

OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

Guide for National Contacts Points on the Initial Assessment of Specific Instances



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Guide for National Contacts Points on the Initial Assessment of Specific Instances

Introduction

Various issues associated with the initial assessment process have been raised as challenges by NCPs. These include substantive issues such as questions about the scope and application of the Guidelines and relevance of national legislation on issues raised in submissions. They also include procedural issues such as to what extent submissions need to be substantiated and difficulties associated with finalizing initial assessments within indicative timeframes.

Initial assessment procedures have been an important theme in NCP peer reviews. Over 50% of NCP peer review reports¹ contain a recommendation related to the initial assessment process. These have included recommendations to publish initial assessments for increased transparency², streamline the information gathering process between submission and initial assessment³, and increase the initial assessment period from one to three months⁴.

Additionally, stakeholders have noted that onerous initial assessment processes can restrict the accessibility of some NCPs. For example, the application of additional criteria not included in the Procedural Guidance, strict readings of existing criteria and a high threshold of evidence for acceptance of a specific instance are some of the practices stakeholders have pointed to that have negatively impacted accessibility of NCPs.

The paper seeks to consider current challenges in initial assessment processes across NCPs and identify good practice to help ensure consistency and encourage resolution of issues as well as functional equivalence. It will seek to answer the following questions:

- What does the Procedural Guidance say about initial assessments?
- How do NCPs undertake initial assessments in practice?
- What are the perspectives of institutional stakeholders with respect to initial assessments?
- What are some of the good practices for NCPs with respect to initial assessments?

¹ NCPs of Belgium, Canada, Chile, Italy, Japan, Netherlands, Switzerland

² Canada Peer Review

³ Swiss Peer Review

⁴ Italian Peer Review

Initial Assessment under the Guidelines and Procedural Guidance

A. Relevant criteria for initial assessment

The Procedural Guidance (para C.1) provides that: “[The] NCP will: 1. Make an initial assessment of whether the issues raised merit further examination and respond to the parties involved.”

The Procedural Guidance (Commentary, para 25) provides that: “[i]n making an initial assessment of whether the issue raised merits further examination, the NCP will need to determine whether the issue is bona fide and relevant to the implementation of the Guidelines. In this context, the NCP will take into account:

- 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.

The objective of the initial assessment process under the Procedural Guidance is to determine whether the issues raised merit further examination. In this respect NCPs are called on to determine whether the issues are 1) “bona fide”, in other words real or authentic, and 2) relevant to the implementation of the Guidelines, in other words within the scope of coverage of the Guidelines. These factors are further elaborated through six criteria, each of which is considered in turn below. The initial assessment process can also be useful for identifying additional issues to discuss with parties that can support framing mediation or good offices.

The Commentary on the Procedural Guidance also identifies accessibility as a core aspect of NCP functionality. It provides that “[e]asy access to NCPs is important to their effective functioning. This includes facilitating access by business, labour, NGOs, and other members of the public [...]. NCPs would respond to all legitimate requests for information, and also undertake to deal with specific issues raised by parties concerned in an efficient and timely manner.”⁵ In this respect initial assessment criteria should be applied in a manner which promotes accessibility of the mechanism to the extent possible.

⁵ OECD Guidelines (2011), Commentary on the Procedural Guidance for NCPs, Para I.

The six criteria of the initial assessment process are considered individually below. However, in practice the factors may be interrelated and necessitate examination as a whole.

How to assess the identity of the party and its interest in the matter?

Under this provision “the party” refers to the submitter of the specific instance rather than the enterprise in question and the criterion notes that the submitter should have some interest in the matters they raise in their submissions. In this respect individuals or communities directly impacted by enterprise activity at issue will have a clear interest. Organisations which represent impacted individuals or communities, such as trade unions or in some instances NGOs or other representatives may also have an interest in the matter. In instances where third party organisations are acting as representatives of individuals, or communities, it will be important to ensure that such representation has been requested or authorised by the relevant individuals or communities. Statements by relevant community members authorising such representation may be one way of assessing this. NCPs may also consider whether there are any conflicts of interest associated with the representatives or misalignments between the objectives of representatives and the individuals or communities they represent in the context of their submission.

Additionally, organisations with mandates or objectives related to certain RBC themes may also have an interest in issues touching on those themes (i.e. instances of environmental harm, forced labour etc.). An NCP may consider the mandate of an organisation as well as its stated objectives in submitting a specific instance in considering the legitimacy of its interests in a matter.

How to assess whether there is a link between the enterprise’s activities and the issue raised in the specific instance?

In many instances, the link between the enterprise’s activities and issues raised will be evident. In certain instances, complex corporate structures and supply chains may make understanding an enterprise’s link to an issue a complex exercise. For example, a multinational enterprise may be legally registered in a different jurisdiction from where it is headquartered. The multinational may also have legally separate subsidiaries and operations spanning multiple jurisdictions.

The Guidelines provide that that “the Guidelines are addressed to *all the entities within* the multinational enterprise (parent companies and/or local entities).” As such, the recommendations of the Guidelines apply to all entities of a corporate group.

Additionally, since 2011 the scope of the Guidelines has increased to include responsibilities regarding business relationships and not just a enterprise's direct operations. In this respect, the Guidelines provide that "enterprises should [...] Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship."⁶ Therefore, in situations where complex corporate structures make it unclear which entity has caused the harm or issues raised, entities within the same corporate group would likely, at the very least, be directly linked to an adverse impact caused by one part of the group through their business relationship.⁷

Likewise, enterprises can be directly linked to impacts caused by business relationships that they do not have a legal or organisational link to. For example, a brand sourcing t-shirts from a manufacturer which is a separate corporate entity may be directly linked to adverse environmental impacts the manufacturer causes in the process of producing the t-shirts.

How to assess whether the issue is material and substantiated?

This criterion refers to the significance of an issue raised in a submission as well as the extent to which it has been authenticated. It should be noted that the Procedural Guidance does not provide any additional guidance on the degree to which issues must be substantiated to merit further examination. Importantly, however, the Procedural Guidance clearly demarcates three separate phases of the specific instance handling process: 1) the initial assessment process, 2) providing assistance to the parties and 3) conclusion of the procedures. The stated objective of the initial assessment process is to determine "whether the issue raised merits *further examination*." In this respect, it is important to note that initial assessments are intended to be *initial*. It is not necessary to undertake fact-finding or a thorough assessment of all the issues raised on their merits during this stage of the process as further examination is envisioned in the next stage of the process.

Therefore, the initial assessment should not be unnecessarily onerous and should not reflect the level of examination required in later stages of the process. In this respect, some NCPs have framed this standard as one of plausibility. For example, the rules of procedure of the Australian NCP note that 'material and substantiated' [should be interpreted] to mean that the issues are plausible and related to the application of the OECD Guidelines, and that there is a plausible link between the enterprise's activities and the issues raised."⁸

⁶ OECD Guidelines (2011), Chapter II, para A.12

⁷ See OECD (2014) Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship. <https://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-1.pdf>

⁸ Article 4.11, Australian National Contact Point Complaint Procedures (2019), <http://www.ausncp.gov.au/complaints/ausncp-procedures>

Some NCPs have noted that due process issues have been raised by companies where initial assessment processes do not require rigorous fact checking or significant evidentiary thresholds for acceptance of a specific instance. In this respect, many NCPs expressly note in their rules of procedure or initial assessment statements that a decision to accept a submission for further examination does not imply that the Guidelines were not observed. Additionally as participation in good offices is voluntary, evidentiary requirements need not be analogous to those required in legal proceedings.

What is the relevance of applicable law and procedures, including court rulings?

Court rulings and domestic law and procedures can provide useful orientation to NCPs on how issues relevant to the specific instance have been assessed by other bodies and what expectations exist in certain jurisdictions. However, in undertaking an initial assessment, NCPs are not expected to assess whether domestic law requirements were met.

The Guidelines provide that they “extend beyond the law in many cases.”⁹ The Commentary on the Procedural Guidance further provides that “[i]n all cases and *irrespective of the country or specific context* of enterprises’ operations, reference should be made at a minimum to the internationally recognised human rights expressed in the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and to the principles concerning fundamental rights set out in the 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work.”¹⁰

Furthermore, 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.”¹¹

A situation where an enterprise has met domestic law requirements is not necessarily equivalent to a situation in which an enterprise observed the Guidelines. Similarly, if an enterprise has followed domestic law, this does not necessarily mean it has met the expectations of the Guidelines. In certain contexts, legal obligations may not be adequately enforced, and furthermore, the expectations of the Guidelines can exceed domestic obligations with respect to the questions at issue.

⁹ OECD Guidelines (2011), Chapter 1 para 2

¹⁰ Id. Commentary Chapter IV, para 39

¹¹ Id. Commentary Chapter IV para 38

For example, an enterprise's responsibility to conduct due diligence across business relationships is not a legal expectation in most jurisdictions.

In some rare instances, domestic law requirements may conflict with the recommendations of the Guidelines. In these situations the Guidelines provide that "enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law."¹² In undertaking an initial assessment, NCPs are not expected to assess whether or how enterprises have accomplished this. However, such issues may be explored during the good offices phase of the process.

How have similar issues been, or are being, treated in other domestic or international proceedings?

The Commentary on the Procedural Guidance provides that, "[w]hen assessing the significance for the specific instance procedure of the other domestic or international proceedings addressing similar issues in parallel, NCPs 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."¹³

The Procedural Guidance does not preclude NCPs from considering submissions previously handled by other NCPs or in other domestic or international proceedings. In fact, it notes that the existence of parallel proceedings alone is not sufficient to decide that the issues raised do not merit further consideration. Therefore, where an NCP receives a submission that involves issues that have been or are being treated at another NCP or before other domestic or international proceedings, it can proceed by "evaluat[ing] [1] whether an offer of good offices could make a positive contribution to the resolution of the issues raised and [2] would not create serious prejudice for either of the parties involved in these other proceedings[...]"¹⁴

In evaluating whether an offer of good offices can make a positive contribution to the issues raised, it is important to note that the specific instance process may provide forms of remedy that are not available or were not achieved during proceedings of a different nature. For example, legal proceedings may focus on injunctions or financial compensation while good offices can assist parties in developing joint solutions. In addition, specific instances use the recommendations of the Guidelines as a framework for discussion. As discussed above, the expectations of the Guidelines may go beyond domestic law or the frameworks of other proceedings and thus may provide an opportunity for parties to discuss issues that were not open for discussion before other processes.

¹² Id. Chapter I Concepts and Principles, para 2

¹³ Id. Commentary on the Procedural Guidance for NCPs, para 26

¹⁴ Id. Commentary on the Procedural Guidance for NCPs, para 26

It may be relevant to consider whether good offices would create serious prejudice for parties in ongoing proceedings, but this would not be relevant for past proceedings which have already been decided. In this respect, NCPs might consider whether select aspects of a submission may be considered which would not cause prejudice or whether good offices could be established in such a way to avoid any potential prejudice with respect to parties. In some cases, to avoid potential prejudice with respect to parties, NCPs may also consider deferring an initial assessment decision pending a relevant decision outside the NCP.

The Procedural Guidance does not provide that submitters must access or exhaust other remediation processes prior to having a specific instance considered by the NCP. While some NCPs encourage submitters to dialogue with the company in question prior to undertaking an initial assessment (see section 1.3), such efforts do not normally form part of the initial assessment process itself.

How to assess whether the consideration of the specific issue(s) would contribute to the purposes and effectiveness of the Guidelines?

While this provision is intentionally broad and can encompass a wide range of issues, as a starting point, understanding the stated “purposes” of the Guidelines as well as what is meant by “effectiveness” can be useful in seeking to understand its specific meaning.

Purposes of the Guidelines

The Foreword to the Guidelines provides that the “Guidelines aim to promote positive contributions by enterprises to economic, environmental and social progress worldwide.” It is further provided that the “The Guidelines aim to ensure that the operations of [multinational] enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises.”¹⁵ Finally, the Guidelines provide that “the common aim of the governments adhering to the Guidelines is to encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimise the difficulties to which their various operations may give rise.”¹⁶

In the context of the above, consideration of the specific issue should contribute to 1) sustainable development or economic, environmental and social progress (i.e. the chapters of the Guidelines) 2) by multinational enterprises.

Cases which do not concern multinational enterprises or issues related to sustainable development (i.e. economic, environmental and social issues, or the issues covered by the chapters of the Guidelines) may be outside the scope of the mechanism.

¹⁵ Id., Preface

¹⁶ Id., Preface

In this respect, an issue raised that *solely* addresses government policy would be outside the scope of the Guidelines. Additionally, issues which do not concern the chapters of the Guidelines, such as commercial disputes between companies, would fall outside the scope.

The question of what constitutes a multinational enterprise remains an open one. The Guidelines provide that “a precise definition of multinational enterprises is not required for the purposes of the Guidelines. These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed.”¹⁷

The Guidelines additionally provide that “The Guidelines are not aimed at introducing differences of treatment between multinational and domestic enterprises; they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant to both.”¹⁸ Importantly, enterprises based in the country of the NCP can still have operations abroad and thus be considered “multinational enterprises.”

Furthermore, the Guidelines note that “while it is acknowledged that small and medium-sized enterprises (SMEs) may not have the same capacities as larger enterprises, governments adhering to the Guidelines nevertheless encourage them to observe the Guidelines’ recommendations to the fullest extent possible.”¹⁹ Therefore, whether an enterprise is an SME or micro-enterprise should not, on its own, constitute a factor for not accepting a specific instance.

NCPs have concluded that various types of organisations including government bodies, sporting associations, non-profit organisations engaged in commercial activities, and micro-enterprises can be considered multinational enterprises for the purposes of the Guidelines.

Effectiveness of the Guidelines

With respect to effectiveness, the Guidelines provide that “[a]dhering countries shall set up National Contact Points to further the *effectiveness* of the Guidelines by [...] contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances taking account of the attached procedural guidance.”²⁰

¹⁷ Id., Chapter 1 para 4

¹⁸ Id., Chapter 1 para 5

¹⁹ Id., Chapter I para 2

²⁰ Decision of the Council on the OECD Guidelines for Multinational Enterprises, para I (1)

Thus, an assessment of whether there is an opportunity to positively contribute to the resolution of issues may be a relevant factor to consider during an initial assessment.

As discussed above, the fact that an issue has already been treated in a parallel proceeding does not necessarily mean that it has been fully resolved or that there is not an opportunity for an NCP to make a positive contribution to the issues raised.

Additionally, it is important to recognise that the Procedural Guidance does not state that NCPs can further effectiveness by *resolving issues* but rather that they *contribute to* their resolution.

NCPs will assess whether providing good offices through facilitating an exchange between the parties, discussing the issues and expectations of the Guidelines with the enterprises in question, or developing meaningful recommendations with respect to enterprise conduct would support or encourage the resolution of the issues. In this respect, a lack of willingness to engage by one party should not be a reason to not accept a case as NCP statements which include meaningful recommendations can be a powerful tool towards contributing to resolution of issues. However, where both parties communicate that the issues have already been resolved, the effectiveness of the Guidelines would not be furthered by accepting the submission for further examination.

In recent years, NCPs have received submissions which raise issues that occurred a significant number of years ago. The Procedural Guidance does not contain any time limits on bringing a case. NCPs which have included such time limits as additional criteria in their initial assessment process have been advised that such criteria go beyond the Procedural Guidance and can limit the accessibility of the mechanism.²¹ Where such issues are submitted to NCPs the first step is to carefully consider whether it is possible to contribute to the resolution of the issue. For instance, if the issues occurred a long time ago, but the harms were never remediated and they may still be ongoing, there may be an opportunity for NCPs to contribute towards resolution. In instances where NCPs have received submissions related to issues occurring in the past they have generally used the version of the Guidelines in force during the time the specific instance arose to guide their analysis of the issues. Where harms associated with past incidents are ongoing it may be appropriate to also consult the relevant older version of the Guidelines.

NCPs have also noted challenges associated with submissions that appear to be politically motivated, and some have determined that these types of issues do not contribute to the effectiveness of the Guidelines. Determining a *motivation* for submitting a specific instance is challenging and can involve some level of subjective assessment. As NCPs are called on to handle specific instances in an impartial manner, reaching conclusions on the motivations of parties may be especially delicate.

²¹ For example the peer review of the NCP of Denmark encouraged the NCP to reconcile inconsistencies with the Guidelines specifically with regard to a five-year statute of limitation which excludes the applicability of the Guidelines to specific instances that would otherwise be admissible under the Guidelines.

Alternatively, it is possible for NCPs to assess instead whether the issues fall within the scope of the Guidelines and whether some contribution to the resolution of the issue will be possible. As noted above, issues which concern *solely* government policy will be outside the scope of the Guidelines. However, the recommendations of the Guidelines, including the responsibility of enterprises to respect human rights, are expectations of enterprises which are distinct and separate from government duties. The role of NCPs is to address the former but not to address the latter.

Lastly NCPs have at times not accepted submissions in which the submitter has requested a specific remedy.

The Guidelines call on enterprises to remedy impacts they caused or contributed to: “[a]void causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.”²² Furthermore, that “potential impacts are to be addressed through prevention or mitigation, while actual impacts are to be addressed through remediation.”²³

As such, remediation is central to both the purposes and effectiveness of the Guidelines. While NCPs cannot compel specific actions or award compensation they can play an important role in facilitating discussions around remedy amongst parties, thereby potentially contributing to the resolutions of the issues. Indeed, various specific instances have been concluded in which NCPs have facilitated the provision of remedy to a submitter by an enterprise. Where a specific remedy is sought by submitters, NCPs can manage expectations by clarifying their role as a potential pathway towards remedy but not providers of remedy specifically. However, a submission should not be rejected on the basis that a specific remedy is sought, as this would not align with the Procedural Guidance nor the purposes and effectiveness of the Guidelines.

The Procedural Guidance does not prohibit an NCP from partially accepting a specific instance. This may be the case where an NCP determines that consideration of the certain issues raised could contribute to the purposes and effectiveness of the Guidelines and consideration of other issues raised would not.

B. Indicative timeframes for initial assessment

The Commentary on the Procedural Guidance provides indicative timelines for the handling of specific instances noting that “NCPs should seek to conclude an initial assessment within three months, although additional time might be needed in order to collect information necessary for an informed decision.”²⁴

As such, timelines are indicative and additional time may be necessary at the initial assessment stage.

²² OECD Guidelines (2011), Chapter 2, para 11

²³ *Id.*, Commentary on Chapter 2, para 14

²⁴ *Id.*, Commentary on the Procedural Guidance, para 40

In addition, the Procedural Guidance notes that more time may be necessary in instances where collection of additional information is necessary. However, delays should not occur due to capacity issues associated with the NCP.

Additionally, as noted above, as the initial assessment stage is meant to determine whether further examination is merited, a thorough fact finding is not necessary at this stage, therefore the collection of additional information should be proportional, relative to the initial assessment exercise.

C. Initial assessment statements

The Procedural Guidance provides that “When the NCP, after having carried out its initial assessment, decides that the issues raised in the specific instance do not merit further consideration, it will make a statement publicly available after consultations with the parties involved and taking into account the need to preserve the confidentiality of sensitive business and other information. If the NCP believes that, based on the results of its initial assessment, it would be unfair to publicly identify a party in a statement on its decision, it may draft the statement so as to protect the identity of the party.”²⁵

It also provides that “The NCP may also make publicly available its decision that the issues raised merit further examination and its offer of good offices to the parties involved.”²⁶

Under the Procedural Guidance where a submission is not accepted for further examination a statement must be published, and where it is accepted, the NCP may choose to publish an initial assessment statement or not.²⁷

The Procedural Guidance notes that where a submission is not accepted for further examination, the statement should “at a minimum describe the issues raised and the reasons for the NCP’s decision.”²⁸ It provides no guidance for what should be included in initial assessment statements where the submission is accepted for further examination; however, in order to promote transparency and accessibility, the NCPs are also encouraged to explain their decision to accept a submission according to the criteria included in the Procedural Guidance.

Initial assessment in practice

Trends and data on NCP decision-making within initial assessment

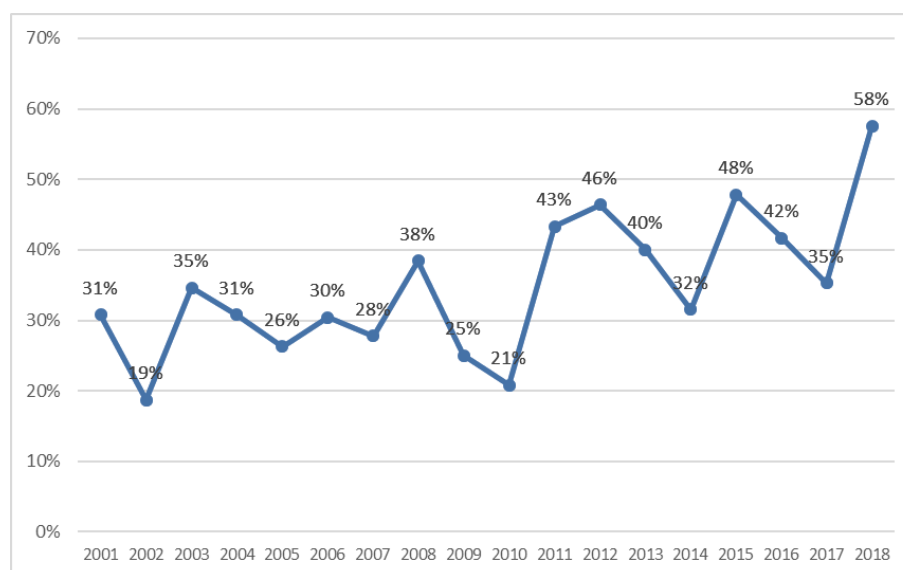
Data examined from 2000-2018 reveals that the percentage of specific instances not accepted for further examination has remained steady, with an average of 35% of cases not accepted annually.

²⁵ Id. Commentary on the Procedural Guidance, para 32

²⁶ Id. Commentary on the Procedural Guidance, para 33

²⁷ See Id. Commentary on the Procedural Guidance, Id. paras 32-33

²⁸ Id. Procedural Guidance, I.C para 3(a)

Figure 1. Percentage of specific instances not accepted for further examination²⁹

However, from 2011-2018 the average rate of non-acceptance is 43%. This is likely a more accurate figure as prior to 2011, as some non-accepted specific instances were reported as concluded. In 2018, 59% of specific instances (20 specific instances out of 34 cases closed) were not accepted for further examination (see Figure 1). This increase may be linked to a higher number of submissions of specific instances in 2018 that fell outside the mandate of the NCP.³⁰

The two most prevalent reasons for not accepting specific instances have been that 1) the case would not contribute to the purposes and effectiveness of the Guidelines and 2) that the issue is not material and substantiated. These two categories have been cited in more than half of all specific instances that were not accepted since 2011 (see Figure 2).

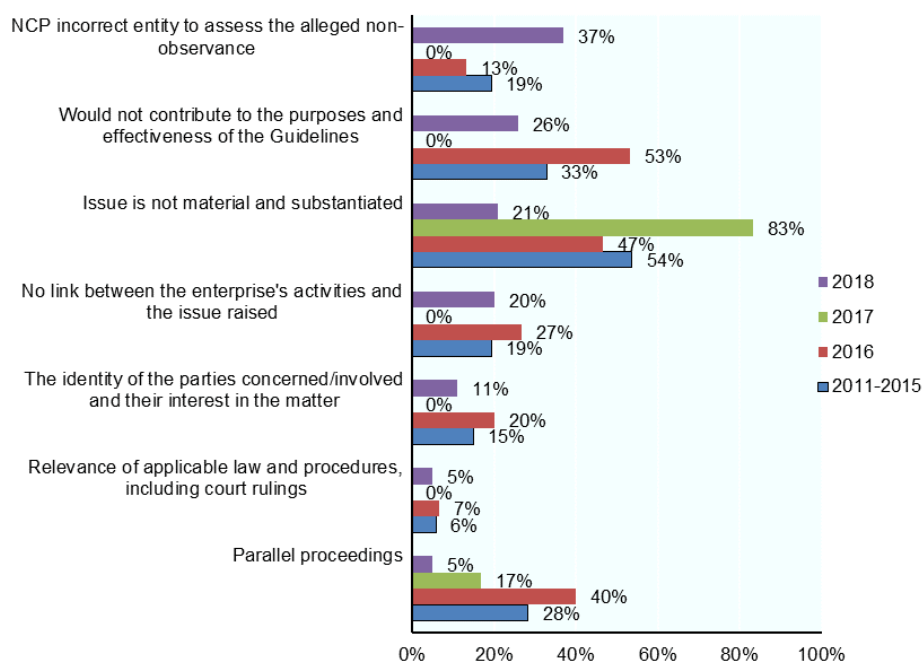
In 2018, the most commonly cited reason for non-acceptance of specific instances was that the NCP was not the correct entity to assess the alleged non-observance. When compared to other reporting periods, this reason was cited most in 2018 (see Figure 2).

Parallel proceedings were referenced as a reason for non-acceptance in only 5% of cases in 2018, compared to 40% in 2016 and 28% on average from 2011-2015 (see Figure 2). In 2011, the revision to the Guidelines clarified that parallel proceedings cannot be invoked as grounds for not accepting a specific instance submission for further examination unless an acceptance of the submission and any mediation process resulting therefrom would be prejudicial to the outcome of the procedures.

²⁹ Source: OECD Database of Specific Instances and Annual Reports on the Guidelines

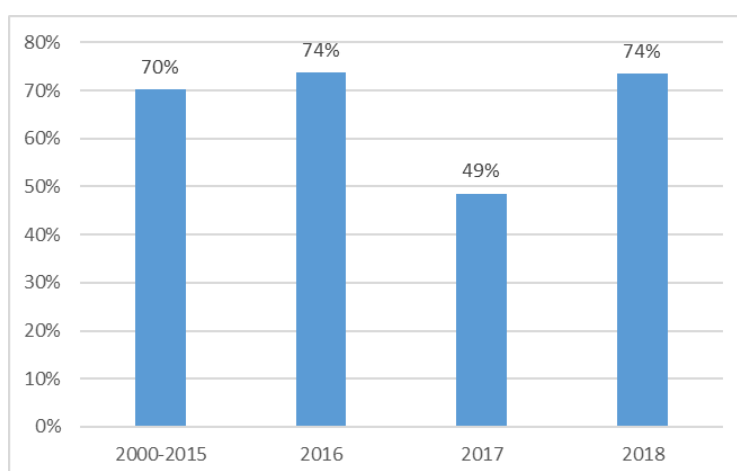
³⁰ For example in 2018, Denmark reported eight specific instances not accepted for further examination. Many of these were rejected within a few weeks based on the fact that the issues raised fell outside the scope of the Guidelines and were referred to other agencies.

Figure 2. Reasons for non-acceptance of specific instances³¹



Another important indicator that can help evaluate how NCPs undertake initial assessments in practice, is to what extent initial assessments have been conducted within the indicative timeframe. As seen in Figure 3, with exception of 2017, the majority of initial assessments have taken longer than three months.

Figure 3. Timeliness with respect to the initial assessment process (percentage of initial assessments that took longer than the indicative timeframe of three months from the date of submission to issuance of an initial assessment)



³¹ OECD Database of Specific Instances and Annual Reports

On average from 2000-2018, 68% of initial assessments exceeded the indicative timeframe of three months. Several initial assessment procedures also took longer than 6, or 12 months. In the past three years, 14% of initial assessments took nearly a year or more to complete (15 out of 106 specific instances closed).

The length of time that initial assessments takes on average may reflect the challenging nature of handling complex and transnational issues, but also may signal that initial assessment processes are being approached as more than an initial check on whether the specific instance should be accepted. An effort to align the timeframe for initial assessments with the indicative timeframe of three months can serve as an important step in ensuring the accessibility and predictability of the NCP system.

NCP procedures for decision-making during initial assessment

NCPs have a diverse set of requirements as well as processes and criteria for undertaking initial assessments.

Of the 40 NCPs³² with publicly available rules of procedure, all included some provisions on initial assessments that made reference to the language of the Procedural Guidance although not all NCPs included detailed or complete guidance. In addition, five NCPs³³ included additional initial assessment criteria beyond that included in the Procedural Guidance.

Of these five NCPs, two NCPs³⁴ include language related to parallel proceedings and court rulings. For example, Brazil will not accept a specific instance if a court has already issued a final decision on the issue that led to the specific instance.

In addition, the NCP of Korea will consider in its initial assessment whether there is an “ability to resolve [the] dispute through applicable law including court rulings and procedures.”³⁵

Two NCPs³⁶ include time limits as part of their initial assessment process. The NCP of Brazil will not accept a specific instance if the issues occurred “more than twelve (12) months from the date of receipt of the Notification by the NCP.”³⁷ The NCP of Hungary will accept a specific instance that is more than five years old only if it relates to a “priority in contributing to the implementation of the Guidelines.”³⁸ Such criteria goes beyond the Procedural Guidance and can limit the accessibility of the mechanism.

³² The NCPs of Greece, Iceland, Portugal, Romania, Tunisia, Egypt, Jordan, Estonia do not have publically available rules of procedure and as such are not considered here.

³³ These are the rules of procedure of Argentina, Brazil, Finland, Hungary, Korea, and Mexico

³⁴ Brazil, and Korea

³⁵ Rules of procedure of the Korea NCP

³⁶ Brazil and Hungary

³⁷ Rules of procedure of the Brazil NCP

³⁸ Rules of procedure of the Hungarian NCP

Additionally the NCP of Mexico considers whether “the claimant has shown its interest in the instance and its good faith.”³⁹

In addition to rules of procedure on initial assessment, many NCPs request a range of information in order to accept a submission for review.

For example, 10 NCPs⁴⁰ require that the submitting party outline what outcome they wish to achieve or what solution they are proposing in the specific instance notification. Three NCPs⁴¹ note that a submission should contain a description or evidence of previous negotiations or approaches between the submitter and the enterprise. Two NCPs⁴² require such information to be included in order for the initial assessment to be conducted.

Beyond criteria for consideration in initial assessments, NCPs have varied processes for how they undertake initial assessments.

Six NCPs⁴³ have developed multi-stage initial assessment processes, of which three NCPs⁴⁴ invite or encourage parties to either meet or discuss the specific instance. Denmark encourages the parties to resolve the dispute between themselves prior to conducting an initial assessment. Latvia encourages the parties to attempt to resolve the dispute after an initial assessment is conducted and the specific instance is accepted for further examination. Belgium invites the parties to take part in a meeting with the NCP, either individually or with the other party included. France firstly assesses the formal eligibility of the specific instance and then carries out the initial assessment. Likewise, the rules of procedure of Austria and Korea note that the NCP will take a decision about whether the specific instance justifies an initial assessment.

As part of the initial assessment process, many NCPs have the option or are mandated to either inform or consult an advisory body under their rules of procedure. A total of 18 NCPs⁴⁵ cite an advisory body, steering group, or other bodies as either being directly involved in the initial assessment process (e.g. the advisory body participates in the NCP’s decision making), or potentially playing a role in it (e.g. the advisory body may be consulted for expert opinion).

³⁹ Rules of procedure of the Mexican NCP

⁴⁰ These are the rules of procedure of Argentina, Costa Rica, Hungary, Ireland, Israel, Italy, Japan, Lithuania, Peru, and the Slovak Republic

⁴¹ These are the rules of procedure of Argentina, Brazil, and Mexico

⁴² Argentina and Mexico

⁴³ Austria, Belgium, Denmark, France, Korea, and Latvia

⁴⁴ Belgium, Denmark, and Latvia

⁴⁵ These are the rules of procedure of Austria, Belgium, Brazil, Chile, Colombia, Costa Rica, Finland, Hungary, Israel, Lithuania, Mexico, New Zealand, Slovak Republic, Slovenia, Spain, Ukraine, United Kingdom, United States.

Enterprise involvement and responses also play a diverse role throughout the various NCP approaches to initial assessments. There are 12 NCPs⁴⁶ that mention enterprise responses or invite the companies to respond as part of the initial assessment process. Korea's rules of procedure require a response from the enterprise before conducting an initial assessment. In the case of Chile, a response from the enterprise is encouraged.

NCPs also offer varying levels of support to the submitters of specific instances. There are 15 NCPs⁴⁷ that mention a procedure or the extension of assistance to a submitter if the submission is incomplete. Australia, Canada, Chile, and Italy explicitly make themselves available, as outlined in their rules of procedure, to answer any questions that the submitters may have prior to the initial assessment. If the submitting party has not submitted all necessary information to the NCP, nine NCPs⁴⁸ note that they will respond to the party asking for either corrections or additional information, with some NCPs outlining a specific timeframe for the provision of the supplemental information by the submitter.

Since 2011, 26 NCPs have either published an initial statement or mention the publishing of initial statements in their rules of procedure. 16 of these NCPs have either never received a case or have not received one since 2011. There are 14 NCPs that do not include any requirements or options for the publishing of initial statements as part of their rules of procedure.

Good practice with respect to initial assessment

Initial assessments can be a complex exercise. Several good practices can be identified to guide NCPs during this phase of the specific instance procedure:

Accessibility: Accessibility is a core criterion of the functional equivalence of the Guidelines. Therefore, the initial assessment criteria should be applied in a manner which promotes accessibility to the fullest extent possible. In this respect, evidentiary thresholds for submissions should not be unduly high. Where there are opportunities to contribute to resolution of issues, NCPs should pursue them to the fullest extent possible. Additional criteria beyond what is in the Procedural Guidance, which unnecessarily limit accessibility, should not be applied. Where submissions do not provide adequate information, NCPs should engage with a submitter to provide advice on what information is missing from their submission and allow them to modify it as necessary. It is also not necessary to undertake fact-finding, or a thorough assessment of all the issues raised on their merits during this stage of the process to fulfil the criterion of substantiation.

⁴⁶ These are the rules of procedure of Canada, Chile, Finland, France, Germany, Hungary, Ireland, Israel, Italy, Korea, Latvia, and Peru

⁴⁷ These are the rules of procedure of Australia, Brazil, Canada, Chile, Colombia, Czech Republic, France, Germany, Italy, Latvia, Lithuania, Luxembourg, Mexico, Peru, and the Slovak Republic

⁴⁸ NCPs of Brazil, Colombia, Czech Republic, France, Germany, Lithuania, Mexico, Peru, and the Slovak Republic

Predictability: To the extent possible initial assessment processes should reflect the Procedural Guidance, meaning they should be completed within three months of submission and they should involve an analysis of the six criteria included in the Procedural Guidance. The Procedural Guidance criteria should duly be reflected in NCP rules of procedure so submitters understand the criteria used to assess a case. Where submitters are asked to provide information which goes beyond the initial assessment criteria in their submissions (e.g. type of remedy sought) an explanation should be provided as to how such information will be used and whether it could be considered in the context of initial assessment. NCPs should also clearly separate the initial assessment phase of procedures from providing assistance to the parties. At the initial assessment stage, NCPs are primarily assessing whether the issues raised are within the scope of the Guidelines, and whether there is an ongoing problem that the NCP could positively contribute to resolving. Once good offices are offered, a deeper examination of the issues raised may occur.

Transparency: Initial assessment decisions should be adequately explained to parties. Statements accepting or not accepting a submission for further examination should provide an explanation of the decision in line with the six criteria in the Procedural Guidance.

Impartiality: NCPs should not pre-judge the outcome of specific instance during the initial assessment stage or make assessments about the motivations of the submitters.

Compatibility with the Guidelines: The Guidelines clearly note that the recommendations set out may go beyond domestic law and that enterprises have a responsibility to respect human rights regardless of whether States are adequately protecting them. In this context, NCPs should assess the materiality of issues raised against the recommendations and standards of the Guidelines, rather than against domestic legal frameworks.

Initial assessment scenarios

In order to illustrate potential challenges and application of initial assessment the following scenarios are provided:

Scenario A: An NCP receives a submission claiming that a mining enterprise polluted traditional lands and impacted the health of an indigenous group. In its submission, the indigenous group demonstrates that the mining enterprise had operations adjacent to their land and claims that community members have been experiencing respiratory problems since the mining enterprise commenced its operations. The mining enterprise has refuted these claims, noting that the respiratory problems of the community are caused by smoking. In assessing this submission, the NCP should consider whether there is an ongoing problem that the NCP could positively contribute to resolving and whether the effectiveness of the Guidelines can be furthered. As the parties have different perspectives on the cause and nature of the harms, organising dialogue amongst them could contribute to a resolution of the issues. The NCP does not require the indigenous group to provide evidence of a causal link between the mining enterprise and their health issues in order to consider the submission substantiated and accept it for further examination.

In this scenario, the NCP may decide to accept the specific instance for further examination, noting that the parties disagree on the cause of the adverse impact and making clear that a decision to accept a submission for further examination does not imply that the Guidelines were not observed.

Scenario B: An NGO has filed a submission with an NCP against a hydropower project noting that it will harm the land and livelihoods of local communities and pose risks to their lives due to risks of flooding. The joint venture enterprise developing the project has noted that it has undertaken all required impact assessments and received all approvals and licenses necessary to undertake the project from the relevant authorities and therefore clearly observed the Guidelines. The NCP should assess the materiality of issues raised against the recommendations and standards of the Guidelines, rather than against domestic legal frameworks.

Scenario C: An NCP receives a submission claiming that a government agency did not undertake sufficient due diligence in its procurement processes and has business relationships with suppliers that use forced labour. The Guidelines provide an initially broad and flexible definition of “multinational enterprises.” The NCP should consider whether the activities of the agency are commercial in nature and thereby, whether the government agency can be considered a multinational enterprise under the Guidelines. The conduct of multinational enterprises is related to the purpose of the Guidelines. Issues that are solely political or not commercial in nature are not related to the purpose of the Guidelines and would not be relevant for further consideration by NCPs.

Scenario D: An NCP receives a submission regarding union busting and retaliation against union leaders by a manufacturing enterprise. The submitters are asking the enterprise to respect and engage in collective bargaining and to provide financial compensation to trade union leaders that were dismissed in retaliation. The manufacturing enterprise has disagreed with the claims, refused to consider the demands of the submitters and noted that it does not recognise the authority of the NCP to consider the dispute and that it would not participate in mediation. The NCP should consider how it might contribute to the resolution of the issues even where the enterprise refuses the assistance of the NCP. Where the NCP determines it may contribute to the resolution of the issues (e.g. through issuing a final statement with recommendations regarding labour rights) it may decide to accept the specific instance. The submitter’s request for a specific type of remedy should not be a factor in deciding whether the submission merits further examination.

ANNEX I. Language of initial assessment evaluation criteria and multi-stage provisions included in NCP rules of procedure

The following provisions were taken from publicly available NCP rules of procedure where available in English or French as at May 2019.

Argentina	<p>Article 6: An individual or legal entity that considers that a Multinational Enterprise may have incurred in non-observance of the OECD Guidelines for Multinational Enterprises through action or omission may submit a complaint to the ANCP, in accordance with the following requirements or formalities:</p> <p>a) The complaint will be set out in writing, in Spanish or in English. In the case of legal entities, the complaint must contain the corporate name, and the complainant's legal entity status and representation must be duly certified by a civil-law notary. The complaint must include, for the purposes of the procedure, a legal domicile, an ID number, a phone number, and an e-mail address, in order for the complainant to be properly identified and for the relevant notices to be given.</p> <p>b) The complaint must contain a detailed description of the action(s) that would amount to non observance of the OECD Guidelines for Multinational Enterprises. Any documents supporting the complaint will be included as annexes.</p> <p>c) The complaint will specify how the alleged non-observance of the Guidelines affects, either actually or potentially, the complainant or the person(s) represented by the complainant.</p> <p>d) The complaint will specify in a manner as detailed as possible the provisions of the OECD Guidelines for Multinational Enterprises that have not been or are not being observed as a consequence of an action or omission of a multinational enterprise.</p> <p>e) The complaint will outline in a detailed manner the remedy sought from the ANCP as a consequence of the alleged violations, taking into consideration the voluntary nature of the Enterprise's participation in the procedure and the facilitating role of the "Good Offices" of the ANCP to reach potential mutually satisfactory solutions.</p> <p>f) The complaint will specify the prior actions undertaken to reach agreements with the Multinational Enterprise and the outcomes of such actions.</p> <p>g) The complaint will be addressed to the Argentine National Contact Point of the OECD Guidelines for Multinational Enterprises, at the Ministry of Foreign Affairs and Worship. The complaint will be submitted to the Reception Desk (<i>Mesa de Entradas</i>) of such Ministry, located at Esmeralda 1212, subsuelo, (1007) City of Buenos Aires, Argentine Republic, or it may be sent to the following e-mail address: pncargentino-ocde@mrecic.gov.ar.</p>
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	<p>Article 7: Complaints of non-observance will not be admitted in any of the following cases:</p> <p>a) If a complaint does not meet the formal requirements nor contain the information established in Article 6 hereof.</p> <p>b) If a complaint fails to clearly specify the connection between the events described and the principles and standards set forth in the Guidelines.</p> <p>c) If a complaint refers to a matter on which the ANCP has already issued a statement involving the same parties (complainant and respondent).</p>
Australia	<p>3.7. Consistent with the Procedural Guidance and Commentary in the OECD Guidelines, in deciding whether to accept a case, the AusNCP will consider whether the issue/s raised merit/s further examination by determining whether the issue is bona fide and relevant to the implementation of the OECD Guidelines. In this context, the AusNCP will take into account:</p> <ul style="list-style-type: none"> a the identity of the party concerned and its interest in the matter; b whether the issue is material and substantiated; c whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance; d the relevance of applicable law and procedures, including court rulings; e how similar issues have been, or are being, treated in other domestic or international proceedings; and f whether the consideration of the specific issue would contribute to the purposes and effectiveness of the OECD Guidelines.
Austria	<p>3.5.) Upon receipt of a notification, the completeness of the latter shall be verified by the Austrian NCP. In doing so, the Austrian NCP can issue an order to amend. The notification is complete if the following information and data are stated in the notification:</p> <ul style="list-style-type: none"> a Name, address, an e-mail address and telephone number, if necessary, of the notifier; b Name, address, an e-mail address and phone number, if necessary, of the respondent; c Designation of the determination of the Guidelines, the violation of which is alleged; d Statement of, in particular, the facts, through which the provision of the Guidelines referred to has been violated; e In case a responsibility of the respondent is alleged within the scope of the supply chain, also data regarding the respondent's relationship to the company having violated the provisions of the Guidelines designated. <p>3.9.) The Austrian NCP shall decide, as far as possible, within three months following receipt of the notification whether the question raised justifies a closer revision (initial assessment). The issuance of an order for amendment addressed to the complainant by the Austrian NCP shall interrupt this time limit pending submission of the improved notification. The result of the initial assessment shall be forwarded to the parties and published on the website of the Austrian NCP.</p> <p>3.10.) The Austrian NCP shall not be entitled to reject the handling of a specific instance solely because parallel proceedings have been conducted, are under way or are available to the parties concerned. Furthermore, it has no right to interrupt an already pending case for this sole reason, unless this is the mutual desire of all parties involved.</p>

<p>Belgium</p>	<p><i>Initial assessment</i></p> <p>[...]in accordance with the provisions of the OECD Guidelines, the Belgian NCP makes an initial assessment of the specific instance. During this assessment, it determines whether to pursue the matter and offers its good offices to the parties involved. Where possible, the Belgian NCP concludes this first phase within three months of the specific instance being submitted. It publishes a public report, after giving notice of the facts to the parties within ten working days. In this context, the NCP considers the following criteria (if these are not met, it rejects the matter or returns it to the party that submitted it):</p> <ul style="list-style-type: none"> • Identity of the party concerned and its interest in the matter: this involves clearly identifying the party and the reason for the specific instance. The party must disclose its name and its interest in the matter at hand. • Responsibility of the Belgian NCP: 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 Belgian NCP is therefore responsible for handling the specific instance asserting that a multinational company in another country adhering to the OECD Guidelines has breached one of their provisions in Belgium. The Belgian NCP is also responsible for handling specific instances relating to the activities of a Belgian company based in a country without an NCP. If the specific instance concerns more than one NCP (e.g. if the company involved is owned by several multinational enterprises or in the case of holding companies), the NCPs concerned decide which of them will be responsible for the specific instance. If it is not responsible for a specific case, the Belgian NCP forwards it to the responsible NCP and informs the party that submitted the specific instance. If the multinational enterprise has a connection with Belgium, the Belgian NCP will on request provide or offer appropriate support to the NCP in the host country. • Scope of application of the OECD Guidelines and material content of the specific instance: in this respect, the review aims to ascertain whether the application falls within the scope of the OECD Guidelines and whether it was raised in good faith (bona fide). Sufficient evidence related to the alleged breach of the OECD Guidelines must also be given. • Legal framework and parallel proceedings: even if the company has met all legal requirements, the NCP may still pursue the specific instance because it is entirely possible that, as internationally-recognised standards, the OECD Guidelines are more stringent than the national legislation. The NCP also ascertains whether the same facts have already been dealt with under national proceedings or if such proceedings are pending (parallel proceeding). The fact that parallel proceedings have already been concluded or are ongoing is not a compelling reason for not pursuing the specific instance. However, in each individual case, the NCP assesses whether its mediation activity could help to resolve the issues raised without adversely affecting the parties involved in other proceedings. • Contribution to the effectiveness of the OECD Guidelines: the NCP considers whether pursuing the issue and any mediation are likely to contribute to the effective implementation of the OECD Guidelines. Where appropriate, the NCP can carry out additional checks on the facts in question with the parties involved or invite the parties to comment on the issues raised. After completing the initial assessment, the NCP produces a written report setting out whether it will pursue the specific instance. This decision refers to the relevant chapters in the Guidelines and confirms whether the specific instance is within their scope. The NCP does not rule on a possible breach of the Guidelines. It expressly states that the decision does not mean an assessment of the content of the issues raised has been made or that a breach of the OECD Guidelines has occurred. The report on the initial assessment is published on the NCP website. If the NCP decides not to proceed, it publishes an explanation and a summary of the key reasons rejecting the matter on its website.
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Brazil	<p>Art. 3 The Notifications of Non-observance should not be accepted if:</p> <p>I – they are based on facts whose knowledge have occurred more than twelve (12) months from the date of receipt of the Notification by the NCP;</p> <p>II – they have been object of a NCP declaration as a result of another Notification of Non- observance based on the same fact, except if the new Notification does add new elements as set forth in the single paragraph of Art. 11;</p> <p>III – they do not contain the information set out in Art. 4 below;</p> <p>IV – they have been object of a lawsuit with a final decision.</p> <p>Art. 10 The rapporteur will present a report on the acceptance for examination of the</p> <p>Notification of Non-observance, which will take into consideration:</p> <p>I – if there is a direct relationship, even potentially, between the claimant and the object of the Notification of Non-observance;</p> <p>II – if the Notification has the elements that keep thematic relevance to the topics addressed by the Guidelines;</p> <p>III – if the Notification of Non-observance contains sufficiently circumscribed focus; and</p> <p>IV – if the Notification of Non-observance presents detailed and verifiable facts and evidence based on objective criteria.</p> <p>Single paragraph. The report will be presented at the NCP working group meeting, that will decide on the acceptance of the Notification of Non-observance in question for further examination.</p>
Canada	<p>10.4. The NCP will carry out an initial assessment with a view to determining whether the issues raised merit further examination.</p> <p>10.5. In determining whether the issues raised merit further examination, the NCP will determine whether the issues are bona fide and relevant to the implementation of the Guidelines. In this context, the NCP will take into account:</p> <ul style="list-style-type: none"> • the identity of the party concerned and its interest in the matter; • whether the issues are 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; and • whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines. <p>10.6. The NCP may also review open source information and consult relevant government departments and other NCPs with knowledge of the issues raised.</p>

Chile

Evaluación inicial: en esta primera etapa el PNC informará a la empresa multinacional aludida de la solicitud recibida, instándole a contestar, tomando en consideración la necesidad de proteger información sensible y confidencial, según cada caso (por ejemplo, salvaguardar la identidad/seguridad de las partes involucradas). Habiendo una respuesta de la empresa, ésta será examinada como antecedente relevante de esta etapa de evaluación inicial.

En la evaluación inicial para determinar si la cuestión que se hubiese suscitado merece mayor consideración, el PNC deberá establecer si la cuestión es de buena fe y si está en relación con las Líneas Directrices. En este contexto, el PNC tendrá en cuenta lo siguiente:

- El(los) nombre(s) de la(s) parte(s) afectada(s) y su interés en la instancia, es decir, cuál es el resultado esperado del procedimiento.
- Si la controversia planteada en la solicitud es significativa y está justificada, en conformidad a los objetivos de las Líneas Directrices.
- Si pareciera existir una conexión entre las actividades de la empresa y la controversia planteada en la instancia específica.
- La relevancia de la legislación y procedimientos concurrentes al caso, incluyendo las resoluciones judiciales.
- De qué manera cuestiones similares o las mismas del caso en particular han sido o están siendo, tratadas en otros procesos locales o internacionales.
- Si la revisión de la instancia específica contribuirá al objeto y la eficacia de las Directrices.

Término de la evaluación inicial:

Esta etapa puede tener 3 vías de desenlace:

1) Examinados los antecedentes aportados por ambas partes, el PNC determina que las cuestiones suscitadas deben ser analizadas en mayor profundidad con las partes involucradas, para lo que ofrecerá sus “buenos oficios” en un esfuerzo por contribuir a la resolución de las cuestiones. La instancia específica pasa a la Etapa 2.

2) La empresa multinacional no responde a la notificación enviada por el PNC o declina a hacerse parte del proceso. En este caso, y habiéndose agotado todas las alternativas de comunicación con la empresa (incluyendo, por ejemplo, la participación del PNC del país sede de la empresa multinacional) el PNC emitirá una declaración final en la cual hará las recomendaciones pertinentes en atención a las circunstancias y antecedentes disponibles.

3) El PNC determina que las cuestiones suscitadas en la instancia específica no merecen mayor consideración. El PNC consultará con las partes a fin de emitir y publicar su Declaración Final. La Declaración Final describirá, como mínimo, el (los) problema (s) planteado (s) y los motivos de la decisión del PNC y podrá hacer recomendaciones a las partes. Hecha la declaración, el proceso se dará por cerrado.

Colombia	<p>Article 19. Initial evaluation of the case. The National Contact Point must make an initial assessment to establish whether or not to continue with the analysis of the case, determining whether it will be accepted or rejected. For this purpose, it must take into account, among others, the following criteria:</p> <ul style="list-style-type: none"> a) If the specific case falls within the scope of the Guidelines. b) The identity of the party that presented the specific case and its interest in the matter. c) If the specific case is duly supported and presented in a clear manner. d) If there is apparently a relationship between the actions of the multinational company and the matter raised in the specific case. e) The relevance of applicable laws and procedures, especially judicial decisions. f) The manner in which similar cases are being or have been dealt with in national or international proceedings. g) If the examination of the specific case will contribute to the fulfilment of the objectives and will increase the effectiveness of the Guidelines. h) If there is a judicial ruling or ruling against the facts of the specific case that is binding on the Parties.
Costa Rica	<p>STAGE I- INITIAL ASSESSMENT OF A SPECIFIC INSTANCE</p> <p>VII. Initial assessment of the specific instance: The NCP will undertake an initial assessment to determine whether the specific instance should be reviewed in detail, or be totally or partially dismissed.</p> <p>To do this, it will verify if the matter was presented in good faith and if it complies with the following aspects</p> <ul style="list-style-type: none"> a. The identity of the party affected and its interest in the matter. b. Whether the issue is significant and justified. c. Whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance. d. If the business related to the specific instance has operations in more than one country. e. The relevance of applicable legislation and procedures, including judicial decisions. f. The way in which this issue, or similar matters, have been relevance of applicable law and procedures, including court rulings. g. If the review of the specific instance will contribute to the object and effectiveness of the Guidelines.
Czech Republic	No official translation available. No official translation available.

<p>Denmark</p>	<p>1. Initial assessment</p> <p>When the Institution receives a complaint, the complaint is assessed to determine, in particular, whether it complies with formal requirements: the complaint cannot be anonymous, and it must be accompanied by a description of what has happened and corresponding documentation, including the respondent company's role in the infringement. The Institution evaluates whether the complaint falls within the scope of the Guidelines. On the basis of the initial assessment, the Institution will either reject the complaint or accept it for further consideration.</p> <p>2. Options for resolving the matter independently</p> <p>When a complaint is approved for further consideration, the Institution encourages the parties (petitioner and respondent) to resolve the matter themselves. This serves to create the basis for a dialogue between the parties. If the parties succeed in resolving the matter on their own, the Institution has no further involvement. The parties must simply notify the Mediation and Complaints-Handling Institution within three months from submission of the complaint to indicate whether they have found a solution. Matters resolved between the parties are not subject to any form of publication by the Institution.</p> <p>3. Preliminary investigation</p> <p>If the parties fail to resolve the matter themselves, the Institution investigates the matter further. This is called the preliminary investigation. The initial requirements to the complaint still apply but the Institution considers the matter in the light of any new information that may have become available in connection with the parties' attempt at resolving the matter themselves. New information may have become available, and the Institution takes on a more active role. The Institution decides whether to consider the matter further and perhaps offer to mediate between the parties. The Institution publishes its decision on its website.</p>
<p>Estonia</p>	<p>2.3. Initial assessment of a complaint</p> <p>2.3.1. Within three months of the submission of the complaint, the NCP conducts an initial assessment of the complaint on the basis of the following:</p> <ul style="list-style-type: none"> a whether dealing with the complaint contributes to the objective of the OECD Guidelines intended for multinational enterprises (hereinafter the guidelines); b whether the NCP is competent to handle the complaint; c whether the issue is substantiated and reasoned; d how similar complaints have been handled in other domestic or international proceedings; e whether experts or other institutions need to be involved in resolving the complaint.
<p>Finland</p>	<p>How to Submit a Complaint</p> <p>A complaint is asked to be delivered in writing to the registry of the Ministry of Economic Affairs and Employment (P.O. Box 32, FI-00023 GOVERNMENT, Finland), and a copy of the complaint is asked to be sent by email to ncp-finland (at) tem.fi.</p> <p>There is no strict guidance on how the complaint is to be formulated, but the complaint should contain the following information:</p> <ul style="list-style-type: none"> - Name and contact information of the complainant; - Name of the company involved; - Specific reference(s) to the section(s) of the Guidelines that are thought not to be complied with. <p>[...]</p>

	<p>Several parties can make a joint complaint. Travel expenses are not reimbursed. Complaints referring to events taken place over three years ago will not to be taken into consideration.⁴⁹</p> <p>Initial assessment</p> <p>When the Ministry has received a complaint, the NCP will assess, whether the complaint merits further consideration (this is called an initial assessment). This process includes a review of the complaint, asking for a statement from the company involved, communication between parties, and possibly consulting other NCPs.</p> <p>During the initial assessment it is possible that the NCP makes further inquiries, which means making request(s) of information to parties, Finnish embassy network, or to other National Contact Points.</p> <p>If the NCP will not take the complaint into closer examination, the NCP publishes a statement, which includes a description of the complaint and reasons for the decision. If on the other hand the NCP takes the complaint into further examination, the process proceeds to the next phase, examination of the complaint. This does not however necessarily mean that the company involved in the complaint has violated the Guidelines.</p>
France	<p>IV– SAISINE DU PCN - EVALUATION INITIALE</p> <p><i>Forme de la saisine</i></p> <p>16. La saisine du PCN doit être précise. A cet égard, elle doit détailler :</p> <ul style="list-style-type: none"> - l'identité de l'entreprise visée ; - l'identité et les coordonnées du demandeur ; - le détail des faits qui sont reprochés à l'entreprise ; - les éléments des Principes directeurs de l'OCDE à l'intention des entreprises multinationales au nom desquels le PCN est saisi. <p><i>Traitement de la saisine dans le cadre de l'évaluation de la recevabilité</i></p> <p>17. Dès réception de la saisine, le secrétariat du PCN accuse réception par courrier ou par voie électronique au demandeur et transmet une copie des éléments reçus pour la saisine aux membres du PCN.</p> <p>18. Dans le cadre de l'examen de la recevabilité de la saisine, le PCN procède à une première évaluation de l'intérêt des questions soulevées pour déterminer si elles méritent d'être approfondies.</p> <p>19. Après son évaluation initiale, le PCN communique sa réponse aux parties concernées. Le PCN publie un communiqué annonçant la recevabilité de la circonstance spécifique, qui précise l'identité des parties, le/les pays concerné(s) par la saisine et comporte une synthèse de son évaluation initiale. Dans le respect de la confidentialité qui s'attache au PCN, le plaignant peut tenir informé son (ses) mandant(s) de la décision prise par le PCN en matière de recevabilité.</p>

⁴⁹ The time limitation requirement has been removed from the Finnish NCP's newly drafted rules of procedure in April 2019. These rules of procedure have not yet been published publically at the time of this paper's finalisation, but the amendment has been considered in this paper's analysis.

	<p>20. S'il décide que la question ne mérite pas d'être approfondie, le PCN informe les parties des motifs de sa décision et publie un communiqué. Dans ce communiqué, le PCN doit présenter les questions soulevées et donner les motifs de sa décision. Ce communiqué ne mentionne pas l'identité de l'entreprise.</p> <p><i>Critères de recevabilité</i></p> <p>21. La saisine est déclarée recevable si elle remplit les conditions de forme mentionnées au point 16.</p> <p>22. Le PCN doit également déterminer si la question soulevée l'est de bonne foi et est en rapport avec les Principes directeurs.</p> <p>23. Pour apprécier la recevabilité de la saisine qui lui est adressée, le PCN doit tenir compte:</p> <ul style="list-style-type: none"> - de l'identité de la partie concernée et de son intérêt dans l'affaire ; - du caractère significatif de la question et des éléments fournis à l'appui ; - du lien apparent entre les activités de l'entreprise et la question soulevée dans la circonstance spécifique ; - de la pertinence des lois et des procédures, notamment juridictionnelles, applicables ; - de la manière dont des questions similaires sont (ou ont été) examinées au niveau national ou international ; <p>24. Une saisine provenant de l'un des membres du PCN est présumée recevable pour autant qu'elle respecte les conditions mentionnées ci-dessus.</p> <p>25. Le PCN doit s'efforcer de déterminer si, en proposant ses bons offices, il peut contribuer de manière positive à la résolution des questions soulevées et si cela ne risque pas d'entraîner un préjudice grave pour l'une ou l'autre des parties engagées dans d'autres procédures, ou de constituer une atteinte à l'autorité de la justice. Il peut décider alors d'accepter ou de renoncer à poursuivre le traitement de la circonstance spécifique.</p> <p>26. Le PCN s'efforce de procéder à l'évaluation initiale dans un délai de 3 mois après l'accusé de réception de la question mais un délai supplémentaire peut être accordé s'il s'avère nécessaire pour recueillir les informations indispensables à une décision éclairée.</p>
Germany	<p>III. Initial assessment</p> <p>On the basis of the complaint and the response submitted by the company, the NCP undertakes an initial assessment and decides whether the issues raised in the complaint merit further examination, i.e. whether or not to accept the complaint for further consideration. This usually happens within three months after the complaint has been submitted.</p> <p>1. Eligibility criteria</p> <p>When deciding whether to accept a complaint for further consideration, the NCP examines the following points:</p> <p>a) Eligibility of the parties</p> <p>aa) Complainant(s)</p> <p>Complaints can be submitted by (natural and legal) persons, trade unions and nongovernmental organisations. The complainant must be able to demonstrate their legitimate interest in the matter in question and justify the complaint. Provided they can demonstrate that they are authorised to do so, complainants can act on behalf of a third party.</p>

bb) Respondent

The complaint must be directed at an addressee of the Guidelines, i.e. a “multinational enterprise”. The Guidelines apply to all sectors of the economy. Whilst the Guidelines do not specify exactly what constitutes a “multinational enterprise”, they do state that these “usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. The Guidelines also apply to activities of business partners of multinational enterprises including suppliers and subcontractors (cf. also paragraph 28 in this regard).

Small and medium-sized multinational enterprises are also subject to the Guidelines. Consideration has been and will be given to the fact that these smaller companies do not have the same possibilities and capacities as large corporations.

b) International competence of the German NCP

By default, complaints are handled by the NCP of the country in which the issues in hand have arisen, meaning that the German NCP forwards complaints to the relevant foreign NCP about issues that have arisen in another country adhering to the Guidelines. If the complaint relates to parts of companies or operations in more than one adhering country, the NCP will consult with the NCPs in those countries on how to proceed.

If the complaint relates to activities in a non-adhering country, the NCP may be responsible for handling the case if the relevant company’s main headquarters are in Germany. In this case, it applies the procedure described above and if appropriate will conduct the complaints procedure to the extent that it deems this to be useful and feasible in order to help mediate between the parties.

In cases where a different NCP is in charge of dealing with a complaint that pertains to a company based in Germany, the German NCP follows the proceedings and cooperates with the competent NCP.

c) Relevance of the issues raised for the implementation of the Guidelines and submission in good faith

The purpose of the examination by the NCP of the issues raised is to advance the objectives of the Guidelines and render the latter more effective. This is generally the case if the questions raised refer to the subject matter of the OECD Guidelines and if support from the NCP can foster the application of the Guidelines in the specific case or in future.

Furthermore, there must be a link between the company’s operations – including the activities of their business partners (cf. paragraph 22 above) – and the issues raised in the complaint. This can derive from negative effects of the company’s own activities, or from a contribution to negative effects. Where a company did not cause or contribute to a negative effect itself, there may nevertheless be a causal relationship because the negative effect was directly linked to a business relationship, the products or services of the company. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.

The complaint must be material and **sufficiently substantiated**. It is sufficient for the allegations to be presented in a credible manner; there is no requirement to prove the case, like in a court.

d) Court or administrative proceedings taking place in parallel

Court or administrative proceedings taking place in parallel are not, per se, grounds for a case to be dismissed by the NCP. The NCP takes a decision on the specific case assessing whether an offer of good offices could make a positive contribution to the resolution of the issues raised and do so without causing serious prejudice for either of the parties involved in these other proceedings or resulting in contempt of court. It is important that the support provided by the NCP and the application of the Guidelines add value over and above the other proceedings.

<p>Hungary</p>	<p>Following official filing of the complaint with the HNCP it will assess whether the issues raised merit further examination. In this respect it is determined whether the complaint is bona fide and relevant to the implementation of the Guidelines. The HNCP will take into account:</p> <ul style="list-style-type: none"> • the identity of the complainant and its interest in the matter, • whether the issue is material and substantiated, • whether the complaint is bona fide, • 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 any 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. <p>If the case constituting the basis of the complaint happened more than 5 years before submitting it to the HNCP it will only be accepted if it had a priority in contributing to the implementation of the Guidelines.</p>
<p>Ireland</p>	<p>Stage 1 – Initial Assessment</p> <p>An initial assessment will be made of whether the issues raised are appropriate and valid for consideration by Ireland’s NCP in the context of the scope of the OECD Guidelines, including:</p> <ul style="list-style-type: none"> • Whether it is appropriate for consideration by Ireland’s NCP and/or that of another adhering country; • whether it falls within one or more of the OECD Guidelines; • whether the issue raised is material and substantiated; and • whether there are any other factors which should be taken into account such as, but not limited to: <ul style="list-style-type: none"> ○ the relevance of applicable law and procedures, including court rulings; ○ how similar issues have been, or are being, treated in other domestic or international complaints; ○ whether consideration of the complaint would contribute to the purpose and effectiveness of the OECD Guidelines.
<p>Israel</p>	<p>Threshold Conditions for Acceptance of the Specific Instance</p> <p>The decision whether to examine the request will be made after examination of the following criteria:</p> <ol style="list-style-type: none"> a The specific instance deals with an issue included in one or more of the chapters of the Guidelines. b The issues raised in the request are material and substantiated. c The identity of the party that submitted the specific instance and its link to the case that is the subject of the specific instance. d The link between the enterprise's activity and the issue(s) raised in the specific instance. e Existence and application of local laws and regulations as the case may be, including court rulings. f The manner by which similar matters were handled or are handled in other local or international proceedings. g Whether examination of the specific instance will contribute to the purposes and effectiveness of the Guidelines.

<p>Italy</p>	<p>Initial Assessment</p> <p>Once received the specific instance, the NCP will determine whether the issue raised merits further examination. To this aim, the NCP will determine whether the issue is <i>bona fide</i> and relevant to the implementation of the Guidelines. In particular, the NCP will consider:</p> <ul style="list-style-type: none"> • 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.
<p>Japan</p>	<p>After receiving the submitted complaint, in accordance with “C. Implementation in Specific Instances” of the Procedural Guidance of the Implementation Procedures, as well as taking into consideration Paragraphs 23 to 25 of the Commentary on the Implementation Procedures, the Japanese NCP makes an initial assessment regarding whether the complaint “merits further examination”. Specifically, the Japanese NCP examines the following points and notifies the parties involved (the complainant and the enterprise involved) in writing, in the name of Japanese NCP.</p> <p>In principle, The Japanese NCP does not publish the Initial Assessment for the purpose of smooth implementation of the due procedures.</p> <ul style="list-style-type: none"> • Whether the Japanese NCP is the correct entity to assess the complaint. (Generally, issues are dealt with by the NCP of the country in which the issues take place.) • The identity of the parties concerned and their interest in the matter. • Whether the issue is material and substantiated. • Whether there seems to be a link between the activities of the enterprise involved and the issue raised in the specific instance. • Relations with 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.
<p>Korea</p>	<p>Article 14 Receipt of complaint</p> <ol style="list-style-type: none"> a If the complainant wishes to file a complaint against a certain multinational enterprise (hereinafter “Respondent”) regarding the implementation of the Guidelines, it can submit a complaint by filling out the form provided in Appendix 2. b When there is a complaint under Article 14(a), the NCP shall decide within 30 days whether to accept the complaint, and notify the receipt of the complaint to the complainant and the respondent. c If the NCP decides that the specific instances fail to merit consideration, the NCP shall inform its decision and the reasons for its decision to the complainant and the respondent within 30 days from the date of receipt of the complaint. <p>Article 15 Initial Assessment</p> <ol style="list-style-type: none"> a If the NCP considers a complaint under Article 14(a) to merit further examination, within 90 days from the receipt of a complaint, the NCP shall notify the complaint and the respondent, and announce at the NCP’s website or by other methods the NCP’s decision by considering the following particulars whether to carry out further procedures including further investigations and mediation/arbitration,

	<ul style="list-style-type: none"> ○ i. contribution to the purposes and effectiveness of the Guidelines ○ ii. outcomes of similar issues treated in other domestic or international proceedings ○ iii. ability to resolve dispute through applicable law including court rulings and procedures. <p>b The NCP shall hear opinions from both parties before making its decision whether to carry out further procedures.</p>
Latvia	<p><i>Initial Assessment</i></p> <p>NCP will engage with the MNE during the initial assessment phase.</p> <p>Making an Initial Assessment of whether the issue raised merits further examination, the NCP will determine whether the issue is bona fide and relevant to the implementation of the Guidelines. The NCP will take into account:</p> <ul style="list-style-type: none"> c whether the Latvian NCP is the appropriate entity; d the identity of the party concerned and its interest in the matter; e whether the issue is material and substantiated; f whether there seems to be a link between the enterprise’s activities and the issue raised in the Specific Instance; g the relevance of applicable law and procedures, including court rulings; h how similar issues have been, or are being, treated in other domestic or international proceedings; i whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines.
Lithuania	<p>22. During the initial assessment of the complaint, the following criteria will be taken into account:</p> <p>22.1. Lithuanian NCP’s competency to examine the specific instance indicated in the complaint. When ascertaining Lithuanian NCP’s competency, it shall be assessed whether the complaint is related to the activities or conduct of a Lithuanian multinational enterprise operating abroad or those of a multinational enterprise operating in Lithuania. In the event that the indicated circumstances are related to the enterprises of other adhering countries or their activities, the Lithuanian NCP may contact and consult the National Contact Points of such countries in order to identify and agree which country’s National Contact Point should assume a leading role in solving the specific instance;</p> <p>22.2. Whether the enterprise against which the complaint has been submitted is a multinational enterprise as per the Guidelines;</p> <p>22.3. Identity of the party that submitted the complaint and its interest in the matter. The complaint may not be completely anonymous. If the complainant thinks that the submission of the complaint and disclosure of the complainant’s identity could have negative effects, the complainant must appoint a representative (for example, appropriate non-governmental organisation or professional union) that will represent the complainant during the process of handling specific instances;</p> <p>22.4. The relation of the issue(s) raised complaint to the Guidelines and its preliminary substantiality (i.e. whether the complaint is clearly unsubstantiated and whether supporting documents relate to the issues raised in the complaint);</p> <p>22.5. The link between the activities of the indicated enterprise and the circumstances indicated in the complaint;</p> <p>22.6. Relevant applicable law and procedure provisions, including case law.</p>

Luxembourg	<p>Initial assessment</p> <p>In making an initial assessment of the Specific Instance that can lead to further examination of the case, the Luxembourg NCP shall take into account 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 procedure, 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 OECD Guidelines for Multinational Enterprises.</p> <p>The Luxembourg NCP will not dismiss outright a Specific Instance brought before it solely because parallel proceedings have been conducted, are pending or have produced results available to parties, although, by the same token, these proceedings may of course influence the Luxembourg NCP's initial assessment of the Specific Instance.</p>
Mexico	<p>28. To decide whether to continue with the specific instance, the NCP will consider the following criteria:</p> <ol style="list-style-type: none"> i. If the claimant has shown its interest in the instance and its good faith. In applying this criterion, the NCP should adopt a wide criteria that provides/gives/grants less weight to the formal identity of the claimants and more weight to the utility of the specific instance to benefit society as a whole; ii. If facts are sufficiently substantiated and could be susceptible of being resolved through the specific instance. In applying this criterion, the NCP should analyse if there is a proven relation between the activities of MNE and the issue raised in the specific case. Otherwise, it will be necessary to verify whether the specific instance suggests potentially valid concerns about the Guidelines and if the instance can be supported through additional research or there are other reliable sources of foundation available; iii. If the question presented is likely to be resolved through the legal framework. In applying this principle, it should consider whether the current legal framework allows the situation that motivates the specific instance to be solved through the good offices of NCP, and if the latter can make a positive contribution to the solution of the problems encountered. The existence of legal processes available or in progress does not necessarily motivate the conclusion of the specific instance, except on those cases in which the good offices of NCP could interfere or cause serious damage to the Parties involved in said procedures; iv. If similar issues have been or are being addressed in other local or international processes. The NCP may not decline to continue the specific instance exclusively under the argument that no judicial administrative or extraordinary proceedings exist where similar issues were dealt with, or because the latter had been discarded in such procedures; and, v. If consideration of the specific instance will contribute to the purpose and effectiveness of the Guidelines. In applying this criterion it should be considered if the resolution of the problem through the specific instance will help to promote the adoption of the Guidelines, raise standards of corporate social responsibility or set a beneficial precedent.
Morocco	<p>Pour apprécier la recevabilité de la requête qui lui est soumise, le PCN détermine si la question soulevée l'est de bonne foi et est en rapport avec les principes directeurs, et ce en se basant sur les éléments suivants :</p> <ul style="list-style-type: none"> • L'identité de la partie concernée et son intérêt dans l'affaire. • Le caractère significatif de la question et des éléments fournis à l'appui. • Le lien apparent entre les activités de l'entreprise et la question soulevée dans la circonstance spécifique. • La pertinence des lois et procédures applicables, notamment des décisions de justice. • La manière dont des questions similaires sont (ou ont été) traitées au niveau national ou international.

	<ul style="list-style-type: none"> • L'intérêt que présente l'examen de la question concernée au regard des objectifs visés par les principes directeurs et de l'efficacité de leur mise en œuvre.
Netherlands	<p>1. Initial assessment (within three months of receiving the report, wherever possible)</p> <p>Firstly, the NCP performs an initial assessment of the specific instance to determine whether further consideration by the NCP is warranted. In doing this, the NCP will take the following aspects into account:</p> <ul style="list-style-type: none"> – Whether the Dutch NCP is the appropriate entity; – The identity of the party concerned (be it an individual or an organization) and its interest in the case; – 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 consideration of this specific problem would contribute to the purposes and effectiveness of the <i>Guidelines</i>.
New Zealand	<ol style="list-style-type: none"> 1. Begin to assess the complaint against the Guidelines: <ol style="list-style-type: none"> a. Is it material and substantiated? b. Is there a link between the enterprise and the complaint? c. What is the relevance of applicable law and court rulings? d. How have similar issues been deal with elsewhere? 2. Consider whether pursuing the specific instance: <ol style="list-style-type: none"> a. Would make a positive contribution b. Would create a serious prejudice against a party or cause contempt of court c. Would contribute to the purposes and effectiveness of the Guidelines
Norway	<p>The NCP will first determine whether any members of the expert panel or the secretariat can be deemed to be disqualified from participating in the further consideration of the case on grounds of conflict of interest. The NCP will then assess the complaint: Does it meet the criteria below? If necessary, the NCP may seek the advice of relevant authorities and consult NCPs in countries relevant to the complaint. In its initial assessment, the NCP will take into account:</p> <ul style="list-style-type: none"> • Whether the Norwegian NCP is the correct entity to assess the complaint. In this context, the NCP will consider whether the complaint concerns a Norwegian company's activities or alleged conduct in Norway. If the complaint concerns other countries' NCPs, the NCPs concerned should consult with each other to agree on which one should lead the work to assist the parties. • Whether the company subject to the complaint is a multinational enterprise. • The identity of the party concerned and its interest in the matter. The complainant cannot be anonymous. If the complainant fears serious consequences if his/her identity is revealed, he/she should appoint a representative (for example a competent NGO) to represent the complainant in dialogue with the company and the NCP. Without knowing the complainant's identity or having a representative of the complainant to relate to, it is not possible for the NCP to determine whether the complainant has a legitimate interest in the case, nor can it facilitate meaningful dialogue between the parties. • Whether the complaint is material and substantiated. A complaint must be substantiated in order for the NCP to assess whether it merits further consideration. The complainant is requested to substantiate the case with facts as far as possible. It is preferable to include copies of original documents/first-hand accounts rather than describing such documentation. The case must also be material and concern an issue covered by the Guidelines. • Whether there is a link between the activities of the company subject to the complaint and the issue raised in the specific instance.

	<ul style="list-style-type: none"> • The relevance of applicable law and procedures, including court rulings. • How similar issues have been or are being handled in other domestic or international proceedings. • Whether the consideration of the specific instance would contribute to the purposes and effectiveness of the Guidelines.
Peru	<p>7.1.6 The NCP shall perform an initial evaluation to establish whether the Specific Instance needs further review or not, for which the criteria established in Paragraph 25 and 26 in “Comments on the implementation procedures of the OECD Guidelines for Multinational Enterprises” will be considered.</p> <p>Considering the information included in the file presented by the interested party that submitted the Specific Instance, the information sent by the multinational enterprise, the criteria previously mentioned and, in general the Guideline terms, among others that the NCP deems convenient; the NCP will decide whether or not the Specific Instance needs further consideration and analysis and shall inform to the parties its decision.</p>
Poland	<p>II. PROCEDURE</p> <p>STAGE I: FROM RECEIVING THE NOTIFICATION TO PREPARATION OF INITIAL ASSESSMENT AND DECISION ON PROVIDING SUPPORT TO THE PARTIES</p> <p>Afterwards, the NCP will start an initial analysis of the specific instance, which covers verification of:</p> <ul style="list-style-type: none"> • whether a given specific instance is related to the OECD Guidelines implementation process • whether the specific instance is significant and justified • whether there is a connection between the enterprise’s activity and the specific instance • whether there are alternative paths of conduct in the specific instance (arbitration, appeal mechanism, court proceedings, etc.) • whether execution of the procedure is possible - if there is a procedure carried out before another body in the same specific instance • whether similar issues took place, and how the procedures of their consideration ended • whether the NCP’s involvement may contribute to the implementation of new good practices within the scope of responsible business conduct
Slovak Republic	<p>3.2 From the submission, the following events and circumstances must be evident, which will allow the NCP to identify the impacted subjects and assess if the specific instance falls within the scope of the Guidelines and if the NCP is the correct entity to treat the specific instance:</p> <ul style="list-style-type: none"> • Name, surname and address of the physical person or name of the seat of work of the legal person submitting the specific instance • Name, seat or city of the multinational enterprise that the specific instance is concerned with • Email and phone number of the submitting party • Statutes of the Guidelines that were not observed that the submitter is informing on or which the specific instance deals with • Subject of the notification, evidence that supports the submitter’s allegations • Solutions proposed by the submitter • Signature by the person and date <p>(5) After receiving the information required in paragraph 3 the Secretariat will undertake an initial assessment of the specific instance and will recommend if the NCP should continue the examination.</p>

	The Secretariat, if need be, can turn to the NCP members with a request for an expert opinion on the specific instance that was received.
Spain	<p>d) La Secretaría preparará un informe, en el que quedará reflejados los siguientes puntos:</p> <ul style="list-style-type: none"> - La identidad de la parte afectada y su interés en la instancia. - Los hechos alegados y si están suficientemente soportados por la evidencia presentada. - Si hay un vínculo entre el caso y las actividades de la empresa. - Si de la información suministrada se deduce una mala aplicación de las Directrices por parte de la empresa y si es posible mejorarla aceptando el caso. - Si existen normas legales, procedimientos administrativos aplicables, o jurisprudencia relativa al caso. - Si el caso estuviera sometido a un proceso judicial o procedimiento administrativo. - Informaciones aportadas por miembros del PNC y otras partes consultadas. - Cómo se han tratado casos similares en otros PNC. - Riesgos existentes en materia de privacidad de datos. - Cualquier otro elemento que se considere relevante.
Sweden	An initial assessment should be made by the NCP if the case merits further examination. Just because the case merits further examination it does not imply that the company has breached the guidelines. The NCP should collect information about the case and consult with the parties.
Switzerland	<p>The NCP assesses the specific instance according to the following criteria; if these criteria are not met, the NCP does not consider the issue raised or returns it to the party raising the issue for modification:</p> <ul style="list-style-type: none"> • Identity of the party raising the specific instance and its interest in the case: It is necessary to ascertain who has raised the specific instance and what their motivation was. The party raising the specific instance is required to disclose its identity and its legitimate interest in the issue at hand. • Responsibility of the NCP: A 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 headquarters. The Swiss NCP is therefore responsible for cases in which multinational companies from other signatory states have allegedly acted in breach of the Guidelines. It is also responsible in cases where a Swiss enterprise abroad is involved in a country that does not have its own NCP. If the specific instance concerns more than one NCP (e.g. if the company involved is owned by several multinational enterprises or in the case of holding companies), the NCPs concerned decide which of them will assume the lead for the specific instance. If the Swiss NCP is not responsible for a particular case, it forwards the specific instance to the responsible NCP and informs the party that has raised the instance. If the multinational enterprise has a connection with Switzerland, Switzerland's NCP will on request provide or offer appropriate support to the NCP in the host country. • Scope of application of the OECD Guidelines and materiality of the specific instance: The NCP ascertains whether or not the specific instance raised falls within the scope of the OECD Guidelines and was raised in good faith (<i>bona fide</i>). Sufficient evidence related to the alleged breach of the Guidelines must also be given in the specific instance.

	<ul style="list-style-type: none"> • Legal context and parallel procedures: Even if the company has met all the legal requirements, the NCP may still pursue the specific instance, as the OECD Guidelines are internationally recognised standards which may be more stringent than local law. The NCP also ascertains whether the issue has already been dealt with in local proceedings or if proceedings are pending (so-called parallel proceedings). If parallel proceedings have already been concluded or are ongoing, this will not necessarily prevent the NCP from pursuing a specific instance. However, in each individual case the NCP assesses whether or not an offer to mediate would make a positive contribution to the resolution of the issues raised or if it would prejudice either of the parties involved in other proceedings. • Contribution to the effectiveness of the OECD Guidelines: The NCP assesses whether pursuing the issue would contribute to the effectiveness of the OECD Guidelines. <p>If required, the NCP can carry out further clarifications in connection with the matter with the parties involved or invite the parties to respond to the issue raised.</p>
Turkey	No official translation available.
United Kingdom	<p>3.4.1 The Initial Assessment decides whether issues raised in the complaint merit further examination. It does not include any decision on whether the company breached the Guidelines. As set out in the “Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises”, in making its Initial Assessment of a Specific Instance the NCP will consider the stated grounds of the complaint and the information it has received about the complaint, taking into account:</p> <ul style="list-style-type: none"> • the identity of the party (complainant) concerned and its interest in the matter • whether the issue(s) is(are) material and substantiated; • whether there seems to be a link between the enterprise’s activities and the issue raised; • 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, and • whether consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines.
Ukraine	<p>16. When the lodged complaint undergoes the initial evaluation, the NCP shall consider the aforesaid grounds of the complaint and information about the complaint supplied by the Party so as to decide:</p> <ul style="list-style-type: none"> • whether it concerns one or several Guidelines for Multinational Enterprises; • whether the raised issue is vital and well-grounded; • whether there are any other factors to be taken into account such as (but not limited to), for instance: whether legislation and procedures, including a court decision, were used; • what similar problems have been handled or are handled in other national or international practices; • whether this complaint handling will help achieve the goals and efficiency of the Guidelines.
United States	<p>In making an initial assessment, the U.S. NCP, in consultation with the IWG, determines whether the issues raised are <i>bona fide</i> and relevant to the implementation of the Guidelines, taking into account</p> <ul style="list-style-type: none"> • 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(s) raised; • The relevance of applicable law and procedures, including court rulings; • How similar issues have been or are being treated in domestic or international proceedings; • Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines

ANNEX II. Stakeholder perspectives on initial assessment procedures

Business and Industry Advisory Committee to the OECD (BIAC):

Trust in the NCP system is important throughout the process, and is required from the very beginning starting with the initial assessment phase. Achieving neutrality by not disadvantaging one party at the expense of another is a challenging but important consideration. There should be a common understanding of what an appropriate threshold is for NCPs to accept specific instances in order to avoid forum shopping. For example complaints which are overly broad or which merely have an indirect connection to an allegedly critical issue risk taking away valuable resources. When an NCP decides to examine a specific instance, this should by no means be considered or presented as implying that the NCP suspects the MNE of having failed to observe the Guidelines. It occurs regularly in NCP procedures that no infringement is identified. Any communication of the NCP on this point should be very clear, as public reports on issues under examination can cause substantial reputational damage. There should be no negative consequences when a company decides to engage in a specific instance, on the contrary, constructive engagement in the discussion should be considered as a first positive step.

The NCP should clearly communicate from the outset of a specific instance that all parties must approach the process in good faith with a willingness to move towards dialogue, problem solving, and further mediation when needed, and to work constructively towards a future-oriented solution. Good faith is a precondition for the whole process and an essential element to build trust in the NCP process. NCPs should make clear at the very start that the NCP procedure is available only to those parties that are willing to abide by the rules and procedures and engage in good faith. There also needs to be assurance that there is strict confidentiality of the information companies are required to share. NCPs should therefore consider providing written confirmation of confidentiality at the start of the process. Adequate consultation with the respective company when conducting the initial assessment is important to ensure impartiality of the process and to promote constructive engagement of the company. In this process, deadlines for a company to respond must be realistic. This is particularly important when the issues raised relate to impacts of operations of a supplier or business partners of the enterprise faced with a specific instance.

Trade Union Advisory Committee to the OECD (TUAC):

Timeframes should be definite and not indicative. Initial assessments take too long, reducing the value in the mechanism for trade unions. Additionally, respondents take advantage of the indicative timeframe. The Procedural Guidance for NCPs regrettably provides MNEs with a roadmap for avoiding participation, delaying resolution and frustrating complainants by maximizing the stated “indicative” timeframe. Time is of the essence in the initial assessment phase, negative impacts alleged or otherwise require swift resolution.

TUAC sees the indicative timeframe in the Procedural Guidance as the most ineffective aspect of the initial assessment phase in the way it actually encourages longer timelines. MNEs would be unwise to provide information and cooperate early in the process when successive OECD instruments instruct that “additional time might be needed in order to collect information necessary for an informed decision.”

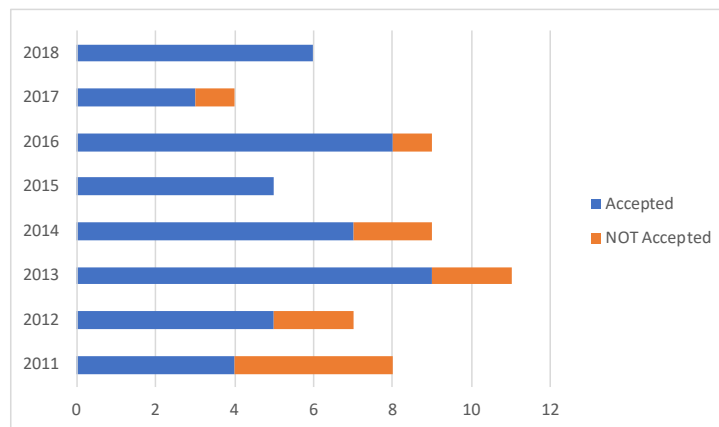
The following text from the NCP Procedural Guidance: “additional time may be necessary at the initial assessment stage” should be removed as a priority action.

One idea might be to offer clear actions that the NCP can take at the end of three months, regardless of the level of cooperation and information from the parties. For example, if there is evidence of a respondent refusing to cooperate by delaying the timeframe, the NCP would be compelled to accept the case and issue its final determination after another three-month period, with or without the respondent’s participation. If, on the other hand, there is evidence of the complainant refusing to cooperate and delaying the timeframe, the NCP would be empowered to automatically reject the case with prejudice against any duplicate case being filed by complainant for one year. Empowering the NCP in this way on the timeframe and action steps would be an effective way to keep both parties at the table, acting in good faith, incentivise cooperation towards a resolution.

The downward trend in the percentage of accepted specific instances is a concern. For the first time the percentage of specific instances accepted dropped below 50% in 2018. The decline in acceptance rates coincides with some trade union opinions about the NCP effectiveness as a non-judicial form of dispute resolution.

Specific instances filed by trade unions have a higher acceptance rate than the acceptance rate for all filings. During the period 2011-2018, trade union cases had a 22% better acceptance rate compared to the average across all filers (where average acceptance rates for submissions was 57% and the average acceptance rates for trade union cases was 79%, see figure below). Reasons for this difference should be examined and positive practices supported.

Figure 4. Specific Instances filed by trade unions accepted and not accepted annually



Source: OECD specific instance database. Figure created by TUAC.

Initial assessments are not judicial determinations. Fairness is irrelevant and there should be no need to protect the identity of either party in an initial assessment. Trade unions and MNEs are not so sensitive. One could understand such a need to protect an MNE's identity if the initial assessment were a judicial determination, which it is not. Moreover, anonymising the MNE demotes the initial assessment to nothing more than a theoretical exercise, which would not be seen as useful by trade unions. MNEs who are the subject of an OECD complaint, regardless of whether or not it is found by the NCP to merit further investigation, is a potential consideration for institutional shareholders with sustainable investment mandates. The suggested approach leaves these investors unaware of risks and opportunities in their portfolios. Transparency throughout the NCP specific instance proceedings is essential to equip governments and sustainable investors to fulfil the purpose of the Guidelines, "to promote positive contributions by enterprises to economic, environmental and social progress worldwide."

OECD Watch

The initial assessment phase is one of the most vital during the specific instance process, because the effectiveness with which NCPs undertake the initial assessment greatly impacts the ability of complainants to use the dispute mechanism and seek remedy for adverse corporate impacts. Unfortunately, a number of practices of NCPs at the initial assessment phase are jeopardizing complainants' access to justice and NCPs' fulfilment of the core criteria and complaint-handling principles of accessibility, impartiality, transparency, and predictability.

Accessibility is one of the core guiding criteria for NCPs; however, it is also one of the areas in which NCPs have shown the most need for improvement. In many cases, NCPs are not helping to ease the burden of filing a complaint. Many NCPs require complainants to pay for the costs of mediation and travel to the NCPs' home country for mediation, do not enable remote (virtual) mediation, and do not help with translation costs where needed. Many NCPs lack user-friendly websites showing the NCP's complaint-handling procedures and a guidance or template on how to file complaints. Other worrying practices include an unreasonably high standard of proof set by many NCPs, and the application of additional admissibility criteria not mentioned in the Procedural Guidance, such as a requirement that both parties be willing to mediate, or a requirement that the NCP personally believe an agreement is likely. Such practices result in the premature rejection of numerous complaints. Some NCPs also reject complaints that allege future harm, but this is counterintuitive to the goals of the OECD Guidelines. In fact, if NCPs can offer good offices during the critical planning stage of a project, it could help achieve the goal of encouraging adherence to the Guidelines by companies and prevent harms from occurring in the first place. NCPs should also use the initial assessment phase as a time to consult complainants about potential reprisal risk they or other community members face, and identify any helpful preventative or responsive actions the NCP can take to discourage harm to human rights defenders.

Other practices of NCPs during the initial assessment phase impede NCPs' impartiality, transparency, and predictability. OECD Watch encourages NCPs to finalize their Initial Assessment statements using only information that both parties have seen and had the opportunity to refute, but this is not always done in practice. An NCP's actual or perceived decision to reject a case on grounds of information shared only between the NCP and a company severely hurts complainants' trust in the impartiality of the NCP complaint system. Similarly, over-protection of confidentiality for the business involved in a case hurts both the impartiality and transparency of an NCP. OECD Watch has found that raising public awareness around cases helps encourage companies to join mediation. By prohibiting all campaigning around complaints, and failing to publish the names of companies involved, the text of complaints, initial assessments, and final statements in all cases, NCP's give stakeholders the sense that they are unduly protecting the business' interest and hiding the potential wrongdoing of companies. Finally, too many NCPs take far longer than the three months recommended in the Procedural Guidance to complete the initial assessment phase. This renders these NCPs, as a whole, unpredictable and inaccessible to complainants. Reasonable timeline extensions should only be taken based on valid reasons and with clear communication to the parties.

Adopting these steps in handling specific instances will help ensure that NCPs' good offices are more accessible to complainants and that NCPs are upholding the core criteria.

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