CALS
Centre for Applied Legal Studies

Our reference: OECD001/LAW/19

23 May 2019

TO: **Christian Schuller**
National Contact Point Secretariat, Luxembourg
Per Email: Christian.schuller@eco.etat.lu

TO: **Cyril Liance**
National Contact Point Secretariat, Belgium
Per Email: Cyril.Liance@economie.fgov.be

CC: **Angel Gurría**
Secretary General for the Organisation for Economic Cooperation and Development
Per Email: Angel.ALONSO@oecd.org

Dear Christian Schuller and Cyril Liance,

RE RESPONSE TO DECISION NOT TO INVESTIGATE FURTHER IN THE MATTER CONCERNING BELGIAN / LUXEMBOURG BANKS (KBC AND KBL)

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1. Open Secrets and the Centre for Applied Legal Studies ("**the complainants**") write this letter in response to your letters dated 26 April 2019.

2. Our response is directed towards both the Belgian and Luxembourg National Contact Points ("**NCPs**"). We have noted where our response is specifically to a point raised by a particular NCP.

3. Our response is made up of the following parts:

   3.1 PART A: Points *in limine*
   3.2 PART B: General responses
   3.3 PART C: Specific responses
   3.4 PART D: Responses directed towards the Belgian NCP
   3.5 PART E: Responses directed towards the Luxembourg NCP
   3.6 PART F: Conclusions and Recommendations

PART A: POINTS *IN LIMINE*

The conflict of interest

4. We wish to remind the Belgian and Luxembourg NCPs that they have a mandate to uphold the Guidelines and ensure redress for corporate misconduct. And that, in this regard, NCPs are bound to operate in accordance with the four core criteria of visibility, accessibility, transparency and accountability.

5. We wish to put on record again, our concerns regarding the conflict of interest present in the decision-making structures of the Belgian NCP. This conflict is a result of the positions and influence of the represented employers' federations, namely the Federation of Enterprises of Belgium ("**FEB**") and Comeos, both of which have senior executives of the KBC Group (an implicated party) in influential positions. This conflict of interest is not only an impediment to the core criteria of accountability, but it is also a breach of the *OECD Guidelines on Conflicts of Interest*,[1] to which NCPs, as bodies acting in the public service, are bound. We have stated as much and outlined in detail the grounds and consequences of the conflict of interest for the complaint, in our correspondence dated 11 April 2019.

6. There was not only a conflict of interest which has never been resolved, but the manner in which our objection was dealt with does not promote transparency and accountability, nor comply with the OECD's own guidelines when dealing with a conflict of interest.

[1] OECD *Managing Conflict of Interest in the Public Service: Annex to the Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service* 2003.

7. In order to fulfil its mandate, the OECD must be impartial and be seen to be impartial. The conduct of the Belgian NCP in this regard has undermined the impartiality of the OECD in handling our complaint.

8. It is because of these grave concerns that the complainants requested that the Belgian NCP provide a substantive response to our concerns. While we received a response regarding whether or not to investigate our complaint, the Belgian NCP has continued to ignore this issue and has not provided any such substantive response. The only response we have received was a paragraph in an email sent to us on 11 February 2019, stating that the NCP thought their procedures were adequate. It did not explain how they are adequate, nor what these procedures were, other than consensus decision-making. It also did not address how our concerns were dealt with at these NCP committee meetings, which were attended by the impugned parties, the FEB and Comeos.

9. Furthermore, the recommendations made by the OECD Secretary General to address this conflict of interest (in his email of 22 August 2018) were simply ignored by the Belgian NCP without any justifiable reasons.

Format of the NCPs' draft responses

10. Due to the lack of page numbers (Luxembourg NCP) and paragraph numbers (both NCPs), it has been challenging to specifically respond to the NCPs' drafts. We have attempted to do so through quotations and headings.

Duty of the NCPs to consider and apply their mind to our response

11. The Belgian NCP, in its correspondence with us, dated 26 April 2019, said that:

    "*The Belgian NCP will meet again in early June 2019 to decide whether comments can be taken into account or not…*"

12. We wish to object to this on the basis that it goes against the NCP's rules and procedures,[2] as well as the rule of law. Our right of reply includes that our reply is considered in good faith and that the decision-makers apply their minds. The fact that this needs to be stated, again raises questions around the Belgian NCP's impartiality.

13. In addition, and contrary to the Belgian NCP's understanding of its role set out in part 6 (b) of its draft assessment, we wish to emphasise that the NCPs are a regulatory accountability mechanism. As an accountability mechanism, while not seeking out confrontation, they cannot shy away from it. Indeed, complaints, by their nature, are confrontational.

14. Regarding the statement by the Luxembourg NCP, that the NCP mechanism is not a tribunal and that the NCPs do not deal with history and politics, we submit that when dealing with multinational corporations, they cannot be divorced. Multinational corporations control substantial political and financial power, often comparable to or greater than governments. The very nature of their political and historical make up, which in many cases have historically involved many gross human rights violations, particularly in the developing world, is an important reason behind the establishing of the National Contact Points as an accountability mechanism. We therefore find the refusal to examine a complaint because it involves 'history and politics' an absurd statement to make.

15. The question before the NCPs was to determine whether or not there was sufficient evidence to investigate the matter further. Before conducting an investigation, it is inappropriate to make pronouncements on the substance of the complaint. Despite the Belgian NCP's statement that it is not a judicial body or tribunal, it nonetheless proceeds to make findings that go well beyond an evaluation of the evidence before it (and, as we argue below, even ignore our evidence), as did the Luxembourg NCP.

PART B: GENERAL RESPONSES

[2] Article 9 and 10 of the Belgian National Contact Point Rules of Procedure Coordinated Text 28/04/2017, and article 2 of Appendix 2 of the Belgian National Contact Point Rules of Procedure Coordinated Text 28/04/2017.

The NCPs' mandate

16. One of the core functions of the NCPs is to 'further the effectiveness of the Guidelines', by, *inter alia*, 'handling enquiries and contributing to the resolution of issues that arise'.[3]

17. To fulfil this core function, NCPs have the power to conduct a thorough examination of the facts in order to issue a final statement, including in situations where a party does not wish to utilise the NCP's "good offices" (understood as mediation).

18. NCPs are able to investigate a complaint in order to assess whether the complaint is justified. In deciding whether to do this, NCPs have several methods available to them in order to examine the facts. These include requests for additional information or statements from the complainant and the company(ies), field visits and interviews, the use of a network of experts[4] and technical assessments.[5]

19. In conducting itself in furthering its objectives (most notably, to 'further the effectiveness of the Guidelines'), NCPs need to exercise their powers in line with the principle of functional equivalence and the right of victims of human rights violations to an effective remedy.[6] Again, this applies irrespective of whether "good offices" and consensus procedures are utilised.

20. As can be seen, a thorough examination of the facts presented are critically important to NCPs fulfilling their main objective (further the effectiveness of the Guidelines) and indeed their mandate. The NCPs' powers go beyond merely offering "good offices".[7]

21. The NCPs, in their draft statements, state their purpose is to diffuse ongoing conflicts through mediation, which misinterprets the true scope of their mandate

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[3] OECD Council, Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises, Section I, para. 1, in OECD Guidelines for Multinational Enterprises, p. 68. See also Procedural Guidance, attached to id., Section I, introductory paragraph, and paragraph C, introductory paragraph.
[4] Appendix 1 of the Belgian National Contact Point Rules of Procedure Coordinated Text 28/04/2017.
[5] Secretariat, the Norwegian National Contact Point, Procedural Guidelines for handling complaints, 1 October 2013, p. 8, available at http://www.responsiblebusiness.no/files/2013/12/NCP-Norway-Procedural-Guidelines.pdf.
[6] OECD Council, Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises, Section I, para. 1, in OECD Guidelines for Multinational Enterprises, p. 68.
[7] Report by the Chair of the 2011 Meeting of the National Contact Points, p. 24.

and disregards their own rules of procedure which express that "participation in dialogue is not mandatory".[8] In fact, the Luxembourg NCP acknowledges this quite clearly in its draft initial assessment by stating that such an approach would undermine the effectiveness of the Guidelines.[9] Yet the Belgian NCP seems to understand that it can only offer its "good offices" in every specific instance.

22. These opposing views by two NCPs handling the same complaint hampers the consistency and predictability of the NCP complaint process if the same Guidelines can be interpreted so differently.

23. The NCPs also seem to regard conflicts related to conduct that is no longer ongoing somehow more difficult to deal with. This approach results in hesitation in considering anything in the past, and this means that NCPs then won't or will be reluctant to consider complaints that relate to any past incidents, which are the majority of complaints. We deal with the NCPs' concerns regarding the amount of time that has lapsed between the conduct and the complaint, below (Part C, under the heading "Time elapsed between the impugned conduct and the complaint").

24. In addition, as explained above and below, significant doubt has been cast on the impartiality and trustworthiness of the processes of the Belgian NCP. This leads us to believe that mediation would have occurred in the context of a dramatic power imbalance that would have at the very least jeopardized the outcome, even when discounting the conflict of interest.

25. We argue below (Part C, under the heading "Evidence") that the NCPs have not applied their minds to the evidence that has been presented to them, particularly the lack of evidence on the part of the Kredietbank Group ("**KBC**") and Kredietbank Luxembourg ("**KBL**"). In addition, if the NCPs found the evidence to be lacking, they have failed to seek additional information from the complainants as the rules of procedure empower them to do. .

[8] Article 2 of Appendix 2 of the Belgian National Contact Point Rules of Procedure Coordinated Text 28/04/2017.
[9] "Rejecting complaints on the sole basis that a company does not wish to engage in mediation or that that mediation would not be fruitful is not contemplated in the Procedural Guidance and is likely to encourage companies to simply ignore the OECD Guidelines and the NCP as an instrument and network, thereby undermining the effectiveness of the Guidelines", Draft Initial Assessment by Luxembourg NCP of 26 April 2019 at page 4.

The NCPs' mandate and the inextricability of public interest, functional equivalence and effective remedies

26. Statements made by NCPs are made to the public as well as the parties, and part of NCPs' ability to enforce the Guidelines requires both governmental and public backing. There is considerable importance in public acknowledgement of what happened in cases of gross human rights violations and crimes against humanity, such as apartheid. This element is one that makes the NCPs' functioning and mandate inextricable from the public's interest in complaints.

27. It is also because of this public interest that a purely consensual solution based on mediation is both inappropriate and insufficient,[10] particularly when it happens 'behind closed doors'.

28. Functional equivalence means that, regardless of how the NCP is structured, all NCPs should operate in accordance with a set of criteria.[11] Fundamentally divergent approaches to the NCPs' roles and powers results in a lack of consistency, equal treatment and predictability of the NCP mechanism as a whole.[12] In addition:

    28.1 Predictability is included in the Procedural Guidance as a standard that the NCPs need to observe.[13]

    28.2 The principle of equal treatment is the basic component of due process.

29. The right to an effective remedy is arguably one of the foundations of the NCPs' powers; a very reason for its existence.[14] It cannot be denied for immaterial

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[10] L. Davarnejad, 'In the Shadow of Soft Law: the Handling of Corporate Social Responsibility Disputes under the OECD Guidelines for Multinational Enterprises', 2011 Journal of Dispute Resolution (2001), p. 382.

[11] J C Ochoa Sanchez, 'The Roles and Powers of the OECD National Contact Points Regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation', *Nordic Journal of International Law,* Vol. 84, Issue 1, 2015, pp 89-126.

[12] Report from an Expert Workshop entitled "Business Impacts and Non-judicial Access to Remedy: Emerging Global Experience" held in Toronto in 2013, in Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Addendum, 28 April 2014, un Doc. A/HRC/26/25/Add.3, p. 13 (hereinafter 'Report from an Expert Workshop entitled "Business Impacts and Non-judicial Access to Remedy: Emerging Global Experience", held in Toronto in 2013').

[13] Procedural Guidance, Section I, part C, introductory paragraph.

[14] J C Ochoa Sanchez, 'The Roles and Powers of the OECD National Contact Points Regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation', *Nordic Journal of International Law,* Vol. 84, Issue 1, 2015, pp 89-126.

reasons, nor brushed aside without giving substantiated reasons, sound in law. The following form part of an effective remedy:[15]

29.1 Public acknowledgement of what happened in context of human rights violations, such as apartheid;

29.2 The importance to the public of knowing what happened;

29.3 The value of truth, because denials and lies often coexist in the commission of human rights violations, as they do with regard to apartheid; and

29.4 Uncovering past atrocities with the aim of preventing their recurrence.

30. While the NCPs have a flexible approach, this flexibility is grounded by the principles mentioned above, namely, functional equivalence, the public interest and effective remedies.[16] These principles all demand that the NCPs conduct a thorough examination of the facts and evidence presented to them, before they make any conclusions.

31. This also means that they must be adequately resourced so that they can undertake a thorough examination of the facts and fulfil their mandate.

32. Importantly, an unsatisfactory answer from a company regarding the factual aspects of a complaint, under certain circumstance, constitutes (in and of itself) a breach of the Guidelines.[17]

The lack of specificity of the NCPs' responses – NCPs' statements are vague and embarrassing

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[15] See S. Cohen, 'State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past', 20 Law & Social Inquiry (1995) p. 18. For empirical studies, see e.g. C. M. Beristain, C. R. Urquilla Bonilla and Inter-American Institute of Human Rights, Diálogos sobre la Reparación: Experiencias en el Sistema Interamericano de Derechos Humanos, vol. 1 (Instituto Interamericano de Derechos Humanos, San José, 2008) p. 189; P. B. Hayner, Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions, 2nd edition (Routledge, New York, 2011) pp. 20–21; D. F. Orentlicher, That Someone Guilty Be Punished: The Impact of the icty in Bosnia (Open Society Justice Initiative and International Center for Transitional Justice, New York, 2010) p. 18; M. Freeman, Truth Commissions and Procedural Fairness (Cambridge University Press, Cambridge, New York, 2006) p. 27. For a thorough analysis of this matter, see J. C. Ochoa S., The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations (Martinus Nijhoff, Leiden, 2013).

[16] OECD Council, Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises, Section I, para. 4, in OECD Guidelines for Multinational Enterprises, p. 68.

[17] See Norwegian NCP, Final Statement, complaint from Lok Shakti Abhiyan et al. v. Posco (South Korea), abp/apg (Netherlands) and nbim (Norway), 27 May 2013, pp. 7–8.

33. In order to reply to disputed facts, we need specific instances of dispute. Generalisations cannot be adequately addressed, though we have done our best to do so. We wish to place on record that vagueness and the blanket dismissals by the NCPs compromise our right of reply.[18]

34. How the NCPs applied the criteria in assessing whether the complaint merits further investigation was inconsistent and, in the case of the Belgian NCP, incoherent. Further, the "process" adopted by the Belgian NCP was fundamentally conflicted and compromised both the process and outcome. It should not be the case that, when examining the two NCP draft statements, there is no formal nor substantial coherence between them. The Belgian NCP's draft statement was particularly astonishing since they had repeatedly given themselves extensions, adding up to a year gap between the initial complaint and the draft statement, only to produce a response consisting of less than three pages of assessment (the rest simply restated facts and a timeline of the correspondence between the parties). This assessment also seemed arbitrary and disconnected from the rules and guidelines that govern NCPs, with very little application and explanation. In previous correspondence to the Belgian NCP, we had expressed our concern that our complaint was not being taken seriously. The draft statements confirm our fears.

PART C: SPECIFIC RESPONSES

The assessment criteria

35. We note that the criteria used in assessing whether or not a complaint merits further examination are as follows:
    - 35.1 the identity of the party concerned and its interest in the matter;
    - 35.2 whether the issue is material and substantiated;
    - 35.3 whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance;

[18] For example, on page 7 of the Belgian NCP's draft statement, "After careful consideration and in compliance with the internal procedures, in particular with article 17 for the treatment of request 3, the NCP has concluded that it will not proceed with further examination of the specific instance".

35.4 the relevance of applicable law and procedures, including court rulings;

35.5 how similar issues have been, or are being, treated in other domestic or international proceedings; and

35.6 whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines.

36. On page 3, under the heading "Applying the initial assessment criteria", in the last paragraph, the Luxembourg NCP states:

> *"complaints can be dismissed outright if one of the mentioned criteria is not met, but it is also understood that NCP's must apply a not unreasonably high threshold for acceptance of the complaint, for it is expected to operate in an accessible manner".*

37. We have interpreted the above to mean that NCPs take a flexible approach in applying the criteria in order to allow parties acting in the public interest to access effective remedies in a manner that promotes functional equivalence.

38. In addition, and in line with the rule of law, we also interpret the above to mean that, in applying the criteria, NCPs will do so in a rational and justifiable way, and give cogent reasons for decisions or findings.

39. The Luxembourg NCP further states that, at this stage in the complaint process, it is inappropriate for an NCP to 'express a judgment or stance on the ultimate merits'.[19] When considering "whether the issue is material and substantiated", the Luxembourg NCP interprets this to mean merely taking a broad and overall view as to the materiality and substance of the complaint.[20] In addition:

39.1 The Luxembourg NCP states in this context, 'The complaint is certainly precise, documented and compelling in its own right',[21] and 'it appears abundantly clear that the alleged violations would have

[19] Luxembourg NCP draft statement, page 4, paragraph 4.
[20] Luxembourg NCP draft statement, page 6, paragraph 5.
[21] Luxembourg NCP draft statement, page 6, paragraph 6.

occurred in or from the South African Embassy in Paris for securing sales of French manufactured weapons to South Africa'.[22]

39.2 However, it then goes on to say that it would be difficult for the banks implicated to bring proof to dispute the allegations, and that confidentiality would be an issue for them.[23]

39.3 This is a disconcerting response. Firstly, it is not the role of an NCP to come to the defense of a corporation, much less using a justification that it is difficult for that corporation to prove its innocence. The fact remains that the complainants have brought a material and substantiated issue before the NCPs, and that the Luxembourg NCP agrees with this.

39.4 As to the confidentiality issue that KBL may encounter, this is a decision that KBC and KBL will need to make. It is wholly inappropriate for a complaint to be dismissed by an NCP because this *could* be an issue for the corporation. Moreover, and again, this "defense", if substantiated, ought to be brought by KBC and KBL, not an NCP.

39.5 Perhaps more alarming, the Luxembourg NCP later states:

"…but it is an altogether different situation when KBC Group and KBL European Private Bankers deny wrongdoings with regard to the Guidelines – or any wrongdoings of any nature for that matter – in the first place. It follows that the banks fail to see how some useful light could reasonably be brought to the matter on a fair basis…"

39.6 It is appalling for an NCP to take the position that a corporation's bare denial of wrongdoing, and its assertion that it will be difficult for it to provide evidence of its innocence, is enough to dismiss a complaint prior to any investigation. It effectively and efficiently provides KBL and other corporations with a convenient, quick and easy escape from scrutiny for human rights violations and disregard of the Guidelines, other than those

[22] Luxembourg NCP draft statement, page 7, paragraph 1.
[23] Luxembourg NCP draft statement, page 7, paragraph 2.

committed in the very recent past (though when the past is recent, and when it is old, or "extremely dated", is an ambiguity completely unaddressed by both of the NCPs).

40. On the assessment criteria, "whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines", the Luxembourg NCP states simply that it does not see how the complainants' requests contribute and it cannot see how it can handle any one of these requests.[24] It does not substantiate these assertions and therefore the complainants do not understand the NCP's reasoning, particularly in light of the arguments outlined in Part B.

41. The Luxembourg NCP goes on to state that, to accept request three, regarding a finding and statement of violation of the Guidelines, would require the Luxembourg NCP to take the complaint at face value.[25] Considering the evidence before it and its statement[26], we find this comment perplexing. A determination of whether KBL violated the Guidelines in aiding and abetting apartheid, or that apartheid has an ongoing effect does not seem to be an impossible task, nor does it need to be done on a "regular" basis.[27] It is also unclear how this determination of the NCP fits into the criteria that it was using to assess the complaint. The fact that conduct happened three or so decades past does not render complaints impossible to consider nor allegations impossible to verify. To say this would mean that complaints for a multitude of human rights abuses could not be brought. This issue of time and evidence is discussed further below.

Time elapsed between the impugned conduct and the complaint

42. The NCPs claim that, while they can look into complaints that happened in the past, in this particular complaint, "the time line of the facts is particularly dated" and therefore it makes the complaint too difficult for the NCPs to deal with.[28] It is to this recurring issue presented by both NCPs that we now turn.

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[24] Luxembourg NCP draft statement, page 10, paragraph 8 and page 11, paragraph 1.
[25] Luxembourg NCP draft statement, page 11, paragraph 2.
[26] Luxembourg NCP draft statement, page 6, paragraph 6.
[27] Luxembourg NCP draft statement, page 11, paragraph 4.
[28] Belgian NCP draft statement, page 6.

43. To draw a distinction between past instances and "extremely old" instances is arbitrary and irrational. Not only is there no way of drawing a line, but in this instance there is ample evidence before the NCPs and less than thirty years have lapsed (since 1994, the end of both apartheid and the impugned conduct). Other instances of crimes against humanity, such as the Holocaust, happened over eighty years ago and are still subject to investigation and consideration regarding liability and reparations.[29] In addition, Belgium has apologised for incidents that took place longer ago than apartheid.[30] It is by no means an impossibility or even a novelty.

44. The exclusion of the crime of apartheid has not been justified by either NCP. If the NCPs determine that they can 'look backwards' at a complaint, then they cannot make arbitrary distinctions about when an instance is old, fairly old, and extremely old. This flouts the principle of functional equivalence.

45. Further, we are concerned at the Belgian NCP's thinly veiled threat regarding the creation of 'prescription' for backward looking claims ("The NCP will start a reflection on its procedures, particularly as regards the handling of extremely old specific instances")[31] in their procedures. We note this with concern, and would ask how grave crimes like murder and crimes against humanity can prescribe, given extensive international law stating the opposite?

46. It is furthermore remarkable that the Belgian NCP has committed to reflecting on its procedures for considering old claims, and yet is unwilling to reflect on their lack of procedures for dealing with conflicts of interest.

The initial leg: is there sufficient evidence to warrant further examination of the complaint?

47. We submit that the NCPs misconstrued their mandate in issuing their draft statements. There are three legs to a complaint being considered by NCPs. The

[29]See https://www.telegraph.co.uk/news/2019/05/13/poland-cancels-israeli-visit-amid-dispute-holocaust-reparations/. Last accessed 13 May 2019.
[30] See https://www.nytimes.com/2019/04/04/world/europe/belgium-kidnapping-congo-rwanda-burundi.html. Last accessed May 2019.
[31] Belgian NCP draft statement, page 7.

first is a consideration of whether there is sufficient evidence to warrant further examination of the complaint (i.e. whether there is a *prima facie* case). The second is that the NCP offer good offices. The third is to issue a statement or report. If the second is not an option, the NCP can proceed to the third leg and apply other remedies.[32]

48. The NCPs in this case seemed to do all three at once, thereby issuing conclusions as to the merits of the allegations while not having undertaken further examination or assessment of the evidence provided. This was particularly stark with the Belgian NCP's draft statement. The issue to be decided was whether there was sufficient evidence. Section 7 ('Conclusion') of the Belgian NCP's draft statement makes findings regarding the four requests asked for by the complainants, but does not address the issue of whether there is ***sufficient*** evidence at hand. These findings can surely only be made once the NCPs have ***investigated*** the matter. It essentially offers two reasons for their conclusions, that the evidence is "dated" and that the complainants do not want to undertake mediation. Both of these concerns have been dealt with above, and inadequately address whether the evidence is satisfactory.

Evidence

49. We wish to emphasize again that the NCPs must be explicit and particular. If they dispute the validity of evidence, then they must be explicit and specific about what evidence they are referring to in order for us to make a proper reply. Our right of reply has consequently been compromised by this and other vague, blanket dismissals.

50. Regarding the inference that evidence brought by a representative of the complainants is not reliable or adequate:[33]

[32] Procedural Guidance, Section I, introductory paragraph, and paragraph C, Section I, part C, paras. 3.a), 3.b) and 3.c).
[33] Luxembourg NCP draft statement, page 7, paragraph 5.

50.1 Open Secrets investigated the matter and published all their findings in the book *Apartheid, Guns and Money: A Tale of Profit*, with very specific sources referenced. The book is easily accessible, and points to detailed source documents/evidence, including extensive primary sources that include officially declassified documents from twenty-five public archives in seven countries. Some of these sources were directly cited in the complaint. How this evidence is considered unreliable or inadequate is never explained by the NCPs in their blanket dismissals and therefore requires further explanation.

50.2 We do not understand why references to *Apartheid, Guns and Money* (which contains detailed source documents for each of our averments) were deemed inadequate by the Luxembourg NCP.

51. The other accusation (by the Belgian NCP in particular) was that the NCP was unable to verify the authenticity of the evidence. We are unaware of any attempts by either NCP to do so, though it is obviously within their powers. Had there been an attempt, it would have required very little effort to verify the authenticity of the evidence presented.

52. Regarding the allegation of money-laundering by the banks, the Luxembourg NCP's response was that the banks might not have known. Considering that the question before the NCPs was whether there is sufficient evidence to merit further investigation (*bona fide* evidence of money-laundering, like the details of 850 accounts and thousands of individual transactions, which were cross-referenced with company registers), a pronouncement about the *mens rea* of the banks is premature to say the least. In any event, we would argue that there is ample evidence that suggests that the bank did know or ought to have known. This includes the expert opinion by Christian Weyer, an expert on international banking who came to this conclusion after consulting the same documentation referenced above. This evidence has not been engaged with by the NCPs at all.

53. The complete lack of evidence presented by the banks is concerning, as discussed above. When a complaint is brought, it is usual that the accused should present an alternative set of facts with evidence to back it up and refute the case

made out by the complainant. Remarkably, in this case the banks' only response was that they could not obtain records. If Open Secrets could obtain documents about the banks, it seems wholly insufficient for KBC or KBL to simply say that they couldn't find any, and for the NCPs to simply accept this quasi-defence.

54. The impact of this is that any corporation accused of misconduct can simply say that they don't have any evidence to back up what they say and should therefore be taken at their word. Not only is it sorely inadequate, it also erroneously discharges the banks of their duty to provide evidence to substantiates any defense which they may raise. This approach would essentially mean that where a company destroys or willfully does not find evidence, it will be exonerated. This again makes us question the impartiality of the NCPs.

55. The Luxembourg NCP said that the complainants only had one testimony: this is not true. Apart from the primary documents cited and discussed above, we referenced three expert affidavits, including one from the former OECD Chairperson on the Working Group on Bribery in International Business Transactions from 1990 – 2013, Professor Mark Pieth.[34] The other two were from Christian Weyer, a respected international banking expert, and Philipe Mortge, a forensic accountant. It is not clear why this evidence was seemingly ignored by the Luxembourg NCP.

56. Regarding the Luxembourg NCP's statement that there is an insufficient link because the evidence only names one KBL official[35] – this ignores the majority of our evidence.

    56.1 We are not specifically seeking personal liability of KBL's officials; we are seeking justice from the juristic person (KBL). The vast majority of our evidence implicates not an individual, but the bank's conduct viewed holistically. The evidentiary burden of needing to prove the direct intent of a specific company's official in order to impute the liability of the corporation, is archaic and outdated, and lays a near-impossible evidentiary burden on the complainants, particularly at the first stage of making a complaint. In addition, it does not seem to appreciate the

[34] Affidavit by Mark Pieth dated 2 August 2007.
[35] Luxembourg NCP draft statement, page 3.

nature and level of secrecy practiced in money-laundering and weapons procurement activities. Whether it was one or thirty employees, the evidence points to money-laundering activities between Armscor and KBL.

56.2 The Luxembourg NCP's statement that the kinds of transactions identified were commonly practiced at the time,[36] takes the evidence presented out of context. Money coming from Armscor during apartheid, during an arms embargo, to various shell companies set up by KBL, for example. The allegation is not just regarding money-laundering – but its role of complicity in a crime against humanity.

57. The difference in how the NCPs approached the complainants and the banks with regard to evidence and generally, is startling. It is difficult to believe that our complaint was dealt with on fair and equitable terms and in accordance with the Guidelines in circumstances where our evidence was largely ignored, while the blanket denials offered by the banks were accepted by the NCPs. Due to the complete lack of engagement with the evidence we provided, it is difficult to know how the NCPs reached a decision that there were not sufficient grounds to warrant further investigation. We also reiterate that, despite these assertions, neither NCP ever sought further information or clarification from the complainants at any stage.

PART D: RESPONSES DIRECTED TOWARDS THE BELGIAN NCP

58. Under 'section 5', "Procedure followed by the Belgian NCP", the NCP gives a timeline of correspondence, not information about the procedure that the Belgian NCP followed. An example is "On 5 June, the Luxembourg NCP forwarded the memorandum of reply of KBL bank to the Belgian NCP". This is clearly not a procedure but is rather an event. This, together with the Belgian NCP's responses to our requests regarding what processes they followed, particularly regarding the conflict of interest, leads us to conclude that the Belgian NCP does not fully understand what a legal process is.

[36] Luxembourg NCP draft statement, page 8, paragraph 4.

59. Re the application of criteria "c" ('scope of application fields of the OECD Guidelines and material content of the specific instance for assessment'):

59.1 The NCP states that the complainants provided material content. It then states that the reason it decided this evidence was not sufficient was because it could not confirm authenticity. It does not explain the reason for its inability.

59.2 This has been discussed above (Part C, "Evidence"). We would like to emphasize that this is also an inadequate finding due to the obligations imposed on NCPs and governments, to be adequately resourced in order to fulfil their mandate. In fact, the Guidelines anticipate challenges in obtaining information or bringing all the parties involved together in non-adhering countries, and empowers NCPs to pursue enquiries and other fact finding activities in such circumstances.[37] This was not done by the NCPs. If the NCPs cannot conduct an initial examination of the evidence before them to establish its authenticity, then it is failing in its mandate.

60. Re the application of criteria "e" ('contribution to the effectiveness of the OECD Guidelines')

60.1 Regarding the NCP's contribution to the effectiveness of the OECD Guidelines, as discussed above, this must extend beyond merely offering 'good offices' or mediation. In fact, in instances of human rights violations it is common cause that mediation is an inappropriate remedy, particularly where there is power imbalance, such as in this instance. Further, condemnation of abominable conduct and complicity in grave crimes is an integral part of the NCPs' function as a means of changing corporate conduct.

60.2 The Belgian NCP relied heavily on article 17 of its Rules of Procedure, which deals with mediation as a remedy to a complaint. The

[37] Implementation Procedures of the OECD Guidelines for Multinational Enterprises, page 86, para. 39.

NCP argued that, because the complainants did not want to utilise mediation, there was nothing that the NCP could do, other than dismiss the complaint. That mediation is the only remedy available to the NCPs is clearly a fallacy, one recognised in the Rules and Procedures (as discussed above), as well as by the Belgian trade union members of the NCP (CSC-ACV, FGTB-ABVV, CGSLB-ACLVB)[38], and the Luxembourg NCP[39]. The Luxembourg NCP puts it thus:

"*Rejecting complaints on the sole basis that a company does not wish to engage in mediation or that that mediation would not be fruitful is not contemplated in the Procedural Guidance and is likely to encourage companies to simply ignore the OECD Guidelines and the NCP as an instrument and network, thereby undermining the effectiveness of the Guidelines.*"

60.3 We would like to point out, again, not only a lack of consistency in the NCPs' responses, but also that the NCPs take polar opposite approaches to the same issue. Both are incompatible with functional equivalence.

60.4 The outcome that the complainants want is justice and accountability. These are two elements compatible with the NCPs' mandate, and are arguably not appropriate to mediation:

60.4.1 Mediation does not lend itself to accountability towards the public, but rather to 'closed door' discussions and outcomes that are secretive in nature – it is not a public forum or method.

60.4.2 Further, neither of the complainants are direct victims, and therefore a reconciliatory remedy such as mediation would be entirely ineffective.

[38] At the end of page 7 of the Belgian NCP's draft statement: "They deeply regret that this argument did not allow to proceed with further examination and that article 17 of the rules of procedure had to be activated".
[39] The Luxembourg NCP's draft statement: 'When accepting the complaint, steps that are required to bring remedies must be implemented by the NCP's, such as offering its good offices for mediation, facilitating an exchange of information between the parties and thoroughly examining the evidence, meaning that thereafter'.

61. The Belgian NCP also claims that their decision-making has been unanimous – it has not been. The Trade Unions had a dissenting comment, which included disagreement with regards to mediation as the solution to our complaint and wished that the matter had proceeded to an investigation. It is inaccurate and disingenuous to claim a unanimous finding, and then add the Trade Unions' objection at the end of the draft statement, as if it is merely a side note.

PART E: RESPONSES DIRECTED TOWARDS THE LUXEMBOURG NCP

62. Re the application of criteria, under the subheading 'As to whether the issue is material and substantiated' (on page 7):

    62.1 The NCP makes legal arguments that go to the substance of the complaint, whereas the question before the NCP is whether there is sufficient *prima facie* evidence to merit further investigation.

    62.2 Instead of considering this issue, the NCP essentially creates 'defences' for KBL: both NCPs acknowledge that there is evidence, but state that the evidence is not good enough (stating, incorrectly, that there was only one source of information, expert opinion, etc.), and that to consider this evidence is outside their scope. Both NCPs completely ignore our expert opinions and other cited sources that substantiate the allegations in the complaint.

63. It is also perplexing that the Luxembourg NCP says, on the one hand, that our complaint lacks sufficient evidence, and yet maintains our complaint merits investigation by someone else; authorities like the Attorney General.[40] The NCP can't simply say that an investigation is too big, and thereby opt out of their mandate, while simultaneously contradicting themselves by asserting that they do not think the matter merits further investigation. The only reasonable interpretation

[40] Luxembourg NCP's draft statement, page 7, paragraph 6.

that we can make is that this statement is a concession that there is indeed so much evidence that they cannot deal with it.

64. On page 9 at the third paragraph from the top, the NCP states that there does not seem to be a link between KBL and apartheid. We do not understand how the NCP came to this conclusion since there is overwhelming evidence that KBL assisted the apartheid state in obtaining weapons, contrary to mandatory UN sanctions, through laundering money for Armscor. This enabled and sustained the system of apartheid. We do not know how this is not considered a link by the NCP.

65. On page 11 at the first paragraph, the NCP states that our first, second and fourth requests surpass their role and power, and therefore scope of the NCP. Our first, second and fourth requests were as follows:

65.1 Request for a public apology by KBC and KBL to the South African government and people for having supported the apartheid regime and for having breached the arms embargo [first request];

65.2 Request for punitive action against the two banks [second request]; and

65.3 Request for the implementation of a monitoring mechanism on a European level to ensure that the banks are not accomplices of human rights violations in relation to their activities [fourth request].

66. As discussed above, the role and powers of the NCP are flexible and the remedies available to them are more than mere “good offices” or mediation. In addition, one of the core principles underpinning the NCP mechanism is to offer an effective remedy to those subjected to human rights violations by corporations. An example of what constitutes an effective remedy includes remedies that offer an acknowledgement of a wrong-doing, like an apology. It does not suffice to simply say that our requests are outside of the NCP’s scope – the NCP must say why it thinks this. In addition, such a narrow and restrictive reading of the role and function of an NCP does not further the effectiveness of the Guidelines.

PART F: CONCLUSIONS AND RECOMMENDATIONS

67. We appreciate the Luxembourg NCP's comments regarding the need for NCPs to be accessible and neutral, as well as the consideration that sometimes shines through in their draft statement. However, there are many inconsistencies, such as their approach to evidence and remedies available to complainants, in addition to their vague and opaque description of transparency.

68. We still do not understand how both NCPs' decision-making processes work in practice (other than representatives from business, trade unions and government being present and each having a representative vote). How, for example, is dissent dealt with? If a unanimous decision is sought, how does active discouragement of dissent not occur? How are representatives chosen? Who is actually in the room during meetings, etc.? The following is, however, apparent:

    68.1 There has not been transparency in the processes utilised by the NCPs. We therefore recommend that these processes be made explicit and specific so that future complainants can know how decisions are made and can challenge these processes where they are flawed.

    68.2 Despite our concerns over the conflict of interest in the Belgian NCP, these concerns were brushed aside (even recommendations from the Secretary General of the OECD were ignored), and we were not given the minutes of the NCP's meeting regarding the conflict. The only response came in an informal email which said that internal processes were followed, and a unanimous decision was made. We therefore recommend that specific appeal procedures be set up to deal with conflicts of interest and other concerns, so that there is transparency in how these matters of grave importance are dealt with. In addition, that conflicts of interest are declared; that a complainant knows who is in the room when a complaint is being discussed or decisions made; and that the minutes of these meetings be made available to complainants.

68.3 Again, given the public importance of the NCPs and their function, both accountability and transparency are crucial to public trust in the process and mechanism as a whole. We therefore also suggest that the Secretary General, or a similar office, in a position of oversight over the NCPs, be given clearer authority over NCPs that abuse their power, do not fulfil their mandate, or do not uphold the Guidelines. The ability of an NCP to blatantly ignore the office of the Secretary General, as happened in this instance, should not remain unremedied.

69. We recommend that the NCPs, as a collective, clarify their mandate and methodology so that NGOs and individuals know whether or not they can seek the NCPs' assistance and can rely on the NCP mechanism to hold corporations to account in upholding the OECD Guidelines. They should make this uniform across NCPs.

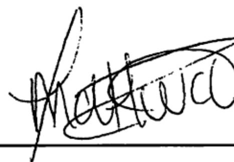
70. NCPs, as a collective, and in a consistent and uniform way, should justify and clarify their stance on prescription (for example, is there prescription on complaints that are linked to murder, crimes against humanity, and other grave crimes).

71. Lastly, we wish to point out that the process was continuously delayed by the NCPs, purportedly because of the complexity of the complaint, and yet, as has been shown, the NCPs did not use this time to adequately engage with the evidence provided to them. The Belgian NCP's response was particularly lacking in engagement and analysis.

Kindly confirm receipt.

Yours sincerely,

Hennie van Vuuren
Director



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