



Colombian National Contact Point (NCP) for
the OECD Guidelines for Multinational
Enterprises



LÍNEAS DIRECTRICES DE LA
OCDE PARA EMPRESAS
MULTINACIONALES

The Colombian NCP wishes to point out that the acceptance of a specific instance does not mean that the NCP has determined a breach of the Guidelines by the Multinational Company against which the specific instance was filed.

INITIAL ASSESSMENT OF A SPECIFIC INSTANCE SUBMITTED TO THE COLOMBIA NPC

Legal person on behalf of a natural person and Company in the information services sector

January 31, 2022

Applicant:	Legal entity representing a natural person (hereinafter "the Applicant").
Company	Company in the information services sector
Multinational:	(hereinafter "the Company")
Provisions object of possible non-compliance:	Chapter VIII Consumer Interests
Date of submission of the instance:	Initial submission - 24 June 2021 Initial Submission Submission - 10 August 2021

In accordance with Article 19 of Decree 1400 of 2012¹, issued by the Ministry of Commerce, Industry and Tourism (Mincit), the Colombian National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (MNEs) is responsible for carrying out an initial assessment of a request for a specific instance submitted by a person, whether natural or legal, alleging possible non-compliance with the Guidelines by an MNE; and which has been declared admissible.

¹ Decree 1400 of 29 June 2012 "Whereby the Colombian National Contact Point is established and the procedure provided for in the Organisation for Economic Co-operation and Development ("OECD") Guidelines for Multinational Enterprises is adopted". Article 23. p. 7. [http://www.suin-juriscol.gov.co/clp/contenidos.dll/Decretos/1280228?fn=document-frame.htm\\$f=templates\\$3.0](http://www.suin-juriscol.gov.co/clp/contenidos.dll/Decretos/1280228?fn=document-frame.htm$f=templates$3.0)





Based on this assessment, the Colombian NCP determines whether to accept or reject the specific instance request and, if accepted, offers its good offices through mechanisms such as mediation to assist the parties in resolving a potential non-compliance situation.

The Colombian NCP proceeds with the initial assessment of the specific instance in question by means of this letter, the content of which complies with the provisions of Decree 1400 of 2012.

The Colombian NCP clarifies and reiterates that the filing of a specific instance request against an MNE is not a complaint but, on the contrary, an invitation to review an MNE's Responsible Business Conduct (RBC) policies. Such a request should be interpreted as a dissatisfaction with the affected party's interests regarding different aspects of its relationship with the MNE. A specific instance before the Colombian NCP is therefore not litigious in nature, and its recommendations, or the offer of its good offices, if the case is accepted, do not constitute judgments or judgments in the Colombian legal system.

Finally, since the specific instances are not legal cases and the Colombian NCP is not a judicial body, it cannot impose sanctions, provide direct compensation, or force the parties to participate in a conciliation or mediation process.

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1. OVERVIEW OF COLOMBIA'S NCP AND ITS FUNCTIONS

The OECD Guidelines for MNEs are recommendations addressed by governments to MNEs operating in or headquartered in adhering countries. They contain non-binding principles and standards for an REC², and cover topics such as disclosure, human rights, employment and labour relations, environment, anti-corruption, consumer interests, science and technology, competition and taxation issues. They also refer to the due diligence processes that MNEs should follow in their operations to comply with these principles and standards.

They are implemented through the NCPs, which are bodies set up by the governments of the adhering countries for this purpose.

NCPs have two functions³:

- Disseminate and promote the Guidelines to the business sector, workers' organisations, other non-governmental organisations and other stakeholders.
- Serve as a mediation platform to resolve practical problems that may arise from a potential breach of the Guidelines by an MNE. In other words, the NCP is a space to help resolve "specific instances"⁴ between the legal or natural person filing the complaint and the MNE alleged to be in breach of the Guidelines. It is emphasised that the NCP is not a judicial dispute resolution mechanism. It is a forum for discussion in which, through tools such as mediation, a space is created for the parties involved to find a way out of a potential non-compliance situation⁵.

In the case of Colombia, the NCP was established in 2012 in the Mincit, in the Directorate of Foreign Investment and Services (DIES), through Decree 1400 of 2012⁶. This decree sets out the guidelines governing the NCP, which reflect the Procedural Guidelines of the

² OECD Guidelines for Multinational Enterprises 2011 Revision. Foreword. p. 3.
<http://www.oecd.org/daf/inv/mne/MNEguidelinesESPANOL.pdf>

³ OECD. Responsible Business Conduct. OECD Guidelines for Multinational Enterprises.
<http://mneguidelines.oecd.org/ncps/>

⁴ "Specific Instance" is the denomination used in most of the Spanish-speaking acceding countries and corresponds to the literal translation of the official English term "*specific instance*". The term "instance" refers, in this sense, to cases or complaints about alleged non-compliance with the Guidelines by an MNE. Amendment to the Council Decision on the OECD Guidelines for Multinational Enterprises. OECD Guidelines for Multinational Enterprises - 2011 Revision. p. 72. <http://www.oecd.org/daf/inv/mne/MNEguidelinesESPANOL.pdf>.

⁵ OECD Guidelines for Multinational Enterprises - 2011 Revision. Commentary on the Procedures for the Implementation of the OECD Guidelines for Multinational Enterprises. p. 88.
<http://www.oecd.org/daf/inv/mne/MNEguidelinesESPANOL.pdf>

⁶ Decree 1400 of 29 June 2012 "*Whereby the Colombian National Contact Point is established and the following is adopted the procedure provided for in the Guidelines of the Organisation for Economic Cooperation and Development ("OECD") for Companies Multinational Enterprises*". [http://www.suin-juriscol.gov.co/clp/contenidos.dll/Decretos/1280228?fn=document-frame.htm\\$f=templates\\$3.0](http://www.suin-juriscol.gov.co/clp/contenidos.dll/Decretos/1280228?fn=document-frame.htm$f=templates$3.0)





OECD for the Implementation of the Guidelines⁷, including the management of specific instances.

As soon as the NCP receives a specific request from a natural or legal person alleging that an MNE is in breach of the Guidelines, the NCP begins an initial assessment process to determine whether the complaint merits further examination and will provide a response to the parties involved indicating whether it accepts or rejects the case.⁸ In doing so, it will take into account the information submitted by the parties, the initial assessment criteria contained in the OECD Procedural Guidance for the Implementation of the Guidelines and the provisions of Decree 1400 of 2012.

In particular, the Decree states that the NCP should make an initial assessment taking into account, inter alia, the following criteria:⁹

- If the specific case is within the scope of the Guidelines.
- The identity of the party who brought the specific case and its interest in the matter.
- If the specific case is properly substantiated and presented in a clear manner.
- If there appears to be a link between the MNE's actions and the issue raised in the specific case.
- The relevance of applicable laws and procedures, especially court decisions.
- How similar cases are being or have been dealt with in national or international proceedings.
- Whether the examination of the specific case will contribute to the achievement of the objectives and increase the effectiveness of the Guidelines.
- Whether there is a court judgment or ruling on the facts of the specific case that is binding on the parties.

The Decree adds that the initial assessment letter shall contain at least the following aspects¹⁰:

- The identification of the parties, if the specific case is accepted. Otherwise, the parties will remain anonymous.
- A summary of the facts and the Parties' arguments on the alleged violation of the Guidelines.
- A summary of the NCP's prosecutions.
- The reasons for accepting or rejecting the case in whole or in part.
- A statement that acceptance of a specific case does not mean that the NCP has determined a breach of the Guidelines by the MNE against which the case was filed.

⁷ OECD Guidelines for Multinational Enterprises - 2011 Revision. Procedures for the Implementation of the OECD Guidelines for Multinational Enterprises. Page 75.
<http://www.oecd.org/daf/inv/mne/MNEguidelinesESPANOL.pdf>

⁸ Ibid. p. 76.

⁹ Decree 1400 of 29 June 2012 "Whereby the Colombian National Contact Point is established and the procedure provided for in the Guidelines of the Organisation for Economic Co-operation and Development ("OECD") is adopted for Companies Multinational Enterprises". Article 19. pag. 6.

[http://www.suin-juriscol.gov.co/clp/contenidos.d/Decretos/1280228?fn=document-frame.htm\\$f=templates\\$3.0](http://www.suin-juriscol.gov.co/clp/contenidos.d/Decretos/1280228?fn=document-frame.htm$f=templates$3.0)

¹⁰ Ibid. Article 23. p. 7.





- An indicative timeline of the next steps in the process.

In addition, the Decree states that before the NCP publishes the initial assessment letter on its website, it will send it to the parties requesting their written comments within five (5) working days of receipt. It should be noted that it is at the NCP's discretion to decide whether or not to take them into account. The final version of the initial case assessment will then be sent to the parties and posted on the NCP website¹¹.

If the NCP decides to reject the case, it will inform the parties of the reasons for its decision and close the case. If the NCP accepts the case, it will discuss it further with the parties and offer its "good offices" in an effort to contribute informally to resolving the issue¹². As part of its good offices offer, the NCP will offer access to or facilitate access to consensual, non-adversarial procedures, such as mediation, to help resolve the issues raised in the specific instance¹³. Importantly, mediation procedures will be used only with the agreement of the Parties involved and their commitment to participate in good faith.¹⁴

2. EXECUTIVE OVERVIEW

On 24 June 2021, the NCP received an application from a legal entity on behalf of a natural person. The legal entity is a non-profit association, incorporated in April 2021, whose purpose is, among others, to advocate for the defence of consumers and users by protecting their rights; and using for this purpose different strategies such as filing group and individual class actions, filing complaints and claims with international bodies, including the National Contact Points (NCPs) of the OECD Guidelines for Multinational Enterprises (MNEs).

The Company against which the specific instance is brought was incorporated in April 2015. It is based in another country and has a branch and operations in Colombia. The Company belongs to the information services sector and its corporate purpose is to connect consumers with retailers by means of a virtual platform consisting of a website and a mobile application, so that consumers can access the virtual platform, find out about the consumer products on display and carry out the purchase and sale transaction directly with the retailers electronically.

The Applicant, i.e. the natural person represented by the legal entity, is a customer of the Company. The Applicant alleges that the Company is in breach generically and in relation to all its users of at least 6 rules under Law 1581 of 2012 (protection of personal data), not only violating the right of consumers as holders of habeas data, but also seriously violating several principles of the consumer protection law, also statutory.

¹¹ Ibid. Article 23. Second and Third Paragraphs. p. 7.

¹² Ibid. Article 20. p. 6.

¹³ Ibid. Article 24. p. 7.

¹⁴ OECD Guidelines for Multinational Enterprises - 2011 Revision. Commentary on the implementation procedures of the OECD Guidelines for Multinational Enterprises. p. 88.
<http://www.oecd.org/daf/inv/mne/MNEguidelinesESPANOL.pdf>





To this end, the Applicant bases its case on Resolution 9800 of 2019 issued by the Superintendence of Industry and Commerce (SIC) against the Company. This resolution stems from a complaint filed by a customer of the Company, other than the Applicant in this specific instance, for the *"(...) alleged violation of the rules on the protection of personal data contained in Law 1581 of 2012, by the company XXX (...)"*.

The SIC found that the company failed to comply with several of the obligations set out in the aforementioned law, for which it imposed a fine and issued several orders. In response to the NCP's query to the SIC about the status of compliance with the orders it issued in the investigation against the company, contained in Resolution 9800 of 2019, the authority reported that *"(...) accreditation of payment of the fine was filed on 20 January 2020 and compliance with the order was accredited on 30 June 2020 (...)"*. In its response, the SIC added that, after checking its processing system, it did not find any complaint from the Applicant against the Company for alleged improper processing of his personal data.

As for the provisions of the Guidelines that, according to the Applicant, are being breached by the Company, they are limited to paragraph 6 of Chapter VIII Consumer Interests: *Respect the privacy of consumers and take reasonable steps to ensure the security of the personal data they collect, store, process or disseminate.*)

With respect to the request that the NCP is asked by the NCP in its specific instance to *"(...) offer its good offices so that the parties involved can resolve the issue raised in this request and in this way facilitate access to the means consensual and non-contentious, such as conciliation or mediation, so that the parties, with their agreement and assistance, we can resolve the issue at hand (...)"*.

Finally, with regard to other ongoing proceedings, in 2020 the natural person represented brought a class action against the Company before a Civil Court of the Bogotá Circuit, seeking payment of compensation to the open and closed group of the Company's customers for the improper treatment that the Company has given to the personal data of the aforementioned customers. The claim was rejected because it referred to a specific sector affected by the factual situation set out in the complaint, which did not make it possible to determine with certainty the composition of the group. On appeal by the Applicant, this decision was reversed by the High Court of Bogotá. Among other reasons, given that *"(...) the holders of the class action are persons who have suffered individual harm, any of them may bring the action on behalf of the others who have also been individually affected by the same infringing facts, without the need for each of the interested parties to bring their own action separately, nor for them to have granted power of attorney, (...)"*.

After conducting the assessment of this specific instance, the Colombian NCP concludes that the request does not merit further consideration and has determined not to accept it. Its decision is based on an analysis of each of the assessment criteria set out in Article 19 of Decree 1400, as summarised below:

- The Applicant is a natural person represented by a legal person. In accordance with the third paragraph of Article 14 of Decree 1400 of 2012, it is required that if the





person *"who submits the specific case is not the person directly affected by the possible non-compliance, he/she must have express written authorisation from those directly affected, which shall be attached to the information referred to in this article"*. The NCP received such authorisation from the Applicant for the legal entity to submit the specific request on its behalf.

However, it should be remembered that the NCP does not represent a lawsuit or a judicial proceeding in the Colombian legal system. To that extent, the requirements that a specific instance submitted to the NCP must meet could not resemble those of a judicial proceeding. This is in reference to the class action filed by the Applicant, which was rejected and then overturned by the High Court of Bogotá, stating that *"(...) class actions may be brought by persons who have suffered individual harm, and may be brought by any of them on behalf of the others who have also been individually affected by the same infringing facts, without the need for each of the interested parties to bring their own action separately, or to have granted a power of attorney, (...)"*.

This is why Decree 1400 of 2012 provides that a specific instance can be filed with the NCP by a natural or legal person on behalf of another person who is directly affected by the MNE's conduct, provided that express authorisation is given. For this specific instance, the authorisation given would be limited to the representation of the natural person who alleges that the company is in breach of its obligations to them as a customer. This would also imply that the facts and evidence in the case must correspond to those specifically faced by the Applicant in its relationship with the Company. In this regard, it would not be feasible for the NCP forum to replicate a scope of representation / authorisation such as the one that would be occurring in the current class action lawsuit.

- The Applicant argues that it is being affected by the possible breach of paragraph 6 of Chapter VIII Consumer Interests of the Guidelines by the Company; and that it has suffered a violation of its rights as a consumer. However, there is no description of how the Company would be in breach of these provisions vis-à-vis the Applicant, nor does the evidence provided contribute to this exercise, nor does it make it clear which specific actions of the Company vis-à-vis the Applicant could represent a possible breach of the Guidelines.
- In the presentation of the specific instance, allusion is made to Resolution 9800 of 25 April 2019 issued by the SIC, but without making a link between what is referred to in this resolution and the facts and evidence of the case involving the Applicant and the actions of the Company. In the NCP's opinion, and as it indicated to the Applicant in the communication it sent to the NCP requesting missing information and clarifications to the request, neither the substantiation of the facts that would be giving rise to the breach of the Guidelines by the Company vis-à-vis the Applicant nor the corresponding evidence would be clear.





- The NCP notes that the Applicant bases its case on Resolution 9800 of 2019 issued by the SIC. This refers to the sanctions and orders issued by the SIC to the Company in response to the findings of its investigations, generated by a complaint filed by a customer of the Company, to the effect that the Company failed to comply with several of the provisions on the handling of personal data set out in Law 1581 of 2012.

In this regard, it is worth mentioning that the resolution in question refers to past behaviour by the company, which resulted in the SIC imposing a fine on the company and issuing a series of corrective orders. These orders, as mentioned above, were complied with on 30 June 2020, as the NCP was able to ascertain after consulting the SIC. Based on the above, and given that the argumentation of the case revolves around the aforementioned resolution, the NCP wishes to clarify that it is not an instance to enforce judicial rulings or orders issued by a national authority, which for this specific instance would be the SIC. This is in the event that the Applicant considers, as would be inferred from the submission of the specific instance, that these have not been complied with by the Company in its particular situation as a customer of the Company.

- The initial assessment of a specific instance submitted to the NCP should be conducted in accordance with the criteria set out in Article 19 of Decree 1400 of 2012 and the OECD Procedural Guidance for the Implementation of the Guidelines. Among these criteria is that the specific case must be properly substantiated and clearly presented.

The NCP respectfully notes that it would not be sufficient for the arguments of a specific instance to be limited to arguing that the facts are clear, or evident without further interpretation, or unobjectionable or causal, if they are not supported by clear and convincing evidence. Fulfilment of this criterion, in addition to all the other criteria set out in Decree 1400, is essential for the NCP to determine whether the specific instance is accepted, which is not the case here.

In sum, while the Applicant may have complaints regarding the issues at hand, these complaints have not been sufficiently substantiated with respect to the Company's responsibilities towards the Applicant in relation to the Guidelines.

In light of the above, the NCP considers that the case is not properly substantiated or presented in a clear manner.

- In addition, the matters referred to in the complaint involve the Applicant as a customer of the Company. However, based on the substantiation of the case and the evidence provided, it would not be possible to conclude that there would appear to be a link between the Company's actions and the issue raised in the specific case. This is because it would not be clear that the Company's actions, as described, argued and supported by evidence in the specific instance, are affecting the Applicant's individual situation as a customer of the Company.





- In compliance with the provisions of Decree 1400 of 2012, the existence of parallel proceedings is not sufficient to decide that the issues raised in a specific instance do not merit further consideration. However, in the NCP's view, the ongoing class action being pursued by the Applicant would seek financial compensation for the open and closed group of consumers affected by the Company's actions in processing their personal data as customers of the Company. Such a claim is beyond the scope of the NCP's competence.
- Taking into consideration the specificities of this specific instance, as outlined above, the NCP is of the opinion that the examination of the case would not contribute to the fulfilment of the objectives and would not increase the effectiveness of the Guidelines.

Decree 1400 states that before the NCP publishes the initial assessment letter on its website, it will send it to the Parties requesting their written comments within five (5) working days of receipt. It should be noted that it is at the NCP's discretion to decide whether or not to take them into account. The final version of the initial case assessment will then be sent to the Parties and posted on the NCP's website.¹⁵ In accordance with the above, the NCP sent the initial assessment letter to the Parties for their comments on 16 December 2021.

3. JUSTIFICATION OF THE REQUEST AND THE COMPANY'S RESPONSE

3.1 IDENTIFICATION OF THE PARTIES

Decree 1400 of 2012¹⁶ states that if after the initial assessment the NCP determines that the specific case will not be accepted, the parties will remain anonymous. In this regard, as the NCP has determined to reject this specific instance case, the parties involved will not be identified in this initial assessment letter, but will be referred to generically.

Applicant: Legal entity representing a natural person (hereinafter "the Applicant").

Company Company in the information services sector

Multinational: (hereinafter "the Company")

In order to carry out the initial assessment, it is necessary to determine whether the Enterprise that is the subject of the complaint is a "multinational enterprise" covered by the scope of the Guidelines. In this respect, the Guidelines do not contain an express definition of "multinational enterprise". The Guidelines describe them as *"enterprises present in all sectors of the economy. They are typically companies or other entities"*

¹⁵ Ibid. Article 23. Second and Third Paragraphs. p. 7.

¹⁶ Decree 1400 of 29 June 2012 "Whereby the Colombian National Contact Point is established and the following is adopted

the procedure provided for in the Guidelines of the Organisation for Economic Cooperation and Development ("OECD") for Companies Multinational Enterprises". Article 23. pag. 7.

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established in more than one country and related in such a way that they can coordinate their activities in various ways [with] private, public or mixed capital”¹⁷ .

In addition, the Guidelines *“apply jointly to multinational enterprises operating in or headquartered in their territories”¹⁸ and “are addressed to all entities belonging to the multinational enterprise”,¹⁹ including companies, parent companies and/or local entities, “in order to [exercise an] effective distribution of responsibilities among them”.²⁰*

In view of the above, and considering that, according to the Certificate of Existence and Legal Representation issued by the Bogota Chamber of Commerce as of 5 August 2021, the Company is controlled by a parent company domiciled outside Colombia, the NCP finds that the company meets the open description of the concept of “Multinational” contained in the Guidelines. It is therefore subject to the standards set out in the Guidelines and may therefore be the subject of a specific instance filed with the NCP.

Now, regarding the identity of the Applicant, it is a legal entity that submits the specific instance on behalf of a natural person. According to the third paragraph of article 14 of Decree 1400 of 2012, it is required that if the person *“who submits the specific instance is not the person directly affected by the possible non-compliance, he/she shall have the express written authorisation of those directly affected, which must be attached to the information referred to in this article”*. Such authorisation was submitted by the Applicant.

3.2 FACTS AND ARGUMENTS OF THE PARTIES INVOLVED IN THE SPECIFIC INSTANCE

3.2.1 Facts

- The complaint involves the Requester and a Company in the information services sector.
- The Applicant is a natural person, represented by a legal entity.

By Act of April 6, 2021 of the General Assembly, registered in the Chamber of Commerce of Bogotá, on April 23, 2021, the referred legal entity representing the Applicant was constituted as an Association.

According to the Certificate of Existence and Legal Representation issued by the Chamber of Commerce of Bogotá, its corporate purpose is *“(…) in general to promote, encourage, support, rescue, defend, reclaim, plan, project...”, “developing, disseminating, preserving, safeguarding and contributing to the improvement of the quality of life of consumers and users, through the filing of international legal actions, applications, claims and complaints, proceedings*

¹⁷ OECD Guidelines for Multinational Enterprises - 2011 Revision. Chapter I. Concepts and Principles. Numeral 4. p. 19. <http://www.oecd.org/daf/inv/mne/MNEguidelinesESPANOL.pdf>

¹⁸ Ibid. Statement para. I. p. 10.

¹⁹ Ibid. Chapter I. Concepts and Principles. Numeral 4. p. 19.

²⁰ Ibid.





The aim is to provide them with fair treatment before public or private entities that offer services or consumer goods, and the recognition of their rights through judicial, international or administrative defence, also carrying out research, strengthening, promotion, planning, development and assistance to their families, promoting and executing actions that contribute to making their rights and interests effective and prevailing the principles and purposes of our constitutional and legal system in this field (...)".

The aforementioned certificate adds that "(...) as a legal entity it may: 1. File constitutional, public, collective, individual and collective legal actions, file complaints and claims before international bodies, including the System Universal Declaration of Human Rights (UDHR), Inter-American Human Rights System (IAHRS), National Contact Points (NCPs) of the OECD Guidelines for Multinational Enterprises, seeking the promotion, recognition, protection and redress of the rights of consumers and users (...)"

- The Company, by Private Document of 23 April 2015 of the Shareholders' Meeting, registered in the Chamber of Commerce of Bogotá on 29 April 2015, was incorporated as a company of a commercial nature.

According to the Certificate of Existence and Legal Representation issued by the Bogota Chamber of Commerce, the Company's corporate purpose is "(...) To connect consumers with retailers through a virtual platform composed by a website and a mobile application, so that consumers can access the virtual platform, find out about the consumer products on display and make the purchase and sale transaction directly with the retailers electronically; (...)"

- The natural person represented by the legal person is a customer of the Company.
- A natural person who is a client of the Company, other than the Applicant of this specific instance, filed a complaint with the SIC for the "(...) alleged violation of the rules on the protection of personal data contained in Law 1581 of 2012, by the company XXX (...)", a company that is the Company that is the subject of this specific instance.
- On 26 March 2018, the SIC initiated an administrative investigation against the Company for alleged violation of the rules on personal data protection.
- In the framework of that investigation, through Resolution No. 9800 of 2019, the SIC determined that the Company did not obtain prior, express and informed authorisation from the Data Subject, in accordance with the provisions of article 17(b) of Law 1581 of 2012. Likewise, it determined that the Company did not keep a copy of the data subject's authorisation under the conditions provided for in Law 1581 of 2012. Additionally, the same Resolution No. 9800 of 2019 established that the Company did not prove that it was the Data Subject, and not another person, who provided the personal data in question. The above, in the opinion of the SIC, evidenced the lack of a process or method to establish the full identity of the data subjects who allegedly authorise the processing of the data. The SIC ruled that the Company did not respect the





right of the data subject to delete his or her data, and therefore infringed the duty to guarantee the data subject the full and effective exercise of his or her right to habeas data, as set out in Law 1581 of 2012.

- Through Resolution No. 9800 of 2019, the SIC imposed a fine on the Company and issued the following orders:

"Within three (3) months of the execution of this decision and pursuant to Articles 2.2.2.25.6.1 (Demonstration) and 2.2.2.25.6.2 (Effective internal policies) adopt effective, appropriate and verifiable measures to:

- a) Refrain from sending text messages, e-mails, making telephone calls or communicating by any means with data subjects in respect of whom it does not have full proof of prior, express and informed authorisation to that effect.*
- b) Establish the full identity of visitors to its website or users of its platforms whose data is collected, used or processed by the Company.*
- c) Delete in a definitive and timely manner the personal data of data subjects whose information is collected, used or processed by the Company, once any data subject requests by any means the deletion of their data or revokes the authorisation for the processing of their personal data for all services offered by the digital platform of the Company's application, or for specific services that they no longer wish to receive.*
- d) Keep proof of the prior, express and informed authorisation granted by each of the data subjects.*
- e) Make available to the Data Subject free and easily accessible mechanisms to submit a request for the deletion of data or the revocation of the authorisation granted. These should be implemented through the same means or channels through which the Company contacts or communicates with data subjects.*

In addition, the investigated party must implement a permanent monitoring mechanism regarding the effectiveness of the measures adopted to comply with the above orders.

PARAGRAPH: To demonstrate the above, the Company shall:

First: Provide this entity with a certification of compliance with the orders issued by this entity within a period of three (2) (sic) months from the date of execution of this decision. This certification must be issued by a national or foreign legal entity, which must be an impartial third party specialised in the issues involved in the implementation of each order.

Second: Conduct an external audit focused on the verification of the application of effective and appropriate measures to comply with all the orders of this entity. The results of the audit should be submitted to the Superintendence of





Industry and Commerce, within three months of timely compliance with the orders described above".

- According to the information provided by the Applicant to the NCP, in 2020 the natural person represented brought a class action before the Civil Court of the Bogotá Circuit against the Company to *"(...) order it to "recognise and pay compensation for the material and non-material damages caused to the group" and to "(...) order it to "recognise and pay compensation for the material and non-material damages caused to the group" open and closed to consumers who have entrusted their personal data to the company through the use of its e-commerce platform and its website, which have not been processed in accordance with Law 1581 of 2012 which regulated the protection of personal data, thereby infringing the consumer statute (...)"*.
- On 24 July 2020 the Applicant sent a right of petition to the Company requesting *"(...) to be informed of the date of my activation in the Company's application and to be informed of the status of my subscription. "(...) to provide me with the documents by my subscribed or accepted for the handling and processing of personal data (...)"*.
- On 31 July 2020 the Civil Court of the Bogotá Circuit declared the claim inadmissible and ordered the claimant, among others, *"(...) to individualise the persons making up the group by providing the names of the persons affected with the The number of actions imputed to the defendant cannot be less than 20 (...)"*.
- On 20 August 2020, the Civil Court of the Bogotá Circuit rejected the claim because the plaintiff *"(...) within the period granted, did not fully comply with the order of inadmissibility, the present claim is rejected and ordered to be returned without any further action. the need for a breakdown. This is because it refers to a specific sector affected by the factual situation set out in the complaint that does not make it possible to determine with certainty the composition of the group, which makes it difficult to consider the correction presented in paragraph 3 of the inadmissibility order to be correct (...)"*.
- The plaintiff lodged an appeal with the High Court of Bogotá, which was granted on 4 November 2020.
- On 28 January 2021 the High Court of Bogotá decided *"(...) to revoke in its entirety the order of 20 August 2020 (...)"*, issued by the Civil Court of the Circuit of Bogotá, given that *"(...) the plaintiff did establish the criteria to determine the group that convenes the action, which is conformable with all the criteria of the group that is the subject of the action". persons subscribed with the defendant company prior to the issuance of the aforementioned administrative decision who, according to the plaintiff, were affected by the omissions noted by the Superintendence of Industry and Commerce (...)"*.

Also, among other reasons, the High Court of Bogota stated that *"(...) class actions may be brought by persons who have suffered an individual injury, and any of them may bring the action on behalf of others who have suffered an individual injury, and any of them may bring the action on behalf of others who have suffered an individual injury". have also been individually affected by the same infringing acts, without the need for*





each of the interested parties to bring their own action separately, or to have granted a power of attorney, (...)".





- On 24 June 2021 the Complainant submits a specific instance request to the NCP arguing that the Company "(...) *generically fails in relation to all its users to comply with at least 6 mandatory rules contained in a law not only violating the right of consumers as holders of habeas data, but also seriously violating several postulates of the consumer protection law, which is also statutory (...)*". He adds that the SIC, by Resolution 9800 of 25 April 2019, concerning an administrative process In the case of a sanction, it determined that in universal terms, the company violates a series of obligations in terms of the processing of its customers' data.
- When a specific instance received by the NCP is declared admissible, i.e. it has complied with the information requirements set out in Decree 1400, which in this case occurred on 18 August 2021, the NCP must forward the information submitted by the Submitter to the Company. The Company has a period of twenty (20) working days to comment on the issues raised, attach the documentation it deems necessary on each aspect described in the specific case and send it to the NCP. The NCP made the referral on 30 August 2021. The estimated date for the company to submit the information was 27 September 2021, which did not occur.
- In the absence of a response, the NCP reiterated its request to the company in a communication sent on 5 October 2021. The deadline for receiving a response from the company to this second communication was 4 November 2021, which was also not met.
- In the absence of a response, on 5 November 2021, the NCP requested a meeting with the OECD Secretariat to receive its recommendation on this situation and how it should be handled. This is because Decree 1400 of 2012 states in Article 20 that based on the information submitted by the Parties, the NCP will make an initial assessment of the case to determine whether to accept or reject it.
- The meeting was held on 9 November 2021. At the meeting, the OECD Secretariat recommended that the NCP conduct the initial assessment on the basis of the information submitted by the NCP and that which the NCP could obtain through its own searches and consultations, including with the entity involved, in this case the SIC. He added that despite what is mentioned in Decree 1400 of 2012, the NCP has all the legitimacy to proceed in this way, otherwise it would be an easy way out for any company involved in a specific instance not to meet the NCP's requirements, and under that excuse, the NCP would have to proceed to close the case due to lack of response from the company concerned.
- In response to the OECD Secretariat's recommendation, the NCP prepared this assessment letter. To this end, on 15 November 2021, the NCP consulted the SIC on the status of compliance with the orders it had issued in relation to the investigation against the Company, contained in Resolution 9800 of 2019. In a reply sent on 17 November 2021, the SIC informed the NCP that "(...) *accreditation of payment of the fine was filed on 20 January 2020 and compliance with the order was accredited on 30 June 2020 (...)*". In its response, the SIC added





that, after checking its processing system, it did not find any complaint from the Applicant against the Company for alleged improper processing of his personal data.

It is of the utmost importance to inform that the certification of compliance with the orders and injunctions issued to the Company through Resolution No. 9800 of 2019 of the SIC, is confidential and therefore may not be published or disclosed to third parties.

3.2.2 Applicant's arguments

The Company obtained its commercial registration in Colombia on 29 April 2015.

The corporate purpose of this company is, among other activities, to: *"connect consumers with exo-sellers through a virtual platform consisting of a website and a mobile application, so that consumers enter the platform*

The virtual marketplace, they can find out about the consumer products on display and can make the purchase and sale transaction directly from the retailers electronically [...]".

In the development of the aforementioned corporate purpose, the Company dedicates the ordinary course of its business to e-commerce through technological platforms (application and website) within which it captures personal information of the consumer who agrees to be a user of the services offered by this company. By virtue of the above, the Company accesses personal data such as: name, identification, physical address, email address, mobile phone number, socioeconomic status, consumption preferences, among many others.

In the Colombian legal system, the right internationally recognised as "habeas data" (Article 15 of the Constitution) has been elevated to the category of fundamental right. Likewise, the right to information is constitutionally enshrined in the normative system (Article 20 of the Constitution).

The Congress of the Republic issued Statutory Law 1581 of 2012, "whereby general provisions for the protection of personal data are issued", which regulates - not exhaustively - the most important vicissitudes in relation to the fundamental right to habeas data and some other aspects concerning the constitutional right to information.

By Resolution 9800 of 25 April 2019, issued by the SIC in an administrative sanctioning process, it was determined that in universal terms, the Company:

- It does not demonstrate that it is authorised to use its users' data.
- It denies its users the right to erasure of data.
- It violates Article 17(a) of Law 1581 of 2012, on the obligation of the controller of personal data to "Guarantee the data subject, at all times, the full and effective exercise of the right to habeas data".
- It violates Article 17(b) of Law 1581 of 2012, which enshrines the right of the holder of the personal data to "Request and keep, under the conditions provided for in this law, a copy of the respective authorisation granted by the Data Subject".





- It complies with the guiding principle of the statutory law 1581 of 2012 contemplated in article 4, paragraph c, referring to the "Principle of freedom: Processing may only be carried out with the prior, express and informed consent of the Data Subject. Personal data may not be obtained or disclosed without prior authorisation, or in the absence of a legal or judicial mandate that relieves consent".
- It violates the right provided for in Article 9 of the statutory law 1581 of 2012, according to which: "Without prejudice to the exceptions provided for by law, the processing requires the prior and informed authorisation of the Data Subject, which must be obtained by any means that may be subject to subsequent consultation".

The Applicant argues that the above is documentary evidence which, in objective terms, indicates that the Company is in generic breach of at least 6 mandatory rules provided for in a statutory law in relation to all its users, not only violating the right of consumers as holders of habeas data, but also seriously violating several principles of the consumer protection law, which is also statutory.

The Applicant adds that it should be taken into account that in the sanctioning resolution taken by the competent administrative body, it was determined that the Company generically incurred in the described conducts, meaning that any person who was a user or customer of the Company from its creation (2015) until at least the issuance of the referred resolution (25 April 2019) were victims of the mishandling, processing and use of their own personal data.

Despite the fact that the SIC has issued a series of orders, it has not reported on their compliance with respect to the Applicant, who has suffered the violation of his rights as a consumer, as he has never received any communication, notification or similar where the variations and measures ordered by the supervisory body with respect to the processing of his personal data are mentioned.

Now, in view of the Requester's expectations, the Requester requests the NCP "(...) *That after the respective initial assessment, the National Contact Point - NCP offer its good offices so that the parties involved can resolve the issue raised in this request and thus facilitate access to consensual and non-contentious means, such as conciliation or mediation, so that the parties, with their agreement and assistance, can resolve the issue raised (...)*".

Regarding the arguments outlined by the Applicant on the specific provisions of Chapter VIII Consumer Interests of the Guidelines that are allegedly being breached by the Company:

▪ **Chapter VIII Consumer Interests Provision 6:**

6. Respect the privacy of consumers and take reasonable steps to ensure the security of the personal data they collect, hold, process or disseminate.





The Applicant argues that it is reasonable to consider that the Company is not fully complying with the OECD "consumer interests" guideline which expressly provides for the recommendation to companies to respect the privacy and responsibility to preserve the personal data of their users and consumers. In a globalised context, the acquisition of personal data is a very important and relevant activity within business management, therefore, it is understood that this asset inherent to the personality of citizens is worthy of protection.

Thus, national legislation, the Applicant argues, has envisaged laws and different types of rules aimed at protecting the personal data of citizens and the main, although not the only, addressee is the industrial and commercial sector, which is the main debtor of these mandatory rules. In the particular case of Colombia, the issue is regulated by statutory law 1581 of 2012 (statutory because the right to protection of personal data is considered a fundamental right). In this context, there are many occasions in which the public entity belonging to the executive branch of government, the SIC, has administratively and definitively sanctioned the company for considering that, although it is responsible and obliged to give adequate treatment to the data that it massively collects as part of its economic activity, it does not comply with national regulations in relation to the protection of personal data, does not comply with national regulations in relation to the handling and treatment of these assets of citizens, in line with the OECD guideline that can be seen in numeral 6 of chapter VIII of part one of the OECD Guidelines for Multinational Enterprises, Recommendations for Responsible Business Conduct in the Global Context.

The Applicant adds that, although it would be appropriate to clarify and elaborate on why the Company is considered to be a macro infringer of paragraph 6 of Chapter VIII of Part One of the OECD Guidelines for Multinational Enterprises, Recommendations for Responsible Business Conduct in the Global Context, as it affects not only the Applicant as the triggering agent of this non-judicial mechanism, but all its users, it is appropriate to explain how the alleged infringement manifests itself from the individual perspective of the Applicant. Thus, and in an absolutely simple, intuitive way and without further efforts to intercept that the ways in which the summoned Company handles the personal and sensitive data of its users and/or consumers, does not comply with internationally accepted regulations and to a large extent incorporated by local instruments into Colombian law, such as the statutory law 1581 of 2012 and Law 1480 of 2011.

The Company, as determined by the competent administrative authority, did not respect the rules on consumer protection and for the handling and processing of personal data of ALL its users, including the Applicant, which materialised in the conduct described above.

These behaviours have in common that they are flawed commercial behaviour, or rather, practices that are not fair in their relations with their users and/or consumers, as recommended by the OECD itself: *"In their relations with consumers, the OECD has recommended that companies should act in accordance with fair business, marketing and advertising practices [...]"*.





For the Applicant, even more important, and which is ultimately the subject of this specific instance, is that the Company's conduct is contrary to paragraph 6 of Chapter VIII, as it is contrary to national law and in direct violation of the Guidelines, it disposes of and abuses the privacy of consumers, as the security of the personal data of its customers is not guaranteed; these behaviours took place when 1.) Failed to obtain the Applicant's prior and informed authorisation, which must be obtained by any means that may be subject to subsequent consultation, for the handling of his personal data; 2.) Placed the Applicant's privacy at serious risk by failing to comply with the legal imperative of Article 4 of Law 1581 of 20122, as evidenced by Resolution 9800 of 2019; 3.) By its actions and omissions the Company prevented the Applicant from accessing an effective personal data deletion mechanism, which currently puts the security of his information at risk.

For the Applicant, it is clear that as a customer of the Company, the Company violated the Consumer Relations Guidelines. He adds that denying the infringing nature of the Company would be nonsensical, as it is clear that there is an unobjectionable causal link between the measures and sanctions received by the Company in relation to legal procedures of an administrative nature of the Colombian legal system, the fact of being a victim of this conduct of the Company by the Applicant and the aforementioned Guidelines, which forms a triangular relationship of causality that must be taken into account for the admissibility of this specific instance.

3.2.3 Arguments of the Company

- As mentioned above, despite two communications sent by the NCP to the company requesting its response to the specific complaint filed against it, to date no response has been received.

4. SUMMARY OF THE NCP'S PROSECUTIONS

Since the date of receipt of the request, the NCP has taken the following actions:

DATE	NCP ACTIONS
24/06/2021	The NCP receives the request.
26/07/2021	The NCP responds to the Requester with a request to provide missing information. In addition, the NCP offers the Submitter a virtual meeting via Microsoft Teams to explain in detail the missing information and to address any concerns the Submitter may have regarding the processing of the request. There was no response from the Applicant to this offer of the NCP.
10/08/2021	The Applicant provides the missing information.





18/08/2021	The NCP sends communication to the Submitter stating that the case is appropriate.
30/08/2021	The NCP transfers the application to the Company (the Applicant stated that it no information was of a confidential nature).
05/10/2021	After verifying the contact details of the Company included in the Certificate of Existence and Representation issued by the Chamber of Commerce of Bogotá, the specific request submitted by the Applicant, as well as other sources of consultation, the NCP makes a second transfer of the request to the Company, given its lack of response.
05/11/2021	The NCP requests a meeting with the OECD Secretariat to receive its recommendation on the lack of response from the Company and how it can be used in the future. should be handled.
09/11/2021	The meeting between the NCP and the OECD Secretariat takes place, where the OECD Secretariat recommends that the NCP prepare the initial assessment on the basis of the information submitted by the NCP and information that the NCP may obtain through its own searches and consultations, including with the entity. involved, in this case the SIC.
15/11/2021	The NCP consults the SIC on the status of compliance with the orders it issued in relation to the investigation against the Company, contained in Resolution 9800 of 2019. The SIC sends its response to the NCP on 17 November 2021.
02/12/2021	The NCP completes the initial assessment.
02/12/21	The NCP sends the initial assessment to the Advisory Committee for feedback. opinions.
16/12/21	The NCP shares the initial assessment with the parties for comment.

5. EVALUATION INITIAL FROM NCP: ANALYSIS OF THE RELEVANT CRITERIA

In accordance with article 19 of Decree 1400 of 2012, upon receipt of a specific instance and declaration of merit, the NCP must make an initial assessment to determine whether or not to continue with the analysis of the case, and whether or not it will be accepted or rejected. In compliance with these provisions, the NCP made its initial assessment based on the information submitted by the NCP, its own research and consultations, and the criteria set out in Article 19 of the NCP Guidelines. In assessing these criteria, the NCP should describe its reasoning for accepting, partially accepting or not accepting the specific



instance.





The NCP regrets the lack of response from the Company, and therefore what could be interpreted as an unwillingness to address a complaint alleging that the Company's actions may be adversely affecting a person, given its possible non-compliance with the provisions of the OECD Guidelines for MNEs.

Although this instrument consists of a series of non-binding recommendations that governments invite MNEs to observe, this does not mean that MNEs are not called upon to operate under principles of responsible business conduct. Failure to do so would run counter to the expectations of governments and society itself that MNEs contribute to the development and well-being of the population and the environment in which they operate.

The NCP invites the company to be aware of the existence of non-judicial dispute resolution mechanisms, such as the NCP, as a means to help the parties involved find a way out of a possible situation of non-compliance with the standards of responsible business conduct contained in the Guidelines.

5.1 Is the specific case within the scope of the Guidelines?

The issue that is the subject of the specific instance concerns data misuse, which would relate to the obligation of MNEs to ensure the security of the personal data they collect, hold, process or disseminate, under Chapter VIII Consumer Interests of the Guidelines.

From the above it is concluded that the specific instance falls within the scope of the Guidelines.

5.2 Identity of the party that brought the specific case and its interest in the matter

The Applicant is a customer of the Company in question, and argues that he has suffered improper processing of his personal data by the Company. By virtue of this, it would appear that the Applicant would have an interest in the matter.

The Applicant is a natural person represented by a legal person. According to the third paragraph of Article 14 of Decree 1400 of 2012 it is required that if the person *"presenting the specific case is not the person directly affected by the potential*

The NCP has provided the NCP with an express written authorisation from those directly affected, which must be attached to the information referred to in this article". The NCP received such authorisation from the NCP so that the legal entity could submit the specific request on the NCP's behalf.

However, it should be recalled that the NCP does not represent a lawsuit or a judicial proceeding in the Colombian legal system. To that extent, the requirements that a specific instance submitted to the NCP must meet could not resemble those of a judicial proceeding. This is in reference to the class action brought by the Applicant, which was rejected and then overturned by the High Court of Bogotá, stating that "(...) *the holders of the class action are the*





persons who have suffered individual damage, and any of them may bring the action on behalf of the others who have also been individually affected by the same harmful facts, without the need for each of the interested parties to bring their own action separately, or to have granted a power of attorney, (...)".

This is why Decree 1400 of 2012 provides that a specific instance can be filed with the NCP by a natural or legal person on behalf of another person who is directly affected by the MNE's conduct, provided that express authorisation is given. For this specific instance, the authorisation given would be limited to the representation of the natural person who alleges that the company is in breach of its obligations to them as a customer. This would also imply that the facts and evidence in the case must correspond to those specifically faced by the Applicant in its relationship with the Company. In this regard, it would not be feasible for the NCP forum to replicate a scope of representation / authorisation such as the one that would be occurring in the current class action lawsuit.

5.3 Is the specific case adequately substantiated and presented in a clear manner?

The NCP would understand that the complaint is filed by a legal entity on behalf of a natural person who is affected by the company's possible breach of Section 6 of Chapter VIII Consumer Interests of the Guidelines, and who has suffered a violation of his or her consumer rights. However, there is no description of how the Company would be in breach of these provisions vis-à-vis the Applicant, nor does the evidence provided contribute to this exercise, nor does it make it clear which specific actions of the Company vis-à-vis the Applicant could represent a possible breach of the Guidelines.

In the presentation of the specific instance, Resolution 9800 of 25 April 2019 issued by the SIC is mentioned and described, but without making a link between what is referred to in this resolution and the facts and evidence of the case that would involve the Applicant and the actions of the Company. In the NCP's view, and as indicated to the Applicant in the communication it sent to the NCP requesting missing information and clarifications to the request, neither the substantiation of the facts that would give rise to the breach of the Guidelines by the Company vis-à-vis the Applicant nor the corresponding evidence would be clear.

The NCP notes that the NCP notes that the Applicant bases its case on Resolution 9800 of 2019 issued by the SIC. This refers to the sanctions and orders issued by the SIC to the Company in response to the findings of its investigations, generated by a complaint filed by a customer of the Company, to the effect that the Company failed to comply with several of the provisions on the handling of personal data set out in Law 1581 of 2012.

In this regard, it is worth mentioning that the resolution in question refers to past behaviour by the company, which resulted in the SIC imposing a fine on the company and issuing a series of corrective orders. These orders, as mentioned above, were complied with on 30 June 2020, as the NCP was able to ascertain after consulting the SIC. Based on the above, and





Given that the argumentation of the case revolves around the aforementioned resolution, the NCP wishes to clarify that it is not an instance to enforce judicial rulings or orders issued by a national authority, which for this specific instance would be the SIC. This is in the event that the Applicant considers that these, as would be inferred from the specific instance, have not been complied with by the Company in its particular situation as a customer of the same.

Finally, like all NCPs, the Colombian NCP is governed by the general principles applicable to specific instances contained in the OECD Procedural Guidance for the Implementation of the Guidelines. That is, the NCP should, in its activities, deal with specific instances respecting the principles of impartiality, predictability, fairness and compatibility with the Guidelines.

In this regard, the initial assessment of a specific instance submitted to it must be carried out in accordance with the criteria set out in Article 19 of Decree 1400 of 2012 and in the OECD Procedural Guidance for the Implementation of the Guidelines. Among these criteria is that the specific case must be duly substantiated and clearly presented.

The NCP respectfully notes that it would not be sufficient for the argumentation of a specific instance to be limited to arguing that the facts are clear, or that they are evident without further interpretation, or unobjectionable or causal, if they are not supported by clear and convincing evidence. Compliance with this criterion, in addition to all the criteria set out in Decree 1400 of 2012, is essential for the NCP to determine whether the specific instance is accepted, which is not met in the present case.

In sum, while the Applicant may have complaints regarding the issues at hand, these complaints have not been sufficiently substantiated with respect to the Company's responsibilities towards the Applicant in relation to the Guidelines.

In light of the above, the NCP considers that the case is not adequately substantiated or presented in a clear manner.

5.4 Is there an apparent link between the actions of the multinational company and the issue raised in the specific case?

The matters referred to in the complaint involve the Applicant as a customer of the Company.

However, on the basis of the case and the evidence provided, it would not be possible to conclude that there would appear to be a link between the actions of the Company and the issue raised in the specific case. This is because it would not be clear that the Company's actions, as described, argued and supported by evidence in the specific instance, are affecting the Applicant's individual situation as a customer of the Company.

5.5 Relevance of applicable laws and procedures, especially judicial decisions





The SIC issued an administrative decision, materialised in Resolution No. 9800 of 2019, through which it imposed a fine on the Company and issued several orders. By virtue of the aforementioned, for the development of this initial assessment letter, on 15 November 2021 the NCP proceeded to consult with the SIC on the status of compliance with the orders issued. In a reply sent on 17 November 2021, the SIC informed the NCP that *'(...) proof of payment of the fine was filed on 20 January 2020 and proof of compliance with the order was provided on 30 June 2020 (...).'* In its response, the SIC added that after checking the processing system, it did not find any complaint from the applicant against the company for alleged improper processing of his personal data.

The NCP reiterates what was mentioned in criterion 5.3 of this initial assessment letter, in the sense that it does not represent an instance to enforce judicial rulings or orders issued by a national authority, which for this specific instance would be the SIC. The above, as previously mentioned, in the event that the Applicant considers, as would be inferred from the submission of the specific instance, that these have not been complied with by the Company in its particular situation as a customer of the same.

5.6 How similar cases are being or have been dealt with in national or international procedures

As previously stated, a class action is currently underway before the Civil Court of the Bogotá Circuit, through which the Applicant requests *"(...) to recognise and pay compensation for material and non-material damages and losses" caused to the open and closed group of consumers who have entrusted their personal data to the company through the use of its e-commerce platform and its website, which have not been processed in accordance with Law 1581 of 2012, which regulated the protection of personal data, thereby violating the statute of the consumer (...)"*.

In addition, the aforementioned class action process had a stage of inadmissibility by the Civil Court of the Circuit of Bogotá and then revocation by the Superior Court of Bogotá when it decided *"(...) to revoke in its entirety the order of August 20, 2020 (...)"*, issued by the Civil Court of the Circuit of Bogotá, given that *"(...) the plaintiff did establish the criteria to determine the group that summons the action, which is conformable with all persons subscribed to the company" defendant prior to the issuance of the aforementioned administrative decision which, according to the plaintiff, were affected by the omissions noted by the Superintendency of Industry and Commerce (...)"*.

Also, among other reasons, the High Court of Bogotá stated that *"(...) class actions may be brought by persons who have suffered an individual injury, and any of them may bring the action on behalf of others who have also suffered an individual injury" have been individually affected by the same infringing acts, without the need for each of the interested parties to bring their own action separately, or to have granted a power of attorney, (...)"*.





In compliance with the provisions of Decree 1400 of 2012, the existence of parallel proceedings is not sufficient to decide that the issues raised in a specific instance do not merit further consideration. However, in the NCP's view, the ongoing class action would seek the payment of financial compensation to the open and closed group of consumers affected by the Company's actions in the processing of their personal data as customers of the Company. Such a claim goes beyond the scope of the NCP's powers.

Finally, it should be reiterated that the NCP does not represent a lawsuit or a judicial proceeding in the Colombian legal system. To that extent, the requirements that a specific instance submitted to the NCP must meet could not be similar to those of a court proceeding. Therefore, Decree 1400 of 2012 provides that a specific instance can be submitted to the NCP by a natural or legal person on behalf of another person, provided that there is express authorisation to do so. For this specific instance, the authorisation given would be limited to the representation of the natural person who alleges that the Company is in breach of its obligations to them as a customer. Therefore, the facts and evidence in the case must correspond to those specifically faced by the Applicant in its relationship with the Company.

5.7 Will the examination of the specific case contribute to the achievement of the objectives and increase the effectiveness of the Guidelines?

Taking into consideration the specificities of this specific instance, as outlined above, the NCP is of the opinion that the examination of the case would not contribute to the fulfilment of the objectives and would not increase the effectiveness of the Guidelines.

Indeed, the OECD Procedural Guidance on Implementing the Guidelines does not state that NCPs can increase their effectiveness by resolving issues, but rather by contributing to their resolution. The NCP's task is to assess whether offering good offices through an exchange between the Parties, discussing the issues and expectations with the Company, or developing recommendations on the Company's conduct would contribute to resolving the dispute. This would not be possible in this specific instance.

5.8 Is there a court judgment or ruling on the facts of the specific case that is binding on the Parties?

There is a class action brought by the Applicant, which is ongoing.

6. DETERMINATION OF THE NCP

Based on the information submitted by the Applicant and based on the analysis conducted above for each of the criteria set out in Article 19 of Decree 1400 of 2012, the NCP concludes that this specific instance request does not merit further consideration, and therefore REJECTS the case.

The NCP makes it clear that it does not express an opinion on the veracity of the Applicant's statements or the validity of the documentation provided by the Applicant.





7. NEXT STEPS

The NCP does not accept this case for further examination. This Initial Assessment concludes the process under the Guidelines with respect to this application.

Decree 1400 states that before the NCP publishes the initial assessment letter on its website, it will send it to the Parties requesting their written comments within five (5) working days of receipt. It should be noted that it is at the NCP's discretion to decide whether or not to take them into account. The final version of the initial case assessment will then be sent to the Parties and posted on the NCP's website.²¹ In accordance with the above, the NCP sent the initial assessment letter to the Parties for their comments on 16 December 2021.

The NCP will inform the OECD Secretariat of the outcome of the initial assessment, to be added to the database of specific instances of the OECD Guidelines for Multinational Enterprises.

²¹ Ibid. Article 23. Second and Third Paragraphs. p. 7.

