



## STATEMENT

**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 complaint submitted by**

- four former employees and union representatives of a Congolese company, Democratic Republic of the Congo (hereinafter referred to as “DRC”), on behalf of themselves, four other former employees and union representatives as well as other employees of the Congolese company

(hereinafter referred to as “the Complainants”)

**against**

- the Congolese company, DRC,
- its Luxembourg holding company, Grand Duchy of Luxembourg, and
- a German company, Federal Republic of Germany

(hereinafter referred to as “the Respondents”)

Hereinafter, the Complainants and the Respondents will be collectively referred to as “the Parties”.

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## **A. SUMMARY**

- 1 The complaint was addressed to the National Contact Points for the OECD Guidelines for Multinational Enterprises (hereinafter referred to as “NCPs”) of the Kingdom of Belgium, the Federal Republic of Germany, the Grand Duchy of Luxembourg and the Swiss Confederation. After coordination on the international competence for the complaint the NCPs involved decided that the complaint would be handled by the Luxembourg NCP as far as it relates to the Luxembourg holding company and its subsidiary, the Congolese company, and by the German NCP as far as it relates to the German company.
  
- 2 The German NCP does not accept the complaint against the German company for further examination, because the allegations against the company are not substantiated and there is no link between the company’s activities and the issues raised.

## **B. FACTUAL BASIS AND POSITIONS OF THE PARTIES**

- 3 The factual basis underlying this complaint procedure can be summarised as follows, insofar as it is relevant for the purposes of this statement:
- 4 The Complainants are former employees and union representatives of the Congolese company. The company is an agro-industrial and pharmaceutical enterprise specialising in the production of quinine and quinine products, headquartered in the DRC and structured as a public limited company under DRC law. The Luxembourg holding company holds 99.99 % of the shares in the Congolese company and is structured as a public limited company under Luxembourg law. The German company is a service provider in the field of international cooperation for sustainable development and international education work, headquartered in Germany and structured as a limited company under German law.

### **I. Submission of the Complainants**

- 5 The Complainants are of the opinion that the Respondents failed to fulfil their obligations under the OECD Guidelines for Multinational Enterprises (hereinafter referred to as “OECD Guidelines”). The main allegation, which is not directed against the German company and thus not subject to the proceedings before the German NCP, is that the Congolese company does not pay the minimum wage and dismissed after a letter of complaint to the President of the DRC eight union representatives including the Complainants in 2019.
- 6 The further allegations, which are subject to the proceedings before the German NCP, are as follows: the Complainants claim that a predecessor of the German company entered into a development partnership with the Congolese company related to an antiretroviral drug in the 2000s. On the basis of this cooperation they assert – without further specification – a responsibility of the German company for the following activities of the Congolese company:
  - 7 First, the Complainants allege that the Congolese company discharges sulphuric and hydrochloric acids, toluene and other wastes in the open, especially into Lake Kivu, and has no system of environmental management regarding waste disposal, including no monitoring and verification of process. Second, they claim that the Congolese company relies intensively on low paid day labourers without social and pension insurance, does not compensate or rehabilitate workers in cases of occupational accidents, and cancelled milk rations for employees. Finally, the Complainants allege that the man-

agement buy-out of the Congolese company during the civil war in the DRC 1999 was handled irregularly and that in the following restructuring the company dismissed more than eight hundred employees and cooperated with rebel forces.

- 8 The Complainants are of the opinion that the German company violated provisions laid down in chapters I (Concepts and Principles), II (General Policies), III (Disclosure), IV (Human Rights), V (Employment and Industrial Relations), VI (Environment) and VII (Combating Bribery, Bribe Solicitation and Extortion) of the OECD Guidelines in their current (2011) edition.
- 9 Against this backdrop, the Complainants request to put an end to the alleged practices and claim damages for the Complainants and the four other dismissed union representatives in the amount of 5,000,000 US dollars and for the employees of the Congolese company affected by environmental pollution in the amount of 10,000,000 US dollars.

## **II. Submission of the German company**

- 10 The German company concedes that its predecessor cooperated with the Congolese company in three development partnerships between 1999 and 2007, but rejects the assertion of responsibility for the alleged activities of the Congolese company
- 11 The German company states that the development partnership the Complainants refer to related to the local production and distribution of an antiretroviral drug between 2003 and 2007. The three core areas of the project were: capacity development at production plants of the Congolese company for local manufacture of antiretroviral molecules, equipping the HIV diagnosis and monitoring centre in which the antiretroviral drugs were dispensed, and strengthening the capacity of health care staff and municipal authorities to provide care for patients infected with HIV. The German company explains that the cooperation included two other partnerships, one to support the conversion of cinchona bark plantations no longer used by the Congolese company, into small-scale farming and their allocation to a farming cooperative between 1999 and 2001.
- 12 The German company, however, rejects the assertion of responsibility for the alleged activities of the Congolese company. It says that the complaint fails to conclusively demonstrate or adequately substantiate the allegations against it. According to the German company, it is even unclear whether the complaint relates to the period covered by the partnerships. It underlines that the alleged activities of the Congolese com-

pany in any case have no relation to the development partnerships and would not have been known to its predecessor at the time. Therefore, asserts the German company, the OECD Guidelines were not breached, neither in their editions at the time (1991 and 2000) nor in their current (2011) edition. It adds that the editions at the time would be applicable, and that these did not include detailed recommendations for business partners.

- 13 Finally, the German company argues, it is unclear how the acceptance of the complaint and a subsequent mediation or conciliation might specifically promote the application of the OECD Guidelines: as the most recent partnership ended in 2007, it is not apparent that there would be any influence the German company could exert over the Congolese company.

## **C. PROCEDURE**

- 14 On 6 May 2019 one of the four Complainants lodged the complaint with the Belgian, German, Luxembourg and Swiss NCPs by email. The complaint was accompanied by supporting documents attached to the email and further emails dated 7 May 2019.
- 15 The German NCP confirmed the receipt of the complaint on 9 May 2019.

### **I. NCPs' Coordination on the International Competence for the Complaint**

- 16 The German NCP indicated in the confirmation of receipt that, as the complaint was addressed to four NCPs, the NCPs involved would first need to decide on the international competence for the complaint. The NCPs discussed this question by phone and email, and agreed to decide on it at the meeting of the Network of the National Contact Points for Responsible Business Conduct in Paris on 19 and 20 June 2019.
- 17 At the meeting the NCPs involved decided to separate the handling of the complaint. The complaint against the Luxembourg holding company and its subsidiary, the Congolese company, would be handled by the Luxembourg NCP. The complaint against the German company would be handled by the German NCP. However, as the complaints are interrelated the Luxembourg and German NCPs would coordinate the further handling of the complaint.

### **II. Procedure before the German NCP**

- 18 On 21 June 2019 the German NCP gave the German company the opportunity to reply to the letter of complaint and further emails dated 8, 11, 13, 23 and 31 May and 13 and 17 June 2019, including a submission regarding allegations against the German company from 31 May 2019. The German company responded to the allegations in an email dated 30 July 2019. Following further emails from the Complainants on 24 June, 25 July and 3, 5, 11 and 14 August 2019, including submissions regarding allegations against the German company dated 24 June and 14 August 2019, the German company responded again by email on 11 September 2019. The Complainants, finally, responded in an email dated 19 September 2019.
- 19 Following questions in this regard, the initial complainant confirmed in an email dated 11 May 2019 that he was being assisted in the complaint procedure by a counsel from DRC. He further clarified in emails dated 11 and 13 May 2019 that he was complaining on behalf of himself, the seven other dismissed union representatives and other em-

employees of the Congolese company. Three of the other dismissed union representatives joined the complaint by email on 25 July 2019.

- 20 The initial complainant reported in an email on 13 June 2019 that security staff of the Congolese company tried to contact him and his counsel. He then reported in an email dated 17 June 2019 that he had met with a Congolese intelligence agent writing a report on the events at the Congolese company. In emails dated 3 and 5 August 2019, the other Complainants reported that the initial complainant had been arrested by Congolese prosecutors.
- 21 Having regard to the complexity of the case, the German NCP entered into an exchange with the Complainants and the German company, notably requesting the Complainants to further specify the allegations against the German company. Furthermore, the German NCP continued to confer with the Luxembourg NCP and contacted the German Embassy in Kinshasa (DRC) regarding the safety and arrest of the initial complainant.
- 22 It is on this basis that the present decision was taken by the Interministerial Committee on the OECD Guidelines, which consists of the German NCP at the Federal Ministry for Economic Affairs and Energy and seven other federal ministries<sup>1</sup>. Prior to the publication of this statement, the Complaints and the German company were given the opportunity to comment.

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<sup>1</sup> 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 and Federal Ministry for Economic Cooperation and Development.

## D. ADMISSIBILITY

- 23 The complaint is not admissible, because the allegations against the German company are not substantiated and there is no link between the company's activities and the issues raised.

### I. Applicable Editions of the OECD Guidelines and Procedural Guidelines

- 24 As the complaint addresses issues over a time span of twenty years, it poses the preliminary question of the applicable editions of the OECD Guidelines and the Procedural Guidelines of the German National Contact Point (hereinafter referred to as "Procedural Guidelines").
- 25 As a principle of intertemporal international law issues are to be assessed in accordance with the rules applicable at the time they occur. From this follows that the admissibility is generally to be assessed in accordance with the rules applicable at the time of the lodging of the complaint, here the OECD Guidelines and Procedural Guidelines in their current (2011 and 2019, respectively) editions.
- 26 However, it also follows from the principle that, in substance, the issues are to be assessed in accordance with the rules applicable at the time the events took place. The question of whether the issues are substantiated<sup>2</sup> also addresses – although this is an admissibility criterion – the substance of the complaint. Insofar as it relates to the substantive recommendations of the OECD Guidelines it is therefore to be assessed in accordance with the rules applicable at the time the events took place. The allegations against German company refer to the time of the development partnerships between 1999 and 2007, i.e. to the time of the OECD Guidelines' 1991 and 2000 editions. The question whether the allegations are substantiated must therefore be assessed against the substantive recommendations of the OECD Guidelines in their 1991 and 2000 editions.
- 27 The connected question of whether there is a link between the German company's activities and the issues raised<sup>3</sup> manifestly shows this linkage between an admissibility criterion and the substance of the OECD Guidelines. The criterion was introduced in

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<sup>2</sup> Paragraph 43 bullet point 2 of the Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises (hereinafter referred to as "Implementation Commentary") in its 2011 edition and paragraph 29 of the Procedural Guidelines in their 2019 edition.

<sup>3</sup> Paragraph 43 bullet point 3 of the Implementation Commentary in its 2011 edition and paragraph 28 of the Procedural Guidelines in their 2019 edition.

the 2011 edition together with expanded substantive recommendations regarding business partners.

## **II. International Competence for the Complaint**

- 28 The German NCP is the internationally competent authority for the separately handled complaint against the German company.

### **1. Internationally Competent NCPs**

- 29 As a general rule complaints are dealt with by the NCP of the country in which the issues have arisen<sup>4</sup>, in this complaint the DRC. However, as the DRC is a non-adhering country, the home NCP, i.e. the NCP of the home country of the multinational enterprise, has a residuary competence<sup>5</sup>. It takes steps to develop an understanding of the issues involved and follows the procedures where relevant and practical.
- 30 Whereas there is no home NCP for the Congolese company and the home NCP of the Luxembourg holding company is the Luxembourg NCP, the home NCP of the German company, which is headquartered in Germany and structured as a limited company under German law, is the German NCP.

### **2. Separate Handling of the Complaint against the German company**

- 31 As two Respondents have different home NCPs, the NCPs involved decided to separate the complaint. The complaint against the Luxembourg holding company and its subsidiary, the Congolese company, being handled by the Luxembourg NCP and the one against the German company by the German NCP.
- 32 There was no need to handle the complaint as a whole by a lead NCP assisted by a supporting NCP, because the Luxembourg holding company and the German company are not a group of enterprises organised as a consortium, joint venture or other similar form<sup>6</sup>. The only relationship between the Luxembourg holding company and the German company is that the former's subsidiary company, the Congolese company, en-

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<sup>4</sup> Paragraph 23 of the Implementation Commentary in its 2011 edition and paragraph 24 of the Procedural Guidelines in their 2019 edition.

<sup>5</sup> I.C.5. of the Procedural Guidance in the Implementation Procedures of the OECD Guidelines for Multinational Enterprises (hereinafter referred to as "Procedural Guidance") in its 2011 edition, paragraph 39 of the Implementation Commentary in its 2011 edition and paragraph 25 of the Procedural Guidelines in their 2019 edition.

<sup>6</sup> Paragraph 24 of the Implementation Commentary in its 2011 edition, paragraph 24 of the Procedural Guidelines in their 2019 edition

tered into three development partnerships with the latter. The overlapping factual basis of the allegations does not necessitate the handling of the complaint as a whole.

### **III. Substantiation of the Allegations against the German company, and Link between the German company's Activities and the Allegations**

- 33 The allegations against the German company are not substantiated<sup>7</sup>, i.e. not plausibly and credibly submitted. Connected with this is the absence of a link between the German company's activities and the issues raised<sup>8</sup>.
- 34 The substantiation of the allegations is, as stated above, to be assessed against the substantive recommendations of the OECD Guidelines in their 1991 and 2000 editions. The responsibilities of enterprises regarding business partners were introduced by the 2000 edition and expanded in the 2011 edition. The 2000 edition introduced a provision that enterprises should encourage, where practicable, business partners to apply principles of corporate conduct compatible with the Guidelines<sup>9</sup>. However, it was only the 2011 edition which complemented this with provisions on risk-based due diligence as well as prevention and mitigation of adverse impacts when the impact is directly linked to their operations, products or services by a business relationship<sup>10</sup>.
- 35 The assessment of the substantiation of the allegations is therefore limited in time and scope. In time it is limited to the time of the development partnerships, in which the 2000 edition was applicable, i.e. between 2000 and 2007. In scope it is limited to the relevant provision of the 2000 edition, i.e. the encouragement, where practicable, of business partners to apply principles of corporate conduct compatible with the OECD Guidelines.
- 36 The allegations against the Congolese company for which a responsibility of the German company is asserted fall in part outside the relevant time, i.e. between 2000 and 2007. This is particularly true for the allegations regarding the management buy-out and the restructuring of the company which predate 2000.

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<sup>7</sup> Paragraph 43 bullet point 2 of the Implementation Commentary in its 2011 edition and paragraph 29 of the Procedural Guidelines in their 2019 edition.

<sup>8</sup> Paragraph 43 bullet point 3 of the Implementation Commentary in its 2011 edition and paragraph 28 of the Procedural Guidelines in their 2019 edition.

<sup>9</sup> II.10. of the OECD Guidelines in their 2000 edition and II.A.13 of the OECD Guidelines in their 2011 edition, elaborated in paragraph 10 of the Implementation Commentary in its 2000 edition.

<sup>10</sup> II.10. and 12. of the OECD Guidelines in their 2011 edition, elaborated in paragraphs 14 to 23 of the Implementation Commentary in its 2011 edition and the OECD (2018), OECD Diligence Guidance for Responsible Business Conduct.

- 37 More importantly, the allegations are not within the scope of the relevant provision of the OECD Guidelines in their applicable 2000 edition. They do not refer to an encouragement to apply principles of corporate conduct compatible with the Guidelines, but assert a not further specified responsibility of the German company for impacts of the alleged activities of the Congolese company. This could be understood as asserting that the German company would be required to carry out a risk-based due diligence as well as to seek to prevent and mitigate adverse impacts of activities of the Congolese company. However, the 2000 edition did not, unlike the 2011 edition, require enterprises to carry out risk-based due diligence or seek to prevent and mitigate adverse impacts by business partners.
- 38 Even if the 2011 edition would be applicable, the allegations would not be substantiated. This is because the 2011 edition limits the responsibility for business partners to impacts which are directly linked to the enterprises' operations, products or services by a business relationship. Such a direct link is, however, not plausibly and credibly submitted. The two relevant development partnerships refer to the local production and distribution of an antiretroviral drug and to the conversion of cinchona bark plantations into small-scale farming. They do not refer to the core business of the Congolese company: the production of quinine and quinine products. This business is, however, the basis for the allegations against the Congolese company regarding environmental and employment issues. The alleged discharge of wastes and the absence of a system of environmental management relates to the production of quinine as does the reliance on day labourers and the non-compensation or non-rehabilitation in cases of occupational accidents. The development partnerships also do not relate to the management buy-out or the restructuring of the company. The one regarding the conversion of cinchona bark plantations into small-scale farming only relates to the later efforts to mitigate adverse impacts of the restructuring of the Congolese company.
- 39 As the allegations against the German company are not substantiated and there is no link between the company's activities and the issues raised, the question whether the German company's development cooperation activities were by their nature business conduct covered by the OECD Guidelines does not need to be answered.

## E. CONCLUSION

40 The German NCP does not accept the complaint against the German company for further examination, because the allegations against the company are not substantiated and there is no link between the company's activities and the issues raised.

Berlin, 16 December 2019

*signed Brauns*

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For the National Contact Point

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