



S T A T E M E N T

**of the German National Contact Point for the
OECD Guidelines for Multinational Enterprises
at the Federal Ministry for Economic Affairs and Energy**

in response to a specific instance submitted by

- Action pour le développement et l'innovation médicale ("ADIMED"), Bukavu (Democratic Republic of Congo)

(hereinafter referred to as "the Complainant")

against

- Pharmakina S.A., Bukavu (Democratic Republic of Congo)

(hereinafter referred to as "the Respondent" or "the Company")

Hereinafter, the Complainant and the Respondent will be collectively referred to as "the Parties".

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A. SUMMARY

- 1 The German National Contact Point for the OECD Guidelines for Multinational Enterprises (hereinafter referred to as “NCP”) does not accept this specific instance for further examination as it is not the internationally competent authority.

B. FACTUAL BASIS AND POSITION OF THE PARTIES

- 2 The factual basis underlying this specific instance procedure can be summarized as follows, insofar as it is relevant for the purposes of this statement:
- 3 The Complainant is a non-governmental organisation from the Democratic Republic of Congo (hereinafter referred to as "DRC") acting on behalf of 139 former employees of the Respondent (hereinafter referred to as "the Employees"). The Respondent is an agro-industrial and pharmaceutical enterprise headquartered in the DRC and structured as a public limited company under DRC law.
- 4 The Parties give differing accounts of the circumstances of the Company's founding as well as the subsequent developments in its shareholder structure. After several requests for clarification, the facts now present themselves to the German NCP as follows:

Pursuant to the Respondent, the Company was founded in 1961 by the Belgian company KINABEL. The NCP notes that the Complainant contests this assertion. Similarly, there is dispute between the Parties on whether the German firm Boehringer Mannheim was ever a shareholder of the Company or remained limited to the role of a (major) customer. However, a final decision on these issues is not necessary as it would not alter the gist of the present Statement.¹

At a point in time which is no longer verifiable but which pre-dates the year 1971, the Company's shares were taken over by a Canadian company and a Luxembourg holding which then held 75.00 % and 24.99 % of the shares respectively. Subsequently and prior to 1987, the shares of the Luxembourg holding were bought by another holding located in the same country. Finally, in 1999 a French and a German employee took over the Company in a management buyout. As a result of this buyout, 99.99 % of the shares were placed in a new holding which is structured as a public limited company under Luxembourg law.

- 5 The Complainant is of the opinion that the Respondent failed to fulfil its obligations under the OECD Guidelines for Multinational Enterprises (hereinafter referred to as "OECD Guidelines") with regard to certain events which – pursuant to the Complainant – occurred in the turmoil of the civil war in the DRC between 1996 and 1999. The Complainant claims in essence that during this time the Respondent cooperated with

¹ Cf. in particular paragraph 23 below.

rebel forces in the DRC and violated human rights as well as domestic labour law when laying off Company employees. Hence the Complainant is of the opinion that the Respondent violated provisions laid down in chapters I (Concepts and Principles), IV (Human Rights), V (Employment and Industrial Relations), and VII (Combating Bribery, Bribe Solicitation and Extortion) of the OECD Guidelines for Multinational Enterprises in their current (2011) edition. Against this backdrop, the Complainant claims damages for the Employees in the amount of 370,000,000 Euros.

- 6 The Respondent rejects the Complainant's allegations as unfounded. It maintains, in essence, that the company did neither collaborate with any rebels or illegal authorities nor did it violate human rights. The Respondent argues that the layoffs in question were effected in accordance with applicable domestic labour law after obtaining the necessary permissions from the relevant authorities and justified by economic difficulties the Company was facing.

C. PROCEDURE AND ACTIVITIES UNDERTAKEN BY THE GERMAN NCP

- 7 On 16 May 2018, the Complainant formally lodged its complaint with the German NCP by e-mail. The complaint was accompanied by a considerable number of explanatory documents contained in 28 additional e-mails sent on the same day. Six days prior to this, the Complainant had sent a first series of pertaining documents. The Respondent was given the opportunity to reply to the allegations and did so by e-mail sent to the German NCP on 18 July 2018.
- 8 Having regard to the complexity of the case, the German NCP subsequently continued an extensive exchange with the Parties both in written form and by phone. The NCP thereby aimed at a better understanding of the underlying facts of the case, notably with regard to the Company's corporate and ownership structure as well as its relationship with German companies. Further factual information was provided by the German Embassy in the DRC.
- 9 Moreover, the German NCP conferred with the National Contact Points of Belgium, Canada, France, Luxembourg, and Switzerland on material issues of the case as well as questions of territorial competence.
- 10 It is on this basis that the present decision was taken by the German NCP in agreement with the German federal ministries represented in the Interministerial Steering

Group for the OECD Guidelines². Prior to its publication, the Parties were given the opportunity to comment as stipulated in the German NCP's Procedural Notes for Specific Instances.

D. ADMISSIBILITY

- 11 The specific instance is not admissible.

I. Multinational enterprise

- 12 Contrary to the Respondent's assumption, the non-admissibility is not owed to the Company not qualifying as a multinational enterprise within the meaning of the OECD Guidelines.
- 13 The OECD Guidelines do not provide a specific definition for the term "multinational enterprise" (hereinafter referred to as "MNE") but clarify that a wide range of companies including small and medium-sized companies may fall within its scope. MNEs usually comprise companies or entities established in more than one country and so linked that they may coordinate their operations in various ways.
- 14 In the present case, the Company's economic activities are not limited to the DRC. Furthermore, the Company is and always has been linked to (different) holdings in third countries. Hence the German NCP concludes that the Company could qualify as an MNE within the meaning of the OECD Guidelines.

II. Role of the German NCP

- 15 However, the German NCP cannot accept this specific instance for further examination as it is not the internationally competent authority.

1. Preliminary question

- 16 In this context, the question arises which version of the OECD Guidelines is applicable in the present case.

² Federal Ministry of Finance, Federal Foreign Office, Federal Ministry of Justice and Consumer Protection, Federal Ministry of Labour and Social Affairs, Federal Ministry of Food and Agriculture, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, Federal Ministry of Economic Co-operation and Development.

- 17 As already indicated in paragraph 5 above, the Complainant refers to certain events which allegedly occurred in the DRC between 1996 and 1999. Hence it seems possible that the *material* issues of the present case – which the German NCP will not assess – need to be evaluated on the basis of the OECD Guidelines in their 1991 version.
- 18 However, the latter version of the OECD Guidelines does not address questions of territorial competence. Accordingly, the German NCP has taken the decision to assess this *procedural* issue on the basis of the current (2011) version of the OECD Guidelines with its pertaining Procedural Guidance.

2. No NCP in the DRC

- 19 As a general rule, the OECD’s “Commentary on the Implementation Procedure of the OECD Guidelines for Multinational Enterprises” (hereinafter referred to as “Implementation Commentary”) foresees that

“issues will be dealt with by the NCP of the country in which the issues have arisen.”³
- 20 As the DRC is neither an OECD member country nor one of the thirteen additional states which adhere to the OECD Guidelines, there is no NCP in the DRC. Accordingly, the above-mentioned general rule does not apply in the present case.

3. Germany is not the Company’s home country

- 21 For situations where OECD Guidelines-related issues arise in non-adhering countries, paragraph 39 of the Implementation Commentary establishes a – subsidiary – competence of so-called “home NCPs”, i.e. National Contact Points situated in MNEs’ home countries. In the case at hand, this rule is not applicable either.
- 22 To begin with, Germany is not Pharmakina’s home country. For the Company is headquartered in the DRC and structured as a public limited company under DRC law as was already pointed out in paragraph 3 above.
- 23 Furthermore, the Company seemingly neither has nor has it ever had a parent company located in Germany capable of directing Pharmakina’s economic activities. Yet even if Boehringer Mannheim had at a certain point in time counted among the Company’s shareholders, the said firm ceased to exist in 1997 after a takeover by the Swiss company Hoffmann-La Roche. Thus the German NCP could no longer turn to Boehringer

³ *Ibid*, para. 23.

Mannheim in order to find a suitable mediation partner for the Complainant for the purposes of the current specific instance procedure.

- 24 Likewise, the mere fact that a German manager took part in the management buyout in 1999 (cf. paragraph 4 above) neither suffices to make Germany Pharmakina's home country nor does it qualify the pertaining holdings situated in third countries as *German* companies. In addition, the said German manager as a natural person cannot be regarded as an MNE as this would over-extend even the wide definition of the OECD Guidelines for that notion.
- 25 Finally, the Complainant has proffered no further possible factors nor are any such factors evident that would allow the German NCP to come to the conclusion that it may assume the role of home NCP within the meaning of paragraph 39 of the Implementation Commentary.

E. CONCLUSION

- 26 The German NCP does not accept this specific instance for further examination as it is not the internationally competent authority to handle this case.
- 27 After thorough examination of the information at its disposal and exchanging with the National Contact Points named in paragraph 9 above, the German NCP does not see the possibility to refer the case to another National Contact Point that could possibly act as home NCP in the case at hand. Any such decision would require an in-depth assessment of the *material* aspects of the case that would exceed the scope of the present *procedural* statement on (non-)admissibility.

Berlin, 18 October 2018

signed Brauns

For the National Contact Point

Detlev Brauns

Federal Ministry for Economic Affairs and Energy