

**Statement from the Belgian National Contact Point – 14 september 2020**

**Initial assessment of the specific instance ITUC/ACV – (K)SBSI**

**The Belgian NCP will not proceed for 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 two specific instances from an individual, declaring to act as the chair of an Indonesian trade union called (K)SBSI. A first complaint was addressed against the International Trade Union Confederation (ITUC) and a second one against Algemeen Christelijk Vakverbond - Confédération des syndicats chrétiens (ACV-CSC).

As the facts underlying these two complaints were similar, it was considered appropriate to carry out an initial assessment for both of them.

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

This initial assessment of the Belgian NCP does not imply that any organisation mentioned has transgressed the OECD Guidelines or not.

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

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

The following items are taken from the issues raised in the specific instance introduced by the notifier bringing the specific instance to the Belgian NCP. These items have not been verified by the NCP and do not commit the NCP.

The facts giving rise to the complaint date back to the early 1990's with the creation of a Trade Union called SBSI. In 2003, and following a decade of different historical, political and societal events, SBSI has changed name into KSBSI. Its founder, the notifier of the case to the NCP, had in the meantime left SBSI. He rejected the changes adopted and declared that the name, logo, mars and tri tarma used by the newly created KSBSI belonged to the SBSI. He decided to set up a new union called (K)SBSI, which in his view, has the sole right to use the full copyright of the previous union SBSI. He has initiated, on behalf of (K)SBSI, several legal proceedings to challenge the use of these names by (K)SBSI. The notifier mentions that several of these proceedings have confirmed the validity of its arguments.

According to the notifier, its complaints concern copyright. He also mentioned that *"KSBSI continuously is using of name SBSI, and political supported by ITUC and financial supported by ACV. Who support KSBSI against the law it is mean also against the law"*

The complaints are based on the consideration that ITUC and ACV-CSC Belgium have not respected supreme court decisions which confirm the prohibition for KSBSI and its federations *"using of name SBSI, logo SBSI, mars SSI and Tri tarma SBSI with give fund grant yearly at Konfederasi Serikat Buruh Sejahtera Indonesia until has changed the name to be the Konfederasi Serikat Buruh Seluruh Indonesia, same abbreviation KSBSI"*.

## 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 notifier refers to the 2011 Guidelines:
  - *Chapter IV Human Rights :*
    1. *Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.*
    3. *Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.*
    4. *Have a policy commitment to respect human rights.*
  - *Commentary on Human Rights :*

*Article 38:*

*A State's failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights. In countries where domestic laws and regulations conflict with internationally recognised human rights, enterprises should seek ways to honour them to the fullest extent which does not place them in violation of domestic law, consistent with paragraph 2 of the Chapter on Concepts and Principles.*

Article 41 :

*In paragraph 1, addressing actual and potential adverse human rights impacts consists of taking adequate measures for their identification, prevention, where possible, and mitigation of potential human rights impacts, remediation of actual impacts, and accounting for how the adverse human rights impacts are addressed. The term ‘infringing’ refers to adverse impacts that an enterprise may have on the human rights of individuals.*

Article 42 :

*Paragraph 2 recommends that enterprises avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur. ‘Activities’ can include both actions and omissions. Where an enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact. Where an enterprise contributes or may contribute to such an impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the practices of an entity that cause adverse human rights impacts.*

Article 44 :

*Paragraph 4 recommends that enterprises express their commitment to respect human rights through a statement of policy that: (i) is approved at the most senior level of the enterprise; (ii) is informed by relevant internal and/or external expertise; (iii) stipulates the enterprise’s human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services; (iv) is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties; (v) is reflected in operational policies and procedures necessary to embed it throughout the enterprise.*

Article 46 :

*When enterprises identify through their human rights due diligence process or other means that they have caused or contributed to an adverse impact, the Guidelines recommend that enterprises have processes in place to enable remediation. Some situations require cooperation with judicial or State-based non-judicial mechanisms. In others, operational-level grievance mechanisms for those potentially impacted by enterprises’ activities can be an effective means of providing for such processes when they meet the core criteria of: legitimacy, accessibility, predictability, equitability, compatibility with the Guidelines and transparency, and are based on dialogue and engagement with a view to seeking agreed solutions. Such mechanisms can be administered by an enterprise alone or in collaboration with other stakeholders and can be a source of continuous learning. Operational level grievance mechanisms should not be used to undermine the role of trade unions in addressing labour-related disputes, nor should such mechanisms preclude access to judicial or non-judicial grievance mechanisms, including the National Contact Points under the Guidelines.*

### **3. Requests for the receiving party of the referral**

Regarding the complaint addressed to ITUC, the notifier is asking the NCP to :

1. *“Decide that the affiliated member of the International Trade Union Confederation (ITUC) is Serikat Buruh Sejahtera Indonesia (SBSI), which is now has changed name into (Konfederasi) Serikat Buruh Sejahtera Indonesia or (K)SBSI.”*
2. *“Propose that Konfederasi Serikat Buruh Seluruh Indonesia can be accepted as a member un accordance with the procedures and mechanisms by Articles of Association of ITUC”*

In others words, the notifier is asking the NCP to help to withdraw the current affiliated member of ITUC called KSBSI and to register and affiliate the trade union he represents called (K)SBSI. He suggested that if KSBSI wishes to be recognised by ITUC, it should apply again through the regular ITUC membership process.

About the complaint addressed to ACV-CSC, the notifier is asking the NCP to :

1. *“Decide to stop cooperation among ACV and DEN KSBSI and stop fund grant from ACV to DEN KSBSI.”*
2. *“Suggestion. If ACV wants to give fund grant to DEN KSBSI, it is better ACV suggest Konfederasi Serikat Buruh Seluruh Indonesia will not use KSBSI, look another abbreviation for example KSerbusi.”*

The notifier is therefore asking the NCP to stop cooperation among ACV-CSC and DEN KSBSI and prohibit financial support from ACV-CSC to KSBSI (DEN KSBSI) and also suggests that KSBSI change its name, for exemple KSerbusi.

In a subsequent mail, the notifier also mentioned that he knows *and agrees “the NCP position is to mediate both side into a dialogue.”*

#### **4. Position statement of ITUC and ACV-CSC**

The secretariat of the Belgian NCP conducted several phone conversations with ACV-CSC, on the one hand, and with ITUC, on the other. In addition, questions were also sent by email.

- The ITUC’s primary mission is the promotion and defence of workers’ rights and interests, through international cooperation between trade unions, global campaigning and advocacy within the major global institutions. ITUC represents 207 million workers through its 331 affiliated organizations within 163 countries and territories.

For ITUC, the complaint does not fall within the purview of the OECD Guidelines because ITUC is by no means engaged in any business activity. They explained that they have the mandate to defend the rights and interests of workers but not to pursue any commercial objectives.

Moreover, ITUC specifies that the notifier has never requested to affiliate his organization, (K)SBSI. The criteria and process for membership are described on article 1 of ITUC’s constitution<sup>2</sup>. The notifier has sent to ITUC communications about his legal cases concerning trademark claims, which is , in the view of ITUC, an issue that is outside the mandate of their organization<sup>3</sup>.

- The Confederation of Christian Trade Unions (Dutch: *Algemeen Christelijk Vakverbond, or ACV*) is the largest of Belgium's three trade union federations. It was founded in 1904. Today ACV has 22 regional federations and 16 sectoral unions, with a membership of 1.7 million (almost 16% of the total Belgian population).

For ACV-CSC, the main issue concerns the relations between the two Indonesian trade unions, and in this precise case, KSBSI and (K)SBSI. This issue doesn’t have, in its view, any link with the OECD guidelines

<sup>2</sup> ITUC Constitution and Standing orders : [https://www.ituc-csi.org/IMG/pdf/ituc\\_constitution\\_2019\\_en.pdf](https://www.ituc-csi.org/IMG/pdf/ituc_constitution_2019_en.pdf)

<sup>3</sup> As mentioned in the section “aims” of ITUC’s constitution

ACV-CSC indicates that they have no commercial activities and no legal personality in line with the Belgian legislation. They mention that therefore, they can't be "*accused before the NCP*".

Concerning the context of the situation, ACV-CSC explains that the notifier has left SBSI (which became KSBSI- Konfederatie Serikat Buruh Sejahtera Indonesia) and that only KSBSI remains its current partner and ITUC affiliate.

ACV-CSC was aware of juridical proceedings of the notifier towards KSBSI but mentions that it has never been contacted by the notifier about the support from ACV-CSC to KSBSI or to receive this support for his organization (K)SBSI. The complaint from the notifier to the NCP is the first contact (though indirectly) with ACV-CSC.

## **5.Procedure followed by the Belgian NCP**

The complaints were addressed through a first email received by the Belgian NCP secretariat on 6 May 2020 followed by a second email on 8 May 2020. The NCP secretariat acknowledge reception for the two on 15 May 2020.

On 13 May, the secretariat invited representatives of ACV-CSC to a call for an initial contact in order to exchange views on the case.

On 14 May, the NCP came together for the first time to discuss the specific instance.

On 15 May, the Belgian NCP sent a series of questions to the notifier to clarify several points of the specific instance.

On 18 May the NCP secretariat sent digitaly the complaint to ITUC and ask for an interview in order to exchange information and to address questions

On 19 May, after having contacted the Dutch NCP, its secretariat accepted to organise a call to share information and views about the different specific instances which took place on 9 June 2020.

On 23 May, the notifier wrote back to the NCP answering several questions and mentioning more clearly the chapters of the OECD Guidelines entering into the scope of its request.

On 29 May, the secretariat engaged in a conversation with ITUC general secretary explaining in more details several aspects of the case according to their understanding, questions were addressed in writing by the NCP afterwards and answers provided by ITUC on 5 June 2020.

On 10 June, complementing the call with ACV-CSC held on 13 May, the secretariat also addressed several questions to them in order to have their views on the matter since the notifier is alleging that the trade union is unduly financing KSBSI. ACV-CSC provided answers on 1 July 2020.

On 14 and 21 June, the notifier addressed more information and documents to the NCP secretariat, concerning his mandate from (K)SBSI

On 10 July, the NCP came together again and decided not to go further in the specific instance and then not offering its good offices.

After the completion of the initial assessment, stakeholders were allowed a period of 10 working days to become familiar with this document and propose factual amendments. The Belgian NCP will publish this initial assessment on its website,<sup>4</sup> and it will be sent to the OECD to be included in the global database of specific instances<sup>5</sup>. 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 notifier has disclosed its name and its interest in the matter at hand.

On 21 June, the notifier sent to the NCP a document, in local language, containing a list of names and data, answering the NCP's invitation to receive clarifications on his mandate from (K)SBSI to act on their behalf in this case and to submit the formal complaint under the OECD Guidelines. The notifier states that he was writing as chairman and on behalf of (K)SBSI.

### **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 Indonesia 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 organisations have established their head offices in Belgium. 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.

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

The application fields of OECD Guidelines is clearly referred with the chapters mentioned in a coherent approach with the narrative of the case.

The submission is detailed with documents attached. As these attachments were provided in local language, the NCP was not able to take them into consideration for this initial assessment

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<sup>4</sup>Belgian 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/communiqués-du-point-de>

<sup>5</sup>Database of specific instances: <http://mneguidelines.oecd.org/database/>

which was not a limitation as the burden of proof for conducting an initial assessment should remain reasonable.

As mentioned above, for ITUC and ACV-CSC, the complaint does not fall within the purview of the OECD Guidelines because both organisations are by no means engaged in any business activity.

One of the aims of the OECD Guidelines is “to promote positive contributions by enterprises to economic, environmental and social progress worldwide.” They are recommendations addressed to organisations with a commercial purpose of activity.

With regard to the clarifications provided by ITUC and ACV-CSC, these organisations don’t have a commercial purpose or activity. Therefore, they don’t fall within the NCP complaint mechanism from the perspective of the notifier.

#### **d) Legal framework and parallel proceedings**

Article 26 of the comments on the implementation procedures of the OECD Guidelines clearly stipulate that “NCPs should not decide that issues do not merit further consideration solely because parallel actions have been conducted, are under way or are available to 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.

In this particular case, the notifier also addressed a similar complaint (based on the same facts) to the Dutch NCP against a Dutch trade union. The secretariat of the Belgian NCP contacted its counterpart in order to share information on both specific instances. It should be noted that this coordination was very constructive and helpful in order to align views on our analysis of the case.

In addition, as mentioned above, since 2003, (K)SBSI has engaged several proceedings filed before different Indonesian courts. It seems to be that some of the issues remaining consist of the non-application of these judgements by the parties involved. Those judgements are now made public.

As mentioned above, ACV-CSC and ITUC specify that they have never been contacted by the notifier about their support to KSBSI nor to receive support for (K)SBSI.

#### **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 this context, the NCP takes into consideration the scope of the OECD Guidelines and the purpose of the complaint.

As the complaint is linked to the recognition of membership by an international trade union organisation, it could therefore be linked to the effectiveness of point I(b) of Chapter V of the Guidelines which states that enterprises should: “*respect the right of workers employed by the multinational enterprise to have trade unions and representative organisations of their own choosing recognised for the purpose of collective bargaining, and engage in constructive*

*negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on terms and conditions of employment."*

But the requests for action by the Belgian NCP does not consist in asking for the respect of these rights by an enterprise. The aim of the requests is to be recognised as a member by other organisations (ITUC and ACV-CSC) , and to obtain, through dialogue, respect for judicial decisions which were handed down against another national trade union organisation not covered by the request. Moreover, the purpose of the request concerning ACV-CSC is to stop their support to KSBSI.

Initiating dialogue between a trade union (via the notifier) and trade union organisations outside the country through the intermediary of the NCP doesn't therefore seem to respond to the problems presented by the notifier and not contribute to the effectiveness of these Guidelines.

The request doesn't correspond to the purpose of effectiveness of the OECD-guidelines, more precisely, in its chapters IV and V.

## **7. Conclusion**

After considering the different criteria explained above (6.), the NCP decided to not offer its good offices by gathering together parties such as those referred to in the requests .

This assessment is based on the following elements:

- Neither ITUC nor ACV-CSC fall within the scope of the OECD guidelines from a notifier perspective.
- The NCP has no mandate to enforce these court decisions nor to reform such decisions linked with the applicability of national laws in Indonesia.

The Belgian NCP wishes to remind that one of a trade union's main aim is to protect and advance the interests of its members in the workplace. In this spirit of delivering concrete and better working conditions to the Indonesian people, the Belgian NCP would recommend to the representatives of KSBSI and (K)SBSI to enter into a constructive bilateral dialogue. Such dialogue would support an agenda with the aim to find solutions at national level, first regarding their respective mandates and potential synergies for common actions in the future, since the core of the issue concern domestic matters.

Dutch NPC Website : [www.oecdguidelines.nl](http://www.oecdguidelines.nl)