conduct is not a sufficiently appropriate tool. Furthermore, to the complainants the respondent´s headquarters seemed not to be informed by its subsidiaries of particular issues in the subsidiaries.
The complainants therefore suggested a grievance mechanism.

The respondent pointed out that it had more than 470,000 employees in 220 countries and territories worldwide at the end of 2012. It is a member of the UN Global Compact and declared its commitment to respect the ILO Declaration on the basic rights and principles at work of 1998 in accordance with national law and practises. Many of its employees are being represented by employee representatives, works councils or unions. Since 2003 the DPDHL Forum, equivalent to an European Joint Work Council and consisting of employee and management representatives, discusses issues according to its agreement. The complainants are entitled to participate in the plenary meetings. The respondent regularly reports on its Corporate Social Responsibility activities to its Board and to its shareholders and publishes a yearly Corporate Responsibility Report.

The respondent explained that it had a worldwide compliance program in place that allowed all of its employees to report breaches of the respondent's code of conduct and other compliance related issues via different channels such as the management reporting line, local grievance procedures, a compliance hotline, website and email.

The respondent further explained that it made comprehensive efforts to safeguard its employees' labour rights and to ensure compliance with national and international law. In order to improve industrial relations it had, in particular, introduced an industrial relations assessment process in 2013 to examine the respect of labour rights in selected emerging market countries. This comprises visits by employees of the respondent´s headquarters to subsidiaries to evaluate respect of workers´ rights, to investigate possible deficiencies and propose an action plan with concrete improvements, with implementation of the action plan to be examined afterwards.

The respondent also explained that it had introduced a forum with clear contact points to deescalate labour relations issues and to make best practises in labour relations known.

To the NCP the respondent in general shows a good sustainability performance and has succeeded in assuming Corporate Social Responsibility. The respondent is considered an attractive employer world-wide as in the respective regions. As a leading global employer the respondent´s conduct influences standards and practises worldwide.

The NCP considers that the number of direct contacts of the complainants with the respondent could be increased to three-monthly meetings, so that the complainants could raise issues of concern regarding labour relations in a more direct way. These talks would be carried out in the mutual understanding that this does not grant the complainants an exclusive right to raise issues of labour relation to the respondent in relation to other representatives of the employees, in particular other unions engaged at local level. The NCP will receive reports on these meetings in the next two years. It is understood that issues that could not be settled to the complainants´ satisfaction could be raised at the NCP pursuant to the OECD Guidelines´ procedure in specific instances.

The parties agree that by means of the mediation process at the NCP the alleged complaints have been clarified or can be resolved by further bilateral dialogue.

Berlin, 2014

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