

## **OECD WATCH**

### **MULTISTAKEHOLDER CONFERENCE 1, April 2005, Brussels Putting the OECD Guidelines for MNEs into Practice**

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#### **Working Group 3:**

#### **GOVERNMENTS AND THE OECD GUIDELINES FOR MNEs**

#### **Proposal for Improving the Monitoring of Guideline Application**

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- 1. The Peer Review and Why Is OECD Watch Suggesting Its Introduction?**
- 2. The Guidelines' Monitoring Tools and Their Respective Limitations**
  - **Strength and Weaknesses of the National Contact Points**
  - **Strength/ Weaknesses of the Reporting and Complaint Procedures**
- 3. Objective Monitoring, the Road to Achieving Greater Functional Equivalence, Credibility and Acceptance**

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There appears to be widespread agreement that the potential of the Guidelines as a tool for guiding corporate conduct is not being fully realized. Fortunately, even harsh critics seem to agree that greater effectiveness is not only desirable, but also possible.

What can adhering governments do to improve the effectiveness of the Guidelines?

Transparency International and most other members of the OECD Watch Network believe that improved monitoring of the application of the Guidelines by the National Contact Points (NCPs) could be a significant step towards strengthening the Guidelines effectiveness.

In many OECD policy areas, a mechanism known as the Peer Review has been applied to monitor adherence and impact of agreed policies and rules. Widely used for many years, the Peer Review is now a well-established, tried and proven OECD monitoring mechanism.

The OECD Watch Network is thus considering proposing to the Investment Committee, the introduction of the Peer Review to the Guidelines' existing, not entirely satisfactory, monitoring system. During this Conference, we hope to stimulate Committee members interest and support for the proposal to establish the Peer Review as part of the Guidelines monitoring system.

My presentation in this Working Group is intended to gather critical feedback and initiate the process of winning stakeholder and adhering governments' support for the Peer Review. I will structure my remarks as follows:

- First, I will introduce the concept and functioning of the Peer Review as practiced in the OECD

- Secondly, I will present evidence, based on the past five year practice, of the existing monitoring system's limitations
- In conclusion, I will argue, that given the requirement to ensure the "functional equivalence" of the NCPs and given the "oversight responsibility" of the Investment Committee for the OECD Guidelines, adhering governments urgently need to consider further steps to improve the quality and reliability of NCPs effectiveness in promoting corporate observance of the Guidelines.

## **1. The Peer Review and Why is OECD Watch Suggesting its Introduction?**

In OECD Watch's view, **sophisticated monitoring is key to raising NCPs performance** to reflect the high standards encapsulated in the Guidelines. With the Peer Review, the OECD has a tool in hand which is uniquely sophisticated, combining as it does external with insider know-how and thus bringing both objective standards and legitimate, individual national experiences to the task of monitoring adherence to agreed standards.

The Peer Review has been developed and used by the OECD as a monitoring and mutual learning tool since the beginning of the organization 40 years ago. Originally it was basically an examination of one state's performance by other states. Over time the instrument was adapted to accommodate new developments in the OECD and in society. Due to its steady incorporation of modern monitoring concepts, the Peer Review has managed to retain its widespread acceptance and reputation as an objective and thus valued feedback mechanism.

Today

- **The Peer Review is a well-established, tried and proven OECD monitoring tool.** It is used to monitor the members' adherence to OECD recommendations in whole policy areas such as for example "development cooperation". And it has proven itself equally useful for monitoring the implementation of specific OECD regulations such as the "Convention on Bribery".
- The present highly sophisticated procedure of the peer reviews is basically the same throughout all OECD policy areas and instruments.
- Peer reviews are **conducted periodically by a team of selected examiners** consisting of one or two members of the relevant OECD Secretariat, one or two officials of member governments, and one or more independent experts including, where appropriate, representatives of social partners and NGOs.
- Based on written documentation prepared by the country under review, the review team visits the responsible national political and or technical institutions, conducts a series of in country interviews and prepares an **extensive mission report on findings, conclusions and recommendations.** This independent review report, including the recommendations, is discussed by the entire Committee and subsequently published.
- The peer review generally proves quite **influential because it combines professional independent expertise, insiders' sensitivity towards local circumstances with empathic peer pressure.** Often alone the scheduling

of a peer review suffices for the relevant ministries to try harder to get the agreed upon tasks done.

Based as they are on solid, independent research and sensitive analysis, **Peer Review recommendations have proven key to initiating necessary adjustments and desired developments in the reviewed policy areas.** Even where the political will to act upon the reviewers recommendations seems weak, the recommendations rarely remain without some beneficial effects.

## **2. The Guidelines Monitoring Tools and their Respective Limitations**

The fact that the Peer Review over time has been proven an outstanding monitoring instrument, one which even has been copied by other international organizations, of course does not suffice to propose its application to the Guidelines.

The proposal to enhance the present Guideline monitoring tools by introducing the Peer Review, is motivated and we believe justified by the limitations revealed during the past five years of Guideline application. Limitations which the present monitoring system could not explain, much less help correct.

### **2.1 Strength and Weaknesses of the National Contact Points**

The OECD Guidelines for Multinational Enterprises differ in a number of unique and by and large positive ways from all other existing standards encouraging responsible corporate behavior. Although corporate adherence remains strictly voluntary, governments have formally committed themselves to promote observance of the Guidelines. One formal expression of this commitment is the requirement that each adhering country establish a National Contact Point responsible for the promotion and monitoring of corporate observance of the Guidelines.

In the context of the overall Corporate Social Responsibility (CSR) movement, the NCPs constitute a major institutional and procedural innovation. Their potential for influencing corporate behavior is considerable. Their actual performance, judged on the basis of the NCPs' own annual activity reports and the research of NGOs and trade unions (TUAC) remains enormously diverse and by and large below the level required to make MNEs more accountable.

The major potential strength of the National Contact Points is their institutional and operational flexibility; their major weakness is that in practice, by and large, they have been left to monitor themselves.

**Flexibility in the institutional arrangements** (e.g. responsibility and management of the NCP, choice and role of participants, procedural arrangements) **and in dealing with alleged corporate miss-conduct** ("specific instances") can, and in fact **have produced very unequal results.**

- A few National Contact Points have undertaken broad ranging information and promotion campaigns to make the Guidelines known. Others have done next to nothing.

- Some NCPs have gone to considerable length to investigate and clarify alleged non-compliance issues and thus proactively promoted observance. Others view their role as moderators and still others prefer to refer cases to another NCP to deal with.
- There remains a wide range of attitudes and practices regarding the admittedly conflicting requirements of transparency and confidentiality. In some cases, the commitment to transparency has given way to a creeping confidentiality.

In summary, the institutional and operational flexibility allowed in meeting the obligation to promote adherence to the Guidelines have given room to and tolerated the emergence of both very laid back, more or less inactive NCPs as well as a variety of proactive and imaginative approaches and implementation practices.

In the OECD context one normally would expect divergences in implementation and results at the start of a new common policy or program. After some time, however, an appropriate monitoring system and resultant mutual learning would have succeeded in bringing about a more equal performance in accordance with set standards.

## **2.2 Strength and Weaknesses of the Reporting and Complaints Procedure**

Compared to all other international efforts to advance corporate social responsibility, the various monitoring elements created in and for the Guidelines constitute major innovations. Our proposal is not to discard them, but under all circumstances to maintain and enhance them.

### **Major features of the present monitoring system are:**

- The possibility for concerned parties (social partners/NGOs) to launch a complaint and initiate a review of corporate adherence to standards;
- the requirement for each NCP to annually report its activity to the OECD Investment Committee;
- the compilation of an Annual Report of all NCP Activities,
- and last but not least, the Annual NCP Conferences and Round Table Forums on focal issues.

All these opportunities and requirements are part of the unique monitoring system supporting the goals of the Guidelines.

Nonetheless, the both the official governments' and the stakeholders' documentation of the past five years' activities provides ample evidence that overall, the NCPs efforts to promote corporate adherence to the Guidelines have remained uneven at best. The existing monitoring tools do not appear to encourage, much less ensure the necessary level of mutual learning and improvement. The reasons for the NCPs' persistently unequal performance remain clouded.

A few examples of NCPs' activities documented in the OECD's own official "Annual Report on the OECD Guidelines for Multinational Enterprises" 2004

underline the point that **little can be learned from the present reporting/ monitoring activity.**

In the 4 years since the last revision of the Guidelines in the year 2000, 78 Specific Instances have been filed with NCPs (Report p. 18). The number complaints per country varied from 1 (e.g. Belgium, Brazil, Finland etc.) to 11 (e.g. France, Netherlands and USA) . The Report makes no mention of the possible reasons much less offers explanation for this divergence.

Even more interesting to my mind is the divergence in the relationship between the number of cases filed and those actually considered by NCPs. In Germany 6 specific instances were filed and 2 considered; in France 11 filed, 6 considered, Canada 5 filed and 4 considered; and in the Czech Republic 5 filed and 5 considered.(Report p. 49-55)

An analysis of the reasons and meaning for such divergent rates of consideration could be of considerable value for clarifying how NCPs operate and make their decisions. For example, very different interpretations regarding what alleged corporate misconduct falls under the Guidelines might be the reasons why some NCPs choose to consider only 1 out 3 cases filed, whereas others consider every second case worthy of further examination, and still others deal with 80% or more of the cases brought before them. Again the 2004 Annual Report volunteers neither analysis nor explanation.

Even on issues in which the Investment Committee has in its own words “invested heavily”, such as the proper procedure for handling “special instances” under parallel legal procedures, no satisfactory clarification could be achieved. In conclusion the OECD Report merely states: “Despite broad agreement on the suitability of the general framework, there appear to be some significant and unexplained differences in practice.” (Report p. 24-5)

Indeed **the persistence of significant and unexplained differences in the NCPs interpretation and practical application of the Guidelines remains a major challenge to the Guidelines effectiveness and credibility.**

In the absence of objective monitoring and the resultant lack of trustworthy explanations for the divergent practices in promoting and interpreting the Guidelines, the impartial observer is tempted to conclude that:

- the NCPs do more or less as they please, and
- report what they choose of what they believe they do.

As the Investments Committee’s Annual Report is in its own words “based on the individual NCP reports”, it cannot surprise that the Committee has thus far only been able to ascertain, but not interpret, much less overcome the “significant and unexplained differences in practice” (Report p. 24-5).

In OECD Watch’s view, **the basic flaw in the NCPs’ system of implementation and monitoring is the absence of elements of independent objective review and evaluation, of opportunities for systemic mutual learning and of constructive peer pressure to perform in accordance to agreed standards.**

### **3. Objective Monitoring, the Road to Achieving Greater Functional Equivalence, Credibility and Acceptance**

While the flexibility allowed the NCPs may have had some merits as part of an initial learning process of what works best in a specific national and corporate set-up, in the longer run, the unevenness of the results cannot and should not be tolerated.

**In a highly competitive, globalized world, socially responsible corporate behavior can only be achieved if most countries actively promote it.** In other words, many more NCPs than is presently the case, will have to do a good job of seriously encouraging and monitoring corporate adherence to the Guidelines.

In conclusion, OECD Watch suggests, that given the requirement to ensure the **“functional equivalence”** of the NCPs and given the Investment Committee’s **“oversight responsibility”** for the OECD Guidelines, it appears imperative for adhering governments to take further steps to improve the quality and reliability of NCPs effectiveness in promoting observance of the Guidelines.

Just as law enforcement is indispensable for the effectiveness of legal rules, so an appropriate monitoring system seems a sine qua non if voluntary standards are to have meaning and sufficient impact.

OECD Watch members thus propose adding the Peer Review mechanism to improve the monitoring of Guideline implementation. Based on OECD’s extensive experience with this tool, we feel confident that the introduction and systematic use of **the Peer Review monitoring mechanism could contribute considerably towards reducing the inconsistencies and other systemic weakness of the NCPs’ current implementation practice.**

Finally, we suggest that better monitoring of Guideline implementation and thus more widely accepted results might go a long way towards reducing the need and demand for renewed substantive revisions of the Guidelines. The **cost benefit relationship** of adding the Peer Review to the Guidelines of June 2000 instead of encouraging still another major revision or risking the Guidelines falling into disuse as newer, presumably more effective, CSR instruments come into favor, also seems to speak for our proposal.