

Assessment Guidance



Protecting and Advancing
Freedom of Expression and
Privacy in Information and
Communications Technologies

Introduction and purpose of the assessment

This document is guidance for the independent assessors who are evaluating a company's implementation of the GNI Principles. This guidance should assist assessors in conducting their work but should not be taken as a firm structure for the assessment product. The assessors' expertise, the particulars of the company's operations and other factors such as the size of the company and its stage of growth and development will also influence the structure of the assessment. This guidance should be used in conjunction with the Principles and Implementation Guidelines, which set out the commitments that companies have made when they join GNI.

The Global Network Initiative (GNI) has active participation from companies in the Information Communications Technology (ICT) sector, human rights and press freedom groups, investors and academics. Protecting and advancing freedom of expression and privacy in the ICT sector requires a multi-stakeholder approach. GNI provides operational guidance for companies seeking to operate responsibly, with respect for international standards on human rights.

Companies who join GNI commit to implement its Principles within their organization. As part of this commitment, company members agree to an independent assessment process. The purpose of the assessment is three-fold:

1. To review the implementation of the GNI Principles within the company member's organization, including how the GNI Principles were applied in actual cases to test how the processes are used in practice.
2. To contribute to the policy and learning work of GNI through the identification of best practice, gaps, limitations and issue trends highlighted through the assessment.
3. To enable the GNI Board to make a determination of compliance for each company being assessed.

Prior to the independent assessment and after one year of membership new GNI member companies complete a self-assessment of their work to implement the GNI Principles. This report is presented to the GNI Board. After two years of membership they are independently assessed. The assessment will cover all aspects of company systems, policies and procedures that are in place to implement its GNI commitments. In subsequent assessments (carried out every two years), the focus will be any material changes that have been made since the previous assessment. In these assessments case reviews will continue to be used to test the systems, policies and procedures that are in place, both existing and new. Material changes would include changes to systems, policies and procedures to implement GNI commitments, new markets, products and services, mergers or acquisitions or emerging human rights challenges.

It will be important for assessors of subsequent assessments to have access to any prior year assessments carried out for a company.

Materiality

The term material as used throughout this document and the assessments should be interpreted to focus on the impact of the rights of freedom of expression and privacy. Using the Principles and Implementation Guidelines and this guidance, the assessor will prioritize where the company has the greatest material impact on freedom of expression and privacy and where the risks to these rights are greatest.

Member companies of GNI are at different stages of growth and of different sizes and this will need to be reflected in the assessment process for individual company assessments.

Section 1 – Description of the company

Company description and understanding

Given the diversity and speed at which the technology sector develops it is vital the assessors have a good understanding of what part of the value chain the company represents and the company's business, structure and operations. GNI's Principles and Guidelines focus on how the company deals with government requests. However, the free expression and privacy challenges also extend to the way in which the company is structured, the mergers and acquisitions that are made (and how/if they are being incorporated into the existing corporate structure), products and services that are being developed and markets that are being entered into. Understanding the business to determine the range of issues to be covered in the assessment is vital.

Section 2 – Confidentiality, Privacy and Attorney-Client Privilege

All non-public information disclosed by a company member during the assessment process shall be held in the strictest confidence and considered confidential information of the company. The assessor will only make available non-public information about the company to the GNI Board as expressly agreed by the company in writing.

In some situations a company will withhold information because it has determined that the law or its notices or disclosures to users prohibits disclosure or because the company has determined that withholding information is necessary to protect or preserve user privacy or sensitive non-public information, including competitive information such as trade secrets or for reasons of attorney-client privilege. That said, assessors will require a reasonable level of information in order to accomplish their assessment. The assessors will determine and comment in their report on whether their access to information was adequate to evaluate the company's compliance with the Principles or the company's application of the GNI Principles in actual cases.

Section 3 - Consultations with the Executive Director and Independent Chair

The assessor will discuss progress with the Executive Director and the Independent Chair at the midpoint of the assessment to update them on the status of the assessment and request guidance or raise concerns about the assessment, consistent with their confidentiality obligations. The company being assessed is welcome to participate in this discussion.

Section 4 - Specific themes of the assessment

The Principles and Implementation Guidelines form the basis of the assessment and are attached in Appendix A and B of this document. In particular the Implementation Guidelines give direction to the assessors on the specific issues that the assessment will cover in relation to a company's efforts to implement GNI's Principles.

As reflected in the Principles and Implementation Guidelines, the assessment will cover 5 specific themes, described below. These should all be considered from both a free expression and privacy perspective.

1. Governance

The assessor should examine the ways in which the company oversees its approach to free expression and privacy. Examples of issues to be covered include whether and how the company's board or senior level is involved in free expression and privacy issues impacting users or the company and how the company oversees its implementation of GNI's Principles.

2. Risk Management

This theme is focused on how the company identifies its most material issues and situations from a free expression and privacy perspective across its business, the way in which the identification of these issues/situations influences decision-making processes and the steps it takes to mitigate those risks. The role that human rights risk assessments or similar processes play in the company will be considered in detail. For example what criteria does the company use to decide when to assess risks to free expression and privacy and how are the results of such risk assessments incorporated into business, sales or design decisions.

3. Implementation

This theme involves the steps the company takes to implement GNI's Principles. For example, the assessment should consider the written procedures or policies of the company, escalation, remediation procedures and whistleblowing mechanisms and how the company communicates the GNI Principles inside the company including the training of staff and externally. Consideration should also be given to the way in which partners, suppliers and distributors are included in the company's implementation of the GNI Principles bearing in mind that member companies are required to implement the Principles where they have "operational control" and use best efforts where they do not. Under the GNI Principles and Implementation Guidelines, best efforts means that the company will, in good faith, undertake reasonable steps to achieve the best result in the circumstances and carry the process to its logical conclusion. Efforts to engage with and influence local authorities and governments should also be reviewed to describe the company's policy efforts when, for instance, local law is in conflict with international standards, or efforts to encourage governments to make it legal for companies to disclose more publicly about how the company is responding to requirements to restrict freedom of expression and privacy.

4. Follow up and improvement

This theme has two aspects. The first is the way in which compliance with internal policies and systems is monitored and improvements made over-time. From the second assessment onwards for a particular company, this theme will also have an external component in terms of reviewing the follow up and recommendations for improvement that have been made through previous assessments.

5. Transparency

Communicating with users is an important theme in the Implementation Guidelines. It has a number of different components including how the company communicates with users about specific incidents/government requests whether communication occurs and in a timely way and how it makes users aware of the laws and regulations that require it to limit access to content or restrict communications or interfere with privacy. To what extent is the company being transparent to the broader stakeholder community about its overall work on free expression and privacy? Many companies now also produce transparency reports on government requests that can also be considered as a part of the assessment.

Section 5 - Cases

The use of specific cases in the assessment process is to test in practice how the GNI Principles are being implemented.

Case Selection

Cases may be provided by the company or by the assessor as part of the consultation process described below. The final selection made by the assessor shall reflect the outcome of consultations with the company and stakeholders and should provide the information required to create and support an effective assessment including the GNI Board meeting.

In its final report, the assessor will report on the rationale underlying the selection of each case, including why any specific cases recommended for inclusion by a GNI stakeholder or Board member was not ultimately used in the assessment.

In order to assess how a company member is executing against the implemented policies, procedures, and programs in practice, the company, shall identify, for the assessors, actual cases arising out of government demands for information during the last 24 months for review by the assessor. The case selection process should strive to identify a set of cases that raise the most salient issues under the GNI framework and illustrate the company's approach to implementing the GNI framework across a range of contexts, given the company's particular products, services and geographic footprint. It is recommended that for most company assessments, a minimum of 8 cases are included in the assessment but the number of cases will be influenced to some extent by the size and complexity of the company. At least 25% of the cases should be privacy related and 25% of the cases free expression related. The remaining cases should be chosen to give a broad insight into the issues faced by the company and to stimulate discussion in the board. It is important that the cases demonstrate the different ways in which the company responds to government requests. For instance, the cases selected should demonstrate instances not only when the company complied with or rejected a government request, but should also reflect instances where the company may have pushed back against a government request, for example by challenging a request

through a legal process or requiring that a government put a request in writing or submit a more narrow request. Cases should also reflect situations where the company could not achieve its desired outcome.

Any individual cases specifically recommended by a GNI stakeholder or Board member, or significantly highlighted through research of external written sources, should be given particular consideration when deciding which cases to include in the assessment. If such a case is not included, the assessor should explain that decision.

Preparation of cases

To prepare for the discussion with the company regarding cases, there is an expectation that the assessor will have an informed understanding of the context within which the assessment will be undertaken. GNI's non-company constituencies will provide specific written guidance in addition to this document on the types of cases that they would like to see covered in the assessment including any company specific cases. The steps outlined below indicate ways in which the assessor could develop their understanding of the context for the assessment by investigating potential jurisdictions and/or products of interest:

- a. Consult (meaning to engage in substantive oral discussion designed to identify the most useful types of cases that would fulfill the purposes of the assessment) with the stakeholders of GNI;
- b. Consult with GNI Board constituencies and/or its members;
- c. Research and review of external written sources such as Freedom House reports, State Department or other Foreign Affairs ministry reports on human rights;
- d. Reports of public events and cases mentioned in headlines or other news;
- e. Review of the countries in which the company member may face the most challenges.

GNI will provide training and guidance for assessors on the scope of these requirements.

Case Review

Assessors must have sufficient access to adequate information within the cases selected and presented for review, keeping in mind the constraints of privilege and the company's contractual and legal obligations to assure the privacy of their users or the confidentiality of information. The assessor should consider document review and interviews as a central aspect of a comprehensive case review. The interviews should include those individuals most knowledgeable about the facts of the case as well as the member company's implementation of the GNI Principles in that case.

At a minimum, the following examples suggest characteristics of a case that should be described to the assessor:

- Whether the case concerns privacy (e.g., requests for user information), or freedom of expression (e.g., content takedown or blocking), or both;
- Whether the case consists of a single instance or multiple sets of similar

incidents. A “case” could also represent how a company operates in a particular environment, rather than how it responded to a specific government request to address the representativeness of the case;

- Where and when the case occurred, to the maximum specificity possible consistent with user privacy and privilege concerns;
- What government branch or agencies of government originated the demand;
- Whether the government followed its own laws and formally prescribed processes;
- How the company responded to the request(s) involved in the case;
- If and how the company was able to avoid, minimize or mitigate the impact of government requests, through narrow interpretation of requests, jurisdiction, or other measures in the GNI Implementation Guidelines;
- If the company was not able to avoid, minimize or mitigate the impact of the government request, did the company reach out to others with expertise or leverage on the matter in order to collaborate, did the case lead to subsequent policy efforts?

The cases should enable exploration and illustration of the potential and limits to the scope of influence and actions of the company, thereby offering insights into the challenges and dilemmas, and associated practical compromises reached and made by the company, in the application of the Principles. Some sense of the gravity of the cases needs to be determined, and in broad terms the relevance of the cases in illustrating the broader experience and practice of the company.

In order to provide guidance to the assessor on achieving a successful case review, the following types of questions should be considered:

- (1) will/do the cases demonstrate how the companies policies and procedures work in practice?;
- (2) does the case file present adequate information to test the above, from both internal and external sources, including access to company staff directly involved in the case?;
- (3) will the cases touch on issues and places of operation raised by external stakeholders as particularly pertinent to the application of the GNI Principles and Guidelines?;
- (4) have any of the cases been mentioned by external stakeholders and/or profiled in the public media?;
- (5) do the cases focus on areas of the greatest risk to freedom of expression and privacy?;
- (6) do the cases focus on regions with the greatest threats to freedom of expression and privacy?;
- (7) are the cases adequately comprehensive (meaning within the scope of company operations and of the GNI Principles)?;
- (8) are the cases adequately representative of the range of cases experienced by the company?

It is highly likely that all cases considered will be closed cases, given the user privacy implications of considering open cases. However, for pending cases of particular current public attention or of particular interest to stakeholders, there will be a discussion with the company about whether it would be possible to include the case.

Section 6 - Determining compliance

Drawing on the assessor's report, the GNI Board will consider the following factors in determining whether a company is in compliance with GNI's Principles:

- Whether the company has the systems and procedures in place as set out in the Principles, and whether they are being operationalized effectively across the company, including as illustrated through the specific cases considered, and further evidenced by additional information considered by the assessor;
- Whether the company has made significant progress in implementing the Principles since the last assessment, where there has been one previously, and has concrete and time-bound plans to address material aspects of the effective operationalization of the Principles that have not yet been adequately implemented;
- A determination of "compliance" may reflect that the company has additional progress to make on agreed areas of implementation. The assessor will provide information on how the company's policies and procedures are being implemented in fact, including details with regard to the review and specific cases and systems, policies and procedures.

GNI's Board will consider whether the company has policies and procedures in place that reflect the efforts of the company to implement GNI's Principles and Guidelines. It will also consider whether a company's policies and procedures were implemented using reasonable efforts, and where governments or other institutions affected the outcome of a case in a manner that implementation could not prevent or change, as opposed to a situation in which reasonable efforts to implement GNI's Principles were not taken.

In some situations a company will withhold information because it has determined that the law or its notices or disclosures to users prohibits disclosure, or because the company has determined that withholding information is necessary to protect or preserve user privacy or sensitive non-public information, including competitive information such as trade secrets, or for reasons of attorney-client privilege. That said, assessors will require a reasonable level of information in order to accomplish their assessment. The assessors will determine and comment in their report on whether their access to information was adequate to evaluate the company's compliance with the Principles or the company's application of the GNI Principles to actual cases.

In addition to being an assessment of how the company is implementing and executing against its GNI commitments, the results of the assessment of cases should foster shared learning and the exchange of information, improve GNI's understanding of challenges and opportunities relating to freedom of expression and privacy in the ICT sector, capture best practices and inform changes to the assessment process itself.

Section 7 - Feeding into GNI's policy and learning work

The outcome of the assessments and the discussion at the Board meeting should provide valuable insights into the challenges faced by companies to feed into GNI's policy and learning work. Time at the Board meeting should be dedicated to identifying the specific issues to be taken forward, and plans to address them. Examples of the issues that could be included are:

1. Recurring themes related to a particular country
2. Implementation challenges for example integration into mergers and acquisitions
3. Emerging best practice for responding to government requests