WRITTEN SUBMISSIONS OF KINGSLEY NAPLEY LLP

1) What is your understanding of undue corporate influence in policy and regulatory matters? What challenges have you observed? Could you think of any concrete examples in activities or operations of your organization?

Our starting point is that legitimate engagement by businesses in political and regulatory activities should be encouraged: such engagement is a function of democracy and, when done properly, can improve regulatory outcomes. The increasing trend of businesses to undertake Environmental, Social and Governance commitments, over and above those required by law, as part of their unwritten 'social contract' underlines the capacity for responsible businesses to make useful contributions to the political process. However, in our experience undue corporate influence in political and regulatory matters can take a number of different forms, and we provide key examples from the public domain below.

1. **Lobbying:** Lobbying, which means here the process by which businesses try to persuade government and regulators on a certain political and regulatory outcome, will not always result in undue corporate influence. There are legitimate ways for businesses to engage in the political system[1]; it can be an important function of democracy for businesses (with other stakeholders) to voice their opinion in front of political decision-makers. However, corporate lobbying can result in undue influence upon political actors and regulators primarily where:

    a. political decision-makers unduly overlook competing interests as a result of corporate lobbying - sometimes because of their acquaintance with the lobbying entity/person;

    b. there is a resulting fairness and inequality issue where some actors, but not others, have access to the decision-maker's 'sphere of influence' (e.g. businesses do but campaigning groups representing other interests do not); and/or

    c. lobbying is conducted in a non-transparent manner. We note the findings of the independent Boardman Review last year[2], which recommended in part that the UK strengthens the transparency rules around lobbying rules, and that it makes legally enforceable post-employment restrictions on lobbying by those particularly close to government (MPs and senior civil servants).

2. **Theoretical/policy capture:** This is where businesses and regulators develop a common theoretical understanding of their relevant market, which then has an impact upon policy and how the regulator regulates the market in question. What is key to theoretical/policy capture is that the shared methodology then adopted by the regulator practically privileges corporate interests over competing interests. As noted by the OECD, policy capture results in a situation where public decisions over policies are consistently or repeatedly directed towards a specific

[1] Please see below in response to question 2.

[2] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1018176/A_report_by_Nigel_Boardman_into_the_Development_and_Use_of_Supply_Chain_Finance__and_associated_schemes__related_to_Greensill_Capital_in_Government_-_Recommendations_and_Suggestions.pdf

interest, which can exacerbate inequalities and undermine democratic values[3]. The OECD's view is that international energy and tax policy – for example, the latter as regards international tax havens and loopholes – are possible examples of policy capture.

3. **Bribery and corruption:** This is, of course, at the extreme end of undue corporate influence on the public sector. In this context, broadly speaking, bribery is the offering, promising or giving of something in order to influence a public official by corporate actors; and corruption is dishonest conduct by public officials in order to acquire illicit benefits or abuse power for privatised gains. In the UK the criminal law sanctions such conduct, including by means of the Bribery Act 2010 and the common law offence of misconduct in public office.

2) Do you think there is a kind of political engagement by businesses that could be defined as appropriate or necessary?

In our view, a number of kinds of political engagement by businesses are both appropriate and necessary. Transparent stakeholder engagement from all sectors is invaluable for markets to function well and for regulators to supervise the market effectively. Businesses, like other stakeholders, help to shape the understanding of the market and its outcomes, and can thereby assist in making regulation effective. Many businesses like to operate in a well-regulated market because this creates certainty. Our view is that legitimate political engagement by responsible businesses can further the public interest and improve regulatory outcomes.

We see some examples of appropriate and necessary political engagement by businesses to be:

1. Businesses providing factual information to their regulators.

2. Businesses identifying existing regulations that are outdated or unnecessary.

3. Where appropriate, businesses challenging regulatory practice, in order to make government and regulatory action more transparent and in order to establish more orderly and predictable decision-making processes.

In our experience, responsible businesses can provide helpful information to regulators, helping them to understand the position of the market and sharpen their regulatory priorities. This is particularly so in the artificial intelligence and technology space, alongside other 'new' industries, where participating businesses often have an appreciably stronger understanding of the market than government and regulators.

However, we have also observed that there can be a fine line between appropriate political engagement and undue corporate influence: close communications and collaboration between businesses and regulators, and the creation of an 'orderly marketplace', can be an environment which leads to policy capture, when a corporate's understanding of the marketplace is adopted uncritically. Because of this, it is important that regulators face scrutiny, including from Parliament, external audits, and the public at large by amenability to the principles of administrative law, discussed further below.

[3] https://read.oecd-ilibrary.org/governance/preventing-policy-capture_9789264065239-en#page1

3) Could you please share concrete examples?

We consider that consultations conducted by the Food Standards Agency over recent years provide strong examples of transparent and multi-stakeholder engagement, including from participating local authorities and industry stakeholders. Recently, the Agency has had strong participation from stakeholders in holistic consultation exercises, including in relation to its National Enforcement Priorities[4] and reviews of important policy and regulatory processes (its Food Law Code of Practice, Food Law Practice Guidance and implementation of the Competency Framework)[5]. The strong participation from both those being regulated, and those involved in implementing the regulatory scheme, is likely to improve the Agency's outcomes.

4) What measures could States take to prevent and address corporate political activities that may undermine the State's ability to protect human rights and businesses' responsibility to respect human rights?

In many Member States, there are already a number of legal rules which police the independence and probity of political and policy decision-making. With respect to the UK, we have referred to the Bribery Act 2010 above. There is also the body of law that has built up around the legal remedy known as judicial review, especially around bias and independence. In 2020, a campaigning group in the UK challenged the UK Cabinet Office's award of a contract to a communications agency that was run by an associate of the Prime Minister's former special advisor. Though the Court of Appeal overturned the High Court's finding that there was apparent bias in the awarding of the contract[6], the challenge showed the propensity of the rules of judicial review to regulate relations between corporate and political actors in appropriate circumstances. More widely, the rules of judicial review in the UK require government and regulators to take into account material considerations when making a decision, to act rationally and compatibly with human rights (pursuant to the Human Rights Act 1998), and to have regard to the elimination of unlawful discrimination and the advancement of equality of opportunity (pursuant to the Equality Act 2010). Broadly, these rules assist in encouraging the State to act within the public interest and consider its duties to protect human rights across its activities, including those where corporate influence plays a role.

Recent proposals by the UK government seek to water down judicial review and we consider that it would be helpful for the Working Group to encourage Member States to strengthen the legal means by which public body decision-making is scrutinised, particularly administrative law.

Many regulators in the UK also have good corporate governance practices. We note an increasing trend amongst regulators to carry out lessons learned reviews, similar to internal investigations, in order to scrutinise important decisions that were made including in respect of the influence of external stakeholders including corporate actors. Such reviews can assist the State to address the role played by external stakeholders and consider its role to protect human rights during important decisions.

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[4] https://www.food.gov.uk/sites/default/files/media/document/Final%20NEPs%202022-23%20.pdf
[5] https://www.food.gov.uk/news-alerts/consultations/review-of-the-food-law-code-of-practice-food-law-practice-guidance-and-implementation-of-the-competency-framework-england
[6] [2022] EWCA Civ 21, https://www.bailii.org/ew/cases/EWCA/Civ/2022/21.html

As with the 2020 judicial review outlined above, informal corporate capture becomes more likely where there are shared social networks and / or common interests between those in positions of responsibility within businesses and those in similar positions within regulators and politics. These informal methods of corporate capture can (to some extent) be mitigated by ensuring that Diversity and Inclusion initiatives ("**D&I**") are taken seriously and that D&I and equality law obligations are properly implemented by both regulators and business.

Member States should also look closely at their regimes around political donations by corporates and any mandatory reporting or transparency requirements that are in place.

We propose the following specific measures to improve the transparency around Member States' role in corporate political activities, including those that may have an impact upon human rights.

1. At national level, we propose lobbying registers and transparency requirements, requiring lobbyists (including former politicians and senior civil servants) to register as lobbying for specific interests and political actors to report upon their dealings with lobbyists.

2. We propose training for public bodies and the promulgation of codes of conduct in respect of stakeholder engagement, in order to ensure consistency and transparency with regard to the range of ways in which corporate stakeholders influence the development and substance of policy.

3. We propose additional training for public bodies in respect of the importance of D&I and the link between strong implementation of D&I principles and the independence of and better decision making by public bodies.

4. We propose requirements for corporates to disclose and report on any political donations and funding that they have undertaken.

5) What are good practices that business could implement to avoid undue political influence or engaging in political activities that negatively impact human rights?

We consider some examples of best practice by responsible businesses in this area to be as follows:

1. Registration and regular, voluntary reporting of corporate lobbying activities.

2. Pledges that all corporate public statements, particularly regarding Environmental, Social and Governance commitments, will be consistent with the business' practice and political and regulatory engagement.

3. Corporate governance provisions which stipulate their 'best practice' with political actors, when engaging with them as external stakeholders on an issue and which provide guidance as to how Directors are to weigh ESG issues when adopting a position on corporate lobbying (e.g. viz-a-viz the interests of shareholders).

6) What are the specific human rights risks posed by corporate influence in the political and regulatory sphere to groups in most vulnerable situations such as women and girls, indigenous communities, human rights defenders, persons with disabilities, persons with different sexual orientation or gender identity or migrant workers?

It is those in positions of vulnerability in Member States with a weak rule of law that are most at risk of the negative effects of corporate influence. This is often because illegal methods of exerting influence, such as bribery and corruption, can occur with impunity and allow for any laws and regulations that might have been put in place to protect vulnerable communities to be disregarded. The range of human rights risks exposed by the kind of illegal activity in issue here cover the full range of human rights violations, including Articles 2, 3, 4, 5, 6, and 8 ECHR.

As we elaborate in response to question 7, Kingsley Napley has done particular work and thought leadership in respect of the regulation of corporate responsibility; specifically the development of mandatory human rights due diligence laws with proper regulatory enforcement mechanisms, that could cover redress for those impacted by environmental and human rights abuses committed extraterritorially by corporate actors, and where accountability is unavailable in the territory where harm occurred for a number of different reasons, including political reasons.

There have been a number of cases over the years of abuses, which undoubtedly harm those in the global south and indigenous communities disproportionately. In 2020 Kingsley Napley acted pro bono for the CORE (Corporate Responsibility) Coalition and the International Commission of Jurists in the UK Supreme Court case of *Okpabi*, a landmark corporate responsibility case, where allegations of complicity and negligence in respect of environmental devastation in the Niger Delta were made against an oil supermajor by a group of Nigerian citizens. Our view is that it is important that the political will is found to provide effective redress where there is corporate responsibility for extraterritorial harms.

7) How does corporate influence in the political and regulatory sphere impact the ability of victims of business-related human rights abuses to seek access to effective remedies? What specific challenges do rightsholders face in accessing effective remedy?

In 2020, Kingsley Napley collaborated with Dr Rachel Chambers of University of Connecticut and the NGO Traidcraft Exchange to research and deliver a report on the future of corporate responsibility regulation in respect of extraterritorial harms[7]. Our report focused on the situation for victims under English law in these circumstances.

There are serious obstacles for victims seeking redress for business-related human rights abuses law in the English courts currently, in respect of harms committed abroad. The key mechanism by which victims seek access to effective remedy in the English courts is through tort law.

[7] 'Report of research into how a regulator could monitor and enforce a proposed UK Human Rights Due Diligence law' by Dr Rachel Chambers (University of Connecticut), Sophie Kemp (Kingsley Napley) and Katherine Tyler (Kingsley Napley): https://74120717.flowpaper.com/Reportofresearchintohowaregulatorcouldmonitorandenforceaprpdf/#page=1

Because of the rules about when the English courts have jurisdiction to hear a civil case, victims only have a chance of redress under English law when the harm in question was contributed to by a company that is related to a UK company (often, an overseas subsidiary of a UK parent company). Even where there is this connection, victims face serious challenges in seeking redress. In short, the key issues are:

1. Companies take steps to distance themselves from the operations of their subsidiaries or related companies abroad to avoid liability; it is hard for victims to prove that the UK parent company was sufficiently involved.

2. To show that the civil trial should be heard in the UK, victims have to show sufficient involvement from the UK parent. But this is before they have the right to full disclosure, which leads to a Kafkaesque situation where victims plead their case without seeing all relevant evidence.

3. The cost of gathering evidence overseas, and funding and conducting the litigation, is prohibitive for victims and law firms.

4. Civil liability through tort litigation is not well-suited to cases where the business in question contributes a small proportion to an extraordinary harm, e.g. companies contributing to climate change.

It is hard to assess the extent of corporate political influence on the current landscape for victims seeking redress in such circumstances. We did acknowledge in the report that significant prosecutorial appetite from regulators is needed in this area, to find the political will to take on large corporates, fund a complex cross-border investigation, and overcome the risk of failure. Often decisions on funding and perceptions of ability, which may or may not be susceptible to corporate influence, are the driving factor in whether or not to take on a particular case. It is also likely that political appetite, which is likely to be affected by corporate influence, is a significant force in these decisions. A high-profile example of political interference in an investigation against a corporate (albeit in the bribery and corruption sphere) was the SFO's abandoned prosecution of UK defence company BAE systems in December 2006, in relation to allegations of corruption in respect of a Saudi Arabian arms deal. This investigation was discontinued following representations from the UK and Saudi Arabian governments about the investigation's threat to the UK's national security.

It is clear that an effective regulatory enforcement mechanism is essential to deter businesses from misconduct in the area of extraterritorial corporate harm, and to provide effective redress. We found in our paper that a human rights due diligence law could impose the following duties on subjected organisations (broadly):

1. To prevent adverse human rights and environmental impacts of their domestic and international operations, including in their supply and value chains.

2. To develop and implement appropriate due diligence procedures to prevent such impacts.

3. To publish a forward-looking plan on future procedures to be adopted, and an assessment of the effectiveness past procedures.

The political will should also be found to provide effective redress to victims for breaches of these duties. Our report proposed a civil penalty if organisations fail to meet the due diligence duties. If organisations fail to prevent adverse human rights and environmental impacts from their operations, our report proposed that they would be liable for related harm and loss enforceable both through regulatory civil penalties and civil litigation. It would be a defence for organisations to prove that they acted with due care to prevent human rights and environmental impacts. We proposed finally that organisations and their senior managers would be criminally liable if they failed to prevent serious human rights or environmental impacts.

Sophie Kemp
PARTNER

Sophie is an experienced public lawyer who became the Head of the Public Law team in September 2021. Sophie specialises in judicial review, large scale investigations and inquiries, and business and human rights, and was described by Chambers 2021 as an "*impressive lawyer*" and "*contributor to public law*" and Chambers 2022 as "*ferociously hard-working and her client handling is incredible*".

Sophie leads the firm's Business and Human Rights group. Her practice includes representing The Corporate Responsibility (CORE) Coalition and the International Commission of Jurists to intervene in the Supreme Court case of Okpabi v Shell, a landmark case on corporate accountability brought by thousands of claimants in respect of pollution in the Niger Delta as well as advising the ICJ in connection with the Fundão dam litigation before the High Court and Court of Appeal in England and Wales. She is co-author of the "Report of research into how a regulator could monitor and enforce a proposed UK Human Rights Due Diligence law" commissioned by the CORE Coalition, Traidcraft Exchange and the Business and Human Rights Resource Centre. Sophie has delivered a number of talks with the Home Office on the Modern Slavery Act 2015 with the aim of promoting this ground legislation to the business community and public sector.

Sophie has many years of experience judicial review litigation (particularly acting for senior police officers and regulators), public inquiries and inquests, including the FCA's Davis Inquiry and the 7/7 Inquest.

Katherine Tyler
LEGAL COUNSEL

Katherine Tyler is Legal Counsel in the criminal litigation team at Kingsley Napley. She is recognised as a Global Market Leader for Business and Human Rights Law by Chambers and Partners Global

2022. She has worked in the Business and Human Rights field since 2010 and has a particular focus on the criminal and regulatory implications of the developments in this field and that of ESG. Katherine's work in this sphere has included advising those under investigation in modern slavery investigations both with a national and an international nexus; acting in an independent, multi-jurisdictional, review into allegations of a leading charity's involvement in human rights abuses and co-authoring the well-received "Report of research into how a regulator could monitor and enforce a proposed UK Human Rights Due Diligence law" commissioned by the CORE Coalition, Traidcraft Exchange and the Business and Human Rights Resource Centre. Other relevant work has included advising NGOs and law firms on issues of corporate responsibility and liability for human rights abuses and environmental harm and representing individuals in relation to bribery investigations by the SFO.

She is co-founder and co-chair of the Business and Human Rights Practitioners' Network and a contributor to consultations convened by the UN Business and Human Rights Working Group. Katherine is regularly called upon as an expert on Business and Human Rights and Modern Slavery issues including by the British Institute of International and Comparative Law, the Law Commission and the Bonnavero Institute of Human Rights.

Nick de Mulder
ASSOCIATE

Nick is an Associate in the firm's Public Law and Business and Human Rights/ESG teams acting on a range of public law and business and human rights cases, as well as regularly advising on information law issues.

Since joining Kingsley Napley Nick has acted as lead Associate in the Supreme Court business and human rights intervention in Okpabi on behalf of two charities; represented an interested party in the major judicial review of the Government's PPE procurement scheme (ranked as one of the Lawyer's Top Cases of 2020); and he also assisted on a major report on enforcement of business and human rights laws, commissioned by CORE, Traidcraft Exchange and the Business and Human Rights Resource Centre. He has a keen interest in corporate responsibility matters, writing a blog about mandatory human rights due diligence laws which has been published by LexisNexis. He has assisted an NGO client with advice about a possible major intervention into a class action.

In his previous firm, Nick worked in teams including the Employment and Corporate Crime & Investigations. He was supervised in the latter team by Herbert Smith Freehills' Co-Head of Business and Human Rights, giving him insight into corporate accountability and labour matters.