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The Revised 2000 OECD Guidelines for Multinational Enterprises – Challenges and Prospects after 4 Years of Implementation

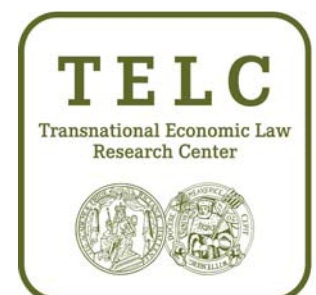
Alexander Böhmer

TRANSNATIONAL ECONOMIC LAW RESEARCH CENTER

Faculty of Law
Martin-Luther-University
Halle-Wittenberg
Universitätsplatz 5
06099 Halle (Saale)
Germany

Tel.: +49 345 / 55 23149
/ 55 23180
Fax: +49 345 / 55 27201

E-Mail: telc@jura.uni-halle.de
www.telc.uni-halle.de



The revised 2000 OECD Guidelines for Multinational Enterprises – Challenges and Prospects after 4 Years of Implementation

There are still very disparate views as to whether Multinational Enterprises (MNEs) in their investment activities around the globe should take on responsibilities other than maximising the returns for their shareholders. Only very recently the assertion was reiterated rather prominently that MNEs on balance, while investing abroad and taking a risk already, as such foster the social good in the countries they invest. That would mean that any case for "additional" corporate social responsibility (CSR) activities of MNEs can at least not be made on the basis of an argument that corporations need to offset harmful impacts they may have on the host country (Jagdish Bhagwati, In Defense of Globalization, 2004). However, governments, international organisations, civil society and more and more consumers in home countries of MNEs are expecting corporations to be engaged in CSR related activities. Increasingly, government officials and NGOs are working together to raise the awareness of the public to CSR issues. International relations theory has tried to explain the motives behind this new openness of government officials to CSR concerns. Certainly government officials – formerly often seen as working on rather technocratic issues – appreciate the increased public attention to their dossiers: Nowadays your Minister calls you on CSR related issues even if you are a customs/GATT specialist.

Be it as it may, for companies investing in non-OECD countries the observance of certain basic CSR standards is surely in their own best interest. For business and industry as a whole government willingness to further liberalise markets and promote investment depends more and more on the perception of companies as "good corporate citizen". Furthermore, the 'whole of industry' has an interest in preventing a negative image of "big business" in the public perception stemming from misconduct by a few. Factors like this have already led to numerous companies developing internal codes of ethics as part of their strategic international human resource management policies. The issue today is rather how to solve the increasingly difficult ethical dilemmas following from diverging host-country and home-country norms, the extent to which multinationals are responsible for the activities of direct suppliers and other companies in the whole supply chain, and for supplementing governments in case of insufficient regulatory and enforcement capabilities of host countries.

The Organisation for Economic Co-operation and Development (OECD) was one of the first international organisations which succeeded in developing a multilateral set of principles for responsible business conduct with the OECD Guidelines for Multinational Enterprises. The Guidelines were formulated already in 1976 as one of several elements of an OECD Council Declaration on International Investment and Multinational Enterprises and revised extensively in 2000. They are recommendations addressed by the adhering governments to multinational enterprises operating from their territories. The Guidelines cover key areas of

investment-related business conduct, including disclosure, employment and industrial relations, environment, bribery, consumer protection, science and technology, competition and tax regulation. The observance of the Guidelines by enterprises is voluntary and legally not enforceable. There are 38 adhering countries to the Guidelines, that are 8 more than OECD countries. The Guidelines were revised in 2000 in partnership with the organisations officially recognised by the OECD as their social partners: The Business and Industry Advisory Committee (BIAC), the Trade Union Advisory Committee (TUAC) to the OECD and NGOs.

The role of the Guidelines in the international concert of CSR instruments is not easy to assess. On the one hand one could argue that although many business codes of conduct are now publicly available, the OECD Guidelines for Multinational Enterprises are the only multilaterally endorsed and comprehensive code that OECD governments are committed to promote and recommend to their enterprises. This certainly does speak strongly in favour of their effectiveness and importance. However, as a matter of fact many other CSR instruments are much more detailed and might be better applicable for specific sectors or companies. There is probably no 'winner to be picked' amongst the CSR instruments at this point in time. In fact, diversity is to be welcomed since it leaves companies with the flexibility required in choosing the instrument they might find suitable to their size and sector.

What does make the Guidelines rather exceptional is the fact that they are complemented by a *governmental* monitoring procedure, called the "Implementation in Specific Instances", that allows interested parties to bring Guidelines issues to the attention of National Contact Points (NCP), focal points in governments of the adhering countries. These NCPs consist of a single or a multiple government department, or tripartite and even quadripartite structures involving civil society. The point is that the NCP is under the supervision of the government and that the implementation procedures under the Guidelines are administrative procedures. The NCP is supposed to promote the Guidelines, to handle inquiries about their content and application and to assist in solving problems that may arise. It is this last function which gives the Guidelines some teeth: More than 77 "specific instances" have been filed with NCPs since the 2000 revision by NGOs and Trade Unions against companies allegedly in breach of the Guidelines. Now, after 4 years of implementation since the June 2000 Review, the OECD Guidelines for Multinational Enterprises are on their way to becoming an effective tool rationalising complaints against companies by providing a procedure which follows certain 'due process' standards. Although a certain degree of flexibility in dealing with Guidelines implementation procedures is needed, the NCPs and the OECD Investment Committee have done valuable work in clarifying and streamlining many aspects of the Guidelines procedures. Many NCPs have meanwhile developed their own formal or informal procedures which are modelled on the guidance given by the Committee.

Turning to the legal status of the Guidelines, the OECD Guidelines for

Multinational Enterprises are part of the wider OECD Declaration on International Investment and Multinational Enterprises. The Guidelines set forth investors' responsibilities in a host country. In turn, in the Declaration host governments undertake not to discriminate against multinational enterprises and to avoid imposing conflicting requirements on them. Further standards protecting the investor should have been put into place by an OECD multilateral agreement on investment (MAI) which failed in 1998. More recent efforts in the OECD are focusing on the development of a 'Policy Framework for Investment' – a soft law instrument recommending best investment regulatory practice to host countries. While a 'Declaration' of the OECD is legally non-binding, so-called "Decisions" of the Council of the OECD are legally binding OECD instruments (Article 5 OECD Convention, 1960). The June 2000 Decision of the OECD Council creates an obligation binding on the member states of the OECD to set up National Contact Points and to "take due account of the attached Procedural Guidance" aimed at complementing the Guidelines. This construction has the surprising consequence that the content of the Guidelines text and its Commentary is legally non-binding, however, the implementation procedure laid out in the Council Decision and the Procedural Guidance is legally binding for adhering countries.

That leads to the question whether the text of the Guidelines itself has any legal relevance. As an instrument of an international organisation it can be regarded as at least creating a soft law standard. To some extent 'soft law' is recognised in international law as having some limited normative force even though those norms would not be enforceable by an international court or other international organ. Given that the implementation procedure is binding international law, we are confronted with a category of soft law which is procedurally binding, though substantively non-binding. Still, this should not be considered as a category closer to 'hard' law since there is a clear expression of OECD member government's legal opinion to deliberately not give the Guidelines text the character of binding 'hard' law.

However, although the Guidelines themselves may have merely the character of 'soft law', the parts of the Guidelines text which is restating recognised standards of public international 'hard' law can be regarded as binding obligations on member states, although this obligation does not derive from the Guidelines themselves. For example, the core labour standards laid out in the ILO Declaration on Fundamental Principles and Rights at Work from June 1998 regarded as "ius cogens" by a majority of legal scholars and restated in the Guidelines could be regarded as part of that standard. Basic principles laid out in the Environment Chapter as well as in the Chapter on Combating Bribery are equally reiterating principles which are legally binding on states through other international conventions. For example, the Principle stating that an enterprise should "not offer, nor give in to demands, to pay public officials" is covered by the "OECD Convention on Combating Bribery in International Business Transactions" from 1999 when it comes to bribes paid to foreign public officials. Although the Guidelines text itself has not been endorsed by the

Council of the OECD as legally binding on member states, certain principles of the Guidelines can be regarded as being already part of public international law, thus obliging states to implement them in their legislation.

But what is the content of this commitment the Guidelines impose on governments be they legally binding or not? As a matter of fact the Guidelines text does only establish one single obligation to adhering governments: to recommend the – legally binding or not – Guidelines Principles to their MNEs.

For any non-adhering governments these principles are only legally binding if they are a party to respective binding international conventions or if they constitute 'ius cogens' which would be directly applicable *erga omnes*, i.e. independently of whether a state has agreed to them or not. For some of the Guidelines principles this case can be made. The question following from that would be whether this category of Guidelines principles, which can be regarded constituting 'ius cogens', is also binding on companies - even if traditionally only states can be regarded as subjects of international law. This would require MNEs to be qualified as at least partially subjects of international law. Recent evidence speaks against such an - even only limited status - of companies as subjects of international law. The clear rejection of the draft UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights by the UN Commission on Human Rights ("no legal standing" Decision 2004/116 (c)) is a case in point. The other state practice often cited refers to investor-to-state dispute settlement under bilateral investment treaties (BITs) or the Energy Charter Treaty. An argument can be made that recent model BITs by the US and Canada narrowing the scope of their investor protection provisions and the possibility to engage in investor-to-state dispute settlement, but also governmental statements questioning the ICSID investor-to-state dispute settlement procedures point in the direction of an evolving governmental opinion which is currently rather trying to roll-back the legal standing of private companies under these instruments. Taking this evidence together with the recent ruling of the US Supreme Court in *Sosa v. Alvarez-Machain* which narrowed down considerably the scope of the Alien Torts Claim Act from 1789, the current trend in state practice speaks rather in favour of not granting even a limited legal status to companies under international law. Thus, a legal obligation deriving from the 'ius cogens' part of the Guidelines text for companies can not be established. The strongest argument can be derived from the Statement by the Chair of the June 2000 OECD Ministerial adopting the Guidelines, who stated that "the Guidelines are not a substitute for, nor do they override, applicable law. They represent standards of behaviour supplemental to applicable law and, as such, do not create conflicting requirements." This clear intention of governments expressed at the end of the 2000 revision underline that the Guidelines remain voluntary legally non-binding recommendations for companies, although some of its provisions have to be qualified as being legally binding on adhering as well as non-adhering governments given that they restate binding international law.

At the end of the day what matters for the pursuit of CSR goals through the Guidelines is their acceptance by companies as a valuable while practical tool. The practical impact of the Guidelines on company behaviour is difficult to estimate. The OECD Secretariat uses certain parameters to measure the impact the Guidelines have. Amongst others this includes references during high-level meetings, the use of the Guidelines implementation procedures, the fact that the Guidelines have been translated now into 26 languages, the fact that over 70.000 web pages refer to the Guidelines and the reference to the Guidelines in governmental export credit and investment guarantee schemes. Out of the 77 specific instances raised under the revised 2000 Guidelines procedures, the majority deals with the 'Employment and Industrial Relations Chapter' of the Guidelines. This is not surprising, since Trade Unions are the best institutionalised users of the Guidelines procedures and international investment in, for example, Export Processing Zones is certainly prone to creating disputes on labour standards. However, the OECD's business community has voiced some satisfaction with the fact that the majority of 'specific instances' dealt with by National Contact Points since the 2000 Review concluded that the allegations against investors involved have been found unsubstantiated or *bona fide* resolved. There are, however, other cases in which companies have been found violating principles of the Guidelines and NCPs have explicitly expressed this in public statements.

For all the cases dealt with under the Guidelines so far, the Procedural Guidance text annexed to the Guidelines establishes with the 'specific instances procedure' a unique tool helping rationalising conflicts between companies in their role as foreign investors and stakeholders. The first 'procedural right' a company confronted with allegations under the Guidelines procedures can rely upon is simply to deny participation in the procedure as such since the June 2000 Decision of the OECD Council does not establish any obligation for a company to participate in a Guidelines procedure. However, in most cases a company would be badly advised to not participate. Public pressure will not be appeased by mere non-participation and the underlying allegation will remain in the public sphere. As a matter of fact, all evidence suggests that companies tend to decide to participate in the Guidelines procedures given the rationalising effect which they promise to deliver. The "due process" standards the procedures provide can be found already in the *'formal' objections* to the applicability of the Guidelines a defending company can raise:

- The issue has no "investment nexus", i.e. concerns a pure trade related issue;
- The issue is dealt with already by parallel legal or administrative procedures in the investor's host country – the Guidelines cannot override national law;
- Any other objection derived from national administrative laws the NCP has to apply (data protection, protection of legitimate expectations, etc.);
- The issue does not merit "further examination" by the NCP, since it is not *"bona fide"* *or* "substantiated" *or* not relevant to the implementation of the Guidelines.

Arguments raised by the company on the substance must show that the behaviour of the company is in line with the recommendations of the Guidelines and its Commentary. Throughout the procedure confidentiality of proceedings and the materials submitted by the parties must be guaranteed. If there are doubts as to the interpretation of the Guidelines, every NCP and also BIAC or TUAC can ask the OECD for an official clarification on the interpretation of the Guidelines text and Commentary. The procedures end in the case that the parties do not agree on the substantive issues - and if confidentiality allows – with a public statement from the NCP on the case with recommendations on how the Guidelines need to be implemented by the company or with the notion that the company has not violated the Guidelines.

Having pointed out all these procedural requirements it is important to mention that nothing can prevent interested parties including MNEs to use NCPs as mediators, whether the Guidelines Procedures strictly apply or not. As long as there is *bona fide* on all sides the NCPs can play a helpful role in resolving the various problems MNEs are confronted with in their role as foreign investors in a more and more integrated global economy.

Dr. Alexander Böhmer, LL.M. is a Senior Policy Manager with the Business and Industry Advisory Committee to the OECD (BIAC). The views expressed in this article are personal and can not be attributed to BIAC.