



UK National Contact Point for the OECD
Department for International Trade
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19th June 2024

Dear UK NCP,

OECD complaint against Drax Group plc: grounds of review of NCP final statement

1. We write in relation to the NCP's final statement (the **Decision**) in the above matter, which was received on 17th May 2024. By e-mail dated 3rd June 2024, the Complainants requested a review of the Decision. This document provides the substantive grounds on which the request for a review of the Decision is made. The Complainants specify herein the ways in which the Decision has failed to follow its own procedural rules and the rules of fairness.

Synopsis of the Complaint

2. The Complainants are a group of non-governmental organisations that are concerned with climate and forests: The Lifescape Project, the Partnership for Policy Integrity (**PFPI**), the Royal Society for the Protection of Birds (**RSPB**), Conservation North, Save Estonia's Forests and Biofuelwatch.
3. The Complaint was made against Drax Group plc (the **Respondent**) in relation to certain public statements, advertising and communications regarding the woody biomass energy produced at its power plant in Selby, North Yorkshire, which the Complainants contend is misleading to consumers and policymakers.
4. The Complaint identified five claims that Drax repeatedly makes in public statements which the Complaints submit are misleading and/or otherwise in breach of the OECD Guidelines for Multinational Enterprises (the **Guidelines**) on the Environment (Chapter VI, paragraphs 2(a) and 6(c)) and Consumer Interests (Chapter VIII paragraphs 2, 4 and 5).
5. The five statements initially challenged by the Complainants are as follows:

Statement 1: Woody biomass energy is already effectively a carbon neutral technology;

Statement 2: Woody biomass energy has resulted in Drax reducing its carbon emissions by 90% compared to when it burnt coal for energy;

Statement 3: Using bioenergy with carbon capture and storage ("BECCS") technology, Drax can become "carbon negative" by 2030;

Statement 4: Drax accounts for all supply chain emissions of woody biomass energy; and

Statement 5: Whole trees are not felled to produce wood pellets burnt by Drax and Drax's woody biomass energy does not damage forests.

6. The Complainants submitted the Complaint to the NCP on 21st October 2021. The Complaint runs to 79 pages with detailed evidence in support of the five Statements and over 200 footnotes. Three bundles of documentary evidence were also provided, extending to over 1,800 pages; Bundle A is comprised of legislation, guidelines and guidance, Bundle B contains documents demonstrating the Respondent's misleading statements, while Bundle C provides factual and scientific material in support of the Complaint.
7. At initial assessment stage, the NCP determined that there was sufficient evidence relating to claims 1, 2, 4 and 5 for them to proceed to further examination, but insufficient evidence in respect of Statement 3. This review therefore concerns Statements 1, 2, 4 and 5 only.
8. The Parties were offered mediation on 27th July 2022. The Complainants entered into the mediation process in good faith and with a genuine willingness to resolve the Complaint before the further examination stage. Unfortunately, the Respondent was not willing to engage in mediation on the basis of the standard terms of reference as regards confidentiality, and so no mediation was undertaken.
9. There were numerous delays to the NCP's handling of the Complaint. These are set out in ground 6 below, but briefly:
 - a. At the outset, the NCP took over 5 weeks to even inform Drax of the Complaint;
 - b. This contributed to a delay of around 3 months in completing the Initial Assessment stage, compared to the timeline set out in the NCP's procedural guidance at paragraph 2.2.1;¹
 - c. Most of the delay, however, occurred at the Further Examination stage. This commenced on 14th October 2022 and was only completed when the draft final assessment was sent to the Parties on 29th February 2024; a total of 16.5 months.

Relevant provisions of the OECD Guidelines

¹ [uk-ncp-specific-instance-procedures.pdf \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/115555/uk-ncp-specific-instance-procedures.pdf)

10. The Complainants submitted that the Statements each breached one or more of the following provisions of the 2011 OECD Guidelines:

- a. Chapter VI, Paragraph 2(a) which requires that enterprises “*provide the public ... with adequate, measurable and verifiable (where applicable) and timely information on the potential environment ... impacts of the activities of the enterprise*”;
- b. Chapter VI, paragraph 6(c) which requires enterprises to “[c]ontinually seek to improve corporate environmental performance, at the level of the enterprise and, where appropriate, of its supply chain, by encouraging such activities as: ... promoting higher levels of awareness among customers of the environmental implications of using the products and services of the enterprise, including, by providing accurate information on their products (for example, on greenhouse gas emissions, biodiversity, resource efficiency, or other environmental issues)”;
- c. Chapter VIII, Paragraph 2 which requires that enterprises should “*provide accurate, verifiable and clear information that is sufficient to enable consumers to make informed decisions, including information on ... environmental attributes ... of goods and services. Where feasible this information should be provided in a manner that facilitates consumers’ ability to compare products*”;
- d. Chapter VIII, Paragraph 4 which requires enterprises “*not [to] make representations or omissions, nor engage in any other practices, that are deceptive, misleading, fraudulent or unfair*”; and
- e. Chapter VIII, Paragraph 5 which requires enterprises to “*support efforts to promote consumer education in areas that relate to their business activities, with the aim of, inter alia, improving the ability of consumers to ... (ii) better understand the ... environmental ... impact of their decisions*”.

Grounds of review

11. The Complainants fully understand that the NCP review procedure does not permit an appeal against the substance of an NCP final statement, and that the review process is limited to procedural and natural justice grounds as set out below. Notwithstanding this limited remit, the Steering Board review guidance² makes clear at paragraph 1.5.2 that the Steering Board’s conclusions on a procedural ground may relate to the substance of a decision. The guidance gives the example of a finding that the NCP did not take into account evidence which may mean that the decision itself is incorrect.

12. The procedural grounds for review relate to failings in respect of the NCP’s procedural guidance. The “*appropriate fairness*” basis for review, which is

² Guidance: Steering board review of UK NCP procedures, paragraphs 1.5.1-1.5.2 - <https://www.gov.uk/government/publications/complaints-brought-under-the-oecd-guidelines-for-multinational-enterprises-to-the-uk-national-contact-point-review-procedure/steering-board-review-of-uk-ncp-procedures>

based on the rules of procedural and natural justice, covers failure to treat the parties with "appropriate fairness" in the circumstances of the case. Procedural justice aims to provide individuals with a fair opportunity to influence the outcome of a decision and to ensure the decision's integrity. It governs the way in which a public authority should act, and the procedures it should follow, when making decisions that affect the rights, obligations, or interests of individuals. The concept of procedural justice is rooted in the principles of natural justice: (i) that a person must be given a fair opportunity to present their case and respond to any evidence against them before a decision that affects their rights or interests is made; and (ii) that the decision-maker must be impartial and free from bias.

13. Procedural and natural justice include the following core individual rights:

- a. The right to a fair hearing (to present a case and respond to any evidence);
- b. The right to be heard (to make representations, provide evidence, and argue a case before the decision-maker);
- c. The right to notice (to be informed of the opposing case and to be given adequate notice of any hearings or proceedings);
- d. The right to an impartial decision-maker (decisions are made by an unbiased decision-maker without any conflict of interest);
- e. The right to reasons (decision-makers to provide reasons for their decisions);
- f. The right to a decision within a reasonable time; and
- g. The right to a review or appeal the decision.

14. All of the Complainants' grounds in this request for review are made within the required scope of: (i) the NCP's failure to follow its own procedures (referred to in the table below as "*Procedure*"); and (ii) the NCP's failure to treat the Complainants with appropriate fairness according to the rules of procedural and natural justice (referred to in the table below as "*Fairness*"). The grounds pertaining to (ii) are based on the aforementioned rights and principles.

Overview of the Complainants' review request

15. The Complainants invite the Steering Board to consider and uphold this review request on the following grounds:

Ground	Category
Ground 1 – The NCP has failed to apply the correct test and/or to follow the correct procedure	Procedure / Fairness

Ground 2 – The NCP has failed to consider the relevance of the 2023 OECD Guidelines	Procedure / Fairness
Ground 3 - The NCP has been highly selective as to the domestic and international policy and guidance that it has taken into account	Fairness
Ground 4 – The NCP has taken a partial and incomplete view of the evidence	Fairness
Ground 5 – The NCP has failed to provide a fair hearing to the Complainants	Procedure / Fairness
Ground 6 – Significant delay: The NCP failed to adhere to the procedural timetable	Procedure / Fairness
Ground 7 – The NCP has not acted in accord with its own transparency rules	Procedure

The NCP's failure to treat the parties with "appropriate fairness"

16. In reaching its Decision, the NCP has failed to treat the parties with *"appropriate fairness"*. The Decision is characterised by the following key flaws:

- a. It is superficial in its treatment of the evidence, is extremely limited in its consideration of the Complainants' evidence and undue weight has been placed on irrelevancies.
- b. It is sparse in its analysis of the facts and of the Complaint. The NCP's analysis of each statement extends to 2-3 short paragraphs in each case, and to only around two pages in total. Such threadbare analysis is plainly inadequate and points to the lack of a fair and due process in the context of a 2.5-year complaint process in which detailed and extensive submissions to the NCP were made by the Complainants.
- c. It is strikingly one-sided, indicating either consistent bias on the part of the NCP in favour of the Respondent or a total failure by the NCP to engage with the issues. The flavour of bias in the Decision leaves the impression that rather than undertaking an independent review process, the NCP in this case may have been influenced by Drax's commercial interests which are supported and relied upon by the UK Government.

17. One of the most significant flaws, which forms ground 1 below, is that the NCP has failed to analyse the Complaint in accordance with the requirements of and specific wording in the OECD Guidelines themselves. In particular, the NCP has conspicuously omitted to analyse the Respondent's statements in light of the consumer protection provisions of the Guidelines that are relied upon in the Complaint. It has taken the erroneous approach of considering that the Respondent's statements being *"in line"* with current UK Government policy means they cannot be environmentally flawed or misleading to consumers in the terms of the Guidelines. If it was that straightforward to meet the requirements of the Guidelines, the NCP review process and the Guidelines themselves, would be entirely obsolete.

The NCP's failure to act in accordance with its own procedural rules

18. Separately, there have been significant delays to the NCP's handling of the Complaint from the outset. Instead of the 12-month timeframe for determination set out in the NCP's "Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises" (the **Procedural Guidance**)³, it has taken nearly 2.5 years to receive the Decision. The NCP's stated reasons for the repeated delays were "*a high staff turnover*", a "*high volume of cases*" and at one point, that it was having to help the Department for International Trade with wider "*departmental priorities*". Whilst it does not form part of the Complainants' grounds for review, it does appear that resourcing issues could explain in part the absence in the Decision of critical analysis of the Complaint relative to the Guidelines and to the evidence as a whole.
19. For the reasons summarised above and set out in detail below, we invite the Steering Board to consider and uphold this review request on the basis that the NCP has failed to follow a fair and due process in determining the Complaint. We accordingly invite the Steering Board to remit the matter to the NCP, with appropriate directions for reconsideration.

Ground 1 – The NCP has failed to apply the OECD Guidelines to its determination of the Complaint

20. The Complainants consider that this ground relates to both breaches of appropriate fairness and of the NCP's own Procedural Guidance. Appropriate fairness in complaint procedures requires a decision to be taken on the correct basis, with reference to the appropriate test, benchmark or reference point. In this case, the NCP complaint process exists to enable individuals and organisations to seek redress for what they consider to be breaches of the Guidelines. The only appropriate reference point for the NCP's decision-making on the Complaint was and is therefore those same Guidelines, and specifically the Environment and Consumer Protection provisions relied upon in the Complaint. (The Complaint is provided as Appendix 3⁴).
21. The fact that the specific wording and provisions of the Guidelines must provide the analytical framework for an NCP decision on a Specific Instance is clear from its final statements in the case of *Bonsucro* (Appendix 1)⁵ which was published on 11th January 2022 and also in *Victoria Oil and Gas plc* (Appendix 2)⁶, published on 22nd October 2022. In both of these final statements, the NCP discussed and analysed the relevant parts of the OECD Guidelines throughout and assessed directly each element of the Complaint against the Guidelines.

³ Published version dated September 2019.

⁴ The Complainants have not appended to this review request the three Bundles of supporting evidence provided to the NCP with the Complaint. Should the review committee wish to see them, however, the Complainants will be pleased to furnish them.

⁵ Final statement: IDI, EC and LICADHO complaint to UK NCP about Bonsucro Ltd - GOV.UK (www.gov.uk)

⁶ Final statement: AHN and CBVL complaint to the UK NCP about Victoria Oil & Gas plc (VOG) - GOV.UK (www.gov.uk)

That is the approach that the NCP needed to take in this, and indeed in every, Specific Instance.

22. In contrast to its approach in *Bonsucro* and *Victoria Oil and Gas plc*, the NCP in this Specific Instance has not based its decision-making on the actual text and provisions of the Guidelines. The Complainants invite the review committee to read both of the above final statements in order to appreciate just how different the NCP's consideration of the Guidelines and the basis of its decision-making was in those complaints relative to this Specific Instance.
23. A key part of the NCP's erroneous approach to determining the Complaint arises from its failure to grasp what is required by Chapter VIII of the Guidelines on Consumer Interests, and specifically what makes a statement "*misleading*". Nowhere in its analysis does the NCP discuss or consider how consumers understand environmental claims made by large corporations such as the Respondent, nor what can make such claims "misleading" in a consumer context. This is a central and fatal flaw in the NCP's consideration of the parts of the Complaint brought under the Chapter VIII Consumer Interests provisions.
24. Paragraph 9 of the Decision provides the NCP's alternative approach to assessing the alignment of the Respondent's four statements with the OECD Guidelines:

*"The UK NCP relies on UK policy in its analysis as there is contesting information on the emissions of woody biomass. **The UK NCP considers that if the Respondent is in line with UK policy, it is meeting its responsibilities under the Guidelines.** This includes to provide accurate, measurable, verifiable and timely information on environmental impacts and information that is sufficient to enable consumers to make informed decisions. **Additionally, the UK NCP considers that if the Respondent is providing accurate information based on its reporting requirements, the statements it makes are not misleading.**"* (Emphasis added)

25. The NCP has superficially stated that its Decision is based on the Guidelines, yet there is a complete absence of analysis of the Guidelines relative to the grounds of Complaint. The NCP has taken the simplistic and erroneous approach of conflating alignment with a narrow selection of domestic policy and regulations with compliance with the Guidelines. This is nowhere provided for in the Guidelines themselves and is out-of-keeping with the NCP's approach in earlier decisions.
26. While it is appropriate for the NCP to refer to relevant policy, it cannot override the requirements of the Guidelines and importantly, all relevant policy and guidelines must be taken equally into account. In contrast to such an approach, the NCP in this Specific Instance has only considered UK policy on the treatment of woody biomass, with limited reference to applicable international codes and guidance. Furthermore, the NCP has had no regard to guidance and policy on consumer protection which are equally relevant to the determination

of a complaint made under both Chapter VI on the Environment and Chapter VIII on Consumer Interests.

27. With respect to the Decision on the four specific statements by the Respondent that are challenged in the Complaint, the NCP's erroneous approach is reflected as follows.

Statement 1 – Woody biomass energy is already effectively a carbon neutral energy generation technology

28. In respect to Statement 1, the NCP states in the section headed "UK NCP analysis" that:

*"The UK NCP will rely on UK policy, guidance, definitions and understandings of carbon neutral biomass in its analysis of this claim."*²

29. This analysis and conclusion section is devoid of discussion as to whether statement 1 is aligned with Chapter VI paragraph 2(a) or Chapter VIII, paragraphs 2 and 4 of the Guidelines. The NCP has limited itself to making bald statements of compliance with the above provisions based simply on alignment with UK policy and the Respondent fulfilling its reporting requirements. In any case, the latter point as to whether Drax is actually fulfilling its reporting requirements is open to question, given the ongoing Ofgem investigation into the matter. The investigation is acknowledged by the NCP at paragraph 7 of the Decision:

"[T]he UK NCP notes that Ofgem is investigating the Drax Power Limited's [sic] compliance with reporting requirements relating to the Renewable Obligation (RO). The opening of this investigation does not imply that Ofgem have made any findings about possible non-compliance."

30. Furthermore, at paragraph 23 of the Decision, the NCP concludes that Statement 1 is not misleading to consumers because UK policy "*suggests that woody biomass can be considered low carbon*". First, "*low carbon*" does not mean the same as "*carbon neutral*", and second Drax's statement is not that woody biomass can be carbon neutral, but that it *is*. This is what should have been analysed in considering whether the Respondent is breaching the Environment provisions of the Guidelines and/or whether it could be misleading to consumers under the relevant provisions of the Guidelines. This clearly demonstrates a complete lack of consideration of Chapter VIII and of the specific provisions relied upon by the Complainants. It is also an example of a failure of proper analysis due to bias towards the Respondent or a failure by the NCP to follow due process and engage fully with the evidence.

Statement 2 – Woody biomass energy has resulted in a carbon emissions reduction of 90%

31. The NCP has based its Decision that the above statement is neither contrary to the Environment or Consumer Interests provisions of the Guidelines in part

on the fact that the Respondent reports on its smokestack emissions in its Annual Report.

32. Although paragraph 28 of the Decision makes mention of the Complainants' reliance on the Competition and Markets Authority (**CMA**) guidance (paragraphs 3.100 and 3.101) that comparisons must be made on a like-for-basis in order to avoid being misleading in a consumer context, the NCP does not discuss or assess the relevance of this guidance in its "analysis/conclusion" section, nor does it address the consumer perspective with regard to Statement 2. Furthermore, there is simply no analysis of the provisions of the Guidelines relied upon by the Complainants. The only mention of the Guidelines is a bare statement that because the NCP is satisfied that Drax adheres to its reporting requirements, consumers could not be misled by the statement, and therefore there has been no breach of the Guidelines. Reporting requirements for companies were not designed with consumer understanding in mind. It is for such reasons that Chapter VIII of the Guidelines exists.

Statement 4 – Drax accounts for all of the supply chain emissions of woody biomass

33. The conclusion of the NCP at paragraph 38 is:

"Given that the Respondent has been issued a ROC [referring to a Renewables Obligation Certificate], the UK NCP considers that the Respondent reports on all necessary supply chain emissions in the energy sector and within its reporting scope and that the UK NCP does not consider that this statement is misleading."

34. The NCP's analysis is both incomplete and illogical. As the Complaint explained, ROCs are issued on the basis of supply chain emissions of carbon dioxide emitted by burning fossil fuels during biomass processing and transport. Biogenic emissions,⁷ that are many times higher, are not taken into account in consideration of whether to grant ROCs; the carbon reporting protocol associated with ROCs automatically considers biogenic carbon emissions as zero. In short, the NCP's decision is based on the Respondent reporting on all its *required* supply chain emissions. This is different to the question of whether it reports on all of its actual supply chain emissions. It is the latter that consumers will understand to be covered by the Respondent's Statement 4. Consumers will have no understanding of the ROC rules and that the Respondent's statement is referring solely to those.

35. In summary, the NCP has decided that the simple fact of the Respondent having a ROC means that its statement on supply chain emissions (Statement 4) does not breach the environmental or consumer protection provisions of the Guidelines. This shows both an acute lack of analysis by the NCP and a failure to engage with the points made in the Complaint. It is a further example of the

⁷ Biogenic emissions include carbon dioxide (CO₂), which is released when biomass (organic matter) is burned or degraded.

NCP failing to satisfy itself that a Statement is not misleading relative to the consumer provisions of the Guidelines themselves.

Statement 5 – Whole trees are not felled to produce wood pellets burned by Drax

36. The NCP's reasoning on Statement 5 was made on the same erroneous basis. It concluded at paragraph 42 that:

"The Respondent is required by the RO scheme [referring to the Renewables Obligation scheme], which is in line with UK policy, to report on these types of residues and meet the requirements under the sustainability criteria in order to be issued a ROC. Therefore, the UK NCP does not consider that statements made by the Respondent that their biomass energy does not damage forests to be misleading."

37. Once again, the NCP has invoked evidence that is not relevant to the question. The ROC scheme does not require companies to ensure that forest harvesting for wood pellets does not damage forests. Neither the ROC guidelines nor the Forest Europe sustainability guidelines that it references prohibit heavy logging and clearcutting. Therefore, the Respondent being in receipt of a ROC does not mean there are no impacts on forests, nor does it mean that whole trees are not felled to produce the wood pellets burned by Drax.

38. In conclusion, none of the Respondent's Statements have been analysed and determined on the basis of the actual OECD Guidelines. The NCP's analysis says nothing about whether any of the Statements are, or could be, misleading in terms of how they are understood by consumers. Most consumers will be completely unaware of the 2023 Biomass Strategy, for example, and will have no understanding of what a ROC even means. Nor will the vast majority of consumers be privy to the reporting that the Respondent provides to Ofgem.

39. The NCP's failure to determine the Complaint on the basis of the Guidelines is a fundamental failure to determine the complaint using appropriate fairness. It amounts to a failure by the NCP to act in accordance with the rules of natural justice and to fulfil its core duty to uphold, promote and further the implementation of the Guidelines.

Ground 2 – The NCP has failed to consider the relevance of 2023 OECD Guidelines

40. The NCP states that as the Complaint was received in 2021, it was considered under the 2011 OECD Guidelines. It has therefore taken no account of the 2023 Guidelines which were published in June 2023. This is a procedural failure. As set out in this article by OECD Watch⁸ the 2023 Guidelines should be used if the conduct prior to 8th June 2023 (the date of publication of the 2023 Guidelines) is ongoing. In this case, the NCP does not appear to have asked itself (nor the parties) the question of whether the Respondent's conduct is ongoing by the making of the same, or substantially similar, claims to those in

⁸ [OECD 2011 or 2023 Guidelines - Which to use for which complaint - OECD Watch](#)

the Complaint since 8th June 2023. It has therefore failed to consider the potential relevance of the 2023 Guidelines. Furthermore, the NCP's choice of applicable Guidelines stands in contrast to, and is incompatible with, its reliance on the 2023 Biomass Strategy, 2024 Impact Assessment for Biomass Power Transitional Options and the 2023 Task & Finish Report in the Decision.

41. As a minimum, proper procedure required the NCP to invite the parties to comment on whether any of the four Statements being examined are ongoing, such as to make the 2023 Guidelines relevant to the NCP's determination.
42. The importance of the NCP's omission is that there are important amendments and additions in the text of the 2023 Guidelines relative to the 2011 version that are relevant to the Complaint. These are summarised below:

Preface

43. The Preface to the 2023 Guidelines states that:

*"The common aim of the Adherents to the Guidelines is to **encourage the positive contributions enterprises can make to economic, environmental, and social progress and to minimise the adverse impacts on the matters covered by the Guidelines that may be associated with an enterprise's operations, products and services.**"*
(Emphasis added)

44. The relevance of this wording in terms of the NCP's handling of the Complaint is the greater emphasis that it places on the Guidelines' contribution to diminishing the negative effects of corporate conduct on the environment and on consumers.

Chapter VI – Environment – Paragraph 2(a)

45. The Environment provisions in Chapter VI have been significantly revised relative to the 2011 version. The equivalent of paragraph 2(a) is found in paragraph 1(d) of the 2023 Guidelines which states that:

46. "[E]nterprises should:

1. *Establish and maintain a system of environmental management appropriate to the enterprise associated with the operations, products and services of the enterprise **over their full life cycle, including by carrying out risk-based due diligence**, as described in Chapter II, for adverse environmental impacts, including through:*

[...]

- d) *providing the public, workers, and other relevant stakeholders with adequate, measurable, verifiable (where applicable) and timely information on environmental impacts associated with their*

operations, products and services based on best available information, and progress against targets and objectives as described in paragraph 1.b.

47. This new version therefore stresses the importance of considering the full lifecycle of the Respondent's woody biomass energy production, which is relevant to the NCP's determination of Statement 4.

Chapter VI – Environment – Paragraph 6(c)

48. Paragraph 6(c) in the 2011 Guidelines has become paragraph 5(c) in the 2023 version. Paragraph 5 contains slightly amended wording, for example by referring to *“entities with which [enterprises] have a business relationship” rather than “supply chain”*. Subsection (c) adds a requirement for businesses to provide information to customers that is *“relevant”* as well as *“accurate”* and for this information to relate to the business' *“environmental impacts”*:

*“5. Continually seek to improve environmental performance, at the level of the enterprise and, where appropriate, **entities with which they have a business relationship**, including by:*

[...]

- d. promoting higher levels of awareness among customers of the environmental implications of using the products and services of the enterprise, including by providing **relevant and accurate** information on their **environmental impacts** (for example, on greenhouse gas emissions, impacts on biodiversity, resource efficiency, **reparability and recyclability** or other environmental issues).” (Emphasis added)*

49. These amendments are clearly relevant to all four Statements that were taken to further examination.

50. The Commentary to the Environment provisions has also been enhanced in the 2023 Guidelines. One example is the insertion of the following paragraph, which is again of relevance to the Respondent's activities and public statements that are the subject matter of the Complaint:

“76. Enterprises have an important role in contributing towards net-zero greenhouse gas emissions and a climate-resilient economy, necessary for achieving internationally agreed goals on climate change mitigation and adaptation. During the process of transitioning to net-zero greenhouse gas emissions, many business activities will involve some level of emissions of greenhouse gases or reduction of carbon sinks. Enterprises should ensure that their greenhouse gas emissions and impact on carbon sinks are consistent with internationally agreed global temperature goals based on best available science, including as assessed by the Intergovernmental Panel on Climate Change (IPCC).”

51. It is therefore clear that there are additional obligations and strengthened wording in the 2023 Guidelines that is relevant to the NCP's determination of this Complaint, and which it could and should have considered. Paragraph 76 (as quoted above) on the need for businesses such as the Respondent to ensure that its emissions and impact on carbon sinks are aligned with the internationally agreed temperature goal of "well below" 2 degrees Celsius⁹ is particularly relevant to the NCP's consideration of the Complaint. In particular, it shows the importance of Drax making public statements (such as Statement 2) that are based on its actual carbon emissions instead of making those emissions disappear through the use of a country-level IPCC accounting protocol whose purpose is simply to avoid those emissions being double-counted for the UNFCCC regime.

Ground 3: The NCP has been highly selective as to the domestic and international policy and guidance that it has taken into account

52. This ground relates to a failure by the NCP to act with appropriate fairness. The Guidelines are explicit that their application in respect to Chapter VI on Environment requires "*consideration of relevant international agreements, principles, objectives and standards*".¹⁰ Similarly, Chapter VIII of the Guidelines requires that "*enterprises should act in accordance with fair business, marketing and advertising practices*"¹¹, many of which will be embodied in national and international codes of best practice. The Complainants made detailed submissions to the NCP regarding relevant codes and guidance that are relevant to an assessment of compliance with both Chapters VI and VIII.

53. In relation to Chapter VIII, the Complainants highlighted various provisions of the ICC's Marketing Code, which falls into this category of "*fair business, marketing and advertising practices*", and which the Decision does not even reference. The Complainants also drew the NCP's attention to other UK domestic codes that fall into this category, notably the CAP code and guidance from the Competition and Markets Authority (CMA) and specifically invited the NCP to take them into account, in accordance with the requirements of Chapter VIII. Specifically, the Complainants relied upon paragraphs 3.41, 3.50 and 3.64-3.74, of the CMA guidance, none which are referenced in the analysis/conclusions parts of the decision.¹² The Complainants also expressly referenced various provisions of the CAP Code and requested they be taken into account.¹³ The decision contains only one reference to the CMA guidance in referring to the Complainants' submissions¹⁴, and makes no mention of the CAP Code. There is no discussion by the NCP of the CAP Code or CMA

⁹ The Paris Agreement to the UNFCCC, Article 2(a): [english.paris.agreement.pdf \(unfccc.int\)](https://unfccc.int/english/paris/agreement.pdf)

¹⁰ OECD Guidelines 2023, Chapter VI, p. 33 (for the 2011 Guidelines, the reference is p. 42)

¹¹ OECD Guidelines 2023, Chapter VIII, p. 43 (for the 2011 Guidelines, the reference is p. 51)

¹² The decision references only paragraphs 3.100 and 3.101 of the CMA guidance.

¹³ See the Complaint at section 7.3.

¹⁴ NCP final statement, paragraph 28.

guidance in any of the “*analysis/conclusions*” sections, and no discussion as to the NCP’s view on their relevance or application to the Complaint.

54. In relation to Chapter VI, in addition to the aspects of UK policy and regulation which the NCP exclusively relied upon in reaching the decision (see Ground 1 above), the NCP should have considered the relevant parts of the guidance of the Intergovernmental Panel on Climate Change (“IPCC”), identified in the Complainants’ evidence.¹⁵ Such guidance is applicable because the UK is a signatory to both the UNFCCC and the Paris Agreement, both of which are guided by the scientific reports of the IPCC and require reporting according to its accounting protocol. Although the Decision does refer to IPCC reports, it focusses only on the parts identified as relevant by the Respondent and adopts the Respondent’s interpretation as to its meaning. There appears to have been no consideration given to key IPCC statements identified by the Complainants. The Complainants referred to the IPCC no less than 25 times in its Complaint, the December 2022 and December 2023 letters; these are set out in Appendix 7. The NCP’s failure to refer to any of these demonstrates its very selective consideration of and reliance on relevant international standards. This is especially problematic given that the 2023 Guidelines explicitly call on enterprises to ensure their impacts on greenhouse gas emissions and sinks is consistent with IPCC protocols.

55. Overall, it is apparent that the NCP has relied very selectively on certain external policy, regulation and guidance, and has neglected to take into account other applicable codes and guidance. The NCP has provided no reasons for this. The impression created is that the NCP has only considered such external sources to the extent they are favourable to the Respondent and has ignored those which are not. The result is a lack of fairness to the parties and a failure to determine the Complaint on a proper and unbiased basis.

56. This is indicative of the NCP’s one-sided approach to determining the Complaint; the NCP appears to have sidelined every point raised by the Complainants that is unfavourable to the Respondent and/or for which the Respondent does not have an answer.

Ground 4 – The NCP has taken a partial and incomplete view of the evidence

57. There are four parts to this ground, which, individually and collectively, demonstrate a failure by the NCP to act with appropriate fairness, to take decisions in accordance with the rules of natural and procedural justice, and to make a judgement on the evidence before it.

The NCP has failed to consider most of the Complainants’ factual evidence

58. First, the Decision fails to reference most of the extensive evidence provided by the Complainants. The Decision generally states that the Complainants

¹⁵ See, for example, the Complaint at paragraph 9.15.

“alleged” certain matters as if no supporting evidence had been provided to sustain them.¹⁶ This is the case for each of the Statements that formed the Complaint. As can be seen from the Complaint itself, the Complainants provided extensive evidence in respect of each of the four claims that the NCP accepted for examination. Given that the Decision is silent on why the NCP rejected the Complainants’ submissions and/or considered that they did not point to a breach of the Guidelines, it appears that the NCP has not even considered the bulk of the Complainants’ evidence.

59. For example, in respect of Statement 1, the Complainants provided evidence that included Chatham House reports from 2021 and 2017, various academic and scientific research papers, documentary evidence from the IPCC, EU scientific and policy documents and a study from the Spatial Informatics Group. None of these are even referenced in the NCP’s final statement.

60. The Complainants also provided significant further evidence by letter dated 12 December 2022¹⁷ (Appendix 4) which included excerpts from a select committee meeting at which the Drax CEO was questioned. That evidence was highly relevant to Statements 1 and 2, as the following extract (paragraph 24 of the letter) demonstrates:

“Committee member Andy McDonald asked Drax CEO Will Gardiner to explain how the emissions from biomass plants compare to those from the coal plants they replace. Mr Gardiner’s answer was that “the emissions actually coming out of the stack are broadly quite similar, but the key point again is that the terminology used there is consistent with international accounting frameworks and descriptions”.

61. Despite this evidence in the December 2022 letter being highly relevant, the NCP does not even refer to it in the Decision. Similarly, the Complainants drew the NCP’s attention to a Panorama documentary highly relevant to Statement 5 and invited the NCP to watch it. There is also no reference to this in the Decision. Despite the Chairman’s email to Mishcon de Reya on 4 January 2024 confirming that *“[t]he UK NCP will consider all information provided by the parties in the Further Examination of the complaint”*, it is unclear to the Complainants whether the NCP did in fact take the evidence in this letter into account.

62. With regard to Statement 1 and the Respondent’s claims of carbon neutrality, the NCP also has taken no account of the important fact of Drax’s own independent advisory board (**IAB**) issuing the following recommendation in early 2023:

“2. Drax should reassess its criteria for determining carbon neutrality. For example, Drax should move away from saying “carbon stocks are increasing/stable” and stating biomass is carbon neutral. Drax needs to understand what alternative criteria there might be for carbon neutrality and how it can be measured cost effectively.”

¹⁶ See, for example, the NCP final statement at paragraphs 14, 15, 27, 33, 39.

¹⁷ Complainants’ letter to the NCP dated 12 December 2022, paragraphs 23-28 (Appendix 4).

63. This is evidence that the Complainants' provided to the NCP by email dated 21st April 2023 (Appendix 6), to which the NCP gave no response.

64. The NCP has further completely disregarded evidence provided by the Complainants regarding the IPCC's stance on bioenergy. Paragraph 9.41 at p. 36 of the Complaint quotes the IPCC as follows:

*"The combustion of biomass generates gross GHG emissions roughly equivalent to the combustion of fossil fuels. If bioenergy production is to generate a net reduction in emissions, it must do so by offsetting those emissions through increased net carbon uptake of biota and soils."*¹⁸

65. Similarly, on Statement 2, the NCP has not taken into account the Complainants' evidence that the IPCC's accounting methodology, whereby carbon emissions from the burning of biomass are counted in the agriculture and land use section ("**AFOLU**") and not in the energy sector, does not mean that those emissions do not occur. Instead, it is simply an accounting method to avoid the double-counting of those emissions for the purposes of the United Nations Framework Convention on Climate Change ("UNFCCC"). The NCP has based its Decision on Drax's arguments to the contrary, but does not even reference or discuss the Complainants' counter-argument and supporting evidence by way of direct quotes from the IPCC's reporting guidance that *"the approach of not including these [bioenergy] emissions in the Energy Sector total should not be interpreted as a conclusion about the sustainability or carbon neutrality of bioenergy."*¹⁹

66. A further striking example of this is in respect to Statement 5, for which the Complainants provided extensive photographic and documentary evidence strongly linking Drax's bioenergy production to the logging of whole trees. This is referred to in the Decision as the Complainants having "*stated*" that various NGOs have carried out investigations into pellet manufacturers owned by Drax sourcing whole trees for pellet manufacturing. None of the photographic and documentary evidence is actually referred to or analysed in the Decision.

67. The NCP's limited consideration of the Complainants' evidence is further demonstrated by the NCP's assessment of the evidence in the "*analysis/conclusions*" sections of the Decision. Save for Statement 1 at paragraph 25, the NCP's analysis in the Decision does not provide any discussion of the Complainants' arguments or evidence at all. This results in the Decision reading as very one-sided and indicates either bias, conscious or unconscious, in favour of the Respondent, and/or a failure by the NCP to fully engage with the issues.

¹⁸ Taken from IPCC (2014) *Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*. Edenhofer, O., et al (eds). Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA. At page 877.

Available at: https://www.ipcc.ch/site/assets/uploads/2018/02/ipcc_wg3_ar5_full.pdf

¹⁹ Complaint, paragraph 9.18 and footnote 108.

The NCP has accepted unquestioningly the contrary statements and evidence of the Respondent

68. Throughout the Decision, the NCP has uncritically accepted the Respondent's statements and has sidelined the evidence that is contrary to the Respondent's position without giving it due consideration. The Decision, therefore, appears to have been taken on only half the evidence, all of which was provided by the Respondent or by the Department for Energy Security and Net Zero (**DESNZ**). The latter is very likely to be predisposed towards the Respondent's position given the Government's extensive financial and political support for Drax.
69. This apparent bias is visible in the NCP's consideration of Statement 5. The first part of Statement 5 reads *"[w]hole trees are not felled to produce wood pellets to be burnt by Drax"*. It is a clear and unequivocal statement by the Respondent. Yet, in quoting the Respondent's evidence on this point, the final statement reads: *"The Respondent stated that they "commit to not use: (i) biomass that drives harvesting decisions that would adversely affect the long-term potential of forests to store and sequester carbon, (ii) biomass that increases harvesting above the sustainable capacity of forests, (iii) biomass that displaces solid wood product markets and (iv) biomass that comes from stumps."* A *"commitment"* not to use certain types of wood is obviously not the same as *"do not use"*, thereby proving the Complainants' point that Statement 5 has the potential to be misleading to consumers. Similarly, the Respondent's statement above does not actually say that whole trees are not felled to produce wood pellets that they burn. The Decision on Statement 5 is therefore plainly not based on the actual evidence before it, nor with reference to the relevant Guidelines.
70. The NCP's uncritical acceptance of the Respondent's evidence is striking in the *"analysis/conclusions"* section for Statement 5 where the NCP relies squarely on Drax *"stating"* the contrary of the Complainants' evidence and makes its Decision accordingly. This can be clearly seen from the following extracts from paragraphs 42-43 of the Decision where, astonishingly, the NCP acknowledges evidence from the Respondent that it **does** source wood from whole trees and yet still concludes that Statement 5, where Drax states the exact opposite, is not misleading to consumers:
- "The Respondent states that it sources materials from thinnings and forestry, sawmill and arboricultural residue ... Additionally, **the Respondent states that it only uses whole trees or "roundwood" that helps to maintain or improve the growing stock, growth rate and productivity of forests.** As such, the UK NCP does not consider that the claims that "whole trees are not felled to produce wood pellets burnt by Drax" is misleading."* (Emphasis added)
71. In reaching its conclusion regarding Statement 5, the NCP also relied on the fact that the Respondent has obtained a ROC. This is despite the fact that having a ROC does not prevent the sourcing of whole trees for biomass

burning, something which the NCP failed to consider. The Complainants' documentary and photographic evidence of whole trees being logged for wood pellets burned by Drax has been ignored for the purposes of the Decision. In short, Drax denied the Complainants' allegations, and as far as the NCP was concerned, that denial, together with the irrelevant point of the Respondent having a ROC, was determinative of the matter. The NCP has completely failed to reach an independent conclusion based on the actual evidence before it. This can only be due either to bias in favour of the Respondent or a failure by the NCP to follow due process and critically appraise the evidence.

72. The NCP's unquestioning acceptance of the Respondent's assertions is equally apparent in paragraph 6 of the decision which relates to Statement 1 and reads:

"The UK NCP considers that the Respondent has adhered to the Guidelines as it is accredited by Ofgem (Great Britain's independent energy regulator), they are aligned with UK policy, and states it uses Sustainable Biomass Program ("SBP") accredited suppliers which demonstrates compliance with national legal and sustainability requirements for woody biomass."

73. None of these accreditations are relevant to the question of whether Drax's claims of carbon neutrality are misleading to consumers and therefore whether Drax has breached the Guidelines. Given the amount of detail contained in the Complaint and the length of time the NCP took to conduct the further examination, the NCP had ample time to inform itself sufficiently of the issues and to understand that compliance with these programmes is not a proxy for carbon neutrality. The NCP's repeated invocation of Drax's compliance with the Sustainable Biomass Program (SBP) is particularly troubling in light of the SBP's own warning that *"an SBP claim should not be misrepresented as a guarantee of carbon savings, nor should it be associated with claims of carbon neutrality."*⁴

Ground 5 – The NCP has failed to provide a fair hearing to the Complainants

74. The NCP has failed to follow its own procedures and to meet the requirements of fairness, in accordance with the rules of natural and procedural justice, by not affording the Complainants a fair hearing. The Complainants have been denied a fair hearing in the following three respects: (1) the NCP has determined the Complaint exclusively on the basis of the Respondent's compliance with national policy; (2) the NCP has failed to provide transparency regarding its consultations with external bodies; and (3) the NCP has failed to inform the Complainants of whether its later submissions were taken into account in reaching its Decision.

The NCP's unexpected reliance on policy documents from 2023-2024

75. The first point arises from the NCP's unexpected approach of determining the Complaint exclusively on the basis of the Respondent's compliance with national policy and with its reporting requirements, as described in ground 1 above. The Complainants did not anticipate (and could not have anticipated) the NCP considering the 2023 Biomass Strategy, the 2023 Task & Finish Group report and the 2024 Impact Assessment for Biomass Power Transitional Options to be cited in support of its conclusions on whether Statement 1 breaches the Guidelines. This is particularly so given that the Complaint dates from 2021, and yet the NCP has assessed the Respondent's statements made up to 2021 on the basis of a UK Government policy adopted two years later. As a consequence, the Complainants had no chance to make submissions on these points. Had they been aware in good time that the NCP was proposing to place considerable reliance upon these very recent policy and supporting documents produced by or for the UK Government, the Complainants would have provided formal comments on them for the NCP's consideration.

The NCP's failure to provide transparency regarding its consultations with external bodies (including government)

76. This point is both a breach of the right to a fair hearing and a failure by the NCP to follow its own procedures. The NCP's Procedural Guidelines at paragraph 4.6.4 relates to the examination process and explains that, as part of this, the NCP *"may also seek advice from other relevant government departments..."* and *"if appropriate, it will seek informed expert opinion"*. Paragraph 2.5.1 states that the NCP will share information with all parties, and this applies *"to information provided by the parties or any other person or organisation, and applies whether information is provided in writing or in the course of a meeting with the NCP"*. (Emphasis added)

77. The draft final statement provided by the NCP on 29 February 2024 stated that it had consulted *"experts in energy and environment"*. However, this reference was removed from the final statement and replaced with a reference to the NCP having *"sought insights"* from DESNZ, Ofgem and the CMA.²⁰ No explanation has been provided to the Complainants for this material change. Further, the Complainants have not been informed of the timing, purpose or content of any of these meetings or discussions. Nor is there any information in the Decision as to what *"insights"* were obtained or how they influenced the NCP's decision-making. The Complainants had specifically asked the NCP by letter on 2nd and 21st August 2023 respectively whether it had consulted independent experts. At no point did the NCP provide an affirmative response to those questions.

78. The NCP's failure to provide any information regarding these meetings further contradicts its claim to operate in accordance with the requirements of the Guidelines by acting *"transparently"*.²¹ The Complainants had no opportunity to raise any matters in response to these consultations and are entirely in the dark

²⁰ NCP final statement, paragraph 8.

²¹ NCP final statement, paragraph 13.

as to how these discussions influenced the Decision. In addition to being a procedural failure, this omission by the NCP has also deprived the Complainants of their right to a fair hearing.

The NCP's failure to take the Complainants' later submissions into account

79. After various requests for confirmation as to whether the Complainants' substantive submissions sent in letters dated 12th December 2022 and 6th December 2023 (Appendix 5) would be considered,²² the Chairman of the UK NCP confirmed to Mishcon de Reya (lawyers acting for two of the complainants) in an email that "[t]he UK NCP will consider all information provided by the parties ..." However, it remains unclear as to whether the evidence in these letters was in fact taken into account given there are no references to these additional substantive submissions in the Decision. This means that the Complainants are unable to know the full evidential basis on which the Decision was made and, if certain material was excluded, the reasons for this. This runs contrary to the rules of fairness and the Complainants' right to a fair hearing.

Ground 6 – Significant delay: The NCP failed to adhere to the procedural timetable

80. The NCP process is required to follow the NCP's own Procedural Guidance,²³ in addition to the basic rules of fairness in accordance with the right to a decision within a reasonable timeframe. In this Specific Instance, there have been numerous delays in the handling of the Complaint, and poor communication from the NCP throughout the process. Full details of the persistent delay are provided in Appendix 8 to these grounds. Example breaches of the NCP's Procedural Guidance are as follows:

- a. The Complaint was submitted to the NCP on 21st October 2021. The draft final statement was received on 29th February 2024. It therefore took 2 years and 4 months to get to that stage, which does not even complete the NCP process. The procedural rules at paragraph 2.2.1 of the NCP's Procedural Guidance states that the NCP is committed to completing the entire process within 1 year of receiving the Complaint. By the time the process is complete in this case, that timeframe will likely have been exceeded 3 times over.
- b. Furthermore, by letter dated 14th October 2022, the NCP informed the Complainants that the further examination process was about to start and the intention was to complete it by March 2023. The NCP stated at that time that it was conscious of the delay in determining the Complaint. In this context, it is even more unsatisfactory that it took an additional 11 months for the draft final statement to be produced.

²² Moreover, these further submissions were only necessary because of the delays to the NCP's handling of the Complaint.

²³ <https://www.gov.uk/government/publications/uk-national-contact-point-procedures-for-complaints-brought-under-the-oecd-guidelines-for-multinational-enterprises>

- c. Paragraph 2.2.2 of the NCP's Procedural Guidance states that in the event of delay, the parties will not only be informed, but that a revised timetable will be provided. Between March and December 2023, the NCP provided no substantive update as to the ongoing delay and it was only in December 2023 that it provided a revised timetable to the Complainants. This is in spite of the Complainants requesting updates from the NCP on 3rd, 11th, 27th July, 2nd, 21st August and 7th September 2023, which were added to by letters from Mishcon de Reya on 29th September, 16th October and 27th October 2023.

81. The NCP received extensive submissions from Drax on 28th April 2023 but failed to provide these to the Complainants until 31st October 2023. No explanation was provided by the NCP for the six-month delay. Furthermore, the delay was in spite of the Complainants asking the NCP on four occasions whether Drax had responded to the Complainants' letter of December 2022. This delay meant that the Complainants were only able to respond to Drax's letter in December 2023, several months later than it would otherwise have been sent. This may have been too late for it to be taken into account, causing prejudice to the Complainants' case and denying them a fair hearing. In any event, it is a further instance of procedural unfairness.

Ground 7 - The NCP has not adhered to its own transparency procedures

82. As explained at paragraph 76 above, in the draft final statement, the NCP stated that it had "*sought insights from the Ofgem, Competition and Markets Authority ("CMA") and experts in energy and environment*". There was no reference to the DESNZ. However, in the final statement, the reference to "*experts in energy and environment*" has been removed without explanation, and DESNZ has been added as a consultee. This is the opposite of procedural transparency as it raises uncertainty as to whether experts in energy and environment were actually consulted, and if not, how the reference to such came to be in the draft statement.

83. In addition, the Decision has numerous supplementary references to DESNZ policy positions, including the 2023 Biomass Strategy, which were absent from the draft version. It therefore appears that the NCP, without informing the Complainants, has consulted DESNZ in-between the draft and final statements being produced, at a time when the examination stage was meant to have concluded and only factual corrections to the statement were to be made. Nowhere is this provided for in the examination section of the procedural guidance, or at all.

84. Finally, there has been an important change to the text in between the draft and final statements in paragraph 41. In the draft final statement, the relevant part of paragraph 41 reads:

*“The Respondent stated that they **“do not use:** (i) biomass that derives harvesting decisions that would adversely affect the long-term potential of forests to store and sequester carbon, (ii) biomass that increases harvesting above the sustainable capacity of forests, (iii) biomass that displaces solid wood product markets and (iv) biomass that comes from stumps.” (Emphasis added)*

85. In the final statement, the NCP has changed this text to:

*“The Respondent stated that they **“commit to not use:** (i) biomass that drives harvesting decisions that would adversely affect the long-term potential of forests to store and sequester carbon, (ii) biomass that increases harvesting above the sustainable capacity of forests, (iii) biomass that displaces solid wood product markets and (iv) biomass that comes from stumps.” (Emphasis added)*

86. The terminology “do not” use and “commit to not use” is not one and the same thing. The Complainants’ suspect that this change arose from factual commentary on the draft statement provided by Drax, as Drax’s initial response to the Complaint used the latter wording. However this amendment arose, it is a highly significant change relative to the Complaint on Statement 5 with an obvious potential bearing on the Decision. As part of its duty to reach a decision on the evidence and act with appropriate fairness, the NCP should have considered whether this amendment to its understanding of Drax’s position on Statement 5 altered its views on whether the Guidelines had been breached. The NCP appears not to have done so.

Summary of the NCP’s failings

87. There is a distinct appearance of bias towards the Respondent from the NCP’s overall handling of the Complaint, the various delays, the other procedural errors and its approach to the evidence. The only other possible explanation is a high level of incompetence and/or underperformance by the NCP, although this is hard to square with its other very detailed and thorough published final statements. Whichever is the case, the effect is the same – a striking failure by the NCP to treat the Complainants with appropriate fairness.

88. The key elements that give this appearance of bias and/or demonstrate a lack of fairness by the NCP can be summarised as follows:

- a. The NCP has produced a Decision that bears very little resemblance, in terms of its structure, its approach to the Guidelines, its level of detail and its analysis of the evidence, to the other final statements produced in the last two years (*Bonsucro* and *Victoria Oil and Gas plc*). This is despite the NCP explaining by letter in August 2023 that it could not “*expedite this important, detailed work*” and taking 16 months to produce a final statement with little more than two pages of discussion and analysis;

- b. The NCP has failed to consider most of the Complainants' evidence and has failed to indicate whether or not it took into account the Complainants' further submissions of December 2022 and December 2023;.
- c. The NCP has relied uncritically on statements from Drax, including parts of its submissions that are not even supported by accurate references or documentary evidence²⁴ and irrelevant information relating to its receipt of ROCs;
- d. The NCP has reached perverse conclusions that no reasonable, unbiased decision-maker could reach on the evidence in the case, such as that Drax complies with its reporting requirements when it is aware of a pending Ofgem investigation into that very matter, and that consumers could not be misled by Drax stating that it does not source wood for pellets from whole trees when the NCP accepts that Drax **does** source some wood from whole trees.
- e. The NCP took 6 months to forward to the Complainants Drax's response letter of 28th April 2023. The NCP has never provided an explanation for this delay, which was in spite of the Complainants on **four** separate occasions writing to the NCP to ask if Drax had provided a response.²⁵
- f. The NCP failed to inform the Complainants that it had consulted government officials from DESNZ, and that it had spoken to Ofgem and the CMA. The NCP has provided no information as to the content of these submissions, nor as to how these consultations influenced its Decision.
- g. Most of the procedural delay occurred during the further examination stage between 14th October 2022 and December 2023 when the revised timetable was sent. In particular, the NCP communicated very little with the Complainants between March and August 2023 when the UK Government was in the process of finalising its Biomass Strategy. The Complainants have the impression that as part of their bias towards the Respondent, the delay was due in part to the NCP deciding to wait for the Strategy to be published in order to then rely on it.

Remedies

89. The Complainants seek that the Steering Board:

- a. Remit the Final Statement back to the NCP with a requirement that each of the appropriate fairness and procedural issues identified above is addressed;

²⁴ For example, the quote allegedly from the IPCC on page 4 of Drax's letter of 28th April 2023 is nowhere to be found on the hyperlinked document.

²⁵ E-mail dated 10 May 2023 and letters dated 1 August, 21 August and 29 September 2023.

- b. Require that any statement by the Steering Committee as to its handling of the Complaint is annexed to the Final Statement.