Luxembourg National Contact Point for Responsible Business Conduct
Ministry of the Economy
L-2937 Luxembourg

Statement from Luxembourg's National Contact Point – 28 June 2019

-

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

-

Luxembourg's NCP will not proceed with further examination of the case

The OECD Guidelines for Multinational Enterprises are recommendations addressed by governments to multinational enterprises operating in or from adhering countries, regardless of where they operate.

They are non-binding principles aimed at creating responsible business conduct, which governments have committed to promoting, such as disclosure, human rights, employment and industrial relations, environment, fight against corruption, consumer interests, science and technology, competition and taxation. They also feature the important concepts of responsible supply chains and due diligence.

The Guidelines are implemented with the support of National Contact Points (NCP's), which are non-judicial grievance instruments established by adhering governments. The NCP's thus provide a platform aiming at the resolution of issues raised – called specific instances, where breeches of the Guidelines are alleged – through consensual and non-adversarial means such as mediation or conciliation.

Luxembourg's National Contact Point is established and managed within the Ministry of the Economy.

The complaint (Specific Instance) was submitted by Open Secrets (NGO - South Africa registered independent non-profit organisation) and the Centre for Applied Legal Studies (NGO - South Africa registered civil society organisation) against KBC Group (Belgium headquartered bank) and KBL European Private Bankers SA (Luxembourg headquartered bank), with the latter branch of the complaint handled by Luxembourg's NCP.

Context

The complaint was lodged with the Luxembourg National Contact point (NCP) on April 26th 2018, and, prior to that, with the Belgian NCP on April 24th 2018. This in turn lead to a meeting in person with members of the latter on April 25th.

Representatives of the complainants then also met in person with the Luxembourg NCP on April 26th 2018 and were thus enabled to further comment and elaborate on their complaint.

Along the lines of its rules of procedure, the Luxembourg NCP informed the OECD of the complaint on April 27th 2018 and forwarded the complaint to KBL European Private Bankers on Mai 2nd 2018, so as to allow the latter to examine the griefs and respond accordingly.

Gathering information for assessing the case in a thorough way is part of the initial assessment of the complaint. The Luxembourg NCP met, at their request, the legal representatives of KBL European Private Bankers in Luxembourg on June 4th 2018 to discuss the matter.

The Luxembourg NCP (Tom Theves and Christian Schuller, Ministry of the Economy) stressed that this meeting was part of the assessment phase of the complaint, since only the complainant's views had been thus far expressed, and, should the NCP accept the case, that this would not imply by and in itself any breach to the OECD Guidelines, but would reflect that the complaint and the underlying substance appears to be within the realm of the Luxembourg NCP's competence and the Guidelines' scope.

KBL European Private Bankers requested to provide a written position of on the issues raised by the complainants. This was sent to the Luxembourg NCP the next day, on June 5th.

Information of these happenings and copy of the written position of KBL European Private Bankers SA was sent by the Luxembourg NCP on the 6th of June to the complainants, with – although not required as such – prior approval of KBL European Private Bankers. An English version was sent on 20th of June at the request of the complainants. It was agreed that all further proceedings would use the English language.

The Belgian and Luxembourg NCP's agreed to coordinate their proceedings, while preserving their independence, as required in their assessment procedures and by the circumstance that KBC Group (Belgium headquartered bank) and KBL European Private Bankers SA (Luxembourg headquartered bank) are distinct entities sharing no ties whatsoever today (at the times of the alleged breaches, they were however sister companies in the Almanij holding company).

The NCPs have thus assessed the complaint in parallel, exchanging their views as to principles at stake, while expressing different views when required.

The aforementioned NCP's assumed that the complaint was submitted to on the grounds that South Africa, the country where the impact occurred, not being an OCDE member state nor adherent to the OCDE Guidelines, the countries where the alleged issues had arisen are those where the multinational enterprises involved – or the legal entities that have taken over their activities – were/are headquartered, namely Belgium for KBC Group, and Luxembourg for KBL European Private Bankers.

The French NCP was informed of the complaint, as France (mainly through Aérospatiale) is mentioned in the complaint as the alleged purveyor of weapons sold illegally to South Africa during the United Nations Security Council weapons embargo against the apartheid government at the time, while the Belgian and Luxembourg established banks have allegedly facilitated these clandestine transactions by providing the required financial platform.

It is also worth mentioning the complainants claim an involvement of a "Portuguese military intermediary (…) codenamed Project Adenia (…) run by an arms dealer, Jorge Pinhol of Beverly Securities Limited in collaboration with the Portuguese military (…) known as the Portuguese Channel".

Furthermore, the complainants contend that "it was through the Portuguese Channel that hundreds of financial transactions took place to mask the payment by Armscor to Aérospatiale (…) estimated to be over US$ 3 billion (…) in violation of the arms embargo".

On these grounds, the Portuguese NCP was also informed of the complaint.

Notwithstanding these issues and context, the complaint submitted to the Luxembourg NCP was assessed in its own right.

The Luxembourg NCP has spared no efforts to thoroughly assess the complaint in an accessible and neutral manner, while ensuring at the same time adequate transparency and appropriate confidentiality, this within a most reasonable timeframe, given the strong input from the parties and the complexity of the complaint, as recommended in the Procedural Guidelines provided by the OECD for completing the initial assessment.

The Belgian NCP brought the case before its members on 7th of June 2018. Given the complexity of the complaint with respect to the initial assessment criteria, they decided to assess the complaint more specifically in an ad-hoc working group. The complainants raised a potential conflict of interest matter as to the tripartite structure of the Belgian NCP, namely the presence of a member from the business side with links to the banking sector, and shared the issue with the OECD Secretary General.

This, along with the numerous follow-up interventions from the parties as to the complaint, the complexity of the case, the summer break, and, in the end, the failure for the Belgian NCP to reach a consensus or to achieve a statuary majority vote along its rules of procedure explain that the initial assessment could not be drafted before April 2019. Still and in context, a full year does seem in hindsight an acceptable timeframe.

Both NCP's proceeded each with a draft initial assessment of the complaint, which was submitted on the 26th of April 2019 to the parties for comments, as foreseen by their rules of procedure.
KBL European Private Bankers SA informed the Luxembourg PCN that on 24 May 2019 that it had no further contribution to add to the dossier, while the complainants submitted a substantial response on 23 May 2019, which was carefully and thoroughly assessed.
This led them to release each their initial assessment, in case of Luxembourg, as follows. This initial assessment is slated to be released on the Luxembourg NCP's website within 15 working days and sent to the OECD as well for information and to feed its specific instances database.

Applying the initial assessment criteria

In making an initial assessment of whether the issues that were raised merit further examination, NCP's are expected to determine whether the complaint is bona fide and relevant to the implementation of the Guidelines.

In this context, Paragraph 25 of the Procedural Guidance lists six criteria – mentioned also in the Luxembourg NCP's rules of procedure to justify further examination of the complaint – which NCPs "will take into account" when determining whether a specific instance meets this test, namely:

· the identity of the party concerned and its interest in the matter;
· whether the issue is material and substantiated;
· whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance;
· the relevance of applicable law and procedures, including court rulings;
· how similar issues have been, or are being, treated in other domestic or international proceedings;
· whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines.

As to the guidance laid out in the Commentary with respect to how NCP's should deal with parallel proceedings, Paragraph 26 of the Commentary states that when assessing the significance for the specific instance procedure of other domestic or international proceedings addressing similar issues in parallel, NCP's should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned.

NCP's should evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised and would not create serious prejudice for either of the parties involved in these other proceedings or cause a contempt of court situation. In making such an evaluation, NCPs could take into account practice among other NCP's and, where appropriate, consult with the institutions in which the parallel proceeding is being, or could be conducted.

Parties should also assist NCP's in their consideration of these matters by providing relevant information on the parallel proceedings (Commentary, Paragraph 26).

A contrario, 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.

A few NCP's have even extended their scope, sometimes considerably and outside the admittedly mandatory part set by the Procedural Guidance and their own rules of procedure – which is of special interest in this case – including when alleged breaches have ceased or were not eligible under the Guidelines at the time (RAID vs DAS Air; Global Witness vs Afrimex; RAID vs Anglo American; Former employees vs Heineken), providing retroactivity to the 2000 Guidelines.

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 in-depth engagement with the parties and thorough examination of the evidence is required.

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.

As to handling the substance of the case itself, the NCP's do not engage in an appreciation of the dispute at this stage of initial assessment nor do they express a judgement or stance on the ultimate merits of the grieves as such. This can be done by the NCP's – and will be done if the case is accepted for further examination and recommendations or determinations are ultimately deemed appropriate – at a later stage if the circumstances of the case plead for a forthright and outspoken final statement.

Finally, it is worth noting that while each of the mentioned requirements for assessing the complaint will be examined on its own, they may prove interdependent and so, some developments may overlap or possess a broader range.

Initial assessment of the case

Based on the complaint and the written position from KBC Group and KBL European Private Bankers, complemented by the parties and by the NCP's own review and research, several elements have surfaced at this stage.

As to the identity of the party concerned and its interest in the matter, as aforementioned, the complaint was submitted to the NCP's on the grounds that South Africa, the country where the impact occurred, not being an OCDE member state nor adherent to the OCDE Guidelines, the countries where the alleged issues had arisen are those where the multinational enterprises involved – or the legal entities that have taken over their activities – were/are headquartered, namely Belgium for KBC Group, and Luxembourg for KBL European Private Bankers.

KBL European Private Bankers raises the issue that the alleged breaches have solely occurred in South Africa and that the complainants now try to establish a link with the bank, headquartered in Luxembourg, since at the time of the facts, the Guidelines would only be considered for alleged violations occurring in OECD member states, until the 2000 revision which extended their application to non-member states.

The Luxembourg NCP considers that while the facts surrounding apartheid and the embargo on weapons had their prime effects, or impact in South Africa, the link with the financial part of the alleged breaches, which it is claimed has occurred or arisen in Belgium and Luxembourg, does not

seem excessive but rather would form a whole for the purpose of handling a case for further examination.

The Luxembourg NCP considers that a coherent and overall credible complaint is sufficient to allow the NCP's to proceed with the other criteria of the initial assessment of the case on the grounds that, if true, part of the alleged breaches could indeed have taken place in Luxembourg (whether the complaint actually passes the test of materiality, substance and correlation/causation is another matter, see "**As to whether the issue is material and substantiated"** and "**As to whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance"**).

An opposite interpretation would mean that solely by denying any or all claims of a complaint, there would be sufficient ground for the NCP's to dismiss a case outright and altogether. It is precisely the purpose of the NCP's assessment of the materiality and substance, which will be discussed later, to appreciate this.

Thus, and notwithstanding arguments to the contrary hinted at by the banks, the Luxembourg NCP, consistent with its rules of procedures and the procedural guidance of the OECD, has competence to handle the complaint from the perspective of territorial competence. It follows that the question of the application of the 2000 version of the Guidelines – in that these allow competence for alleged facts that occurred in non-member states of the OECD – is not relevant here, as there is no need to since Luxembourg, a member state, is allegedly the place where part of the alleged issues would have occurred or arisen.

KBL European Private Bankers also raises the issue that ONG's were not allowed to introduce a complaint with NCP's until the 2000 version of the Guidelines. Since none of the alleged violations occurred after 1994, they conclude that the complainant should be rejected outright.

The Luxembourg NCP considers however that the eligibility of the complainants need not be examined at the time of the alleged violations, which themselves will have their eligibility checked on their own, but on the day of their complaint in late April 2018. But introducing a complaint now based on older alleged violations will obviously raise other difficulties, which will be discussed later.

As to the parties themselves, the complainants quite obviously acted along the lines and within the scope of their activities when submitting their complaint to the Luxembourg NCP. Open Secrets seeks to pursue corporate economic crimes and violations of Human Rights under the apartheid regime, while the Centre for Applied Studies seeks to challenge the nefarious remnants of the apartheid regime, including trough legal actions.

The identity and interest of the complainants are well documented, so no further developments are required here.

As to the banks, arguably KBC Group and KBL European Private Bankers consist of wholly different structures – with other shareholders and executives – at the time of the complaint submitted to the NCP's when compared with the entities that have allegedly been part of a scheme to violate the weapons embargo laid upon South Africa by the international community for the enactment of its apartheid policy during the period 1977-1994.

Although a case could be made for rejecting the complaint on these grounds alone, the Luxembourg NCP feels that there is also sufficient material to consider that KBC Group and KBL European Private Bankers, even as distinct legal entities in their own right, are tied by any actions inherited from the former structures from which they stem. Taking over a legal structure implies taking over assets as well as liabilities, even across a not inconsiderable timespan with numerous schemes leading in the end to the present structures.

The Luxembourg NCP comes to the conclusion that, wishing to remain accessible, this requirement is met, as KBL European Private Bankers must as a matter of principle face accountability for any deeds that would have originated in their past structures, even if quite remote and even if this inevitably will come with its own difficulties, notably for establishing the materiality and substantiation of the alleged breaches, the link between the enterprise's activities and the issue raised in the specific instance, and as to whether the consideration of the specific issue would still contribute to the purposes and effectiveness of the Guidelines.

As to whether the issue is material and substantiated, this must not be confused with the relevance with regard to the Guidelines or the scope of the NCP's, which will be discussed later.

It is worth reminding that the NCP's do neither perform an appreciation of the dispute in itself nor proceed with an in-depth evaluation of its elements and their qualification at the present stage of initial assessment, if at all trough later recommendations and possibly determinations, but merely take a broad and overall view as to their materiality and substance so as to justify further examination by accepting the complaint if the other criteria are met as well.

The complaint in certainly precise, documented and compelling in its own right. It unmistakably addresses a clearly identified topic: an alleged violation of the UN weapons embargo against South Africa in that the financial entities that later became KBC Group and KBL European Private Bankers provided the required financial platform for transactions pertaining to the illegal and clandestine sale of weapons in the timeframe 1977-1994, with alleged ongoing violation of Human Rights with adverse effects – including economic and social – in South Africa and neighboring countries to this very day.

However, the complaint is unusual in that, for facts directly in relation with KBL's alleged misbehavior, its rests by and large on the testimony from 2006 of Mr Martin STEYNBERG, who still lives in South Africa with his family, and was at the time of the apartheid regime allegedly working for Armscor (Armaments Corporation of South Africa) using the cover of a "Technical Council position at the South African Embassy in Paris" from November 1986 to April 1990.

Furthermore, Mr STEYNBERG, allegedly in charge of securing the financial transactions related to weapons sales from French companies Matra and Aérospatiale to South Africa, mentions by the name only a single person working for then KBL in Luxembourg, Mr Germaine MENAGER, while also adding without further precision that he was "his Senior Management people at KBL".

From this isolated testimony, but still considering it if only for the sake of the ensuing discussion, it appears abundantly clear that the alleged violations would have occurred in or from the South African Embassy in Paris for securing sales of French manufactured weapons to South Africa, with

the alleged possible additional implication of the Portuguese military through a Portuguese intermediary, Jorge PINHOL.

Notwithstanding that the alleged involvement of the entities that became later KBC Group and KBL European Private Bankers seems quite remote versus the alleged happenings in France and Portugal, it would seem very difficult, to say the least, for KBC Group and KBL European Private Bankers to elaborate on these allegations, much less bring a negative proof thereof if such a concept is even to be considered, not to mention the confidentiality element which was raised by the banks and is set to prevent the disclosure of the required information even if still available.

Also, the time element – that could have been made less relevant through an earlier complaint, since, again, the core testimony is from 2006 – as well as the change in the structures of what are today KBC Group and KBL European Private Bankers make it challenging if not utterly difficult to find archives and files, or to engage an internal enquiry that includes employees from that era.

In addition, the testimony describes financial vehicles and numbers-only accounts allegedly used trough KBL's offices, but these were at that time legal and used routinely with various clients of banks in Luxembourg and other jurisdictions, until they were framed more tightly by European regulations pertaining to the banking sector and financial transactions. Also, the use of these instruments in itself does not imply that the bank or its employees had the knowledge that they were inevitably connected with illegal and clandestine sales of weapons to South Africa, much less were illegal by themselves.

Finally, the complaint cites on many occasions findings originating from one of the representatives of the complainants, a feature – to say the list – which KBL European Private Bankers did not fail to mention.

In the end, solely accepting the complaint for further examination to seek deeper understanding of matters and facts long past that even the Truth and Reconciliation Commission – or any other commission of post-apartheid South Africa addressing more specifically economic crimes from that era, for that matter – could not undertake does not fit in the mandate of the NCP's but would rather require a thorough investigation by competent authorities such as the attorney general in Belgium and/or Luxembourg ("Parquet du Procureur") on alleged involvement of the banking entities that eventually became KBC Group and KBL European Private Bankers in the financing of illegal and clandestine weapons sale at the time.

For all the above-mentioned reasons, the Luxembourg NCP comes to the conclusion that the complaint does not meet the requirement that the issue should be material and substantiated.

As to whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance,

This requirement is complementary with the previous one. As has already been mentioned before for the purpose of developing a complete view as to the requirement that the issue raised should be material and substantiated, the complaint essentially rests on a single testimony from 2006 from a person allegedly working for Armscor (Armaments Corporation of South Africa) but using the cover

of a “Technical Council position at the South African Embassy in Paris” from November 1986 to April 1990.

That person describes indeed in detail the banking accounts and the various procedures and vehicles used for the purpose of securing the financial transactions required to clear illegal and clandestine weapons sales from France to South Africa during the apartheid era, thus seemingly giving serious credit to allegations that such financial transactions would indeed have taken place routinely.

However the person, admittedly living in Paris, can only mention the name of one employee from KBL with which he claims he was in contact for giving the instructions regarding these financial transactions and vehicles. The link with KBL is thus quite tenuous to begin with, let alone a link with the decision-makers of the bank, the latter being of importance for the requirement under assessment, as it is the policy and the activities of the bank that matter, not a possible misconduct or rogue behavior from an account manager of the bank.

Furthermore – presuming any such link with KBL is real – since the various financial vehicles and numbers-only accounts allegedly used trough KBL’s offices, as mentioned in the testimony, were at that time widely used throughout the banking sector and for financial transactions, the recourse to these instruments and procedures in themselves does not imply that the decision-makers in the bank knew about them in that particular instance, or if they did, that they had the knowledge that they were unmistakably connected to illegal and clandestine sales of weapons to South Africa, or even that the employee of the bank who was in direct contact with the author of the testimony had an understanding of the matter.

In assessing the requirement that there seems to be a link between the enterprise’s activities and the issue raised in the complaint, the Luxembourg NCP is willing to envision that even on single compelling testimony can in principle have reasonable credibility when it is thoroughly documented and abundant with details on the *modus operandi* such as in this case, and that it is also plausible that a financial scheme and banking accounts must have been indeed used in connection with these alleged illegal weapons sales to South Africa during the apartheid era, presuming them to indeed have occurred.

By the same token however, the Luxembourg NCPs cannot fail to express unease and reservations when having to take for granted on the basis of that single testimony that the financial part of the weapons purchases – which were themselves settled at the Embassy of South Africa in Paris – has occurred in Luxembourg with KBL, and, even presuming it was, that the bank’s decision-makers, which are never mentioned directly in the testimony, must necessarily have known about them and the existence within their bank of banking accounts of front-companies for that very purpose.

Furthermore, KBC Group and KBL European Private Bankers deny that their historical entities – for as much as they know or, for that matter, are capable of knowing many years thereafter – provided the required financial platform for the transactions pertaining to the illegal and clandestine sale of weapons in the timeframe 1977-1994 in violation of the UN weapons embargo against South Africa.

As has been highlighted by the Luxembourg NCP when it decided above that the requirement as to the identity of the party concerned and its interest in the matter was met – by stating that KBL European Private Bankers must as a matter of principle face accountability for any deeds that would

have originated in their past structures, even if quite remote – this feature of the complaint inevitably brings along its own difficulties in the face of a denial by KBC Group and KBL European Private Bankers that, presuming the alleged violations were proven true, they should be involved for the actions of their past legal structures, much less that that they would now be liable when they have become distinct entities.

In such a context, it does not appear feasible to establish the materiality and substantiation of the alleged breaches, let alone establish that there seems indeed to be a link between the enterprise's activities – present and even past – and the issues raised in the complaint (see also below **"As to the relevance of applicable law and procedures, including court rulings"** and how the court rejected a similar testimony).

The Luxembourg NCP considers that while a link must indeed not be established but must merely seem to exist between the enterprise's activities and the issue raised in the complaint, it still represents quite a leap given the aforementioned developments, and comes to the conclusion that here too, the requirement fails to be met.

As to the relevance of applicable law and procedures, including court rulings,

As for the parties, there are no other known procedures or rulings at this time.

As for other court rulings of relevance, both the complainants and KBL European Private Bankers mentioned the case filed with Belgian courts by Beverly Securities Limited, now closed with a decision of the Appeal Court from 24th of September 2014, which decided that Belgian Courts were not territorially competent.

This case focuses on unpaid commissions by Armscor to an intermediary in the context of helicopter sales to South Africa, in which it is was alleged that the former entities that became KBC Group and KBL European Private Bankers had handled unfairly in favor of Armscor.

Since it was rejected, it fails to bring any information or relevance regarding the alleged banking schemes at the banks. However, it is here of interest that the court expressed the view that the written testimony of the former financial supervisor of Armscor not only is unverifiable but merely mentions the existence of 3 numbers-only accounts at the KBC Bank in Belgium and so, that no evidence was brought of any wrongdoings in Luxembourg in handling Beverly Securities Limited.

The case highlights only further the difficulties with such testimonies and older alleged wrongdoings, already expressed before, since it doesn't pass the test in court and a similar testimony cannot be expected to be taken at face value by the Luxembourg PCN when assessing the complaint, which explains here again the issues raised under **"As to whether the issue is material and substantiated"** and "**As to whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance"**).

Overall however and in themselves, there are no issues in relation with applicable law and procedures.

The NCP's see no limitations stemming from this requirement, which is obviously met.

As to how similar issues have been, or are being, treated in other domestic or international proceedings,

There are no issues or precedent in relation with similar issues.

As has been mentioned prior, several NCP's have taken an extended view as to their scope of activity. Of special interest in this case is that they have accepted complaints for further examination even when alleged breaches had ceased or did not obviously seem eligible under the Guidelines at the time (RAID vs DAS Air; Global Witness vs Afrimex; RAID vs Anglo American; Former employees vs Heineken).

This will be examined under the assessment of the next and last requirement.

The Luxembourg NCP has not found any limitations stemming from the requirement as to how similar issues have been, or are being, treated in other domestic or international proceedings. The requirement is thus obviously met.

As to whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines,

The complainants summarized their expectations by expressing 4 requests, namely that the Belgian NCP and the Luxembourg NCP **(1)** issue the recommendation that KBC Group and KBL European Private Bankers issue an apology to South Africans and the South African government for their complicity in supporting the apartheid regime and violating the arms embargo during apartheid; **(2)** issue the recommendation that the Luxembourg and Belgian authorities investigate the extent to which there should be punitive action taken against KBC Group and KBL European Private Bankers as a result of their operations during apartheid; **(3)** issue a statement to the effect that the conduct of KBC Group and/or KBL European Private Bankers violated the relevant OECD Guidelines, should the NCP's find this to be the case; **(4)** issue the recommendation that the European banking community establish an oversight and accountability mechanism to ensure that financial institutions are not complicit in human rights violations as a result of their business activities.

It is difficult for the Luxembourg NCP to see how the consideration of the complaint could contribute not only to the purposes and the effectiveness of the Guidelines, but also more specifically in this context how the Luxembourg NCP could handle any one of these 4 requests as expressed by the complainants.

Indeed, requests (1), (2) and (4) not only proceed from the findings pertaining to request (3) that alleged violations really could reasonably have occurred, but they would also require that the

Luxembourg NCP surpasses entirely the role and power normally associated with the NCP's scope. Therefore, they must be dismissed outright.

As for request (3) that the Luxembourg NCP should accept the case and eventually come to the conclusion and state that KBL European Private Bankers violated the relevant OECD Guidelines, the difficulty at this stage of initial assessment stems – along with the sheer materiality and substance of the alleged violations, as noted before under **"As to whether the issue is material and substantiated"** and "**As to whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance" –** from the circumstance that the alleged violations of the Guidelines have taken place broadly in the period 1977-1994, and more particularly during the 1986-1990 timeframe if the written testimony – which is central to the complaint – is to be taken at face value.

To circumvent this fact – and also in order to avoid outright dismissal of the complaint on the grounds that ONG's were not entitled to introduce complaints until the 2000 revision of the Guidelines, a view that the Luxembourg NCP did not adopt however, although for other motives, see "**As to the identity of the party concerned and its interest in the matter"** – the complainants claim that the alleged breaches have ongoing effects as to this day.

This would require as a first step that the Luxembourg NCP either accepts to get back in a very remote time and assesses today if said violations had hurt the Guidelines at the time they were allegedly perpetrated, or accepts that their alleged ongoing effects to this day would somehow form a whole, thus justifying their assessment on a "regular" basis – under one version or another of the Guidelines.

Although the Guidelines or the Luxembourg NCP's rules of procedure did not specifically include limitations for treating remote facts, contrary to other NCP's – and these NCP's thus remain basically free in that regard – it also appears to the Luxembourg NCP that it is not relevant and way beyond its role to investigate if, and to what extent, the alleged violations had hurt the Guidelines at the time they were allegedly perpetrated, supposing that this would even be feasible.

Indeed, the Luxembourg NCP sees its task consisting solely in helping in the resolution of concrete ongoing breaches of the Guidelines by providing good offices, not to assess long passed alleged violations or alleged ongoing effects of prior alleged violations on which it has and will not have any influence whatsoever, directly or indirectly.

True, a few NCP's have lately extended their scope, sometimes considerably beyond the norms set by the OECD Procedural Guidance to the point where they accepted for further examination alleged breaches that had ceased or were not eligible under the Guidelines at the time when they occurred (RAID vs DAS Air; Global Witness vs Afrimex; RAID vs Anglo American; Former employees vs Heineken), although it is doubtful that the first two cases mentioned – handled by the UK NCP – could even be compared to the present case, as they have to do with applying the later version of the Guidelines to prior facts when the main facts had occurred under the newer version. Only the Heineken/Bralima case really takes on prior facts, but even so, no NCP ever accepted to consider facts so remote in time as in the complaint under assessment here.

Moreover, besides that the Luxembourg NCP intends to focus on the core purpose of NCP's – and also wishes to avoid possibly becoming a tribunal for history and politics – handling this case in a similar way does not even seem feasible due to the complexity of the matter and the lack of evidence. It is one thing to examine older facts when it is possible to retrieve the required information and there is some common ground as to their materiality, but it is an altogether different situation when KBC Group and KBL European Private Bankers altogether 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 in their specific situation where they would be unable to access documents or disclose files for alleged facts this old. It is also worth reminding that Luxembourg's legal provisions, like that of many other jurisdictions, require that bank documents be kept for 10 years.

The aforementioned Heineken case handled by the Dutch NCP required for Heineken to accept in principle its responsibility and willingness to settle an old dispute where the labor and social rights of former employees were affected and were clearly identified as such. This is comparatively a simple matter where facts are or can be established, and where the effects for the workers are effectively ongoing until a final settlement has been reached.

The complainants basically ask here that the NCP's accept the case and make recommendations and determinations in the way expressed in the above 4 points, while excluding altogether any good offices the NCP's could provide to bring the parties together and engage in a constructive discussion.

But even then – notwithstanding its stance on its scope and only for the sake of discussing comprehensively the matter – the Luxembourg NCP would not be in a position to make recommendations or determinations with respect to the aims in request (3) given the developments herein and the many reservations as to the substantiation of the complaint.

Thus, the Luxembourg NCP – which at this stage is not determining or trying to determine if KBL European Private Bankers has breached the OECD Guidelines, or even acted inconsistently with regard to them – has come to the conclusion that the consideration of the specific issue would not contribute to the purposes and effectiveness of the Guidelines.

Conclusion

All in all, the Luxembourg NCP takes the view that the complaint fails to meet several conditions required for being accepted and will thus not proceed with a further examination.