

T R A N S L A T I O N

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GOVERNMENT OF CHILE
UNDER-SECRETARIAT OF
INTERNATIONAL ECONOMIC RELATIONS

CER
RESPONSIBLE BUSINESS CONDUCT
NATIONAL CONTACT POINT - OECD

FINAL STATEMENT

Tensa-EIP & Liquidator

Specific Instance

18 May 2021

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1. Introduction

Chile's National Contact Point (hereinafter, NCP) before the Organisation for Economic Cooperation and Development

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(hereinafter, OECD) responsible for the OECD Guidelines for Multinational Enterprises (hereinafter, the Guidelines), reporting to the Responsible Business Conduct Division of the Under-Secretariat of International Economic Relations, is submitting the *final statement* set forth herein.

The *final statement* describes the process and results of the analysis carried out in connection with the specific instance. It is based on information received from the parties and the steps taken by the NCP. According to the rules of procedure of the Chilean NCP, they will always prepare a *final statement*, which is public, whether it was preceded by an Initial Statement or good offices.

The *final statement* marks the closing of the procedure before the NCP.

2. The Parties

2.1 Background of the submitter

Incumbent liquidator of the debtor enterprise, namely Tensa-EIP, in forced liquidation procedure entitled "TENSA-EIP CHILE SA", Case Roll No. C-16226-2018 issued by the 20th Civil Court of Santiago, representing the creditors mentioned in Annex 11 attached to the submission, including enterprises, pension funds, natural persons, Unemployment Fund Administrator (AFC).

2.2 Background of the enterprise

The submission refers to the enterprises named Tensa-EIP Chile, Tensa S.A. Spain, EIP SGPS (Portugal) and EIP Portugal, all of them belonging to the EIP Group, and identifying EIP SGPS as the controlling group member.

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Tensa-EIP Chile S.A. is a subsidiary of the parent company EIP S.A. (Electricidade Industrial Portuguesa S.A.), an enterprise in the business of carrying out electrical projects in the Southern Cone. Their main activity focus is transmission (Construction of Lines and Substations) and power distribution, and the joint serial manufacturing of metal structures and heavy metalworking.

A Spanish enterprise, Tensa S.A. was incorporated in 1976 to carry out the business of designing, building, and maintaining low and high voltage overhead and underground lines. Since 2006 it has been part of the E.I.P. Group, when it was purchased by Electricidade Industrial Portuguesa S.A., and in 2012 it expanded its presence to the Ibero-American region from Chile.

The EIP Group originated from the enterprise Electricidade Industrial Portuguesa S.A. (EIP), which was incorporated in 1956. They are essentially in the business of designing, supplying, and building power systems and are present in 4 continents and 14 countries, with more than 1,500 employees and 130 engineers, as reported in Tensa SA website.¹

3. Summary of the Request

On 9 June 2020, the liquidator, through their lawyer, submitted a request for a specific instance before this NCP, which identifies alleged violations by the enterprise of the recommendations set forth in Chapter IV, Human Rights, of the Guidelines. In their submission, the liquidator states that the

¹ <http://www.tensa-sa.com/grupo-eip/>

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enterprise had resorted to deception when making transfers abroad to reduce their assets, with the purpose to avoid fulfilling their obligations towards to 59 creditors.

The requesting party argues that Tensa-EIP's behaviour may have been a concerted action backed by EIP Group's controlling enterprises based in Portugal and Spain. Among these actions, they point out that Tensa-EIP began a reorganisation process in 2018 in Chile to pay their debts, which would have a contribution from EIP Portugal. However, they state that the transfer never took place; instead, there was a movement of funds on the other direction i.e., a transfer from Chile to the other related enterprises. This meant that, at the time of the liquidation, there was no money in current accounts, or there were other assets available, with which to meet the relevant payment obligations.

It should be noted that, as set forth in the submission, the above offence may be construed as a criminal action committed against the natural persons involved in their operation in Chile and, therefore, it does not affect the foreign enterprises of the EIP Group. This, in the requesting party's opinion, is not an action that generates duplication.

Chapters mentioned in the request for review:

Chapter IV. Human Rights

Outcomes expected by the requesting party through the procedures carried out the Chilean NCP:

As stated in the submission of the specific instance before the NCP, the expected outcomes are as follows:

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- (a) That the NCP, in coordination with their fellow colleagues in Portugal and Spain, summons hearings seeking the remedial actions from the parties involved, especially seeking compliance with the contractual obligations of TENSA-EIP by the EIP Group.
- (b) That the EIP Group enterprises implement participatory due diligence processes allowing the identification and repair of human rights violations in the value chain, especially those related to suppliers affected by the actions of the Group's enterprises in Chile.
- (c) That the EIP Group implements rules and guidelines for all their enterprises and suppliers, to avoid repeating the behaviours reported in the submission.

4. Assessment by NCP on specific instance

Throughout 2020, a series of meetings were held with the contracting parties and with the NCPs of Spain and Portugal, aimed at coordinating the most appropriate way to process this application.

On 28 August 2020, the Chilean NCP sent Letter No. 902 to the enterprises Tensa S.A. and EIP - Electricidade Industrial Portuguesa S.A., through the DocDigital communications platform, notifying them about the submission.

By this means of digital communications, the Letter was sent to the enterprises' email accounts provided in the submission. The Letter urges enterprises to reply to the NCP, within a specified about the facts raised therein. After no reply was received by the enterprises within the specified

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deadline, the NCP insisted to get a reply from them, for which they granted a new deadline. This second period expired without receiving any type of communication from the enterprises mentioned above.

The non-reply on the enterprises' part, including the fact that they do not have presence in Chile, prevented the carrying out of additional actions. This way, in accordance with the OECD Guidelines for multinational enterprises, after having carried out an analysis of the background information according to the criteria set forth in the Procedures for implementing the Guidelines, the NCP decided not to continue with the assessment of the issues referred to in this Specific Instance.

Is the Chilean NCP the relevant entity to assess the issues raised in the notice?

The case herein refers to alleged violations of multinational enterprises that occurred in national territory. However, we are in front of a commercial relationship between private parties, which situation requires further details to assess any relevance under the Guidelines, as well as the feasibility of contributing in a positive way to the resolution of the issues raised.

The Chilean NCP, aware of the fact that the enterprises mentioned in the submission do not have a presence in the country, which is an additional difficulty, held meetings with the NCPs of Portugal and Spain, and the content of the submission with them. Together they decided that work related to the instance was led by the Chilean NCP.

Who are the requesting parties and what are their

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interests?

The requesting party is the incumbent liquidator Tensa-EIP Chile S.A. and represents their creditors, including enterprises, workers' pension funds, and natural persons. Its interest is that the economic compensation of the parties involved is fulfilled. In addition, it is requested that all the enterprises which are part of the EIP GROUP carry out a participatory due diligence process that allows identifying and repairing all human rights violations in the value chain, especially in terms of remedial actions towards the suppliers affected by the behaviour of the Group's enterprises in Chile. The submission also request that they develop standards and guidelines for all their enterprises and suppliers, to avoid the repetition of similar behaviours.

Regarding the interests raised, doubts arise about the feasibility of the NCP being the appropriate instance to obtain financial compensation from the parties involved in a process of judicial reorganisation and liquidation. This is also difficult to assess in the absence of a reply from the enterprises which received the notification.

Is the question raised significant and well-grounded, and in accordance with the Guidelines?

Indeed, a harmonious relationship between enterprises is a condition that, without any doubt, is of interest from the general point of view of the responsible business conduct, and particularly from the Guidelines. In this specific case, the issue relates to the relationship with several creditors of different nature, including workers' pension funds, regarding a

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debtor multinational enterprise, so there is a connection between the enterprise's activities and the question raised.

However, the decision to resolve a contractual difference in various ways is a sovereign matter for any enterprise or entity and its potential relationship with the Guidelines must be analysed in each circumstance. In this case, the requesting party represents a group of natural and legal persons.

As this NCP pointed out in *Minera Escondida & Escapes Santander (2011)*, should the case involve several enterprises, the impact on economic or social progress of a significant scale and magnitude could support an in-depth analysis of the enterprise's relationship with their suppliers, according to the objectives of the Guidelines.

The case analysis could include this case. In other words, the exit of an enterprise from a country and the way in which relations with the different business partners and stakeholders are managed is a significant action.

Is there a connection between the activities of the enterprise and the question raised?

From the background information collected, the Chilean NCP decided that the enterprise in question, Tensa-EIP Chile S.A. of the EIP Group, is part of a multinational organisation and operations scheme, and their activities could be linked to what is stated in the request for a specific instance.

What is the relevance of the applicable legislation and procedures, including court decisions?

In 2018, TENSA-EIP went through a reorganisation process which included a judicial reorganisation agreement. During 2019,

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the request for liquidation of the enterprise mentioned above was submitted. In said proceeding, the enterprise would have declared that the poor state of their business was due to the relationship with a third enterprise. Following a reorganisation agreement, the enterprise would not have fulfilled part of their obligations. Currently, even though their assets have been seized, the process server states that their value does not correspond to what was initially reported by the enterprise.

In what way similar issues, or issues related to this specific case, have been or are being dealt with in connection other local or international processes?

Due to the resolution mentioned above before the civil court, criminal proceedings have been filed for the offences of delivery of false and incomplete records and fraudulent loss of assets. Although, in the opinion of the requesting party, it is not an action that generates duplicity -since it is aimed at the natural persons involved in the operation in Chile and does not affect the foreign enterprises of the EIP Group, it is a relevant precedent to consider, as a parallel procedure.

Will the review of the issues contribute to the object and effectiveness of the Guidelines?

The Guidelines are clear in defining the behaviour expected by multinational enterprises. The objective is set forth in paragraph 1 of the Preface to guarantee that the enterprises' activities are carried by strengthening mutual trust between them and the enterprises where they carry out their activities, among other considerations. However, the Guidelines do not establish a complete detail of the

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relationship between multinational enterprises and their business partners.

However, they set forth some recommendations linked to this relationship. Thus, the chapter on general principles and the general references to risk-based due diligence below set forth some relevant recommendations regarding enterprises to be considered by this NCP, namely:

3. *Encourage the generation of local capacities through close cooperation with the local community, including the interests of entrepreneurs, while carrying out the activities of the enterprise in internal and external markets in a way compatible with the need for healthy commercial practices.*
7. *Develop and implement self-disciplinary practices and effective management schemes that promote a relationship of mutual trust between enterprises and the societies where they operate.*
10. *Implement risk-based due diligence, incorporating it, inter alia, into its risk management systems, to identify, prevent or mitigate actual or potential negative impacts (...). The nature and scope of due diligence depend on the circumstances of each situation.*
12. *Strive to prevent or mitigate negative impacts, even in cases where enterprises have not contributed to them, if they have a direct link with their activities, goods, or services by virtue of a commercial relationship (...).*

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It should be noted that, in addition to the disclosure of information, it is expressly stated that:

1. *Enterprises must guarantee the publication of accurate information on the significant aspects of their activities, including their financial situation, performance, structure, and corporate governance system.*

However, the requesting party has used the chapter on Human Rights as the basis for their submission, without stating precisely which recommendations would they relate with. In her analysis, the NCP could not establish whether, in principle said chapter was relevant in this specific instance.

This way, even though there are recommendations that can be linked to the relationship between a multinational enterprise and a supplier, based on the other elements for analysis, it was decided that reviewing the issues would not contribute to the object and effectiveness of the Guidelines.

5. Conclusion

With the information available and after the analysis carried out, it is possible to conclude that there is not enough basis within the Guidelines to give further consideration to the question raised.

Both the Guidelines and the procedural rules of the Chilean NCP set forth that, if the multinational enterprise does not respond to the notification sent by the NCP or declines to become part of the process, and communication alternatives with them having been exhausted, the NCP will issue a final statement

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with the relevant recommendations, taking into account the circumstances and background information available.

By virtue of the foregoing, the Chilean NCP proceeds to issue the Final Statement, which includes a set of recommendations for enterprises.

5.1 Observations and Recommendations by NCP

The Chilean NCP did not receive a reply from the enterprises served, which prevented them from knowing their views on what was stated by the applicant and whom he represents. However, the Chilean NCP has considered it relevant to conclude this final statement with the following recommendations:

Chilean NCP recommendation for enterprises

- (i) It is recommended to take into consideration participating in good faith in the processes and activities of the network of National Contact Points, responsible for the implementation of the Guidelines, in the countries where they operate.
- (ii) It is recommended that enterprises and their parent companies implement and periodically review the principles of good corporate governance, promoted by senior management, and that they translate into effective management systems and self-disciplinary practices, known to all and periodically reviewed.
- (iii) Enterprises are urged to establish mechanisms that guarantee transparency, especially with stakeholders, which will help build relationships of trust.

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(iv) Enterprises and their parent companies are encouraged to implement ongoing risk-based due diligence processes, both in their operations, goods, and services, and throughout their supply chains, to identify actual and potential impacts, according to OECD guidelines.

According to the Guidelines, confidentiality must be kept during the procedure. Information and opinions provided during the proceedings shall be confidential, unless the party concerned consents to the disclosure of the information or views or where confidentiality contravenes the provisions in the domestic laws and regulations.

It is noted that, throughout the process carried out in this specific instance, the social context in Chile since October 2019 and the pandemic since March 2020, have had an impact on the processing capacity of the NCP.

According to the transparency principle governing the NCP duties, the final statements are published in the NCP's website and informed and sent to OECD Working Group on Responsible Business Conduct.

Before the final statement is issued, the parties are given the opportunity to comment on the draft thereof, bearing in mind that the drafting of the statement is always the responsibility of the NCP, who will decide on the final version of the document.

The Chilean NCP thanks the NCPs of Spain and Portugal for the meetings held and for sharing their views on this specific

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instance.

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Chile's National Contact Point to the OECD
Responsible Business Conduct Division - SUBREI

VMG/

NCP Chile Secretariat

ANNEX: Procedure before the NCP

- 9 June 2020 : Request is submitted.
- 15 June 2020: NCP acknowledges receipt of submission.
- 15 June 2020: Upon consultation with the NCP, the requesting party confirms that there are currently no offices or representatives of TENSA-EIP in Chile.
- 18 June 2020: The NCP sends communication to NCPs of Spain and Portugal informing receipt of Specific Instance.
- 26 June 2020: Meeting with the NCPs of Spain and Portugal is scheduled.
- 3 July 2020: Meeting with NCPs is held.
- 10 July 2020: Meeting is held with the NCPs and the OECD Secretariat. Even though the enterprises no longer have a registered address in Chile, the Chilean NCP is appointed to lead the process

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as she originally received the submission. Contact information of the respective enterprises is requested from the NCPs, sharing the web pages of said entities.

28 August 2020: Digital letter is sent to enterprises.

31 August 2020: Encrypted folder with background information is sent to enterprises.

1 October 2020: Mail is sent to PNCs of Spain and Portugal informing that there is no reply from the enterprises. Another mail is sent to enterprises giving a two-week deadline for replying.

12 January 2021: Mail is sent to the requesting lawyer to ask for a meeting; he informs his departure from the law firm and the case.

14 January 2021: A meeting is held with a new team of the PNC of Spain, with case updating.

20 April 2021: Draft Final Statement is sent to both parties, giving 10-day deadline to receive feedback.

23 April 2021: Communication is received from the requesting party's lawyer, informing his interest to continue with the case. It is indicated that a draft of the final declaration has already been sent for the reasons stated therein. Meeting is offered and reminds deadline for documents.

May 5 2021: The requesting party is informed about the expiration of the term, and a new term is

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delivered on May 6.

12 May 2021: Draft final statement is shared with the NCPs of Spain and Portugal.

18 May 2021: In the absence of comments, the publication of the final statement is decided.

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Translated by Pamela Gallardo V., Res. N° 1,703 dated 28 July 2014.

DONE IN SANTIAGO, CHILE, on this 17th day of June 2021.

ORIANA GONZÁLEZ BUSTILLOS

ASSISTANT ADMINISTRATIVE DIRECTOR

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Revised by the Chilean NCP Secretariat, on the 15th day of July 2021. In case of discrepancy, the Spanish version shall prevail.