



Représentation permanente du Royaume de Belgique
à **GENEVE**

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PL/cc

2019 / 486

Dossier AL BEL 3/2019

La Mission permanente de la Belgique auprès des Nations-Unies et des autres organisations internationales à Genève présente ses compliments au Haut-Commissariat aux droits de l'homme et a l'honneur de se référer au courrier de Mme Beatriz Balbin, Cheffe du Service des procédures spéciales, relatif à la communication conjointe, à l'encontre de la Belgique, envoyée par l'Expert indépendant chargé d'examiner les effets de la dette extérieure et des obligations financières internationales connexes des États sur le plein exercice de tous les droits de l'homme, en particulier des droits économiques, sociaux et culturels, et le Rapporteur spécial sur la promotion de la vérité, de la justice, de la réparation et des garanties de non-répétition, datée du 12 septembre 2019 et enregistrée sous le numéro de dossier AL BEL 3/2019.

La Mission permanente de la Belgique a l'honneur de soumettre, en pièce jointe, la réponse de la Belgique concernant cette communication conjointe.

La Mission permanente de la Belgique saurait gré au Haut-Commissariat aux droits de l'homme de bien vouloir en accuser réception.

La Mission permanente de la Belgique auprès des Nations-Unies et des autres organisations internationales à Genève saisit cette opportunité pour renouveler au Haut-Commissariat aux droits de l'homme les assurances de sa haute considération.

Fait à Genève, le 7 novembre 2019



Haut-Commissariat aux droits de l'homme
Palais Wilson
52, rue des Pâquis
1201 Genève



*Belgian National Contact Point
for the OECD Guidelines
for Multinational Enterprises.*

Statement from the Belgian National Contact Point – 24 June 2019

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Initial assessment of the specific instance Open Secrets – CALS / KBC - KBL

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The Belgian NCP will not proceed with further examination of the case

The OECD Guidelines for Multinational Enterprises are recommendations by governments to their companies, regardless of where they operate.

These recommendations focus on several areas such as disclosure, human rights, employment and industrial relations, the environment, the fight against corruption, consumer interests, science and technology, competition and taxation. In addition, the concepts of responsible supply chains and due diligence have been introduced.

The various National Contact Points are responsible for monitoring the implementation of these Guidelines.

In Belgium, the National Contact Point (NCP) is chaired by a representative of the Federal Public Service Economy. It has a tripartite structure composed of social partners, representatives from the various federal public services and regional governments.

The NCP's role is, particularly, to contribute to the resolution of the issues raised in specific instances. The NCP will facilitate access to consensual and non-adversarial means such as mediation or conciliation.

The Belgian National Contact Point (NCP) for the implementation of the OECD Guidelines for multinational enterprises received a specific instance, jointly with the Luxembourg NCP, by South African organisations *Open Secrets* and *CALS* targeting the activities of the enterprises *KBC* (Belgium) and *KBL* (Luxembourg).

This initial assessment has been carried out in accordance with the rules of procedures of the Belgian national Contact Point.¹

1. Presentation of facts and chronological events according to the notifiers

The following items are taken from the specific instance introduced by the NGOs. These items have not been verified by the NCP and do not commit the NCP.

¹ See Appendix 2 of the Rules of Procedure for the Belgian NCP : <https://economie.fgov.be/en/oeso>

The system of apartheid approved by the State in South Africa began in 1948. It was led by the Government of the National Party. This system implemented a legal separation of racial groups in South Africa, advancing ideas of white supremacy, economic policy and social oppression of black people.

29 March 1960, 69 Blacks were murdered and hundreds wounded by security forces outside a police station in Sharpeville, which was followed by numerous calls for sanctions against South Africa for human rights violations. This led to the adoption of Resolution No. 134 by the United Nations General Assembly in 1960, urging South Africa to eliminate the illegal system of apartheid. The United Nations Security Council thereupon adopted various resolutions aiming to restrict the sell and purchase of arms used to implement racist policies in South Africa during apartheid (Resolutions No. 181 and 182 in 1963 and Resolution No. 282 in 1970, which were not mandatory for Member States) and Resolutions No. 418 and 421 in 1977, which imposed a mandatory boycott on arms against South Africa.

With the UN embargo intensifying, the State-owned enterprise for public arms procurement, the Armaments Corporation of South Africa (Armcor), was seeking circumvention methods to continue to supply and acquire arms. For this, the implementation of a secret and obscure payment system was necessary.

KBL bank was the institution that provided a solution to this problem. Starting from 1977, KBL aided the apartheid government in implementing a money-laundering network that allowed Armcor to purchase its arms without it being evident that Armcor was the buyer. This was done in two ways:

- *With the creation of shell companies (over 850) registered in Panama and Liberia.*
- *With the creation of hundreds of numbered bank accounts, some for Armcor and others linked to fictitious companies to facilitate money transfers for illegal arms purchasing.*

The scale of these arrangements was also quite substantial. South African archives show that the military spent approximately 500 billion rand (33 million euros) on arms purchased between 1977 and 1994. Officials responsible for managing the payment system claim that KBL bank handled 70% of transactions during this period.

Kredietbank Belgium was also a principal creditor of Armcor. In September 1980, loans from Kredietbank Belgium accounted for 25% of Armcor's foreign loan portfolio, making the Belgian bank the largest source of loans to Armcor during this period. As such, this conduct by Kredietbank also breached the UN embargo.

2. Reference to the Guidelines targeted by the referral

For each specific instance submitted to the NCP the notifiers must cite the OECD Guidelines chapters linked with the alleged breaches.

In this case:

- The notifiers refer to the 1976 Guidelines:
 - *Chapter II(1) General Policies: Duty to act in accordance with general policy objectives of member countries;*
 - *Chapter II(9): Duty to abstain from improper involvement in local politics*
 - *Chapter III: Duty to disclose Information*
- The notifiers indicate that the 2000 Guidelines may apply retroactively.
 - *Preamble, paragraphs 1, 5 and 10*
 - *Chapter II General Policies: Duty to act in accordance with general policy objectives of member countries*
 - *Chapter III Duty to disclose Information*
- No reference to the 2011 OECD Guidelines is mentioned.

3. Requests for the receiving party of the referral

Four requests have been articulated by the notifiers :

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;
2. Request for punitive action against the two banks;
3. Request for the acknowledgement of a breach of OECD Guidelines;
4. 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.

4. Position statement of the multinational enterprise - KBC

The Belgian NCP met with three KBC officials: Mr Vic Van de Moortel (General Manager Corporate Sustainability), Luc Van Heylen (General Manager Corporate Public Affairs) and Herman Van Hecke (Head of Dispute Resolution Department) on 7 June 2018. It should be noted that, in a coordinated manner, the Luxembourg NCP met with representatives of KBL on 5 June.

Prior to the meeting, the bank had publicly reacted with a press release on 25 April 2018².

Moreover, KBC bank forwarded to the Belgian NCP a memorandum of reply presenting its arguments in favour of rejecting the specific instance. The Luxembourg NCP also received a memorandum of reply from KBL bank. These documents were shared by the Belgian and Luxembourg NCP.

The following messages have been delivered by KBC representatives to the NCP. These items have not been verified by the NCP and do not commit the NCP.

As a first point, KBC representatives wished to announce their astonishment regarding the operating methods of NGOs Open Secrets and CALS. The KBC representatives stated they themselves were informed of the complaint through the press and the media campaign that therein ensued. No initial contact or meeting request was articulated by the NGOs.

Secondly, KBC bank does not recognise any legal connection with the entity KBL. It assumes that the connection was deliberately perpetuated by the NGOs. Historically, the two groups did belong to the holding company Almanij as sister companies with no responsibilities toward one another. Kredietbank was absorbed by KBC Bancassurance Holding in 1998. In 2005, Almanij and KBC Bancassurance Holding merged into KBC Group. KBL was sold in 2011 to Precision Capital investment group of Qatar's royal family.

KBC bank estimates that the NGOs lack legitimacy in the absence of any legal authority or any other legitimate authority to represent the South African people and the victims of apartheid.

The bank states that the Belgian NCP should not allow the NCP platform being used for political gains, much less as part of legal proceedings. The bank also states that the allegations brought forward could not be subject to voluntary mediation.

² Public reaction of KBC bank on 25 April 2018 following the complaint by the NGOs:
https://www.kbc.com/en/system/files/20180425_SB_apartheid_klacht_FR.pdf

According to archival work carried out by KBC bank, it appears that, concerning trade exchanges and based on internal bank archives, the share of Kredietbank in the financing of Belgo-Luxembourg Economic Union exports to South Africa fluctuated between 4.5 and 10.70% during the 1980 and 1986 period.

In a letter dated 16 March 1983 from Kredietbank President M. Wauters, it is stipulated that 'Kredietbank has no branches in South Africa, in no way participates in the capital of a South African company, nor is there any staff employed there.'

An archive document titled 'Executive Bulletin No. 1629 of 24 February 1989' clearly indicates: 'Since 1985, the bank has not granted credit or loans to South African borrowers (State, parapublic and private sectors).'

The bank also wishes to emphasise the dimension of its ethics and sustainability policy going well beyond its legal obligations. Other than for humanitarian aid, KBC bank does not accept financial transactions with its internal list of controversial regimes.

More specifically for trade in arms, the bank has implemented very strict conduct. (excluding companies trading controversial arms).

5. Procedure followed by the Belgian NCP

The specific instance was expressed by an email received by the Belgian NCP secretariat on 24 April 2018. The NCP secretariat met in person the notifiers who hand-delivered the specific instance during a meeting organised at the Federal Public Service Economy on 25 April. The Luxembourg NCP also received the same specific instance on 26 April.

On 3 May, the Belgian NCP wrote to KBC bank to invite its representatives to a meeting for an initial contact in order to explain the role and function of the NCP.

On 28 May the NCP received a notice from an independent expert from the UN on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights.

On 5 June, the Luxembourg NCP forwarded the memorandum of reply of KBL bank to the Belgian NCP.

On 6 June, NGOs CALS and Open Secrets addressed a letter to the Belgian NCP claiming a conflict of interest in the structure of the NCP and requesting that FEB and Comeos be excluded from the ad hoc assessment committee for the admissibility of the specific instance.

On 7 June, following its invitation dated 3 May, the NCP secretariat and president met with three KBC officials. On the same day, the NCP came together for the first time to discuss the specific instance. During this first meeting, several members indicated that they did not have sufficient time to study the matter in depth and consequently asked for the discussion to be postponed to a subsequent ad hoc meeting. As for the procedure, the members unanimously decided to deny the request for the exclusion of FEB and Comeos from the assessment committee. The members unanimously expressed their position that the Rules of Procedure of the Belgian NCP, revised in April 2017, fulfil all necessary impartiality and confidentiality guarantees.

On 27 June, KBC sent its memorandum of reply to the Belgian NCP.

On 2 July, NGOs CALS and Open Secrets addressed a right of reply concerning the highlighted items in the KBL memorandum of reply.

In the afternoon of 2 July, the Belgian NCP met in an ad hoc session to discuss the specific instance. During this session, members again asked for a prolonged reflection period.

On 5 July, the Belgian NCP informed the French NCP of the involvement of French companies in the specific instance.

On 12 July, NGOs Open Secrets and CALS wrote to the OECD Secretary General to force the Belgian NCP to revisit its decision regarding the matter of a potential conflict of interest and the presence of FEB and Comeos members in the assessment committee.

On 22 August, the OECD (by the Investment Committee) forwarded the NCP a letter suggesting proposals to guarantee the impartiality of the NCP and its members.

The OECD sent a similar letter to the NGOs on 25 August, indicating the measures proposed to the Belgian NCP.

On 4 September 2018, the Belgian NCP came together. The members decided to prolonge the reflection period. Regarding the OECD letter following the request of the NGOs, the members confirmed unanimously their position that it was not necessary to take new measures, underlining that the Rules of Procedure provide the necessary guarantees.

On 27 September, 8 October 2018, 26 November and 17 December 2018, 21 January, 11 February, 26 March, 13 May and 3 June 2019 the Belgian NCP continued discussing the specific instance.

After the completion of the initial assessment, stakeholders were allowed a period of 20 working days to become familiar with this document and propose factual amendments. The Belgian NCP will publish this initial assessment on its website,³ and it will be sent to the OECD to be included in the global database of specific instances⁴. Except when requested by stakeholders, the Belgian NCP does not release anonymous statements.

6. NCP considerations on initial assessment

From the OECD Procedural Guidance and Guidelines as well as its Rules of Procedure, the Belgian NCP has considered following items in its initial assessment:

a) Identity of concerned party and interest in the case

The Open Secrets organisation and the Centre for Applied Legal Studies (CALS) have disclosed their name and their interest in the matter at hand.

b) Responsibility of the Belgian NCP.

According to the OECD Guidelines, the specific instance must be raised in the country in which the alleged breach occurred. If this country does not have an NCP, the issue should be raised in the country where the multinational company has its head office.

The Republic of South Africa is not a member of the OECD nor a signatory of the declaration on investment, neither does it have a National Contact Point. However, the targeted companies have established their head

³Belgian NCP web page providing all of its statements: <https://economie.fgov.be/fr/themes/entreprises/developper-et-gerer-une/responsabilite-societale-de/principes-directeurs-ocde-pour/point-de-contact-national-en/communiques-du-point-de>

⁴Database of specific instances: <http://mneguidelines.oecd.org/database/>

offices in Belgium (KBC) and Luxembourg (KBL) respectively. The Belgian NCP is thus appropriate for the specific instance formulated.

Nevertheless, the primary role of the NCP is to offer a serene environment for dialogue as part of mediation and conciliation between parties. It should be underlined that the NCP is not able nor competent to act as a judicial or quasi-judicial body.

The reflections and analyses led by the Belgian and Luxembourg NCPs resulted in splitting the specific instance, Belgium consequently handling the KBC-file.

c) Scope of application fields of OECD Guidelines and material content of the specific instance for assessment

Firstly, the assessment under point c) aims to determine whether the specific instance falls within the application field of the OECD Guidelines and if it was made in good faith (*bona fide*).

As a reminder, the NGOs articulated four very precise demands to the NCPs:

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.
2. Request for punitive action against the two banks.
3. Request for the acknowledgement of a breach of OECD Guidelines.
4. 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.

The conclusions of the NCP on the admissibility of the specific instance for assessment will be discussed in point 7.

Secondly, according to the NCP's procedures, the evidence related to the specific instance should be sufficient. In this case, material content related to the specific instance, while not verified by third parties, is indeed supplied by the NGOs. It appears, however, difficult for the NCP, within its competence and operational settings, to confirm the authenticity of provided arguments and documents due to the age of items dating back up to more than 40 years.

It should be noted that the OECD Guidelines do not indicate any restriction relative to a potential limitation period for submitted specific instances. This area is left to NCP discretion. In the past, some NCPs have demonstrated openness and a limited amount of specific instances have been accepted with no restrictions regarding the time line of facts. This was the case for three specific instances concluded in 2008 by the British NCP (Afrimex, DAS AIR and Anglo American cases) analysing facts dating back to 1995 and accepting a retroactivity of OECD Guidelines based on the 2000 edition. More recently, in a final statement (Bralima case) on 18 August 2017, the Dutch NCP accepted retroactive application of OECD Guidelines from the 2000 edition for facts dating back to 1999.

In this case, it should be noted that the time line of the facts is particularly dated.

d) Legal framework and parallel proceedings

Article 26 of the comments on the implementation procedures of the OECD Guidelines clearly stipulate that *'NCPs must not decide that questions do not justify further assessment simply because parallel actions have existed, are in progress or could be carried out by the parties concerned'*. The NCP evaluates, however, in each particular case when its mediation activity could contribute to resolving the questions raised without negative consequences for the parties involved in these other proceedings.

The organisations *Open Secrets* and *CALS* have not indicated having lodged any complaint other than the one concerning the Belgian NCP aside from the Luxembourg NCP.

e) Contribution to the effectiveness of OECD Guidelines

During processing of specific instances, the Belgian NCP, when necessary and when it believes able to contribute to the effectiveness of OECD Guidelines, may offer a platform for dialogue and conversation between involved parties, for the purpose of resolving their conflict.

In the context of this specific instance, the Belgian NCP considers itself able to fulfil only (if any) a limited role to offer its good offices. The notifiers are neither requesting mediation nor conciliation but demand condemnation of the activities of the two banks regarding OECD Guidelines.

7. Conclusion

- A. The Belgian NCP came together on 24 June 2019. On the basis of the above mentioned considerations and in application of its Rules of Procedure, has decided unanimously that the specific instance is not admissible regarding requests 1, 2 and 4 as these requests are out of scope of the OECD Guidelines and exceed the mandate and competence of the NCP.
- B. As for the third request 'Acknowledging a breach of the OECD Guidelines', during the many NCP-meetings (10 members meeting between June 2018 and May 2019), discussions have been focused on :
 - The impact of the dated time line of facts on the question of admissibility:
 - arguments pro admissibility : no restrictions/no limitation period in the Belgian Rules of Procedures
 - arguments contra admissibility : extremely dated time line (30/40 years in the past) and difficulty to determine traceable evidence.
 - The impact of the unwillingness of parties to enter into a mediation/conciliation process on the question of admissibility.
 - The ability/unability of the NCP to offer good offices in this setting.
- C. After careful consideration and in compliance with its 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.
- D. The NCP will start a reflection on its procedures, particularly as regards the handling of extremely old specific instances.

Following the period of 20 days offered by the NCPs to all parties to formulate factual comments, the Belgian NCP reconvened and discussed the comments provided by the parties. It should be clarified that following the request of members to use Article 17 of the NCP Rules of Procedure, members were invited to proceed

to a formal vote **only** to decide whether the NCP should consider assessing the admissibility of the 3rd request or not. Results of the vote didn't allow the NCP to proceed further, leading to exclude request 3 of the analysis of the case. Requests 1, 2 and 4, were unanimously rejected by the NCP.

Additional comments made by NCP members:

The three Trade Unions members of the NCP (CSC-ACV, FGTB-ABVV, CGSLB - ACLVB) state that the acceptance of the specific instance (request 3) at the initial assessment would not have implied any judgement on the content of the investigation request and would therefore not indicate that a breach of OECD Guidelines had been established or had not been established. 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.