

Final Statement

TELEFÓNICA & CONTRACTOR COMPANY'S UNION (2019)

Non-official English translation

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CHILE'S NATIONAL CONTACT POINT | RESPONSIBLE BUSINESS CONDUCT DIVISION |
UNDERSECRETARIAT OF INTERNATIONAL ECONOMIC AFFAIRS

FINAL STATEMENT

Telefónica & Contractor company's union

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I. Introduction

1. Chile's National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (Guidelines), located in the Responsible Business Conduct Division of the Undersecretariat of International Economic Affairs, issues this Final Statement.
2. The Final Statement describes the process and the results of the analysis of the specific instance to which it refers. It is based on information received from the parties and the steps taken by the NCP. If there was confidential information submitted to the NCP in the course of the procedure, it has not been disclosed in this statement. According to the NCP's rules of procedure, the NCP will always issue a Final Statement, which is public, whether or not it has been preceded by an Initial Statement or good offices.
3. The Final Statement marks the closure of the NCP procedure, without prejudice to the possibility of a follow-up stage.

II. Parties

a) Identification of the submitter

4. The submitter is the Trade Union of Konexia and Konexia employees (hereinafter, the submitter). Konexia S.A. was a call centre service provider whose sole client was Telefónica Chile S.A. and Telefónica Móviles Chile S.A. (hereinafter, Telefónica or the company).

b) Identification of the company

5. Telefónica is a multinational telecommunications company with a presence in various countries across Europe and the Americas.

III. Issues raised

a) Summary of the specific instance request

6. On 6 June 2019, the submitter submitted a specific instance request to the NCP, identifying alleged violations of the Guidelines by the company.
7. According to the submitter, these violations pertained to irregular payment practices, violations of fundamental rights, and anti-union practices by Konexia, for which Telefónica was sued as a subsidiary party.
8. The submitter states that on 2 May 2019, Konexia informed the Union's President that the company was closing that very day, and therefore, salary and severance payments needed to be settled with Telefónica. The following day, Konexia sent written termination notices to its employees, citing business needs as the reason (Article 161, Paragraph 1 of the Labour Code). During the first meeting between the union and Telefónica Movistar, specifically with its Labour Relations Manager and Legal Head, the company stated that it would acknowledge 271 Konexia workers (out of a total of 340). The submitter further claims that Telefónica was unwilling to pay severance compensation to the workers according to subcontracting legislation, instead using a "settlement agreement" framework, which did not equate to the termination of an employment relationship. On 4 June 2019, Telefónica sent an email to Konexia employees informing them they would

receive severance pay, which the submitter claims was, in fact, a settlement agreement that waived their right to legal claims regarding the payments received, thereby infringing on workers' rights.

9. The submitter identifies alleged breaches by the company of the following chapters of the Guidelines:

1. Chapter IV. Human Rights.
2. Chapter V: Employment and Industrial Relations.

10. The expected outcome by the submitter through the NCP procedure is as follows:

1. Subrogated payment of wages, benefits, and legal compensation (in accordance with Articles 183-A et seq. of the Labour Code).
2. Payment of maternity and medical leave, and union protection benefits, following the regulations of the Labour Code and relevant ILO conventions on trade union freedom, maternity rights, non-discrimination, etc.
3. Compensation for lost union dues concerning workers who ceased to be members due to the aforementioned actions.

b) Summary of the company's response

11. By letter dated 25 June 2019, Telefónica sent a response to the NCP, stating:

- As the client company, it only became aware of Konexia's dismissal of its workers upon receiving a letter from the company on the same day the dismissals took place (3 May 2019), without fulfilling contractual obligations with Telefónica. Konexia claimed its closure resulted from commercial and financial difficulties due to low call traffic and sales flow imposed by Telefónica, as it outsourced Konexia's operations to countries such as Colombia and Peru.
- Telefónica responded to Konexia with a letter terminating their business relationship due to the abrupt closure of operations, Konexia's failure to adhere to contractual formalities, the dismissal of its employees without prior notice, and non-compliance with labour and social security obligations.
- As the client company in a subcontracting arrangement, Telefónica had the discretion to define the legal instrument for engagement with subcontracted workers. In this case, it offered a "settlement agreement" through a public deed. Telefónica could not issue "employment severance agreements," as only the direct employer could provide such documents, per Article 177 of the Labour Code.
- Additionally, it states that the "settlement agreement" would correspond to one of the instruments that the Labour Code itself considers as an enforceable title, in Article 464, and would not undermine the workers' rights, since through it, the provision of services by the worker - under a subcontracting arrangement - and the termination of their employment relationship with their employer are recognised, and the payment of the employment entitlements they are due by concept of severance pay.
- Telefónica also stated that the settlement agreements included a provision reserving workers' rights to challenge discrepancies related to labour benefits and additional

rights not expressly indicated in the agreements.

- The company noted that the settlement agreements had not been challenged by labour courts, other workers, or unions, nor had they been questioned by the Labour Directorate.
- As of the response date, 252 out of 271 Konexia workers had signed the settlement agreements, receiving their due severance pay. Telefónica also highlighted that the Labour Directorate's Inspection Unit had personally supervised the signing of these agreements

IV. NCP evaluation of the specific instance

a) Preliminary issues

12. The preliminary question is whether the NCP is competent to hear the case.
13. To determine this, two requirements: must be verified (1) the requested company must be a multinational enterprise, and (2) the events must have occurred in Chilean territory or, if they occurred in a foreign country without an NCP, the multinational enterprise must be Chilean.
14. Regarding the first requirement, the requested company is multinational in nature because it has entities in different countries and can coordinate its activities in all of them. Therefore, the first requirement is met.
15. As to the second requirement, the events occurred on Chilean territory. Thus, the second requirement is fulfilled and the NCP is competent to hear the case.

b) Initial assessment

16. In determining whether the issue raised merits further consideration, the NCP must establish whether the issue is bona fide and whether it relates to the Guidelines. In this context, the NCP takes into account the following criteria:
 1. The identity of the party concerned and its interest in the matter.
 2. Whether the issue raised in the specific instance request is material and justified.
 3. Whether the company's activities are linked to the issues raised in the specific instance.
 4. The relevance of concurrent legislation and procedures to the case, including court decisions.
 5. How similar or the same issues have been, or are being, addressed in other local or international processes.
 6. Whether the review of the specific instance will contribute to the purpose and effectiveness of the Guidelines.
17. During the NCP's specific instance proceeding, the NCP consulted the Labour Directorate. After multiple attempts to contact the submitter without response and considering the settlement agreements signed by the majority of Konexia's former workers, without objections from the Labour Directorate or courts, the NCP declared the case abandoned.

Consequently, the matter was not considered further.

V. Conclusion

18. In light of the above, the NCP issues this Final Statement, concluding the specific instance and making recommendations to the parties, based on the circumstances and available information.

a) NCP Observations and Recommendations

19. Recommendations for the company:

- Encourage the implementation of risk-based due diligence processes, in accordance with the Guidelines and OECD Due Diligence Guidance for Responsible Business Conduct. These processes are ongoing and involve identifying, preventing, and mitigating the actual or potential negative impacts of the company's activities and business relationships, and reporting on how they are addressed (Paragraphs 11, 12, and 13, Chapter II; Paragraph 5, Chapter IV; 2023 Guidelines).
- Encourage, as far as possible, that its business partners and supply chain apply responsible business conduct standards and implement risk-based due diligence processes, in accordance with the Guidelines, particularly with respect to Chapters IV: Human Rights, and V: Employment and Industrial Relations.
- Strive to prevent and mitigate negative impacts – particularly, but not exclusively, on workers' rights – directly related to its activities, products, or services, as a result of a business relationship, even if the company did not contribute to generating such impacts. To this end, it is expected that the company uses its influence with the other entity causing the negative impact, but this should not be interpreted as a transfer of responsibility from that entity to the company (Paragraph 13, Chapter II, 2023 Guidelines).
- As the client company, oversee the respect – by the subcontracted companies it engages with – for the labour rights of their workers and use its influence to promote that respect.

If the NCP offers its good offices or, in its Final Statement, makes recommendations to the company, this should in no way be interpreted as an assertion that the requested multinational has failed to comply with the Guidelines.

The Guidelines state that confidentiality of the proceedings shall be maintained throughout its duration. Information and opinions provided during the proceedings shall be kept confidential, unless the party concerned consents to the disclosure of such information or opinions or where non-disclosure would be contrary to the provisions of national law.

In accordance with the principle of transparency that governs the functions of the NCP, the final statements are published on the NCP's website and are translated into English and sent to the OECD Working Party on Responsible Business Conduct.

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

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Non-official English translation¹

¹ In case of discrepancy, the Spanish version of this Final Statement shall prevail.