

Open Society Justice Initiative and Telekom Austria AG

Initial Assessment Date (16/03/2022)

The objective of the initial assessment process under the Procedural Guidance is to determine whether the issues raised in the specific instance merit further examination. If so, the NCP will offer or facilitate access to consensual and non-adversarial procedures, such as dialogue, mediation or conciliation (e.g. 'good offices') to the relevant parties. As specific instances are not legal cases and NCPs are not judicial bodies, NCPs cannot impose sanctions, directly provide compensation nor compel parties to participate in a conciliation or mediation process. The decision is based on an initial assessment of the information submitted and does not represent a conclusion as to whether the enterprise observed the Guidelines or not.

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Overview of the NCP and its role

The OECD Guidelines for Multinational Enterprises are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. The Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting.

Adhering countries set up National Contact Points to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances. NCPs will operate in accordance with the Procedural Guidance of the OECD Guidelines, including its core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence.

The National Contact Point will contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines.¹ For this purpose, the NCP makes an initial assessment of whether the issues raised merit further examination and if so, offers good offices to the parties involved.²

Substance of the submission (facts presented) and the enterprise's response

On 16 March 2022, the Open Society Justice Initiative (OSJI, hereafter “the complainant”) filed a complaint to the Austrian National Contact Point (NCP), alleging breaches of the OECD Guidelines by Telekom Austria AG (hereafter “the company”) and its subsidiary A1 Belarus. The complainant alleges that Telekom Austria AG through its 100% subsidiary A1 Belarus were involved in a series of politically-motivated mobile internet shutdowns in Belarus during 9 August 2020 and 29 November 2020.

¹ See OECD (2011), OECD-Guidelines, Procedural Guidance Lit C.

² See OECD (2011), OECD-Guidelines, Procedural Guidance Lit C.

The complainant states that the internet shutdowns were ordered by the Belarusian government in 2020 and were meant to restrict fundamental rights and freedoms, including the rights to free speech, freedom of assembly, political participation and are therefore in violation of international human rights laws and standards. The complainant states that the mobile internet shutdowns have led to grave human rights abuses.

The complainant alleges that following the news that the results of the 9 August 2020 presidential election in Belarus might have been fraudulent, the Belarusian authorities deliberately cut access to the internet in the country. The complainant alleges that the internet shutdown was in part facilitated by A1 Belarus due to its control over its own 2G and 3G network. The complainant further states that the mobile internet disruptions continued until the end of 2020 and coincided with planned protest action on Sundays.

The complainant states that internet shutdowns are used to “silence dissenting or oppositional voices, control information and curb freedom of expression, for example in critical political periods such as protests or elections”. They further state that any type of internet disruption would violate the freedoms of expression and information. The complainant continues that during the internet outages, “journalists, human rights defenders, protesters, and citizen-journalists were limited in their capacity to internationally share the excessive use of force that was being deployed in response to the protests”. It further states that in Belarus the “shutdowns appear to have been used as a tool to actively disrupt free protest activities”.

The complainant alleges that Telekom Austria’s activities in Belarus

- did not respect internationally recognised human rights (Chapter II.A.2 and IV.1 of the OECD Guidelines), e.g. the right to freedom of expression, freedom of assembly and association, economic rights, including the right to work/livelihood; right to health; equality;
- conducted inadequate due diligence through not considering the human rights situation in Belarus and the ways in which their business in the country might contribute to further abuses (Chapter II.A.10, IV.5);
- failed to avoid contributing to adverse impacts and to prevent or mitigate them (Chapter II.A.11, IV.2);
- failed to effectively engage with relevant stakeholders (Chapter II.A.14), e.g. by not providing meaningful opportunities for stakeholders’ views to be taken into consideration;
- failed to remediate adverse impacts (Chapter IV.6);
- were improperly involved in local political activities (Chapter II.A.15);
- have insufficient disclosure policies (Chapter III.2.f, III.3.b, III.3.c);
- failed to promote internet freedom (Chapter II.B.1).

The complainant states that they hope that the “complaint would lead to an exchange with the company that can bring Telekom Austria’s conduct into line with the OECD Guidelines, remediate harms done, and improve company policy as it relates to the respect for human rights and the prevention, mitigation, and remediation of internet shutdowns and their adverse impacts.”

The company transmitted a statement of response on 12 May, 2022. The company underlines its commitment to respect and foster human rights, which is laid down in the A1 Group Code of Conduct. The company stated that it is currently developing a Human Rights Policy which will not solely concentrate on its employees’ human rights but also on society and the whole supply chain.³ It will reference the UN Global Compact, the ILO Declaration on Fundamental Principles and Rights at work, the UN Universal Declaration of Human Rights and the International Bill of Human rights.

The company states that it operates in Belarus through the unitary enterprise A1 Belarus, which is a 100% subsidiary of Telekom Austria AG since 1999 and serves more than 4.9 million people. It further states that the exclusive interconnection with internet providers outside of Belarus is held by a state owned provider. International internet access is only possible through fully state controlled operators.

The company states that between August 9 and August 11, 2020, the access to the global internet was interrupted and according to the state owned provider, this was due to massive DDoS attacks and the Belarusian Chamber of Commerce confirmed these outages as force majeure. The company further stated that it is not in the position to confirm such DDoS attacks and can only refer to the Information of the state owned provider and the certificate of the Chamber of Commerce.

The company states that between August 23 and November 29, 2020, A1 Belarus was ordered by state authorities to reduce the speed of access to the internet for customers of A1 Belarus using mobile phones in certain areas of Minsk. According to the company, such orders must have been fulfilled within minutes and non-compliance would have had severe consequences. The company states that during these times, internet via Wi-Fi and fix net internet access, phone calls, SMS, were possible.

With regards to the alleged violations of the OECD Guidelines, the company states that, wherever possible, it upholds human rights and in cases where national legislation does not allow this, it takes all steps to mitigate negative effects on human rights.

³ See https://esg.a1.group/wp-content/uploads/sites/3/2022/06/A1-TAG-Human-Rights-Policy_2022.pdf (28.03.2023).

The company further says that it is aware of the political circumstances in Belarus and that A1 Belarus however must comply with the regulatory framework of Belarus. The company refers to the government orders to mobile network operators to curb data traffic and states that A1 Belarus was the first provider in Belarus to have publicly and transparently declare the restrictions on internet access. The company further states that A1 Belarus has voluntarily financially compensated its customers for the loss of internet in 2020 in cash and/or data packages. The company further states that, having to obey local legal and regulatory requirements, A1 Belarus tried to comply with international human rights principles to the greatest extent possible. Referring to the OECD Guidelines the company states that where domestic law and regulations conflict with human rights, it seeks ways to honour them to the fullest extent which does not place them in violation with domestic law.

The company states that it monitors possible human rights risks throughout the entire Group through a steering committee consisting of the A1 group Management Board, the national Management Boards, and the Public Affairs Officers of A1 and the companies in the respective country is initiated to assess the national situation in order to evaluate the situation from the perspective of employees, customers, and civil society and make corresponding decisions on business policy. The company notes that in some countries, national laws can make it difficult to ensure that human rights are absolutely respected.

The company further states that human rights complaints can be submitted throughout the group on the compliance whistleblowing platform “tell.me”. The company states that it was and is in contact with various NGOs in the human rights and data security branch and that it was always reachable for any NGO inquiries.

The company further states that with regards to the alleged improper involvement in local political activities, the compliance with the order of the authorized state bodies could not be regarded as “involvement” as non-compliance with these orders would have resulted in severe negative consequences not only for A1 Belarus as a company but also for its employees and customers.

With regards to its allegedly insufficient disclosure policies, it states that all reports are in line with relevant reporting standards and further refers to its non-financial reporting for 2021.

The company states that it supports and promotes unhindered access to the internet, supporting relevant initiatives as a Member of ETNO and GSMA.

The company concludes that it appreciates the active and critical role of NGOs take in order to protect human rights across the world. It renews its commitment to fostering human rights to greatest extent possible and is fully committed to the OECD Guidelines. It believes that some

allegations made by the complainant were based on incomplete or incorrect information regarding the situation. The company states that it didn't support the internet outages which took place between August and November 2020, which according to the company were ordered by the state and A1 Belarus was required by national law to implement them.

The proceedings of the NCP to date

Since receipt of the submission, the NCP has carried out the following actions:

Date	Action that occurred
16.03.2022	Submission of OSJI was received
17.03.2022	NCP confirmed the receipt of the submission and notified the Telekom Austria AG about the submission
08.04.2022	NCP asked OSJI to provide additional clarifications on the submission, which were sent to the NCP on 11.04.2022
11.05.2022	Meeting (Video Call) with OSJI to explain NCP process
12.05.2022	Telekom Austria AG responded to the submission
21.06.2022	Meeting with Telekom Austria AG to explain the NCP process
12.09.2022	Meeting (Video Call) with OSJI to give an update on the proceeding
08.11.2022	Phone call with Telekom Austria AG to give an update on the proceeding
28.02.2023	Meeting (Video Call) with OSJI to give an update on the proceeding
17.03.2023	Phone call with Telekom Austria AG to give an update on the proceeding
28.03.2023	Initial Assessment was shared with the parties for comments

Initial assessment by the NCP

The initial assessment process seeks to determine whether the issues raised in the specific instance merit further examination. It is therefore useful to clarify with readers that the process is not meant to provide a definitive view as to whether or not the enterprise observed the Guidelines.

The NCP welcomes the good cooperation and active engagement of both parties in this initial assessment. The NCP underlines that both parties engaged with the NCP in a cooperative and helpful way.

The NCP has decided to accept the submission.

The decision is based on the information submitted and does not represent a conclusion as to whether the enterprise observed the Guidelines or not.

This decision has been taken following an assessment by the NCP as to whether the issues raised are i) “bona fide”, i.e. real or authentic and ii) relevant to the implement of the Guidelines, i.e. within the scope of the Guidelines. To achieve this, the NCP took into account the following six criteria:

What is the identity of the party concerned (e.g. submitter(s)) and its interest in the matter?

NCP take into account the identity of the party concerned and its interest in the matter. Besides directly impacted individuals or communities and organisations representing impacted individuals or communities, NCPs may also consider organisations with mandates or objectives related to certain RBC themes as an interest in the matter, when the issues touches on causes they defend.⁴

The submitter states that, as part of the Open Society Foundations, it pursues strategic litigation, advocacy, and other legal work to strengthen the law’s protection and to combat human rights abuses. Part of its mission is to counter increasing digital authoritarianism and ensure corporate accountability. The specific instance is brought to the NCP in order to further advance justice and accountability and to strengthen the international human rights framework in relation to corporate actions in the technology sector. The complainant further refers other cases they were involved in in the field of human rights and advanced technology. The identity of the complainant was also demonstrated during the meeting with the party to explain the NCP process.

In accordance with the core criteria, NCPs strive for a high accessibility. This means that easy access to NCP, including facilitating access by business, labour, NGOs, and other members of the public, is important for a functional equivalence.⁵ NCP should further pursue opportunities to contribute to the resolution of issue to the fullest extent possible.⁶ In this light, the complainant has provided sufficient information regarding their identity and interest in the specific instance.

⁴ OECD (2011), OECD Guidelines for Multinational Enterprises, Commentary, II. Implementation Procedures, No. 25; See also OECD (2019), Guide for National Contact Points on the Initial Assessment of Specific Instances, P. 6.

⁵ OECD (2011), OECD Guidelines for Multinational Enterprises, Commentary on Implementation, Chapter I. No. 9.

⁶ OECD (2019), Guide for National Contact Points on the Initial Assessment of Specific Instances, P. 6.

Are the issues raised material and substantiated?

The NCP interprets ‘material and substantiated’ to mean that, based on the information submitted, the issues raised are plausible and related to the application of the OECD Guidelines.

The submission is material in the sense that it refers to specific provisions of Chapters II (General Policies), III (Disclosure) and IV (Human Rights) of the OECD Guidelines. The submitting party has substantiated its submission by providing the necessary information for the NCP to consider the issues raised. This information is plausible as the situation in Belarus regarding the protests during August and November 2020 is documented by international reports and media coverage.⁷

Is there a link between the activities of the enterprise(s) and the issues raised?

According to the OECD Guidelines, Chapter I, No. 4, the Guidelines are addressed to all entities within a multinational enterprise, i.e. parent companies and/or local entities. The Telekom Austria AG is located in Vienna, Austria, and has a subsidiary in Belarus.⁸ The issues raised by the complainants involves the compliance of A1 Belarus with governmental orders to limit the access to the mobile internet network in some parts of Belarus. Prima vista, the information provided are sufficient to say that there seems to be a link between the company’s activity and the issues raised in the complaint.

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

The OECD Guidelines state that the Guidelines are not a substitute for nor should they be considered to override domestic law and regulation. In many cases, the expectations of the Guidelines extend beyond the law. However, they further should not or should not intend to place a company in situations where it faces conflicting requirements. In cases where the principles and standards of the Guidelines are in conflict with national law, companies should seek ways to honour the Guidelines to the fullest extent which does not place them in violation of domestic law.⁹ The Guidelines further state that - within the framework “protect, respect,

⁷ See Report of the United Nations High Commissioner for Human Rights (2021), Situation of human rights in Belarus in the context of the 2020 presidential election, No 35; Der Standard, 1.9.2020, Internetzensur in Belarus: Wien "mischt sich nicht in die Geschäfte von A1 ein", <https://www.derstandard.at/story/2000119709760/internetzensur-in-belarus-wien-mischt-sich-nicht-in-die-geschaefte>. Die Zeit, 9.8.2020, "Kein YouTube, kein Skype, keine Mail und keine Messenger" <https://www.zeit.de/politik/ausland/2020-08/wahlen-belarus-praesident-demonstration-swetlana-tichanowskaja-internetprobleme>.

⁸ See the structure of Telekom Austria AG, https://cdn1.a1.group/final/en/media/pdf/A1_Group_Structure.pdf (12.08.2022)

⁹ OECD (2011), OECD Guidelines, Chapter I, No. 2.

remedy” - a State’s failure to implement or even act contrary to international human rights obligations does not diminish the expectation that companies respect human rights.¹⁰

The complainant states that the company prioritized adherence to national law over human rights considerations. The company states that - in accordance with the Guidelines - it applied national law while attempting to respect human rights to the fullest extent possible.

The NCP acknowledges the sensitivity of the delicate political situation in Belarus. In the initial assessments, NCPs are not expected to assess whether a company has or how it has accomplished to respect human rights to the fullest extent possible.¹¹ During a later stage of the specific instance, it can be explored how to honour and meet these expectations.

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

The NCP notes that there are no ongoing or past parallel proceedings.

Would considering this submission contribute to the purposes and effectiveness of the Guidelines?

The Guidelines aim to (i) promote positive contributions by multinational enterprises to economic, environmental and social progress worldwide; (ii) ensure operations of multinational enterprises are in harmony with government policies to help improve the foreign investment climate and contribute to sustainable development; and (iii) minimise the difficulties to which multinational enterprises various operations may give rise.¹²

Further examining this specific instance would contribute to the purpose of the Guidelines, since the issues raised are strongly related to various Chapters of the Guidelines. Furthermore, the company is a multinational enterprise in the light of the Guidelines since it operates via a subsidiary in Belarus.

To further the effectiveness of the Guidelines, NCPs may contribute to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances. In this specific instance, facilitating an exchange between the parties to discuss the issues and expectations of the Guidelines may positively contribute to the resolution of the issues.

¹⁰ OECD (2011), OECD Guidelines, Chapter IV, Commentary No. 36-38.

¹¹ OECD (2019), Guide for National Contact Points on the Initial Assessment of Specific Instances, P. 9.

¹² OECD (2019), Guide for National Contact Points on the Initial Assessment of Specific Instances, P. 10-11.

Conclusion

The NCP concludes that this submission merits further consideration as the issues raised are i) “bona fide”, i.e. real or authentic and ii) relevant to the implement of the Guidelines, i.e. within the scope of the Guidelines.

The complainant provided sufficient information on its identity and interest in the matter. The submission is material and substantiated as the issues raised refer to specific provisions of the OECD Guidelines, i.e. Chapters II, III and IV. The situation during the protests in 2020 are documented in various international reports and media coverage. Through complying with a governmental order to limit mobile internet access in Minsk in 2020, there seems to be a link between the company’s conduct and the issues raised regarding the provisions of the OECD Guidelines. There are no parallel procedures that would prejudice handling the complaint.

Furthermore, the NCP is of the view that considering this specific instance may contribute to the purpose and effectiveness of the Guidelines. Concerning a company’s conduct and governmental orders and national law that may be in contrary to international human rights, this specific instance may explore ways to honour the standards and principles of the Guidelines to the greatest extent possible. Accepting the case and offering good offices may contribute to the resolution of the raised issues.

This however does not represent a conclusion as to whether the enterprise observed the Guidelines or not.

The conclusions reached by the NCP in this initial assessment rest on the criteria laid out in the commentary to the Procedural Guidance, para 25 and are based on the information received from both parties. The NCP does not express an opinion on the correctness of the statements of the parties or the validity of the documentation provided by them. Before issuing this initial assessment, the NCP gave the parties the opportunity to comment on a draft statement.

Next steps

The NCP accepts this case for further examination and offers its good offices to the parties. The NCP will ask both parties whether they are willing to engage in a conciliation process, with the aim of agreeing how the issues can be successfully addressed. The NCP hopes that the good and faithful cooperation shown by OSJI and Telekom Austria AG will continue in the next steps of

this procedure. The further proceeding of this specific instance will be handled in line with the criteria laid out in the Procedural Guidance.

The parties accepted the good by the NCP, which does not represent a conclusion as to whether the enterprise observed the Guidelines or not.