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EUROPE NEEDS A TRUE DIGITAL TRANSFORMATION TO REGAIN COMPETITIVENESS AND DELIVER GROWTH AND JOBS, **MARKUS BEYRER** WRITES

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THE GLOBAL TRADE PLATFORM



40 YEARS OF OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES



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A unique and comprehensive instrument for responsible business conduct

Business has long recognized the importance of responsible business conduct in a globalized world. Today, many companies have integrated responsible business conduct into their overall business strategy to manage their activities in a responsible way. Out of the range of international instruments that are in place to guide business in this effort, the *OECD Guidelines for Multinational Enterprises (MNE Guidelines)* are the most comprehensive international instrument for responsible business conduct. Adhering countries have committed to promote the *Guidelines* in a global context.

The *MNE Guidelines* cover all major areas of business ethics and include recommendations in the areas of disclosure, human rights, employment and industrial relations, environment, bribery, consumer interests, science and technology, competition, taxation, as well as general policies related to supply chains, due diligence and stakeholder engagement.

In 1976, the OECD adopted the Declaration on International Investment and Multinational Enterprises. It aims to balance the public policy of OECD governments to promote an open international investment climate with a business commitment to make responsible use of the opportunities an open investment climate provides. The *MNE Guidelines* are an integral part of the OECD Declaration, together with a national treatment instrument, the commitment to minimize conflicting requirements, and the commitment to cooperate in the field of international investment incentives and disincentives.

Together, they form the foundation on which the actual international investment regime rests. And in a world in profound transformation, their relevance is as big and fresh as 40 years ago. Equally, the *MNE Guidelines*, which have been substantially updated and revised several times, are more than ever a key international reference document for responsible business conduct for companies around the world.

Why should business be aware of the MNE Guidelines?

First of all, the *MNE Guidelines* provide a comprehensive framework for responsible business conduct. It is based on a consensus view from adhering governments, which was forged in an intensive negotiation process in 2011 with close involvement of business, labour and civil society. Adhering governments have committed to promote the *MNE Guidelines* within the OECD area and globally. The *Guidelines* are

deliberately not legally enforceable as they are intended to stimulate responsible behaviour, not to trigger legal disputes. However, MNEs are expected to fulfil the recommendations set out in the *Guidelines* and to have a policy in place that is consistent with these recommendations.

What makes the *MNE Guidelines* different from other instruments is that they are supported by a unique implementation mechanism of National Contact Points (NCPs), which are established by all adhering governments. The NCP promotes the *MNE Guidelines* and provides a non-judicial grievance mechanism that can contribute to the resolution of issues that arise in relation to the implementation of the *Guidelines*. Any interested party, in most cases NGOs and trade unions, can call upon the NCP to help resolve issues concerning the implementation of the *MNE Guidelines* by a company in a specific case. The *MNE Guidelines* are the only international corporate responsibility instrument with such a grievance mechanism in place.

In 2015, the *MNE Guidelines* and the NCPs got high-level political attention when the OECD Ministerial Council Meeting in June underlined the importance of continuing efforts to further strengthen the performance of NCPs. The critical role of the OECD *MNE Guidelines* and NCPs was further underlined at the June G7 Summit, which encouraged the OECD to promote peer reviews and peer learning on the functioning and performance of NCPs while G7 governments made a commitment to 'lead by example.'

However, the *MNE Guidelines* should not only be considered as a demand on business. They also contribute to providing a more level playing field, nationally and internationally, by setting out the standards of responsible behaviour that are expected from all MNEs. They also protect business from unrealistic expectations from stakeholders. Expectations that go clearly beyond the *Guidelines* will not easily be considered justified.

The MNE Guidelines today

In addition to the 34 OECD member countries, there are also 12 non-member countries that adhere to the *MNE Guidelines*, and discussions with additional non-member countries are underway. The *MNE Guidelines* are applicable to MNEs operating in and from adhering countries, bearing in mind that observance of the *Guidelines* by these enterprises is recommended wherever they operate, not only in adhering

countries, but also in other countries where they invest. In order to create a level playing field, the business community strongly encourages global engagement and implementation of the standards included in the *Guidelines* by non-adhering countries, including major non-member economies, such as China and India. The OECD activities in this field are highly appreciated.

Since the adoption of the OECD Declaration on International Investment and Multinational Enterprises in 1976, the *MNE Guidelines* have been updated five times. These updates reflected the need to consider the changing landscape for international investment, increasingly complex patterns of production and consumption, and the need to establish confidence in open markets.

In particular, the last update in 2011 has led to increased attention from countries and stakeholders around the world to the *MNE Guidelines*, due to a number of new provisions, such as those related to supply chains and the new human rights chapter. The human rights chapter is fully consistent with the UN Guiding Principles on Business and Human Rights, which were negotiated simultaneously with the *Guidelines*.

The grievance mechanism of the *MNE Guidelines* is increasingly being used. Over 320 'specific instances' were submitted to NCPs between 2000 and mid-2015, covering MNE operations in 90 countries from a range of different business sectors. This clearly demonstrates that companies must be aware of the *MNE Guidelines*.

Avoiding adverse impact - due diligence

The 2011 *MNE Guidelines* introduced an important new recommendation: MNEs should avoid adverse impacts of their business activities in the areas covered by the *Guidelines*. First of all, enterprises should prevent their own activities from causing an adverse impact. Enterprises should also avoid substantially contributing to any such adverse impact. Their own activities also include activities in the supply chain,

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however, some meaningful involvement of the MNE in the activity is then required.

In addition, MNEs should seek to prevent or mitigate adverse impacts by a business relationship, when the impact is directly related to the MNE's operations, products or services. The practical implications of this provision are still subject to a societal debate. At the same time, it should be borne in mind that the *Guidelines* are based on the principle that MNEs are responsible for their own behaviour and not for the adverse impacts purely caused by others. They are more demanding depending on how directly or substantially the enterprise is involved in the adverse impact.

To avoid adverse impacts, enterprises should carry out due diligence. This means that they should introduce a process to identify, prevent, reduce, and account for how they address actual and potential adverse impacts.

However, flexibility is also a key concept of the *MNE Guidelines*. The nature and extent of due diligence depends on the precise circumstances. The *Guidelines* recognize that the encouragement of business partners to comply with the recommendations is subject to practical limitations depending on the specific circumstances.



Business recommendations going forward

BIAC, which represents the business community at the OECD, considers responsible business conduct as promoted by the *MNE Guidelines* to be an essential part of an open investment climate and in the best interest of business. At the same time, the business community continues to work closely with the OECD to ensure that there is a level playing field and to address a number of issues related to implementation.

40 years after the adoption of the OECD Declaration, responsible business conduct and the OECD *MNE Guidelines* are receiving increased public attention. Thus, business must be aware of this important instrument and contribute to strategic discussions in a forward-looking manner. Key considerations for business include the following:

For the *MNE Guidelines* to be effectively implemented, it is important that every country fulfills its commitment to put in place an adequately functioning NCP. Countries cannot reasonably expect business to comply with the *Guidelines* if there is no adequately functioning NCP in place. At the same time, it must be ensured that there is a shared understanding of all stakeholders of the NCP procedure. The purpose of the procedure is to help parties to work constructively on the basis of facts and trust towards a common future-oriented solution to the advantage of all parties.

The OECD and NCPs should ensure that the NCP procedure is publicly presented as an offer of good offices to help parties find a solution, and not a platform for campaigning against companies. The initiation of a specific instance procedure does not automatically imply that a company has failed to observe the *MNE Guidelines*. This should be abundantly clear. NCPs, business and stakeholders will get the best result if they adopt a constructive approach

focusing on responsible business conduct and not an adversarial approach based on campaigning.

To be practical, an excessively broad interpretation of the recommendations in the *MNE Guidelines* must be avoided. There must be a clear understanding of the reasonable limitations for an MNE to change third parties' conduct in the supply chain when seeking to avoid or mitigate adverse impacts in a specific business context.

The *Guidelines* need to remain a practical and manageable tool for MNEs, which is also important to facilitate their acceptance in non-OECD-member countries. Seeking to prevent or mitigate an adverse impact to which an enterprise is only linked by a business relationship does not intend to shift the responsibility from the entity causing the adverse impact to the enterprise with which it has a business relationship.

Finally, with the shift of weight in the world economy, it is more important than ever to expand the geographical coverage of the *MNE Guidelines* and promote implementation of the standards of the *Guidelines* by non-adhering countries, including major non-member economies such as China and India. Any country that is actively involved in international investment should give serious consideration to endorsing the *Guidelines*. This will also contribute to creating a favourable investment environment for those countries and demonstrate their commitment to responsible business conduct.

As 2016 marks the 40th anniversary of the OECD *MNE Guidelines*, active engagement on responsible business conduct by companies and countries around the world is more important than ever for a global level playing field and sustainable economic growth. ■

G20 missed opportunities on trade and investment

A recently released scorecard rating G20 responsiveness to key business policy priorities has revealed that during the Turkish presidency of 2015, the G20 made progress on a number of international business priorities but missed some important opportunities to advance trade and international investment policy frameworks.

Prepared by the International Chamber of Commerce, the Scorecard examines a total of 25 business priorities developed during the 2015 Turkish B20 cycle and rates G20 responsiveness across seven policy areas. This year's score of 2.0 out of 3.0 translates to an assessment of 'Fair'.

ICC Chairman Terry McGraw said: "We publish the Scorecard to help the G20 gauge progress and identify areas that merit greater

attention. This edition finds that the G20 is making progress on the B20 (Business-20) recommendations that will lead to economic growth and job creation. It is critical that G20 leaders, with support from business, unite to exercise stronger leadership in tackling the world's economic policy challenges, particularly on trade, investment and the environment."

ICC Secretary General John Danilovich added: "The score is a slight decrease from the previous Brisbane and St. Petersburg Summits' and reflect our disappointment in G20 leadership on the trade agenda."

The Scorecard suggests that passive wording used in the Antalya Communiqué led to a missed opportunity to underscore the urgency of implementing the WTO Trade