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The OECD Guidelines on Multinational Enterprises

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The OECD Guidelines on Multinational Enterprises, first adopted in 1996 by the OECD countries constitute one of the many non-binding guidelines which have been promulgated in relation to responsibility of business enterprises for human rights and environmental violations. As is the case with other non-binding guidelines, these only constitute “soft law”. The revision of the OECD Guidelines in 2000 mandated OECD member states to create a mechanism for handling complaints under the Guidelines, the so-called “National Contact Points” (NCPs). The creation of NCPs have resulted in a somewhat harder effect of the “soft law” in that it was binding on OECD members to institute an NCP compulsorily. The NCPs are to apply the OECD Guidelines as the normative basis on which complaints against Multinational Enterprises may be entertained. A complaint brought to an NCP is termed as a “specific instance”, which does not carry with it any specific legal connotation. In this sense, this is the softest factor in the soft-law of the OECD Guidelines.

The major requirements which need to be fulfilled for the handling of a “specific instance” are the following:

- Firstly, there must be an investment nexus- different NCPs have interpreted this differently, resulting in legal uncertainty as to what this means. For example, the UK NCP has been willing to accept financing as an investment nexus, while the Finnish NCP has not entertained this view. Further, purely trade or supply-chain related issues are generally not considered as constituting an “investment nexus”, resulting in a very restrictive use and interpretation of which cases might be considered at all.
- Secondly, there should not be any other national parallel proceedings. This is to overcome the difficulty of being placed in a situation of having to override national law. NCPs do not have the power to override national judicial mechanisms or laws.
- Thirdly, an enterprise can claim defense on the basis of national administrative law protections like data protection or other procedural guarantees, which might disallow the acceptance of a “specific instance”.
- Finally, the complaint must be “bonafide”, i.e. should relate to an alleged violation of the OECD Guidelines, as these

constitute the substantive normative basis on which NCPs may be involved.

From an institutional perspective, most NCPs are located in the wrong place, i.e. within the investment or trade promotion departments of government. As the saying goes, justice should not only be done, it must also seem to be done, where an NCP is located plays an important role on its ability to be independent from the government and to play the role of an impartial mediator. Only the Dutch NCP is currently completely independent from government

Some factors which decrease the effectiveness of NCPs considerably are:

- NCPs are not constituted as a judicial or other authority but rather only as playing a role of providing a platform for mediation between the enterprise and the complainants.
- The wide-ranging difference in procedures, for example in publishing the complaints from an initial stage, result in less transparency. The UK NCP is well known for its transparent handling of the complaints received, while the Swiss NCP has published few till date.
- NCPs do not have any powers of enforcement or implementation, in some cases, this makes the whole proceeding somewhat superfluous. For example, the UK NCP found an enterprise, Vedanta in violation of several provisions of the OECD Guidelines, yet, with no powers of enforcement, Vedanta does not have to face any consequences as a result of its non-compliance.

With a wide range of NCPs following a wide range of practice in procedural issues and substantive matters, it is difficult to make a general statement on effectiveness. Yet, one can conclude that although the OECD Guidelines through the National Contact Points might play a role in creating awareness of the possible violations by multinational enterprises of human rights, these cannot yet be seen as an effective mechanism in holding enterprises responsible.