

Trade Union  
Advisory Committee  
to the OECD  
Commission  
*syndicale consultative  
auprès de l'OCDE*

## **Submission to the OECD Meeting of the National Contact Points: Issue Paper on Initial Assessment of Specific Instances**

Paris, 27 September 2019

TUAC submits the following comments and recommendations in response to the Issue Paper: Initial Assessment of Specific Instances (DAF/INV/NCP(2019)54) being prepared for the OECD Meeting of National Contact Points for Responsible Business Conduct.

**Timeframes should be definite and not indicative.** Initial assessments take too long, reducing the value in the mechanism for trade unions. On the other hand, 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. The indicative timeframe for the initial assessment phase does not keep parties’ “feet to the fire”.

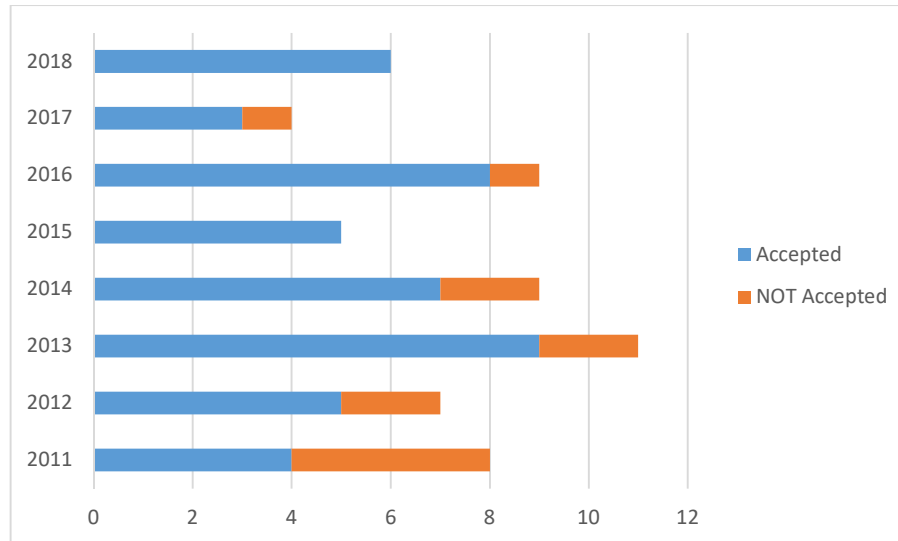
**The downward trend in the percentage of accepted specific instances is a concern.** (Figure 1, p. 11) For the first time the percentage of specific instances accepted dropped below 50% in 2018. The decline in acceptance rates coincides with hawkish trade union opinions about the NCP effectiveness as a non-judicial form of dispute resolution.

**Specific instances filed by trade unions have a higher acceptance rate than the implied acceptance rate for all filings.** Over the same period reported, trade union-filed cases averaged higher acceptance rates (71%) than the overall acceptance rate (65%) implied by Figure 1.

During the period 2011-2018, trade union cases had a 22% better acceptance rate than all filers during the period 2011 – 2018, when average acceptance rates for overall SI cases fell to 57% and the average acceptance rates for trade union cases was 79%.

Reasons for this difference should be examined and positive practices supported. The Chair of the Working Party should ask its advisory bodies with expertise in labour management dispute resolution to develop a set of recommendations about best practices for handling of specific instances involving MNEs and trade unions. This could provide a way of formalising the approach taken in at least two NCPs prior to producing initial assessments. (See Denmark and Latvian NCP examples in para. 60)

### Acceptance rates for Specific Instances filed by Trade Unions 2011 – 2018<sup>1</sup>



### ¶ 39 – 41; 50 – 52 – Indicative timeframes for initial assessment

Timeframes for initial assessments are too long. 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. Also, sanctions for either party acting in a manner inconsistent with the purpose of the Guidelines would be taken more seriously by trade unions and MNEs.

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.

<sup>1</sup> OECD Database of NCP Cases

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.

### **Section C ¶ 42 – 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 (see para. 10 – 14). 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.”