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# FOSTERING RESPONSIBLE BUSINESS CONDUCT IN FOREIGN DIRECT INVESTMENT IN CEE COUNTRIES. THE ROLE OF THE STATE

## Abstract

**Background.** Multinational companies are seen as the key players of global markets. Despite the growing power of business and multinational corporations, the state has the role to play in the execution of responsible and lawful behaviour of companies through employment of a variety of measures e.g. legal provisions, judicial mechanisms, and internationally recognised soft law standards.

**Research aims.** The aim of this article is to discuss the role of the state in providing the framework ensuring responsible business conduct through the implementation of the OECD Guidelines for Multinational Enterprises and effectiveness of functioning of the OECD National Contact Points (NCPs) as tools for observance of corporate behaviour.

**Methodology.** The argumentation presented is based on literature review, conference materials, documentary and internet sources analysis and synthesis, as well as interviews conducted with representatives of the OECD National Contact Points located in selected CEE countries and Western Europe.

**Keywords:** corporate social responsibility, foreign direct investment, OECD Guidelines for Multinational Enterprises.

## INTRODUCTION

Globalization, internationalisation of business ,and the processes of privatisation of the state function, shifted the power from the state to the market, whereas multinational companies (MNC) have been perceived as the primary shapers of contemporary global economy.[1] According to Dylus, the crisis of state structures is caused by unilateral

[1] P. Dicken (2003). *Global Shift Reshaping the Global Economic Map in the 21st Century*. Sage Publication, London.

dynamics of economic growth rooted in the lack of proportion between politics, economy, and society.[2] Foreign direct investment (FDI) is considered as a measure of activities of MNC.[3] The state uses various strategies to attract FDI, that plays an important role in development of economies especially in the context of technology transfer, improvement of productivity, creation of workplaces, transfer of managerial skills, and gaining access to global markets.[4] That was also the case of Central and Eastern European (CEE) countries that remain attractive areas to establish business operations.[5] Despite certain benefits associated with MNC's, some shadows also emerge mostly in the area of violations of human rights, tax evasion, environmental pollution, etc. The need for greater transparency and accountability of MNCs seems to be getting high priority in the global debate on socially responsible business, especially in the context of the upcoming legislation on non-financial reporting of enterprises.[6] The concept of corporate social responsibility (CSR) is not new, current definition specifies CSR as the "responsibility of the enterprises for their impact on society".[7] This approach revised the role of enterprises in contemporary economy and society. Some authors claim that corporations use confusing and complex corporate structures in order to separate the parent company from local subsidiaries, thus protecting MNC from legal liability, but retaining the control over subsidiaries through creation of special policies, technological, and financial power.[8] A more radical opinion was expressed by Ireland stating that "corporate legal form was, and is in large political construct developed to accommodate and protect rentier investors, a construct which institutionalizes irresponsibility".[9] As business does not operate in a vacuum, corporate misconduct should be a subject of interest to the state. The aim of this article is to discuss the role of the state in fostering responsible business conduct in the context of implementation of the OECD Guidelines for Multinational Enterprises (OECD Guidelines).

## The role of the state – United Nations perspective

The approach to understanding the role of the state is related to the Guiding Principles on Business and Human Rights as a tool for implementation of the United Nations

[2] A. Dylus (2005). *Globalizacja, refleksje etyczne*. Zakład Narodowy im. Ossolińskich, Wrocław.

[3] P. Dicken, *op.cit*.

[4] P. Enderwick (2005). *Attracting "desirable" FDI: Theory and evidence*. "Transnational Corporations", vol. 14, no. 2, pp. 93–119.

[5] EY (2014), *EY's Attractiveness Survey Europe 2014. Back in the Game*. http://www.ey.com/GL/en/Issues/Business-environment/european-attractiveness-survey (access: 10.05.2015).

[6] Ministry of Economy (2015). *Nowe przepisy UE dotyczące ujawniania danych pozafinansowych*. http://www.mg.gov.pl/node/22566 (access: 21.01.2015).

[7] European Commission (2011). *Renewed EU strategy 2011–2014 for Corporate Social Responsibility*, European Commission, Brussels.

[8] R. Meeran (1999). *Liability of Multinational Corporations: A Critical Stage*. http://www.labournet.net/images/cape/campanal.htm (access: 20.02.2015).

[9] P. Ireland (2010). *Limited liability, shareholders rights and problem of corporate irresponsibility*. "Cambridge Journal of Economics", vol. 34, p. 837.

(UN) "Protect, Respect and Remedy Framework".[10] The framework proposed by professor John Ruggy is build on III pillars i.e. "The state duty to protect human rights", followed by "The Corporate responsibility to respect human rights" and the last pillar "Access to remedies". Although all of these pillars are linked and interpenetrating, the article will focus on the first pillar. Understanding of the state's duty to protect is composed from the set of foundational and operational principles guiding the state through the actions that should be taken in order to ensure respecting of human rights. Two approaches can be distinguished i.e. protection of citizens from unlawful behaviour of MNC's through regulatory measures, legislation, punishment, adjudication, and effective policies preventing enterprises from further abuses. The second approach: encouraging enterprises towards greater responsibility, is also embedded in a soft regulatory framework. The state uses a variety of measures e.g. legal framework and soft law i.e. the Guiding Principles on Business and Human Rights or/and the OECD Guidelines. Non-effective policies, weak regulatory framework, less severe penalisation may in some instances cause purposeful irresponsibility of MNCs. Weak legislation, legal loopholes, or lower labour standards are often used by businesses to reduce their operational costs, claiming in the same time their responsibility trough well developed PR strategies. The protective and preventive role of state is therefore important to ensure lawful and responsible behaviour of companies. In case of FDI, the state often faces a particular clash of interests between the expectations of foreign investors and citizens. Multinationals tend to exercise their power and dictate the conditions of doing business by using the threat of delocalisation i.e. moving the investment to another country[11], even though the use of this threat is forbidden under the Guidelines.[12] Despite the growing role of international business, the regulatory function of the state in enforcement of law and international standards should not be forgotten.

## Measures and tools in the hands of a responsible state – the OECD Guidelines for Multinational Enterprises

Apart from legal measures, the state can influence business behaviour using non-legally binding standards such as the OECD Guidelines. They represent a set of recommendations on responsible companies' behaviour created by governments adhering to the OECD Declaration on Investment and Multinational Enterprises.[13] Under this declaration, governments are obliged to promote and implement the OECD Guidelines, through the activity of the National Contact Points (NCPs). Poland, Hungary, Czech

[10] United Nations (2011). *Guiding Principles on Business and Human Rights*. United Nations, New York – Geneva.

[11] P. Marginson (2006). *Europeanisation and Regime Competition*. "Industrielle Beziehungen", vol. 13, no. 2, pp. 98–113.

[12] OECD (2011). *OECD Guidelines for Multinational Enterprises*, OECD Publishing. http://dx.doi.org/10.1787/9789264115415-en (access: 10.05.2015).

[13] *Ibidem*.

Republic, and Slovakia, as big FDI receivers, adhered to the OECD Declaration. The NCPs started to work on complaint procedures concerning corporate misconduct in the year 2000. The complaints have usually been submitted by representatives of civil society or trade unions, which is related to parties involved in OECD activities i.e. the Business and Industry Advisory Committee to the OECD (BIAC), The Trade Union Advisory Committee to the OECD (TUAC), and representative of civil society i.e. OECD Watch. In 2011, the OECD Guidelines were revised together with the revision of effectiveness of OECD NCPs. The shift of changes resulting from the revision aimed at mediation, conciliation, and extrajudicial dispute resolution that should be offered by NCPs. In the revised version of the Guidelines' compliance with domestic law was explicitly underlined as well as a clear connection with new definition of CSR i.e. companies should assess and identify the risks of negative impact of their business operations and implement strategies that would prevent the occurrence of risks. The document also made clear that compliance with the Guidelines covers all parties i.e. parent companies and local entities.[14] The nexus "state and business" lies in the enforcement by the state of responsible behaviour of business.

### Social monitoring of MNC's behaviour

Social monitoring of MNCs' compliance with the OECD Guidelines is conducted by civil society organisations (CSO) and trade unions. Both of them developed monitoring tools revealing corporate misconduct. Those tools deliver information about abusive cases and the mechanisms and actions used by NCPs to resolve the conflicts. The specific website established by TUAC provides comparative information on cases submitted by trade unions worldwide and information on the functioning of particular OECD NCPs in the adhering country. The representatives of civil society also conduct their monitoring although a different model of presenting information is used. The effects of monitoring will be presented further in the text.

## DISCUSSION AND RESULTS

In the course of analysis of the collected data, some similarities in OECD NCP operations in CEE countries have emerged. Firstly, Polish, Hungarian, Slovak, and Czech OECD NCPs were established in a single government department i.e. in the Polish Information and Foreign Investment Agency, Hungarian Ministry of National Economy, Slovak Ministry of Economy, and finally Czech Ministry of Industry and Trade. The

[14] OECD (2012). *2011 Update of OECD Guidelines for Multinational Enterprises. Comparative Table of Changes to the 2000 Texts*. https://mneguidelines.oecd.org/text/ (access: 10.05.2015).

other similarities arise in the lack of tripartite models (Poland, Hungary, and Slovakia) which means that other parties i.e. CSOs or trade unions are not involved in NCP operations. Other approaches e.g. creating multistakeholder oversight or an advisory body is also lacking. According to the analysis made by TUAC, apart from the Czech Republic, none of mentioned above NCPs has taken steps to ensure its impartiality. In comparison to models established by other OECD countries e.g. France, tripartite structure of NCP is composed of representatives of a variety of ministries, employers, and trade union organisations. Similarly Denmark has created the Independent Expert Body with participation of representatives of a variety of ministries, employer organisations, trade unions, and academic institutions. The lack of engagement of other stakeholders, such as social partners, CSOs, or academics may lead to a lack of impartiality in the course of dispute resolution. This could be the case of the Polish NCPs, established in an Agency servicing foreign investors, what may question the impartiality of procedures of handling complaints, as the Agency tends to represent the interests of investors. According to the available sources, among CEE countries, NCPs in the Czech Republic received 5 complaints submitted by Czech trade unions and the Polish NCPs received 4 complaints, whereas Hungarian and Slovak trade unions did not submit any complaints concerning violations of the OECD Guidelines. Those cases concerned violations of the right to organise and collective bargaining (in the Czech Republic), violations of trade union rights, trade union activists' discrimination, and sexual harassment in case of Poland (TUAC, n.d). In 99% of complaints filed by trade unions worldwide, corporate abuses have occurred in employment and industrial relations i.e. right to organise and collective bargaining, as well as information and consultation procedures e.g. providing information on restructuring with major employment effects i.e. closure of a particular entity followed by collective redundancies. In some countries e.g. Poland, the abuse of trade unions' rights is not only a lack of compliance with the OECD Guidelines, but most of all a breach of domestic law.[15] In case of Hungary the complaint was filed by an independent lawyer representing a worker of a multinational enterprise and concerned a health and safety issue.[16] Despite the fact that NCPs should be impartial in handling the complaints facilitating dialogue between parties, the structure of NCPs and their location may affect the results of handling procedures. The OECD Watch recommends avoiding establishing of the NCPs in a single government department, and advises to set up oversight, or a multistakeholder advisory or steering body that will ensure impartiality of actions taken by OECD NCPs.[17] The mediation role of the NCPs provides the victims with faster and cheaper access to solutions than typical judicial mechanisms. However, this

[15] J. Unterschutz (2009). *Prawo pracy. Zarys instytucji*. WSAiB, Gdynia.

[16] OECD (2007). *Annual Report on the OECD Guidelines for Multinational Enterprises 2007. Corporate Responsibility in the Financial Sector*. http://www.oecdbookshop.org/en/browse/title-detail/Annual-Report-on-the-OECD-Guidelines-for-Multinational-Enterprises-2007/?K=5L4JHXPQN8XS (access: 10.05.2015).

[17] C. Daniel, J. Wilde-Ramsing, K. Genovese, V. Sandjojo (2015). *Remedy Remains Rare. An Analysis of 15 Years of NCP Cases and Their Contribution to Improve Access to Remedy for Victims of Corporate Misconduct*. OECD Watch, Amsterdam.

can be possible when the proceedings are impartial and access to remedies is facilitated. Remedies can be considered in various ways e.g. it could be compensation for harm, improvement of conditions for the victims of corporate abuse, improvement in the area of corporate policies and strategies[18], and finally judicial remedies provided in domestic law. It is worth noticing that the state is responsible for providing an effective domestic judicial mechanism, as well as non-judicial mechanisms when addressing corporate abuse.[19] Therefore, the effectiveness of NCPs can be considered through the lenses of state accountability. The analysis of functioning of OECD NCPs revealed that the model used by CEE countries (apart from the Czech Republic) carries the risks of promoting business interests over protection of potential victims. The NCP's structure can determine positive results with some remedy-related outcomes. That was the case of NCP operating as an independent expert body, tripartite structure, or oversight multistakeholder committee. Another weakness of the NCP were accessibility e.g. access to information, technical knowledge how to fill out the forms in a proper manner in order to get through the initial stage of processing the compliant; reliance on the statement of one party i.e. company. An important issue is also handling the situation when a company is reluctant to answer NCP's inquiry or refuses to join the mediation process. The analysis has shown that in some cases despite the existence of strong evidence of a company's misconduct and refusal to respond to the complaints, the NCPs tend to avoid giving MNC the non-compliant status in the final statement issued in the process of handling the grievance. The experience of the Norwegian NCP proved that the use of "non-compliant" determination was a strong motivation for companies to join the mediation rather than end-up with such a negative label.[20] Another finding indicates the rejection of allegations on future harms by NCPs. The revision of the OECD Guidelines in 2011 enables NCPs to prevent parties from further conflicts, facilitating dialogue and prevent business from causing potential, future harm. This approach was based on due diligence and human rights-related provisions introduced in the revised version of the OECD Guidelines recommending companies to assess the potential negative impact and risks associated with business operations.[21] Despite the clear guidance concerning avoidance of the potential harm, NCPs have often refused to accept the allegations associated with potential risks of actions planned by the MNCs.[22] Another accusation concentrates on high expectations in providing evidence of breaching the OECD Guidelines. Some NCPs required inappropriate evidence, impossible to deliver by the complainants. In this case the complaint was rejected at the initial stage without a chance to resolve the problem. This approach tends to create concession for corporate misconduct and may deepen confusion about the real role of NCP's in the area of dialogue facilitation and mitigation of conflicts.[23]

[18] *Ibidem*.
[19] United Nations, *op.cit*.
[20] C. Daniel, J. Wilde-Ramsing, K. Genovese, V. Sandjojo, *op.cit*.
[21] OECD (2011), *op.cit.*
[22] C. Daniel, J. Wilde-Ramsing, K. Genovese, V. Sandjojo, *op.cit*.
[23] *Ibidem.*

Despite the presented convergences in NCP's operations in CEE countries, the level of development of Czech, Hungarian, and Polish NCPs varies. The common weaknesses emerged in limited resources (financial and human) dedicated to these activities, relatively low public awareness of the OECD Guidelines which may negatively affect the prospects of long term stability of NCP development. However, some NCP improvement activities have been observed in CEE countries. Although the most significant steps in providing greater impartiality appear to be an introduction of a quadripartite structure of NCP in the Czech Republic, the risk of lack of cooperation between members of the Czech NCP was raised. Furthermore, all complaints were submitted before 2011, so it is hard to assess the effectiveness of the Czech NCP after the reform. Some changes have also been observed in the Polish NCP e.g. introduction of new procedures, organising educational and awareness raising activities in cooperation with the trade unions, employers, and civil society organisations. In the Polish NCP the issue of staff rotation and lack of multistakeholder oversight/advisory body or tripartite structure remains problematic. Political wiliness to the introduction of changes is needed in order to make a step forward. In all countries limited experience with mediation procedures is noted, therefore it is difficult to assess NCP effectiveness in this role. Hungary seems to be the country that still faces difficulties with rather basic activities. The available materials and publications are not widely translated into the national language which reduces the scope of impact and accessibility to educational resources for the companies and their stakeholders. All countries see some opportunities in further development, all of them have managed to establish relations with themselves and other NCPs worldwide, all of them are engaged in the process of education and development, nevertheless these cooperative attitudes are observed among NCPs' representatives/officers, but in order to achieve greater effectiveness they should be reflected in political decisions of institutions where NCP is housed.

## CONCLUSIONS

The analysis of NCP's effectiveness from a civil society perspective does not depict an optimistic picture. For 250 complaints submitted in 15 years there was no compensation for the victims of corporate misconduct, in 1% of cases improvement of conditions for the victims was noted, 8% of cases led to improvement of corporate policies and in 8% of cases companies/ NCPs acknowledged business irresponsibility. Most of European complaints filed by representatives of society or individuals concentrated on human rights violations and came from United Kingdom and the Netherlands.[24] The number of cases submitted to NCPs by trade unions located in the CEE is relatively low in comparison to Western countries

[24] *Ibidem.*

e.g. France – 11 cases, Netherlands and the UK – 15 cases each (TUAC, n.d.). Explanatory factors emerging from the findings indicate a lack of knowledge on how to properly prepare the complaints, lack of impartiality resulting in lack of trust, bias in recognising the case and reliance on information provided by the company, lack of multistakeholder structures and effective cooperation between stakeholders, actions taken in favour of companies, fear of losing investors, etc. Establishing the OECD NCP is an obligation of the adhering country and the state decides how to fulfil its responsibility in providing effective dispute resolutions for conflicted parties. This however, requires more investment, dedicated budget, cooperation with social partners, civil society organisations, academic institutions, and most of all, decisive political steps.

The analysis shows that in some cases instead of effective mechanisms ensuring observance of the OECD Guidelines the state created only an illusion of accountability.[25] Although the practices of business are essential to ensure responsible behaviour of MNCs, the state has to provide a political, strategic, and operational framework executing and facilitating responsible business conduct and protecting citizens from corporate wrongdoing. This obligation lies in the state's responsibility for providing economic and social development of the country not only in the short term, but also in the long run.

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[25] *Ibidem*.

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