

Responsible Enterprise

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mechanism. An *informal, normative order* is created that is by no means voluntary, as it does not require self submission.⁴⁹

Similar to the Draft UN Code of Conduct, the OECD Guidelines define both *positive* and *negative* dimensions of enterprise activities. On the one hand, enterprises should contribute to economic, environmental and social progress *in order to support sustainable development*.⁵⁰ In particular, they should create jobs and training opportunities and cooperate with local communities.⁵¹ They should comply with the applicable national law. The Guidelines should neither replace nor override national law.⁵² However, this occurs de facto, as they (in particular through the uncritical adoption of the UNGP) create their own normative standards and implementation mechanisms that can conflict with or counteract national law.⁵³

On the other hand, enterprises should (“doing no harm”) respect the human rights of those affected by their activities,⁵⁴ not discriminate against whistleblowers,⁵⁵ not cause *any negative impacts* in the areas covered by the Guidelines or contribute to them or should prevent them, where they are directly linked to their business activities.⁵⁶ In order to realize this, they should implement effective self-regulation and management systems and *due diligence*⁵⁷, consult relevant stakeholders⁵⁸ and, where practicable, “encourage” business partners to apply principles of responsible business conduct that are “compatible” with the Guidelines.⁵⁹ The far reaching UNGP conception of responsibility for “negative impact” and for third parties, in particular responsibility for “business relationships” and the due diligence conception are thus largely taken on in the OECD Guidelines and are, beyond the human rights chapter, extended to *all* areas (with the exception of the chapters on science and technology, competition and tax).⁶⁰

The Guidelines contain some further clarifications: Only *substantial* contributions to the negative impacts should be relevant.⁶¹ The dilemma is also recognised that a supplier with several customers can be exposed to *conflicting requirements* from these customers.⁶² The suggested solution for this issue is not unproblematic: The customers are encouraged, taking *competition law* into consideration, to cooperate industrywide with other enterprises that have the same suppliers in order to coordinate their supply chain policy and risk management strategies, particularly through information exchange. This approach may be functional for suppliers in the automotive industry, for example.⁶³ However, applying it to the legal profession would mean that clients in an industry sector would agree concerning requirements, which they would then impose on their legal consultants. This would only resolve the problem of conflicting requirements to a limited extent, as

⁴⁹ On the NCP proceedings, see further below Chapter 3, I. 4. b).

⁵⁰ OECD Guidelines, Part I, II. 1.

⁵¹ OECD Guidelines, Part I, II. 3., 4.

⁵² OECD Guidelines, Part I, I. 2.

⁵³ On the German law related to general terms and conditions, see Spiesshofer/Graf von Westphalen, BB 3/2015, p. 75 ff.

⁵⁴ OECD Guidelines, Part I, II. 2.

⁵⁵ OECD Guidelines, Part I, II. 9.

⁵⁶ OECD Guidelines, Part I, II. 11., 12.

⁵⁷ OECD Guidelines, Part I, II. 7., 10.

⁵⁸ OECD Guidelines, Part I, II. 14.

⁵⁹ OECD Guidelines, Part I, II. 13.

⁶⁰ See OECD Guidelines, Part I, II. Commentary 14–23.

⁶¹ OECD Guidelines, Part I, II. Commentary 14.

⁶² OECD Guidelines, Part I, II. Commentary 23.

⁶³ On this, see the statements by Julia Schwarzkopf, Board Member Office Group Procurement, Volkswagen, at the Multi-Stakeholder Forum on Corporate Social Responsibility of the EU Commission on 04/02/2015, https://europa.eu/newsroom/events/european-multistakeholder-forum-corporate-social-responsibility_en, last accessed on 07/02/2017.

law firms typically advise clients from different industries. Moreover, this approach, to mandate ethical requirements on lawyers through retainer contracts, *encroaches* on law associations' and legislatures' prerogative to formulate and implement behavioral requirements for the legal profession. Furthermore, the issue of competition law compliance requires a closer examination from the point of view of horizontal and vertical agreements, and concerning the abuse of market-dominant positions.⁶⁴

What is not properly clarified in the Guidelines themselves is the relationship between the rigorous due diligence and supply chain requirements that follow the UNGP,⁶⁵ and the more cautious formulation that business partners should be "encouraged" to apply "principles *compatible*" with the Guidelines, corresponding to the earlier version of the Guidelines.⁶⁶ The latter approach appears at first glance to leave space and flexibility for essentially similar but not necessarily identical requirements and to allow that the peculiar characteristics and special circumstances of the business partners be taken into consideration. With regard to the abovementioned frictions and dilemmas in the supply chain⁶⁷ and the potential grounds for liability⁶⁸ linked to comprehensive control and steering of the supply chain, this would be welcome.

However, more recent statements of the OECD on the *Scope and application of 'business relationships' in the financial sector*⁶⁹ and *Due diligence in the financial sector*⁷⁰ point in another direction. The authors of both statements are OECD employees, but only the first paper was adopted by the Responsible Business Conduct Working Party. The second paper, on the other hand, is the personal opinion of the employees, drafted and published like an official OECD statement. These statements are to be reflected upon here as, uncritically following the UNGP, they illustrate the boundless scope of the imagined enterprise responsibility that may be regarded as academically consistent, but which, in its practical effects (and likely legal consequences), misses all sense of proportionality and could become a boomerang, as enterprises react to it with refusal or at best "cherry picking".

The statement on *business relationships* first determines that, on the basis of the wide conception of enterprise, the Guidelines also apply to the financial sector. "Business relationship *includes* relationships with business partners, entities in the supply chain and any other non-State or State entities *directly linked* to its business operations, products or services".⁷¹ The word "includes" should show that it is a non-exhaustive list. This "open-ended description" of the term "business relationship" should be justified on the basis that the Guidelines are (only) *recommendations*. A legal understanding would require much more precision concerning their scope of application.⁷²

⁶⁴ On this, see the Background Paper "Competition Law and Responsible Business Conduct", OECD Global Forum on Responsible Business Conduct, 18–19 June 2015, Paris, <https://mneguidelines.oecd.org/globalforumonresponsiblebusinessconduct/2015GFRBC-Competition-Law-RBC.pdf>, last accessed on 07/02/2017.

⁶⁵ OECD Guidelines, Part I, II. 7., 10.

⁶⁶ OECD Guidelines, Part I, II. 13.; see also OECD Guidelines, Part I, VI. 6. Environment Chapter, according to which enterprises should continually seek to improve their environmental performance and "where appropriate" also of their supply chain through "encouraging" measures.

⁶⁷ See above Chapter 2, III. 4.

⁶⁸ See Spiesshofer, NJW 34/2014, p. 2473, 2474, 2477 ff.

⁶⁹ "Scope and application of 'business relationships' in the financial sector under the OECD Guidelines for Multinational Enterprises", 26–27 June 2014.

⁷⁰ "Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship", 26–27 June 2014.

⁷¹ "Scope and application of 'business relationships' in the financial sector under the OECD Guidelines for Multinational Enterprises", 26–27 June 2014, p. 3 (emphasis added).

⁷² "Scope and application of 'business relationships' in the financial sector under the OECD Guidelines for Multinational Enterprises", 26–27 June 2014, p. 3.

This assumption, that “open-ended descriptions” would suffice and that a clear limitation of the scope of responsibility is not necessary, appears to be inappropriate in view of the bindingness of the Guidelines and their possible consequences, particularly enforcement in NCP proceedings. Concerning the scope of responsibility regarding *minority shareholding* in enterprises, Norges Bank, the Norwegian Central Bank, stated that the Guidelines should not apply for minority shareholding in relation to the company in which it is invested, but rather require a separate and thorough assessment in view of the variety of these forms of (shareholder) participation.⁷³ These (justified) concerns of a serious institution with experience in financial market transactions were swept aside with reference to a letter from the OHCHR to OECD Watch and the UN Interpretive Guide on the Responsibility to Respect Human Rights.⁷⁴ The UN Interpretive Guide also places (without differentiated consideration) minority shareholding of institutional investors under the UNGP in a blanket and apodictic manner. The OECD paper follows this approach with a reference to the fact that “international policy coherence” with the UNGP is desirable, without engaging at all with the content of the valid arguments put forward by Norges Bank. Indeed, the complexity of investment participation, in particular through passive instruments and participation in index funds, is recognised, but it should be resolved through “practical guidance”, particularly due diligence. The discussion about differentiated treatment of different investors and asset classes will, however, continue.⁷⁵

The ideas of three OECD Secretariat employees are given in the OECD statement *Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship*.⁷⁶ They lay out, based on the statements of the former SRSG Ruggie and the OHCHR, what, in their opinion, should justify responsibility under the UNGP categories “cause”, “contribute” and “directly linked”.⁷⁷ Other opinions, particularly those of the affected financial industry or state financial market institutions were not gathered (according to the statement).

For “*cause*”, a causal relationship between business activities and negative impacts should suffice, for example discrimination by the financial institution itself. “*Contribute*” would be fulfilled, for example, if a bank were to give a construction company credit for the construction of an industrial facility which displaced residents from their land without public participation. A bank would be “*directly linked*” if it discovered through due diligence that the enterprise in which it has minority shareholding deals in conflict minerals without an appropriate due diligence system. No “direct link”, but nevertheless responsibility on the basis of possible *spill over* effects should exist if a bank financed a road project and the financed construction company independently builds a second project that, for example, contaminates the water supply. In this case, the bank is not “directly linked” to the second project, but it must also take “potential adverse impacts” into consideration, and thus possible “spill over” effects, in its due diligence

⁷³ “Scope and application of ‘business relationships’ in the financial sector under the OECD Guidelines for Multinational Enterprises”, 26–27 June 2014, p. 4.

⁷⁴ http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf, last accessed on 07/02/2017.

⁷⁵ On the different investment classes and different influence possibilities, see the statement “The OECD Guidelines for Multinational Enterprises: A perspective from pension fund asset managers and asset owners”, from USS, APG, PGGM, RPMI RailPen, June 2015, https://friendsoftheoecdguidelines.files.wordpress.com/2015/06/19-june_-final-version_-oecd_guidelinesperspectivefrompensionfundasset-managers.pdf, last accessed on 07/02/2017.

⁷⁶ “Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship”, 26–27 June 2014.

⁷⁷ “Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship”, 26–27 June 2014, p. 10.

for the road project.⁷⁸ In this case, Chapter II, 13 should apply, i.e. the bank should encourage the business partner to comply with principles of responsible behavior that are compatible with the Guidelines in the not directly linked project.⁷⁹ The more flexible approach is therefore to be granted only if and to the extent that the UNGP analogous categories are not applicable.

The OECD Secretariat employees also differentiated that: For *general* corporate loans, it should be “expected” from the bank that the bank reacts to *all* negative impacts connected to the activities of their clients.⁸⁰ This is a limitless demand for comprehensive customer surveillance. For *project financing*, the bank should pay attention to the project-related effects. For *majority shareholding*, a financial institution shall be seen as *contributing* to the negative impacts of the associated company, as the majority shareholding directly supports and maintains the activities of the company. The responsibility shall be increased if the bank is involved in the decision making process, e.g. through representation in a supervisory board. In the case of such participation, the bank should also contribute to the remediation of the negative impacts.⁸¹ This ignores the company law principle of separation of company and shareholder. Moreover, depending on the company form, shareholders have very different rights. In a German stock corporation (Aktiengesellschaft), for example, a shareholder has no right to instruct the board. The required mixing of spheres between company and shareholder, in particular in the remediation of negative impacts, is also not unproblematic, as it can involve piercing the corporate veil or justify the liability of shareholders for the actions of the company.⁸² *Minority shareholding* should be *directly linked* in general. It is only with regard to the implementation of the Guidelines that a practical guide is to differentiate more precisely with regard to influence and position in the value chain and other factors. Directly linked should also include passive investors, fund managers and index funds.⁸³ It is hardly conceivable how this could be managed in practice with widely spread shareholdings in diversified large corporate groups.

Concerning the norm creation process, it is remarkable that the OECD would publish the personal opinion of three employees (made explicit only in the small print) on its website like an official OECD statement and in doing so give the impression that this is the opinion of the OECD. In this way, as through the one-sided orientation to the statements of the SRSR and OHCHR without consultation of the affected and expert circles of the OECD, the political processes are steered in which “expectations” are formulated and positions are developed and coordinated that are later taken up by NGOs as standards of expected behavior.

Enterprises should also apply “good corporate governance practices” derived from the *OECD Principles of Corporate Governance* and for state enterprises from the *OECD*

⁷⁸ “Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship”, 26–27 June 2014, p. 4.

⁷⁹ “Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship”, 26–27 June 2014, p. 8.

⁸⁰ “Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship”, 26–27 June 2014, p. 8 f.

⁸¹ “Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship”, 26–27 June 2014, p. 9.

⁸² On this see below Chapter 9, II.

⁸³ “Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship”, 26–27 June 2014, p. 10 f.; critical of this and in detail, Statement “The OECD Guidelines for Multinational Enterprises: A perspective from pension fund asset managers and asset owners”, from USS, APG, PGGM, RPMI RailPen, June 2015, https://friendsoftheoecdguidelines.files.wordpress.com/2015/06/19-june_-final-version_-oecd_guidelinesperspectivefrompensionfundassetmanagers.pdf, last accessed on 07/02/2017.

I. The OECD Guidelines for Multinational Enterprises

Guidelines on Corporate Governance of State-Owned Enterprises.⁸⁴ Following these guidelines, the board of the parent company should ensure the strategic direction of the enterprise group, be accountable to the enterprise and shareholders, and take the interests of stakeholders into consideration.⁸⁵ “Where possible”, compliance and control systems should encompass subsidiary companies.⁸⁶ These requirements, taking into account applicable company law at least to a certain extent, appear more *cautiously* formulated than the rigorous requirements that follow the UNGP without clarifying their relation to each other. The UNGP, with “knowing and showing”, demand not only the “consideration” of stakeholders, but also accountability to them. On the basis of the far reaching responsibility allocation for linked enterprises and business partners, the UNGP require a corresponding control and compliance architecture that ignores the company law principle of separation and obliges steering of not only subsidiary companies but also of (not necessarily legally linked) business partners, and which does not allow the “where possible” limitation (or if so at most in the context of proportionality).⁸⁷ Thus, the (uncritical) adoption of the UNGP in the OECD Guidelines has created an unresolved contradiction. The problems discussed in the context of the UNGP are fully imported and even extended beyond the area of human rights.

Finally, self regulation and the OECD Guidelines should neither unlawfully restrict *competition*⁸⁸ nor serve as a substitute for effective state legislation. Enterprises should also avoid possible *disruptive effects for trade or investment* in the development of codes of conduct or in self-regulating practices.⁸⁹ This is a pipe dream that aims to obtain a general absolution for the OECD Guidelines. As mentioned above in relation to the UN conceptions,⁹⁰ unilaterally imposed codes of conduct and responsibility allocations by large multinational enterprises and their enforcement in the supply chain *inevitably* lead to market concentration processes that can be of a questionable nature with regard to competition law and can exclude small and medium sized enterprises from the value chain, in particular those from developing countries. They can also lead to non-tariff barriers to trade. The UNGP and, following them, the OECD Guidelines are not a substitute for domestic law but can lead to a “*parallel normative order*” with its own requirements and enforcement mechanisms, detached from national law. In addition, the unclear behavioral expectations in the human rights area and the risk of loss of reputation *de facto* lead to the consequence that enterprises are reluctant to invest in “difficult” countries (especially in Africa).

The *responsibility spectrum* covers all issues that are dealt with under the heading of CSR. From a substantive perspective, this includes human rights,⁹¹ employment and industrial relations,⁹² the environment,⁹³ anti-corruption,⁹⁴ consumer protection,⁹⁵

⁸⁴ See OECD Guidelines, Part I, II. 6., Commentary 7–11.

⁸⁵ OECD Guidelines, Part I, II. Commentary 8.

⁸⁶ OECD Guidelines, Part I, II. Commentary 9.

⁸⁷ The proportionality considerations of the UNGP do not cover this case.

⁸⁸ On this, see the Background Paper “Competition Law and Responsible Business Conduct”, Global Forum on Responsible Business Conduct, 18–19 June 2015, Paris, <https://mneguidelines.oecd.org/global-forum-on-responsible-business-conduct/2015GFRBC-Competition-Law-RBC.pdf>, last accessed on 07/02/2017.

⁸⁹ OECD Guidelines, Part I, II. Commentary 27.

⁹⁰ Chapter 2, III. 4.

⁹¹ OECD Guidelines, Part I, IV., which contains a short version of the UNGP.

⁹² OECD Guidelines, Part I, V.

⁹³ OECD Guidelines, Part I, VI.

⁹⁴ OECD Guidelines, Part I, VII.

⁹⁵ OECD Guidelines, Part I, VIII.

science and technology,⁹⁶ competition,⁹⁷ taxation⁹⁸ and from a procedural perspective, reporting on financial and non-financial factors and due diligence.⁹⁹ Although the human rights chapter, which incorporates essential requirements of the UNGP, partially overlaps with the requirements on employment and industrial relations, consumer protection and the environment, there is no clarification in the text or in the commentaries to the Guidelines about their relation to each other. In fact, the latter should be considered *lex specialis* to the human rights requirements and thus exclude recourse to general human rights in the relevant area. However, this is not clarified.

The OECD Guidelines thus take on the UNGP conception (with the unresolved problems it entails, outlined above),¹⁰⁰ and take the concepts of “negative impact” and “due diligence” beyond human rights. Going further, they cover in principle all issues that the enterprise could have a positive or negative influence/impact on and thus outline a *comprehensive responsibility framework*.¹⁰¹

This is further developed through the commentaries to the Guidelines and their reference to further instruments of the OECD and other organizations,¹⁰² as well as through *sector and issue specific concretization*. For example, the OECD published the *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*¹⁰³ for specific minerals. For the financial sector, as discussed, the issues of “business relationship”¹⁰⁴ and “due diligence in the financial sector”¹⁰⁵ were further developed. In 2017, the *Garment and Footwear Due Diligence Guidance*¹⁰⁶ was published. For the mining sector, the OECD developed a user guide for “stakeholder engagement due diligence in extractive industries”¹⁰⁷. Finally, the *OECD-FAO Guidance for Responsible Agricultural Supply Chains* was developed in cooperation with the Food and Agriculture Organisation (FAO)¹⁰⁸, which should also serve as a guideline for the NCPs. Furthermore, the *Arrangement on Guidelines for Officially Supported Export Credits* is applied.¹⁰⁹ The participants in the Arrangement are bound to a continual process through which market distortions should be kept to a minimum and a level

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⁹⁶ OECD Guidelines, Part I, IX.

⁹⁷ OECD Guidelines, Part I, X.

⁹⁸ OECD Guidelines, Part I, XI.

⁹⁹ OECD Guidelines, Part I, III.

¹⁰⁰ See Chapter 2, III. 4.

¹⁰¹ On this, see further below Chapter 10.

¹⁰² See OECD Guidelines, Part I, Commentary 7 ff. on the OECD Principles of Corporate Governance, 48 ff. with extensive reference to the ILO instruments, 76 ff. with reference to OECD instruments covering corruption, and 105 f. on the OECD Transfer Pricing Guidelines.

¹⁰³ 25 May 2011 C/Min (2011)12/Final, amended 17 July 2012 C(2012)93, <http://www.oecd.org/corporate/mne/mining.htm>, last accessed on 07/02/2017.

¹⁰⁴ “Scope and application of ‘business relationship’ in the financial sector under the OECD Guidelines for Multinational Enterprises”, 26–27 June 2014.

¹⁰⁵ 26–27 June 2014.

¹⁰⁶ Launch 8/9 February 2017, <https://mneguidelines.oecd.org/responsible-supply-chains-textile-garment-sector.htm>, last accessed on 07/02/2017.

¹⁰⁷ <https://mneguidelines.oecd.org/stakeholder-engagement-extractive-industries.htm>, last accessed on 07/02/2017.

¹⁰⁸ Launch 11 March 2016, <http://www.oecd.org/daf/inv/investment-policy/rbc-agriculture-supply-chains.htm>, last accessed on 07/02/2017.

¹⁰⁹ Arrangement on Guidelines for Officially Supported Export Credits, 15/01/2015, [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=tad/pg\(2015\)1](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=tad/pg(2015)1), last accessed on 07/02/2017. They were declared applicable in the EU through Art. 1 of the Regulation (EU) No. 1233/2011 of the European Parliament and of the Council of 16 November 2011 on the application of certain guidelines in the field of officially supported export credits and repealing Council Decisions 2001/76/EC and 2001/77/EC, OJ L 326 from 8/12/2011, p. 45 ff.

playing field should be created.¹¹⁰ The *Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence*¹¹¹ contribute to this.

4. Governance

a) Actors and norm creation

The OECD Guidelines differ from the UNGP in four essential aspects: (1) They are developed and legitimized by the participating states and apply only to enterprises that are located in these states and are under their jurisdiction; thus, they have a *a more legitimate foundation* that also appears to be in compliance with public international law with regard to extraterritorial effect. (2) They contain a *comprehensive responsibility framework* that can counteract a silo mentality, takes into consideration the interdependence of different areas, can resolve incoherencies and is open to organic further development by the OECD and member states through sector and issue specific instruments. (3) In contrast to the NAP strategy of the UNWG, which leads to renationalization and thus to the fragmentation of standard setting and enforcement, the OECD follows a standard development harmonized for all participants and thus has more potential to generate a *consistent multinational responsibility framework*. (4) The OECD Guidelines, with respect to the National Contact Points and the Investment Committee, contain a two-tier, quasi-judicial *mediation and arbitration mechanism* that is aimed at concretizing further development of the Guidelines and a gradual OECD wide procedural and material standardization of the “jurisprudence”.¹¹²

(Democratically legitimate) states were, at least at first, the primary *actors* concerning the OECD Guidelines. While with regard to the UN, a transfer of “norm generation” to individual external experts (SRSG and UNWG) can be observed, supplemented by limited representative stakeholder consultation and “endorsed” by the UNHRC (with a rather thin legitimacy basis), regarding the OECD Guidelines states continue to formally retain the leadership and decision making roles, though only superficially. Through the incorporation of the essential core of the UNGP into the OECD Guidelines and the practice of the OECD Secretariat not to ask state institutions but (only) the former SRSG, the OHCHR and the UNWG for opinions that are used for the interpretative concretization of individual questions, and that are treated and followed as quasi-authoritative the states’ competence is de facto undermined and *their interpretation and concretization power is transferred*. The issue of democratic legitimacy thus appears to be more problematic than at first sight; this also applies particularly to the relation between the executive, legislature and judiciary.¹¹³

In the UN and the OECD processes, *civil society actors* were increasingly involved in broad consultation proceedings, not only concerning the development of “norms”, but also in their enforcement, although in a different way. In the context of the OECD process, the various interest groups are *bundled*: the industry interests in the Business and Industry Advisory Committee (BIAC), the trade union interests in the Trade Union Advisory Committee (TUAC), and, since the 2011 revision, the NGO interests in the *OECD Watch* (an inclusive civil society network of over 80 organizations).¹¹⁴ The

¹¹⁰ Recital 5 Regulation (EU) Nr. 1233/2011.

¹¹¹ Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (The “Common Approaches”), <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/ECG%282012%295&doclanguage=en>, last accessed on 07/02/2017.

¹¹² On the NCP proceedings, see Kasolowsky/Voland, NZG 33/2014, p. 1288 ff.

¹¹³ On this, see further Chapter 11, and Chapter 3, I. 4. d).

¹¹⁴ <http://oecdwatch.org>, last accessed on 07/02/2017.

implementation provisions of the 2011 OECD Guidelines formally institutionalized OECD Watch,¹¹⁵ giving it consultative status¹¹⁶ and the right to bring complaints.¹¹⁷ Hence, the OECD process is organized in a more transparent, structured and institutionalized way than the SRSG and UNWG processes. Through the bundling of interests, the element of chance and preference on the choice of participants from a segment is reduced, as is the consideration and weighting of their contribution,¹¹⁸ and an internal agreement in the interest blocks is enforced that increases representativeness and makes the process appear more structured. However, essential enterprises that are in principle covered by the OECD Guidelines, for example the independent professions, are not included in either the norm generation or implementation processes.

As the OECD Guidelines incorporate the core of the UNGP and their negative impact and due diligence conceptions, and apply them beyond the human rights area, they also import *mutatis mutandis* the problems discussed in detail under the UNGP. The conflict with national law, especially the establishment of a parallel normative order with its own requirements and enforcement mechanism, and the question of conflicting requirements in the supply chain are recognized, but not resolved. The norm creation process not only takes place in formalized procedures, but also through a variety of guidances and tools generated by the OECD secretariat, committees, and employees.

In contrast to the UNGP, governance through internalization, reporting and supply chain management, which gives the role of self and third party regulators to enterprises and gives NGOs a monitoring function, is only *one* element of governance. The *second* is the further concretization of the principled framework of the OECD Guidelines by the OECD committees and the member states through sector and issue specific guidances and other tools, developed with the assistance of consultation processes and stakeholder participation.¹¹⁹ The *third* is the implementation process envisaged in the OECD Guidelines involving the National Contact Points and the Investment Committee, which should also apply for participating non-OECD states.¹²⁰ This will be addressed in more detail in the following.

b) The Implementation Procedures

The Implementation Procedures are a *sui generis process*,¹²¹ which is to be settled between administrative implementation and mediation mechanisms on the one hand, and quasi-judicial arbitration proceedings on the other.¹²² The structure is dual in nature and comprises (1) the National Contact Points (NCP) and (2) the OECD Investment Committee. The establishment, competence and procedural requirements are laid out in the Decision of the Council and the Procedural Guidance, which are to be periodically assessed and updated, as they are a *living document*. The entire procedural architecture is aimed at dynamic development, increasing convergence and coherence in the processes and decisions within the guide rails of functional equivalence, and at the continuous substantive concretization of the OECD Guidelines. This involves, on the

¹¹⁵ See also Weidmann, p. 196.

¹¹⁶ OECD Guidelines, Part II, Amendment of the Decision of the Council, II. 2., 7., 8.

¹¹⁷ OECD Guidelines, Part II, Procedural Guidance, II. 2. b), c).

¹¹⁸ See the above critique of the UNGP and SRSG process, Chapter 2, III. 4.

¹¹⁹ See e.g. Responsible Supply Chains in the Garment and Footwear Sector, <https://mneguidelines.oecd.org/responsible-supply-chains-textile-garment-sector.htm>, last accessed on 07/02/2017.

¹²⁰ See Weidmann, p. 196; OECD Guidelines, Part I, I. 11.

¹²¹ See also Weidmann, p. 257; see also "National Contact Points: An Overview. Global Forum on Responsible Business Conduct", 18–19 June 2015, <https://mneguidelines.oecd.org/globalforumonresponsiblebusinessconduct/2015GFRBC-National-Contact-Points-Overview.pdf>, last accessed on 07/02/2017.

¹²² See Ochoa Sanchez, *Nordic Journal of International Law* Vol. 84 1/2015, p. 89 ff.