

# ESG Resolve

CEDR's Independent Accountability  
Mechanism Procedures and Guidelines



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## 1. Introduction

The purpose of the CEDR (Centre for Effective Dispute Resolution) Independent Accountability Mechanism (“**the Mechanism**”) is to help resolve concerns, complaints, grievances and disputes (“**Complaints**”) arising from the environmental and social impacts and/or governance (“**ESG**”) processes, of business enterprises or other organisations. It is expected to be particularly relevant for reviewing concerns from key stakeholders (“**Complainants**”) regarding an organisation’s human rights and environmental impacts, or alleged governance failings affecting key stakeholders. It may also on occasion be helpful for achieving more structured dialogue with regulators, or when there are challenges by stakeholders to the effectiveness of an enterprise’s due diligence measures or operational grievance mechanisms. Complainants may issue a formal “**Request for Resolution**” where companies, public bodies or relevant industry associations are affiliated to the Mechanism or have agreed its use in a specific instance.

The CEDR Independent Accountability Mechanism focuses on independently managed dialogue as a core approach to helping identify issues of concern, mitigate risk and resolve concerns, complaints, grievances or disputes. Other resolution and factfinding options are available according to the needs of a particular case, party preferences, or contractual terms of a subscriber to the scheme. The aim is to ensure the flexibility and expertise needed to address complex situations well, that are cost-effective and practical in approach, and ensure effective engagement with key stakeholders, for better business and social outcomes in the 21<sup>st</sup> century.

The core vision behind the Mechanism is to ensure that there is an ‘independent sounding board’ system to address ESG issues that may have generated concerns of various kinds amongst stakeholder groups. Skilled independent neutrals will help manage, chair and facilitate difficult dialogue and negotiations around the issues raised in the Request for Resolution. The Mechanism is designed to provide a pragmatic and fair means to ensure that enterprises comply with good standards of conduct in relation to key stakeholders of the organisation, as established within their industry or regulatory environment and/or as set out by such international norms as the UN Guiding Principles on Business and Human Rights or OECD Guidelines on Responsible Business Conduct.

By subscribing to such a system under the auspices of a non-profit organisation with a longstanding track record in such work and a mission

to achieve better and more sustainable outcomes from conflicts, business enterprises can indicate their intention to adhere to good practice and practical, proactive outcomes in a meaningful way. CEDR has a 30 year+ track record of effective disputes assistance in civil and commercial disputes and a significant international reach and reputation.

The Mechanism provides a flexible and efficient process through which ESG complaints may be raised and parties may explore mutually satisfactory solutions on a 'level playing field' made possible by CEDR oversight and expertise. The Mechanism has been developed and is managed by CEDR, after extensive consultation with law firms, industry associations and NGOs. The Mechanism does not preclude parties from following more formal court or regulatory processes but can assist in earlier resolution or in more cost-effective and creative resolutions either alongside such traditional mechanisms or while such processes are paused to allow for focused resolution efforts. It will also normally operate on an assumed confidentiality basis, because of the sensitivities around negotiation positions. However, the parties may agree to more transparency where appropriate, and CEDR will publish anonymized data to assist in developing the approach within the ESG space.

The scope of the Mechanism will be limited initially to those enterprises and industry bodies which have subscribed to the Mechanism as part of their commitment to good governance in the ESG arena. Organisations, or their legal advisers or regulators may also refer cases on an ad hoc basis by agreement with CEDR and the relevant stakeholders. Regulators and courts may additionally encourage parties in formal dispute to use the Mechanism, to resolve or narrow issues. As CEDR is an independent, non-profit institution dependent on services revenues, funding for case referral and case management will commonly need to be pre-agreed by all parties to a referral, or on an otherwise pre-agreed proportion payable by one or some parties; for example, as part of a subscription system by a company or industry body.

## 2. Who may lodge a Request for Resolution of a Concern?

Individuals, community groups and other stakeholders (the "**Complainant**") or their representatives (typically lawyers or NGOs operating in the appropriate arena) may bring a Complaint under the Mechanism if they reasonably believe that they or relevant stakeholders have been, or may in the future be, adversely affected in a material way by environmental and/or social impacts and/or governance decisions that were caused or contributed to by a business enterprise or public organisation (the "**Respondent**"). CEDR has a discretion to accept other

kinds of Complainant or applications for consideration if the Complaint appears likely to be suitable for the processes adopted under the Mechanism and use of the process would appear to contribute to resolving ESG issues or enhancing ESG understanding and evolving practices in a more effective way than alternative routes.

Requests for Resolution of Complaints may be submitted in the following circumstances:

- i. On agreement of the Complainant(s) and Respondent(s) (the **“Parties”**) and subject to meeting CEDR’s terms for registering a Complaint/Request;
- ii. Where a contract, ADR clause or industry association policy requirement refers such disputes with the Respondent to the Mechanism;
- iii. Where the Respondent is a subscriber to the Mechanism and the issue falls within the scope of the subscription;
- iv. In response to a Court order, judicial recommendation or regulator decision; or
- v. Where an Industry Association or Respondent is a member of the CEDR Independent Accountability Mechanism programme and the Complaint falls within the scope defined in the programme (for example certain subscriptions of industry affiliations to the Mechanism may explicitly limit the scope to one of the ESG headings or may limit the scope to special projects within a Company or sector rather than be applicable to the industry/enterprise as a whole).

### **3. How to lodge a Complaint**

Complaints should be delivered in writing by email or post to CEDR Independent Accountability Mechanism. They should be submitted in English unless agreement to use of another language has been reached between the Complainant/Respondent and CEDR.

A Complaint should include the following information:

#### **Identification of parties and issues**

- i. Name, address, telephone number and organisational status of Complainant(s) ;
- ii. Name, address, telephone number of any representative(s) (the **“Representative(s)”**), and evidence that Complainants have

- authorized the Representatives(s) to represent them in the Mechanism Process;
- iii. Whether the Complainant(s) wishes certain information to be kept confidential, and if so providing reasons;
  - iv. The name/location and nature of the Respondent that allegedly caused, is causing or will cause or contribute to materially adverse impacts affecting the Complainant; and
  - v. Brief outline of the alleged past, present and/or future environmental and/or social impacts and/or governance decisions that were caused by or contributed to by the Respondent that impact or potentially impact the Complainant;
  - vi. Confirmation that the Complainant(s) has been, or may be, materially adversely affected by the Respondent's activities or lack of action;
  - vii. Description of any negotiations or measures implemented by the Respondent to address the Complaint;
  - viii. Confirmation that the Respondent has agreed to be covered by the Mechanism, or is a member of a subscribing scheme, and that funding for the process will be available; and
  - ix. A brief statement of the likely evidence to be produced to corroborate claims of alleged adverse impacts.

### Additional Information

To help CEDR and the Respondent(s) understand the referral, The Complainant should provide a Case Summary with expanded detail as per below, but limited to 25 pages – there will be opportunities to expand on a case following a Response once the case has been declared eligible.

- i. A brief chronology of the issues that form the Complaint, and what is sought by way of a Request for Resolution including suggested process;
- ii. A description of any policies, procedures, standards or laws ("**Relevant Standards**") with which the Respondent is alleged not to have complied;
- iii. A description of direct approaches or other efforts the Complainant has made to resolve the concerns and any results that have come from those efforts, including appeals to the Respondent and any Complaints made or related proceedings started with the organisation or any other organisations, including in other jurisdictions;
- iv. A statement of the outcomes that the Complainant sees as desirable, if known;

- v. A note of other relevant more detailed information that may be called on such as documents, media reports, photographs, videos and recordings which may facilitate the Mechanism/Respondent to understand the Complainant's Case;
- vi. Whether the Complainant is seeking special confidentiality terms for the process and reasons for this.

#### **4. Response to Complaint**

Within 20 Working Days of receiving a Concern, and unless CEDR itself has reason to believe the complaint is not eligible under the Mechanism (per the eligibility criteria set out below), CEDR will provide the Complainant or its Representative with notice that the Concern has been received. A copy of the Complaint will also be sent to the identified Respondent(s) within 20 Working Days of receiving a Complaint and the process set out at clause 5 (b) below will be invoked.

#### **5. Eligibility Determination**

##### **a. Eligibility Criteria**

A Complaint will be eligible to be addressed by the Mechanism where the Complaint meets the criteria listed in section two (2) "Who May Lodge a Request for Resolution of a Complaint"), but a Complaint will not be eligible if it falls into any one or more of the following exclusions:

- i. The Complaint is anonymous;
- ii. The Complaint is on its face outside the parameters of the Mechanism (including where use of the Mechanism has been pre-agreed between CEDR and a company or industry association and that agreement limits the scope of eligible cases automatically covered by the Mechanism);
- iii. The Complaint is vexatious, frivolous or fraudulent;
- iv. The Complaint relates to matters and Parties that have already been reviewed by the Mechanism, unless revisiting it is justified by new evidence or circumstances not available at the time of the prior review;
- v. The Complaint relates to adverse impacts that were clearly known to the Complainants more than three years before the Complaint was initiated, or the Respondent ceased its operations in the relevant area more than three years before the Complaint was initiated;

- vi. A Respondent or their industry body which is said to require members to use the Mechanism, is not in fact a subscriber to the Mechanism or has not agreed otherwise to ad hoc use or been ordered by a court or regulator to participate;
- vii. The Respondent cannot be identified from the Complaint; or
- viii. The case is more suitable to be dealt with in another forum.

On the consent of all Parties, CEDR may at its discretion waive any eligibility criteria to provide services for a particular Complaint. CEDR may also determine a lack of eligibility on the face of a Concern without seeking a response from a Respondent.

**b. Procedure for determining eligibility where CEDR has not made an initial determination that a Complaint is ineligible**

Upon Receiving a Complaint, CEDR will provide the Complainant or its Representative, as well as any named Respondent, with notice that the Complaint has been received in accordance with cl 4 above.

The Respondent will be given 20 Working Days to make representations about the eligibility of the Complaint and whether it seeks any matters raised in the dispute to be kept confidential for business reasons, for instance pertaining to trade secrets, competition or market-sensitive information.

If following receipt of the Complaint and the Respondent's representations referred to above, CEDR is not clear whether the Complaint meets the eligibility criteria, it may seek clarification by providing the Complainant and Respondent with an opportunity to provide further evidence and information.

CEDR will endeavour to communicate its decision on whether a Complaint is eligible within 20 Working Days<sup>1</sup> from the time it acknowledges receiving the Complaint or clarified Complaint after a Respondent challenge. Reasons will be provided with the decision.

If a Complaint is found not eligible, CEDR will decline its services. An eligibility decision is procedural and does not represent a judgment on the merits or substance of the Complaint. CEDR's decision is final and not subject to appeal.

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<sup>1</sup> "Working Days" are Monday to Friday excluding official holidays in any country relating to the Complaint and/or the Complainant and Respondent.



## 6. Triage/Assessment

Where a Complaint has been found eligible CEDR will engage with the Complainant and Respondent within 20 Working Days of that eligibility decision in order to:

- i. Understand more fully the issues in the Complaint;
- ii. Determine which dispute resolution process(es) should be used for the Complaint that appears likely to enhance positive dialogue for better understanding and/or resolution of the issues;
- iii. Subject to the confidentiality provisions at cl 12 below<sup>2</sup>, identify other stakeholders relevant to the Complaint;
- iv. Ensure that the Complainant is able to make an informed decision; and
- v. Ensure that adequate funding for the processes (CEDR and Neutral fees, plus for appropriate representation) have been confirmed by the appropriate party or parties.

If CEDR becomes aware of other similarly affected people interested in joining the Complaint and there is no objection from the Parties, they may be added as Complainants. If the Parties object, CEDR will inform the other affected people that they may file a separate Complaint with the Mechanism as appropriate.

## 7. Processes seeking resolution of the Complaint by agreement

If CEDR determines that a Complaint might be resolved by agreement, it may proceed with mediation, conciliation, facilitated dialogue, joint fact finding or other processes. The parties in these circumstances will take reasonable steps to suspend limitation periods for formal proceedings during such process.

Any process that is part of seeking agreed resolution will be facilitated by a neutral, independent expert in dispute resolution from CEDR's roster (the "**Neutral**"). In many ESG cases, a co-neutral team may be necessary to broaden cultural and/or technical competence and trust. Co-neutrals appointed to work on a project under the Mechanism will not necessarily be a member of a CEDR Neutrals Panel themselves but a CEDR Neutral will always form part of the co-Neutral team.

**Mediation** is a flexible process conducted confidentially in which a neutral mediator actively assists the Parties in working towards a negotiated agreement of a dispute or difference, with the Parties in ultimate control of



the decision to settle and the terms of resolution. The Parties normally meet jointly and privately with the mediator who as a neutral can: focus Parties on the problem, facilitate communication, in private probe each party's case for interests and needs, help Parties assess their weaknesses realistically and safely, suggest new avenues to explore including helping Parties to create value, help Parties save face, and explore settlement proposals in depth.

**Conciliation** is a neutrally facilitated discussion of the Complaints between the Parties mainly via a series of separate meetings/communications, with a view to arriving at better understanding and if possible agreed resolution.

**Facilitated Dialogue** is a conversation between individuals or groups in which a facilitator helps Parties overcome communication barriers and engage in productive conversation regarding an issue of mutual concern. In more formal settings, this may take the form of appointment of an Independent Chair for a small group or conference meeting.

**Joint fact finding** is a process in which a neutral third party assists the Parties to agree on the facts and principles relating to an issue in controversy, sometimes with the assistance of technical experts.

**Neutral Evaluation.** Particularly where the issues involved may be highly technical or dependent on sophisticated legal norms, the parties may wish to present their case to a highly qualified neutral for an early opinion on the merits or likely outcomes of technical differences/arguments.

CEDR may make a recommendation to the Parties as to which dispute resolution process seeking agreed resolution will be used, within 20 Working Days of receiving a Respondent Case Summary. Provided the parties agree, the Parties will jointly select a Neutral(s) from a list of neutrals provided by CEDR. If the Parties are unable to agree on the appointment within 20 Working Days, CEDR will appoint the Neutral within 10 additional Working Days. CEDR may appoint a co-neutral should it think it would assist the process, particularly where a co-neutral can enhance cultural or technical competence. The parties may select or CEDR may appoint co-neutrals, to allow better representation of relevant language, culture, technical, political, historic and geographic knowledge within the Neutral team.

Where CEDR does not make a recommendation or where the Parties fail to agree on a recommended process, the default process will be appointment of a Mediator under the CEDR Model Mediation Procedure.

The Parties will agree with the Neutral(s) on the terms of reference for the process and any other relevant details required to enable the process to proceed, including which Party or Parties shall bear the costs of the proceedings, unless the Respondent or industry body has already agreed payment terms with CEDR for use of the Mechanism. The process seeking resolution by agreement will take place virtually, unless otherwise agreed by the Parties and the Neutral(s), and the Parties agree to cover the costs of any alternative arrangements.

The process seeking resolution by agreement should begin within 30 Working Days of the appointment of the Neutral, unless otherwise agreed by the Parties and CEDR.

Any settlement reached between the Parties in the process shall only take effect if it has been written and signed by, or on behalf of, the Parties. Parties who are not legally represented are always advised to seek legal advice before signing any settlement agreement.

## **8. Monitoring and Implementation**

Where the Parties have agreed to an action plan as part of a settlement agreement, the Parties shall follow the requirements of the action plan. Failure to adhere to the activities and/or timelines provided in the action plan may form the basis of a further Complaint against the Respondent or be actionable in other judicial processes if a binding settlement was reached. (CEDR reserves the right to retain anonymised data relating to such settlements for gaining insight and data analysis of the impact of the Mechanism.)

## **9. Language used for the Mechanism**

All documents relating to a Complaint, including eligibility determinations, submissions, settlement agreements and other documents needed to facilitate communication should be in English. Parties may agree to fund translation services.

## **10. Retaliation**

CEDR has a zero-tolerance policy on retaliation, reprisal, intimidation, or harassment. All Parties to a Complaint will refrain from retaliating against, intimidating or harassing other Parties to a Complaint or any individual or community involved in the Complaint, including human rights defenders. Where there is evidence that any of the Parties to a Complaint have

caused or contributed to retaliation, intimidation or harassment against another party to the Complaint or any individual or community involved in the Complaint, including human rights defenders, CEDR may choose to take the following steps:

- i. Pause the dispute resolution process pending investigation into the allegations; and/or
- ii. If appropriate, notify applicable authorities.

CEDR does not purport to replace national or international judicial bodies, protective services and law enforcement agencies whose functions include protecting the public in such situations.

## **11. Flexible approach**

The Mechanism is intended to provide a flexible and pragmatic approach to solving problems related to environmental, social and governance disputes. As such, the Neutral or CEDR may provide extensions of time, or make other procedural changes as they deem necessary.

## **12. Confidentiality and Transparency**

### **a. Confidentiality of the Mechanism Process**

A Party bringing a Complaint is obviously free to publicise that it is seeking to do so. Otherwise, every person and Party involved in the Mechanism:

- i. will keep confidential all information arising out of or in connection with the Mechanism, including the terms of any settlement, unless otherwise agreed by the Parties in writing but not including the fact that the Mechanism is being, has been or will be used, or where disclosure is required by law, or to implement or to enforce terms of settlement or to notify their insurers, insurance brokers and/or accountants; and
- ii. acknowledges that all such information passing between the Parties and their representatives, any other involved individuals, the Neutral, and/or CEDR, however communicated, is agreed to be without prejudice to any Party's legal position and may not be produced as evidence or disclosed to any judge, arbitrator or other decision-maker in any legal or other formal process, except where otherwise disclosable in law.
- iii. Where a Party privately discloses to the Neutral or CEDR any information in confidence before, during or after use of the Mechanism, the Neutral, co-Neutral or CEDR will not disclose that

information to any other Party or person without the consent of the Party disclosing it, (except under the circumstances provided in Section (c) below, “When confidential information may be disclosed”) . The Parties agree, however, that the Neutral may disclose such information to CEDR provided that such disclosure is made by the Mediator and received by CEDR in confidence.

- iv. The Parties understand that the Neutral (which shall be taken to include any person on the co-Neutral team) and CEDR do not give legal advice and agree that they will not make any claim against the Neutral or CEDR in connection with the use of the Mechanism. The Parties will not make an application to call the Neutral or any employee or consultant of CEDR as a witness, nor require them to produce in evidence any records or notes relating to the Mechanism process, in any litigation, arbitration or other formal process arising out of or in connection with their dispute and the Mechanism process; nor will the Neutral nor any CEDR employee or consultant agree to act as a witness, expert, arbitrator or consultant in any such process. If any Party does make such an application (as listed above), that Party will fully indemnify the Neutral or the employee or consultant of CEDR, and CEDR, in respect of any legal and other costs any of them incur in resisting and/or responding to such an application, including reimbursement at the Neutral’s standard hourly rate for the Neutral’s time spent in resisting and/or responding to such an application.

#### **b. Keeping information confidential from other Party**

Information may also be kept confidential from another party, where one of the parties has requested confidentiality be granted over certain matters such as identity (for instance, for reasons of safety), or business information (for instance, but not limited to, reasons pertaining to trade secrets or competition), and CEDR or the Neutral has granted that request.

#### **c. When confidential information may be disclosed**

Apart from where the Parties agree in writing to consent to disclosure of what would otherwise be confidential, there may be circumstances in which the confidentiality of the information cannot be preserved, such as where the Neutral, CEDR or any Party or their representative:

- i. is required by law to make disclosure;

- ii. reasonably considers that there is a serious risk of significant harm to the life or safety of any person if the information in question is not disclosed; or
- iii. reasonably considers that there is a serious risk of being personally subject to criminal proceedings unless the information in question is disclosed.

Such questions might arise in relation to duties under the *UK Proceeds of Crime Act 2002* or related legislation or under any other legislation. Legal representatives (who may themselves be under a comparable duty of disclosure in their own capacity) must take full responsibility for advising their clients of the implications of disclosure in relation to any such matters at a mediation.

CEDR may publish data on the types and numbers of cases going through the Mechanism, but shall do so in a way that avoids identification of specific parties unless already in the public domain or as agreed between the parties.

### 13. Miscellaneous

- i) *Documentation* Any original documents submitted to CEDR by the Parties will be returned as soon as reasonably possible if return has been requested. Copies of documents may be stored at CEDR offices for six years from the date the Complaint process was concluded, after which copies will be destroyed.
- ii) *Flexibility* While the Procedure and Guidelines documentation sets out the core elements of the Mechanism, the overall purpose of the Mechanism is to promote effective dialogue in often difficult circumstances for better social outcomes. CEDR retains the right to adjust any of the provisions on Eligibility, Procedural stages, timetables or other matters in accordance with its judgment of what most assists in achieving effective process and outcomes under the Mechanism framework; provided however that in cases envisaged at cl5(a) (ii) or cl5 (a) (vi) above, express consent to any such adjustments is obtained from relevant Parties to the Complaint.
- iii) *Scope of the Mechanism* Under certain subscriptions and industry schemes, the Mechanism application may be limited to particular organisation projects or to particular areas of ESG concerns e.g. environmental issues, etc.
- iv) *Language* CEDR will keep under review the availability of making the Mechanism accessible via languages other than English, but

- it is not financially feasible in the first phase unless provided for by Party funding.
- v) *Transparency/Data capture* As part of the Mechanism's effectiveness, CEDR will gather data across cases for learning purposes and for communications which it believes will assist ESG's development. This will be subject to the detailed rules protecting party confidentiality.
  - vi) Parties to a Complaint may agree, or the terms of an industry body subscription to the Mechanism may require, a final stage of the process involving a binding award or neutral recommendations for a resolution of a Complaint. Because of the complexities involved in potential ESG referrals, and feedback received in early consultations on the Mechanism, CEDR has decided for now not to include a default determination system within the initial Rules. This will be kept under review.
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***For inquiries about case referrals or subscription/affiliation to the CEDR Independent Accountability Mechanism, please contact [abutt@cedr.com](mailto:abutt@cedr.com) or [kmackie@cedr.com](mailto:kmackie@cedr.com).***

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We anticipate that design and use of the Mechanism will be subject to ongoing amendment in the light of practical experience and in view of the wide range of situations that can be addressed by mediated dialogue approaches. In particular the Mechanism draft is open formally for public consultation/feedback until the end of January 2023. Please contact [abutt@cedr.com](mailto:abutt@cedr.com) or [kmackie@cedr.com](mailto:kmackie@cedr.com) with any comments.