

**To:**

OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS  
ATTN. MS. LENE WENDLAND, CHIEF, BUSINESS AND HUMAN RIGHTS UNIT  
PALAIS DES NATIONS, CH-1211 GENEVA 10, SWITZERLAND

**SUBJECT:**

INTERPRETATION OF THE UN GUIDING PRINCIPLES REGARDING BUSINESS  
RELATIONSHIPS OF PRIVATE SECTOR BANKS ACTING AS NOMINEE SHAREHOLDERS

15 APRIL 2021

Dear Ms. Wendland,

We are writing to request advice regarding the application of the UN Guiding Principles on Business and Human Rights (UNGPs) in the context of passively managed shareholdings and nominee shareholdings, in light of the recent OECD National Contact Point (NCP) case concerning the Swiss bank UBS and the Chinese technology company Hikvision, filed at the Swiss NCP by the Society for Threatened Peoples (STP).

In January 2021, the Swiss NCP “partially accepted” the specific instance filed against UBS related to the bank’s alleged business relationship with Hikvision, a company that is providing equipment to aid and facilitate China’s detention and mass surveillance of its Uighur population.<sup>1</sup> The complaint alleges that UBS has a business relationship with Hikvision via (a) a passively managed fund sold by UBS, and (b) the bank’s role as custodian for Hikvision shares on behalf of clients.

In its assessment, the Swiss NCP accepted the aspect of the case that concerns shares previously held in a passively managed UBS fund, concluding that “a direct link between UBS’s products and services and the alleged human rights violations could not be excluded”. However the NCP further notes that there is considerable uncertainty here, stating that there is “no agreement on whether a business relationship within the meaning of the OECD Guidelines exists” for this kind of relationship. UBS claimed that no business relationship exists since the shares are owned by a fund (“UBS ETF MSCI ESG”) which is owned by its shareholders. UBS is a service provider to this fund.

On a second element of the complaint, the Swiss NCP concluded that no business relationship between UBS and Hikvision exists in relation to UBS’s role as custodian for Hikvision shares on behalf of clients. On this element, the NCP concluded that “based on the information received from UBS...UBS is not an investor in Hikvision but acts as a custodian of Hikvision shares on behalf of its clients and does not actively advise clients to buy Hikvision shares. The mere management of clients’ shares as a custodian implies a business relationship between the bank and its clients, but not with Hikvision.”

This is the first time an NCP decision has reflected on the presence or absence of a business relationship in the case of either a bank’s passively managed shareholdings, or its role as a ‘nominee shareholder’ or custodian of shareholdings on behalf of clients. As such, we see this as a significant case. However, we are concerned by the ruling that no business relationship exists between a bank and an investee company in the case where the bank acts as a custodian or nominee shareholder.

In such a case, the bank typically holds the legal title of the shares under its name, is listed publicly as the owner, and allows its client (the ‘beneficial owner’ of the shares) to invest in the company

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<sup>1</sup> National Contact Point of Switzerland, “[Initial Assessment: Specific Instance regarding UBS Group AG submitted by the Society for Threatened Peoples Switzerland](#)”, Berne, January 20, 2021

without its role being publicly disclosed.<sup>2</sup> As such, the bank not only helps its clients to invest in the investee company, but also helps them to do so anonymously and in secret.

Furthermore, where the investment is in a Chinese company, as in the case in question, Chinese market conditions mean that one of the few ways a foreign investor or shareholder can invest in Chinese companies is via an index fund or via a depositary bank acting as a custodian or nominee shareholder. Services such as the holding of nominee shareholdings are therefore a basic prerequisite for market access in China.<sup>3</sup> We consider that banks must take their share of responsibility as the enablers of this business relationship, and have published a comment expressing concern at the decision of the NCP in this instance.<sup>4</sup>

We would welcome advice and clarification from the OHCHR on the following questions:

- Would there be a ‘business relationship’ under the UN Guiding Principles between a financial institution (“the FI”) and a company in which it holds shares (“the investee company”) on behalf of a client, as a custodian or nominee shareholder?
- If the answer to the first question is yes, how should an FI, acting as custodian or nominee shareholder, ensure that it meets its responsibility to respect human rights as set out in the UN Guiding Principles on Business and Human Rights, particularly in cases of severe human rights risks?

We appreciate the OHCHR’s valuable role in developing guidance for the implementation of the UNGPs for States, business, civil society, and other relevant stakeholders, and would be happy to provide any further information which may be helpful in relation to this request.

With thanks in advance for your consideration in this regard,

**Ryan Brightwell, Researcher & Editor, BankTrack**



**Joseph Wilde-Ramsing, Senior Researcher, OECD Watch**



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<sup>2</sup> In Hikvision’s 2018 Annual Report, “UBS AG” is listed as one of the top ten shareholders in Hikvision, with over 66 million shares held (0.72% of the total) at the end of the reporting period. These are understood to be shares held by UBS as a custodian, on behalf of clients.

<sup>3</sup> See for example, Investopedia: “[Chinese Depositary Receipts](#)” (accessed April 2021); CNBC: “[China wants to open up its financial markets to foreigners](#)”, January 2021.

<sup>4</sup> BankTrack and OECDWatch, “[Swiss NCP misses the mark on UBS links to mass surveillance of Uighurs](#)”, 3<sup>rd</sup> March 2021