

Our reference: OECD001/LAW/19

11 April 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,

1. We write this letter in relation to the complaint submitted to the OECD National Contact Points in both Belgium and Luxembourg (“**NCPs**”) (“**the Complaint**”) by two South African non-profit organisations working in the field of business and human rights; Open Secrets and the Centre for Applied Legal Studies (“**CALS**”) (“**the Complainants**”). The Complaint, brought in terms of the OECD Guidelines on Multinational Enterprises (“**the Guidelines**”), concerns the conduct of the KBC Group (Belgium) (“**KBC**”) and Kredietbank Luxembourg (“**KBL**”) in assisting South Africa’s apartheid regime in violating the compulsory United Nations arms embargo. The NCPs received the Complaint on the 24th of April (Belgium) and 26th of April (Luxembourg) 2018.

2. We note that the above matter is currently awaiting a determination as to whether an investigation will be undertaken by the OECD in respect of KBC and KBL's conduct. In your last correspondence of 21 December 2018, you indicated that a decision would be forthcoming within the first quarter of 2019. The first quarter of 2019 came and went on 31 March 2019.
3. We note that this deadline was for the initial step in the process, being a decision of whether or not to investigate the Complaint. This involves a decision of whether or not there is *prima facie* evidence for the Complaint and on certain points *in limine*.
4. The Complainants have yet to receive a decision regarding whether or not the Complaint will be investigated by the OECD. In this regard we wish to note a pattern of missed deadlines and delays by the OECD NCPs:
 - 4.1 It has been almost twelve months since the Complaint was lodged with the OECD on the 24th and 26th of April 2018;
 - 4.2 On 3 July 2018, you indicated that there would be a slight delay in the publication of your initial assessment and indicated that a further meeting would be held by the NCPs at the end of the Northern Hemisphere summer (which you indicated to be early September);
 - 4.3 On 28 September 2018, you advised that your decision would be delayed until December 2018;
 - 4.4 On 21 December 2018, you advised that a decision would be taken in the first quarter of 2019;
 - 4.5 On 30 January 2019, the Complainants asked for confirmation of a date by when a decision of whether or not to investigate would be reached by the NCPs; and
 - 4.6 On 11 February 2019, you repeated that you should have a response by the end of the first quarter of 2019.

5. We wish to reiterate that almost a year has lapsed without receiving a decision of whether or not the Complaint will be *investigated*. This delay creates the impression that the Complaint is not being taken seriously by the Belgian and Luxembourg NCPs.
6. In this regard, we wish to remind you that the NCPs 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.
7. In addition to this unreasonable delay, we wish to put on record again, our concerns regarding the conflict of interest present in the decision-making structures of the Belgian NCP as a result of the positions and influence of the represented employers' federations, namely the Federation of Enterprises of Belgium ("**FEB**") and Comeos. 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. According the *OECD Guidelines on Conflicts of Interest*:

7.1 A conflict of interest arises when there is a conflict between a public duty and private interest which could improperly influence the performance of their duties and responsibilities, as Guideline 10 states:²

"A 'conflict of interest' involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities."

7.2 A private interest is understood broadly to include circumstances where otherwise legitimate activities could reasonably be considered to influence improperly the official's performance (Guideline 14).

7.2.1 In this instance, the Complaint is against KBC (and KBL). Members of KBC and those intimately connected to KBC are represented by

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.

² 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.

Belgian industry bodies FEB and Comeos. FEB and Comeos are members of the Belgian NCP who will be deciding whether or not the Complaint against KBC should be investigated.

7.2.2 This falls squarely within the OECD definition of conflict of interest as described above.

7.3 Officials serving in the public interest should be disinterested. If an official has a private interest which could compromise their decisions, that official should abstain or refrain from participating in the decision-making process (Guideline 16).

7.3.1 FEB and Comeos should have disclosed their interest and recused themselves, as KBC cannot but be interested in a decision that could negatively impact on them, and by extension FEB and Comeos.

7.3.2 However, it required a closer inspection from the Complainants to uncover this interest, and the resultant conflict.

7.3.3 Moreover, FEB and Comeos continue to participate in the decision-making process.

7.3.4 We wish to place on record that the NCPs also failed to preemptively identify and manage an obvious conflict of interest.

7.4 Further, when deciding whether or not there is a conflict of interest, the NCPs must do more than simply act within the letter of the law – such interests should be disclosed, and the procedures for dealing with the conflict should be open to scrutiny. This should further extend to the OECD's and NCPs' organisational culture, which should be one of open communication and dialogue. (Guideline 16)

7.4.1 Despite numerous requests by the Complaints, we still do not know why our concern regarding the conflict of interest has not been properly addressed. We also do not know the manner in which our concern was brought up at the NCP meetings or the procedures used or not used to discuss it.

7.4.2 It should be noted that a conflict was never denied by the Belgian NCP, and was in fact confirmed by the OECD Secretary General in his email dated 22 August 2018. The Secretary General in fact made recommendations to the Belgian NCP, which the Belgian NCP ignored.

7.5 Moreover, simply declaring that there is a conflict of interest is not sufficient – measures such as recusal should be adopted where there is a conflict. Further, transparency should be promoted in this process and therefore the conflict, as well as how it is to be resolved, should be recorded in a formal document. (Guideline 17, subsection 1.2.2.)

7.5.1 The Belgian NCP's response regarding the conflict of interest was an email consisting of a mere paragraph in which the NCP informed the Complainants that the matter was discussed during the NCP members' meeting on 2 July and that there was unanimous agreement not to recuse any of the members.

7.5.2 This is not only wholly insufficient, but it fails to fulfil the NCPs obligations as outlined above.

8. Therefore, not only is there a conflict of interest which has not been resolved, but the manner in which it was dealt with does not promote transparency and accountability, nor comply with the OECD's own guidelines when dealing with a conflict of interest.

9. 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.

10. We therefore request:

10.1 A substantive response to both the Complaint and our concerns regarding the conflict of interest (including that the minutes of the NCP meetings discussing the conflict of interest are made available for inspection by the Complainants), by **26 April 2019**.

10.2 Alternatively, we request substantive reasons for the continued delay in reaching a decision regarding the investigation of the Complaint, as well as a substantive response to our concerns regarding the conflict of interest by **19 April 2019**.

11. We reserve our right to keep the public informed as to how this matter is being handled by the NCPs.

12. In addition, in the spirit of transparency and accountability, and in light of the OECD Watch's recent report on NCPs (attached as "Annexure A") which mirrors some of our experiences and concerns, we have also sent this letter to OECD Watch for their information.

13. Kindly confirm receipt.

Yours sincerely,



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Director

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