

Roundtable on

## **Forty years of the OECD Guidelines for Multinational Enterprises**

Draft background paper  
DEVELOPMENT OF COHERENT PROCEDURAL  
RULES FOR OECD GUIDELINES' MEDIATION

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## ■ About the background paper

This draft paper by Prof. Dr. Rolf H. Weber is submitted for background information at the Roundtable on Forty Years of the OECD Guidelines for Multinational Enterprises taking place in Paris on 19 December 2016.



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**DEVELOPMENT OF COHERENT PROCEDURAL RULES FOR OECD GUIDELINES’  
MEDIATION**

*Abstract: The OECD Guidelines and the already conducted NCP proceedings have contributed to a better observance of the Guidelines’ substantive principles. However, some weaknesses are not to be overlooked. More attention should be paid to the accessibility, transparency and accountability criteria. Procedurally thorough monitoring and follow-up activities could be improved. Thereby, lessons learned in similar dispute resolution scheme of private markets would be suitable to give some valuable input for a revision of the OECD Guidelines.*

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## **I. INTRODUCTION**

The OECD Guidelines for Multinational Enterprises in the revised version of 2011 (OECD Guidelines) contain several substantive objectives for responsible business conduct in a global context. If certain normative or political aims should be achieved, however, not only the contents of the provisions are of importance but also their effectiveness and enforcement.

Reality shows that during the last decade the Guidelines have not always been complied with, by purpose or unintentionally. In such a case, remedies need to be available. In addition, the access to the remedies should not be jeopardized by inappropriate procedural mechanisms.

After a brief assessment of the effectiveness of the available remedies within the OECD Guidelines' framework this contribution aims at presenting mediation/dispute settlement procedure in private markets and – based thereon – at developing proposals for an' improvement of the present OECD remedies' regime.

## **II. OECD FRAMEWORK FOR DISPUTE SETTLEMENT**

### **1. Existing Procedural Rules**

Only a few general provisions of the OECD Guidelines give procedural directions and provide for specific institutions;<sup>1</sup> in Part II the Implementation Procedures mainly deal with the so-called Procedural Guidance and a commentary thereto.

From an organizational point of view, the implementation of National Contact Points (NCP) is foreseen in order to furthering the effectiveness of the OECD Guidelines.<sup>2</sup> Thereby, the Procedural Guidance states<sup>3</sup> that the OECD wants to extend some flexibility to the countries in organizing the NCP while at the same time ensuring “functional equivalence”. During the extensive discussions on the 2011 revision of the OECD Guidelines no agreement on a harmonization of NCP procedure could be achieved but at least a consensus that “in an ideal world” all NCP would be equivalent. Since procedural matters often are a sensitive topic of sovereign States, this approach is politically understandable. In a globalized world, however, very different procedure in similar cases, conducted in several countries, can lead to incoherent results and forum shopping; such a development is not desirable.

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<sup>1</sup> OECD Guidelines for Multinational Enterprises, 2011 Edition, OECD, Paris 2011, Part II, pp. 67 et seq.

<sup>2</sup> OECD Guidelines (supra note 1), Procedural Guidance, pp. 71 et seq.; the second organization, namely the Investment Committee (pp. 74 et seq.) will not be addressed hereinafter.

<sup>3</sup> OECD Guidelines (supra note 1), Procedural Guidance, p. 71.

In order to achieve a minimal harmonization of the procedural implementation and enforcement of the substantive principles, four criteria for functional equivalence in the activities of NCP are stated:<sup>4</sup>

- *Visibility*: Governments are expected to publish information about their NCP and take an active role in promoting the Guidelines
- *Accessibility*: The effective functioning of the NCP system must be warranted by granting easy access to the actual procedures, possibly by way of electronic communication.
- *Transparency*: The organizational setting as well as the complaints procedures (if no specific confidentiality obligation applies) should be transparent being an important precondition for accountability and credibility.
- *Accountability*: Only if involved stakeholders are accountable for their actions a successful implementation of the Guidelines will be realized; however, the concept of accountability remains relatively vague and – as discussed hereinafter – does not correspond to the concept of determination or compliance.

These four criteria correspond to the requirements usually stated by literature and experts as well as to the access to remedy requirements in principle 31 of the UNGP. As shown in the following chapter, they further receive specification by the voluntary NCP peer reviews. Obviously, however, the practical implementation of these principles in the real world is a key issue.

## **2. Assessment of Their Effectiveness**

Within the OECD the voluntary NCP peer reviews are an important instrument for assessing the effective implementation of the Guidelines and their principles.<sup>5</sup> So far, four peer reviews have been completed (Netherlands, Japan, Norway, Denmark), two reviews took place in 2016 (Switzerland, Italy). Thereby, country-specific, not comprehensive results can be gained.

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<sup>4</sup> OECD Guidelines (supra note 1), Commentary on the Procedural Guidance for NCP, p. 79.

<sup>5</sup> See below, p. 8. *Visibility* has been identified as a key prerequisite for accessibility in all peer reviews (particularly in Japan, Norway, and Denmark); of specific relevance are websites of NCP and detailed, easily available information on the proceedings. *Accessibility*: The peer reviews suggest that the structure of an NCP can have a significant impact on accessibility by e.g. including different stakeholders in the NCP itself or establish institutional linkages with stakeholder communities. NCPs that are hidden in ministries are not only invisible to the outside world but also not accessible. *Transparency*: The rules of procedure and the requirements for submitting specific instances need to be communicated clearly. Equally important is transparent information on the results of such proceedings. However, striking a balance between transparency of proceedings and the need for confidentiality is a challenge for most NCP. *Accountability*: Publishing the annual report seems to have been identified as a minimum requirement for accountability in peer reviews conducted so far. The Norway NCP deserves recognition for strong performance all these criteria.

The first available comprehensive study assessing the effectiveness of the OECD Guidelines' application and their potential weaknesses was presented by OECD Watch, a global non-governmental network with more than 100 members in 50 countries.<sup>6</sup> Based on the analysis of NCP performance of handling complaints during a period of 15 years, the overall assessment with the title "Remedy Remains Rare" is quite negative<sup>7</sup>; this article intentionally does not evaluate (or criticize) the accuracy of the conducted analyses and the proposed recommendations but only gives a short descriptive overview of the outlined procedural weaknesses and later puts them into relation with the lessons learned from the implementation of procedural frameworks in private markets.<sup>8</sup>

The study of OECD Watch analyses four major areas of concern in view of the complaints handling by NCP. The designated areas of concern relate to both, the core criteria of functional equivalence as well as to the guiding principles for specific instances without always using an identical terminology:<sup>9</sup>

(1) *Accessibility*: Four major negative issues are mentioned in connection with access to the NCP complaints procedure,<sup>10</sup> namely (i) the prohibitively<sup>11</sup> expensive and sometimes dangerous procedures for affected communities, (ii) the excessively high standards of proof applied by the NCP in order to accept a claim, (iii) the employment of additional criteria by the NCP for the initial assessment, and (iv) the rejection of allegations related to future harms.

(2) *Impartiality*: The principle that dispute resolution bodies should not show bias towards either party to a case and should be capable of acting and making decisions independently from any outside influence is an obvious procedural requirement in all bodies governed by a proper legal regime ("Rechtstaat"). The study of OECD Watch mentions two weaknesses in reality,<sup>12</sup> namely (i) some NCP structures contribute to a (perceived) lack of independence and (ii) some NCP are basing decisions on information that has not been shared with both parties, in contrast to the well-recognized principle of the "right to be heard" as enshrined in many international legal instruments.

(3) *Transparency and predictability*: The principle of transparency is contained in the "Procedural Guidance" as one of the core criteria that must guide the NCP functioning. In addition, NCP are invited to ensure predictability by disclosing clear information to the public

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<sup>6</sup> OECD Watch, *Remedy Remains Rare*, Amsterdam 2016.

<sup>7</sup> OECD Watch (supra note 6), p. 5, states the following summary: „The overwhelming majority of complaints have failed to bring an end to corporate misconduct or provide remedy for past or on-going abuses.“

<sup>8</sup> See below Chapter IV.

<sup>9</sup> See OECD Guidelines (supra note 1), Commentary on the Procedural Guidance for NCPs, pp. 79, 81 et seq.

<sup>10</sup> OECD Watch (supra note 6), pp. 21 et seq.

<sup>11</sup> In the following description the wording referring to „prohibitively“, „excessively“, etc. is taken from the analysis of OECD Watch and does not reflect the author's assessment.

<sup>12</sup> OECD Watch (supra note 6), pp. 33 et seq.

on their role in resolving complaints.<sup>13</sup> The analysis of OECD Watch identifies two major problem areas,<sup>14</sup> namely (i) the application of overly broad confidentiality requirements by some NCP and (ii) the partly flaunting handling of the indicative timelines provided in the “Procedural Guidance”.

(4) *Compatibility*: The fourth core criticism made by OECD Watch concerns the actual application of the available substantive principles of the OECD Guidelines by some NCP, i.e. the non-compatibility of decisions with the provided normative framework, expressed by the following weaknesses:<sup>15</sup> (i) an insufficient number of NCP are committed to making determinations of non-compliance with the OECD Guidelines when mediation fails; (ii) NCP are often unwilling or reluctant to employ all tools at their disposal to produce successful outcomes; (iii) NCP are mostly not adequately following up on the outcomes of final statements.

With regard to first mentioned weakness, however, the following must be highlighted: The procedural guidance instructs NCP to resolve specific instances in a manner that is compatible with the principles and standards contained in the OECD Guidelines;<sup>16</sup> however, the Guidelines themselves do not explicitly refer to determinations of non-compliance if mediation fails,<sup>17</sup> i.e. the Guidelines do not (at least not explicitly) mandate NCP to issue such determinations. Thus, if NCP do not issue a determination they still act in line with the compatibility criteria; those NCP that issue determinations are in fact mandated by their own procedural rules or bylaws.<sup>18</sup> Hence, it is rather an issue of mandate than of commitment and non-compatibility. Lastly, one might argue that the discussion as to whether NCP should make a determination of non-compliance would be more expedient if it was held under the core criteria of accountability.

#### *OECD Report*

Shortly after the publication of the OECD Watch study, the OECD delivered a very extensive report about the implementation of the OECD Guidelines and the activities of the NCP.<sup>19</sup> The assessment of the activities of local NCP during 15 years was apparently done in parallel with the study of OECD Watch, i.e. the two analyses have not influenced each other nor reacted to specific issues and problems.

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<sup>13</sup> OECD Guidelines (supra note 1), p. 79.

<sup>14</sup> OECD Watch (supra note 6), pp. 37 et seq.

<sup>15</sup> OECD Watch (supra note 6), pp. 41 et seq.

<sup>16</sup> OECD Guidelines (supra note 1), Commentary on the Procedural Guidance for NCP, p.82.

<sup>17</sup> OECD Guidelines (supra note 1), Procedural Guidance, p. 73 lit. c.

<sup>18</sup> The States, where the NCP may investigate whether a violation of the Guidelines occurred, include *inter alia* the United Kingdom, Norway, Denmark, Germany, France, the Netherlands and Switzerland, see Christine Kaufmann et al., Human Rights Implementation in Switzerland, A Baseline Study on the Business and Human Rights Situation in Switzerland, Bern 2014, p. 62; for further details see the procedural guidelines of the respective NCPs: <http://mneguidelines.oecd.org/ncps/>.

<sup>19</sup> OECD Report: Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015, OECD, Paris 2016.

In its report the OECD comes to a more positive assessment than the OECD Watch study, in particular due to significant improvements in the handling of specific instances by NCP, the impact of complaints procedures on the behavior of enterprises, the development of significant skills and experience in mediation and problem-solving within the NCP and the increased attention paid to NCP activities.<sup>20</sup> Nevertheless, some weaknesses have also been diagnosed by the OECD Report: The handling of specific instances appears not to be uniform, the conformity with the core criteria and obligations remains uneven, and better reporting and greater involvement of NCP in the sector projects under the “proactive agenda” would be desirable.<sup>21</sup>

Within the OECD also the NCP peer reviews are an important instrument for assessing the effective implementation of the four core criteria by specific NCP.<sup>22</sup> As mentioned, so far peer reviews of the NCP in the Netherlands (2009), Japan (2012), Norway (2013) and Denmark (2015) have been completed. In Italy and Switzerland peer reviews took place in 2016, the results, however, have not yet been published. Especially the Norwegian NCP was recognized for strong performance across all of these criteria. The peer reviews’ findings are also reflected in the OECD Report.<sup>23</sup>

As in respect of the OECD Watch study, the results of the OECD Report should not be subject of a (critical) assessment or detailed analysis but serve as additional background information for the subsequent comparative considerations related to the adequate design of an appropriate procedural framework for the complaints handling.

### **III. AVAILABLE DISPUTE SETTLEMENT RULES IN PRIVATE MARKETS**

So far, alternative dispute resolution mechanisms have mainly been developed for the solution of legal controversies between private parties. If enterprises are involved, arbitration has for long played an important role. In the meantime, the need to make available cheaper and more practicable complaints procedures has also become apparent in consumer matters. Some examples are discussed hereinafter.

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<sup>20</sup> OECD Report (supra note 19), pp. 42 et seq.

<sup>21</sup> OECD Report (supra note 19), pp. 46 et seq., pp. 77 et seq.

<sup>22</sup> See the NCP National Action Plan 2016 which calls for enhanced peer reviews:  
<https://mneguidelines.oecd.org/action-plan-to-strengthen-ncps.htm>

<sup>23</sup> See e.g. OECD Report: Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015, OECD, Paris 2016, pp. 18, 30 et seq, 49 et seq.; the peers identified room for improvement with regard to all core criteria.

## 1. Financial Markets

### a. Ombudssystem

The term “ombudsman” was invented in Sweden many decades ago; the appointed person was supposed to find an amicable solution in a controversy between an individual (citizen) and the government. Later, this regime has spread out geographically and related to the material domains. In financial markets an ombudssystem has been implemented in three major jurisdictions, namely in the United Kingdom, Australia and Japan:

(i) The *United Kingdom* implemented the Financial Ombudsman Service (FOS)<sup>24</sup> by the Financial Services and Markets Act in 2000, replacing eight previous Ombudsman Bureaus. The system survived the shift of the regulatory supervision from the Financial Services Authority to the Bank of England in 2010.

The FOS attempts at equalizing the weaker position of customers towards big financial intermediaries by offering its services free of charge to them but decision proposals are without prejudice to later court proceedings. But if such a proposal is accepted by the customer, it becomes binding for the financial intermediary, i.e. the weaker contract party is preferentially treated (“consumer protection”); in case of rejection, it must initiate court proceedings. In practice, most of the proposals close the dispute between the two parties.<sup>25</sup>

(ii) In *Australia*, financial intermediaries are obliged to implement an internal complaints mechanism. If an agreement cannot be reached the dispute can be filed with any of the two available settlement organizations, namely the Financial Ombudsman Service (FOS) or the Credit Ombudsman Services Limited (COSL).<sup>26</sup>

After a first assessment of the case the FOS submits an amicable settlement proposal. If the proposal is not accepted by both parties, the FOS starts a deeper investigation ending with a so-called Recommendation which can be accepted by both parties within 30 days. Failing such agreement the FOS issues a so-called Determination that is binding for the financial intermediary and can be contested by the customer only through the filing of a court complaint (as a “preferential treatment” in favor of the “weaker” customer). The proceedings with COSL are very similar.

(iii) *Japan* knows less developed alternative dispute settlement regimes than other countries but designated dispute resolution organizations exist being accredited by the Financial Services Agency (FCA). Financial intermediaries are obliged to inform their costumers about these organizations. The design follows the UK model; due to the variety of organizations

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<sup>24</sup> See [www.financial-ombudsman.org.uk](http://www.financial-ombudsman.org.uk); for further details Shahla F. Ali, *Consumer Financial Dispute Resolution in a Comparative Context: Principles, Systems and Practices*, Cambridge 2013, pp. 35 et seq.

<sup>25</sup> See Rolf H. Weber/Rainer Baisch, *Optimierung der Rechtsdurchsetzung*, in: P. Breitschmid et al. (Hrsg.), *Tatsachen, Verfahren, Vollstreckung*, Festschrift für Isaak Meier, Zürich 2015, p. 775, p. 782 with further references.

<sup>26</sup> See Ali (supra note 24), pp. 64 et seq. and Weber/Baisch (supra note 25), p. 783, each with further references.

and the different applicable rules it is difficult to establish reliable overall results of this ombudsman system.<sup>27</sup>

b. Mediation/Arbitration

Three important financial centers know a mediation or arbitration framework for disputes between financial intermediaries and their customers, namely Hong Kong, Singapore and the United States.

(i) Since 2012 *Hong Kong* knows the Financial Dispute Resolution Centre (FDRC) handling small disputes fast, at low costs and impartially. The first step consists in a mediation taking place only between the parties without their legal representatives. The objective of the mediator consists in convincing the parties to enter into an amicable settlement.

If no solution is achieved the dispute settlement goes to arbitration; in such case, the fees are usually much higher for the financial intermediary than for the customer having the consequence that an incentive is given to settle the case at an early stage.<sup>28</sup> This cost allocation obviously has a consumer protection connotation.

(ii) In *Singapore* the Financial Industry Disputes Resolution Centre was established in 2005. The Monetary Authority of Singapore is accrediting the permissible Dispute Resolution Schemes since 2007. The dispute settlement proceedings are structured in three steps: First, a preliminary assessment is done by the Counseling Services. If the complainant does not agree with this assessment, second, a so-called Case Manager without decision power tries to find an amicable settlement between the parties. Failing such agreement, thirdly, the case is referred to arbitration; the respective decision is binding on the financial intermediary, but the customer has the possibility to invoke the ordinary courts, i.e. the customer enjoys a preferential treatment.<sup>29</sup>

(iii) In the *United States* several mediation/arbitration organizations exist. The most well-known is the Financial Industry Regulatory Authority (FINRA). Its proceedings are announced to be fast, low-cost, fair and impartial; but the problem consists in the fact that in case of ongoing activities of FINRA due to a lack of a common understanding of the parties the fees can substantially increase.<sup>30</sup>

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<sup>27</sup> See Ali (supra note 24), pp. 92 et seq.; Weber/Baisch (supra note 25), p. 785; Kariuchi Shusuke, Regulation of Dispute Resolution in Japan: Alternative Dispute Resolution and Its Background, in: F. Steffek et al. (eds.), *Regulating Dispute Resolution – ADR and Access to Justice at the Crossroads*, Oxford 2013, pp. 259 et seq.

<sup>28</sup> See Ali (supra note 24), pp. 152 et seq. and Weber/Baisch (supra note 25), p. 787, each with further references.

<sup>29</sup> See Ali (supra note 24), pp. 137 et seq. and Weber/Baisch (supra note 25), p. 788, each with further references.

<sup>30</sup> Ali (supra note 24), pp. 111 et seq.; Weber/Baisch (supra note 25), pp. 788/89; Susanna Gut, *Schiedsgerichtsbarkeit: eine Streitbeilegungsmethode für Anlegerstreitigkeiten*, Diss. Zürich 2014, pp. 163 et seq.

A different scheme is the FINRA Investor Complaint Center which can be involved in case of potentially malicious or suspicious activities.<sup>31</sup> A further alternative dispute resolution regime is offered by the American Arbitration Association (AAA), namely the AAA Arbitration Rules for Commercial Financial Disputes;<sup>32</sup> but the respective, litigation-oriented rules are rather time- and cost-intensive.

## **2. Information Technology and Internet Governance**

### **a. Information Technology Markets**

Alternative dispute settlement procedures are also important in the information technology (IT) markets since the implementation of a big IT project should not be stopped through long lasting court proceedings. For example, respective rules have been developed by the Dutch Stichting Geschillenoplossing Automatisering (SGOA)<sup>33</sup>, encompassing the conflict prevention as well as the arbitration

The ICT Conflict Prevention Rules<sup>34</sup> should help to avoid actual judicial proceedings. Correspondingly it is stated that a decision or recommendation by the Conflict Moderator would have the character of advice that is non-binding on the parties, i.e. that the ICT conflict prevention does not aim to provide the parties with a binding decision (No. 5.8). Furthermore, the rules contain the principle that the Conflict Manager will be impartial and independent and must not have or have had any close personal or business ties with either of the parties, i.e. he/she does not have any direct or indirect interest in the outcome of the ICT conflict prevention proceedings (No. 6).

The ICT Arbitration Rules<sup>35</sup> follow the general standards of international arbitration quite closely, for example insofar as an arbitrator must be impartial and independent (No. 9.1)<sup>36</sup> and as the Arbitration Tribunal will judge in all fairness, unless all parties have agreed in writing that the issue will be decided by the rules of law (No. 22.1). Particularly interesting is the provision that in all cases the Arbitration Tribunal, in making its ruling, should take account of the relevant business practices (No. 22.2); this principle helps to develop commercially acceptable standards.

The experience so far has shown that Dutch ICT providers and customers frequently call upon the experts of the SGOA framework; in the meantime, SGOA is also establishing

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<sup>31</sup> Weber/Baisch (supra note 25), pp. 789/90; Marco Franchetti/Philipp von Ins, Arbitration between banks and clients: Could FINRA be a model?, in: P. Nobel et al. (eds.), Law and Economics of International Arbitration, Zürich 2014, p. 83, p. 116.

<sup>32</sup> See [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_004203](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004203).

<sup>33</sup> See <http://www.sgoa.eu/english/>.

<sup>34</sup> See <http://www.sgoa.eu/english/conflict-prevention>.

<sup>35</sup> See <http://www.sgoa.eu/english/services/arbitration>.

<sup>36</sup> Further details are stated in No. 9 and in respect of an interim relief in No. 18.

dispute settlement centers in other European countries due to the fact that the respective services are sought elsewhere.

b. Internet Governance Framework

The field of Internet Governance is characterized by the fact that national law is not an adequate source for deciding disputes. The Internet as a global (cross-border) network requires an international regime by its very nature. Therefore, the Internet Corporation for Assigned Names and Numbers (ICANN) released self-regulatory procedural rules for disputes related to the domain name system already at an early stage of its coming into life. The first version of the Uniform Dispute Resolution Policy (UDRP) dates from 1999, in the meantime the rules have been updated several times.<sup>37</sup>

ICANN is a private organization (organized under Californian law), consequently, the domain name dispute settlement regime must also be organized privately. The specific situation with domain names, however, concerns their function; a name has a public connotation and the allocation of names comes close to the use of a public good.<sup>38</sup> Therefore, dispute settlement provisions cannot be established without having due regard to basic procedural guarantees applicable in public procedures.

For that reason, the UDRP have become under scrutiny from the very beginning. Legal doctrine stated that the UDRP should require that arbitration service providers use neutral, documented, and transparent criteria to select the arbitrator for any given case.<sup>39</sup> The basic fairness issues have been seen in the appropriate information about and the choice of arbitrators as well as in an improved transparency about the details of relevant considerations in the individual proceedings.<sup>40</sup>

The proceedings as such should allow to more easily reaching a settlement of the individual case meaning that respective negotiations cannot constitute evidence of bad faith of any party. In addition, UDRP decisions should be final within the system and parties should not be allowed to undermine a final decision on the merits by an ordinary court.<sup>41</sup> Generally looking, the monitoring and auditing of the quality of the arbitrators and the proceedings remains a continuous task. In the meantime, the UDRP regime has not eliminated all weaknesses but the critical voices are not anymore very strong. In connection with the allocation of new top-level domain names ICANN even established an additional mechanism

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<sup>37</sup> See <http://www.icann.org/resources/pages/help/dndr/udrp-en>.

<sup>38</sup> See Rolf H. Weber, *Shaping Internet Governance: Regulatory Challenges*, Zürich 2009, pp. 60 et seq.

<sup>39</sup> See A. Michael Froomkin, *ICANN's "Uniform Dispute Resolution Policy" – Causes and (Partial) Cures*, *Brooklyn Law Review*, Vol. 67 (2002), p. 608, p. 710. A reason for this request was that at the beginning arbitrators usually tended to decide in favour of complainants (Froomkin, p. 713, uses the term "plaintiff-friendly").

<sup>40</sup> Froomkin (supra note 39), pp. 713/14.

<sup>41</sup> Froomkin (supra note 39), p. 714.

designed to reach decisions more quickly, namely the Uniform Rapid Suspension System (URS) Rules.<sup>42</sup>

### 3. Consumer Dispute Resolution

Consumer dispute resolution has particularly become an important issue in a geographical area that attributes a high importance to consumer protection, namely in the European Union (EU). Already more than 20 years ago, the Commission issued non-binding instruments such as a Green Paper in November 1993 and the Recommendation 98/257 in March 1998 promoting alternative dispute resolution (ADR) and outlining the key principles for an ADR framework. During the following years, the Commission was repeatedly including ADR provisions into specific legal instruments.

The main documents in this field are the Directive 2013/11 of 21 May 2013 on alternative dispute resolution for consumer disputes and the Regulation 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes. In the meantime, the European Commission has created the online dispute resolution (ODR) platform being in operation since 15 February 2016.<sup>43</sup> In addition, Regulation 524/2013 is complemented by the implementing Regulation 2015/1051 of 1 July 2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form and on the modalities of the cooperation between contact points.

The ODR platform of the EU distinguishes between four steps in the proceedings, namely (i) submitting a complaint, (ii) agreeing on a dispute resolution body, (iii) compliant handling by the dispute resolution body, and (iv) outcome and closure of complaint. The Member States of the EU are requested to establish a national contact point (NCP) supporting the consumers in coming along with the ODR platform (thereby using the same term as the OECD Guidelines). Statistics about the procedures are not yet available.

Obviously, the ADR Directive and the ODR Regulation cover disputes between the providers of goods or services and their consumers.<sup>44</sup> Since the ADR Directive must be transformed into national law and the ODR Regulation is effective for only a few month, far-reaching experience is not yet available; but the fact that the Commission puts much emphasis on the implementation of ADR and ODR regimes shows the importance of the new forms of dispute settlement.

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<sup>42</sup> See <https://newgtlds.icann.org/en/applicants/urs/rules-28jun13-en.pdf>; for a detailed description see Peter Müller, *Alternative Streitbeilegung für Domainnamen nach dem Uniform Rapid Suspension System (URS)*, CR 2016, pp. 446 et seq.

<sup>43</sup> See <http://ec.europa.eu/consumers/odr/>.

<sup>44</sup> For further details see Jorge Morais Carvalho/Juana Campos Carvalho, *Online Dispute Resolution Platform – Making European Contract Law More Effective*, in: A. De Francesci (ed.), *European Contract Law and the Digital Single Market*, Cambridge 2016, pp. 245 et seq., pp. 250 et seq.

#### **4. Interim Assessment**

The analysis of the various existing dispute settlement and mediation proceedings in private contractual relationships shows that manifold frameworks have been implemented; each of them is exposed to certain strengths and weaknesses. Positively, the relative success of new forms of dispute settlement procedures is a sign of their value and appropriateness; in several markets, a trend away from ordinary court proceedings can be seen justifying similar movements equally in other areas.

For further consideration, some important elements of the alternative dispute settlement procedures can be identified based on the experience of the existing schemes:

- Information about the exact functioning of the dispute settlement procedures and transparency in respect of the involved mediators/arbitrators is of utmost importance.
- The mediators/arbitrators need to be neutral and impartial, not only in the procedures as such, but also in the general appearance and perception by the stakeholders of the procedures.
- The basic procedural principles applied in ordinary courts are to be equally observed in alternative dispute resolution schemes (equal treatment of the parties, right to be heard, fairness, etc.).
- The contents of decisions, as far as confidentiality undertakings do not prevail, should be made public in order to give guidance for the future behavior of the concerned individuals and companies.
- In many dispute settlement procedures the financially weaker contract party (often also suffering from information asymmetries) enjoys a preferential treatment, for example by imposing a binding effect of mediation proposals or higher procedural costs on the stronger contract party.

The mentioned key messages derived from the experience with dispute settlement rules in private markets can also be taken into account in fields with public stakeholders.

#### **IV. LESSONS FOR THE OECD GUIDELINES**

##### **1. Special Features in Case of Public Involvement**

Drawing lessons for the OECD environment is confronted with the basic problem that not only contracts between private parties but also treaties and guidelines between States as instruments of economic regulation are at stake.<sup>45</sup> This fact has only been reluctantly taken into account by international organizations. An exception can be seen in the activities of UNCITRAL and its Working Group dealing with matters of cross-border electronic commerce

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<sup>45</sup> For an overview related to the respective situation see Mary E. Hiscock, Cross-Border Online Consumer Resolution, *Contemp. Asia Arb. J.* 4 (2011), pp. 1 et seq.

transactions; since 2010 efforts have been undertaken to develop online dispute resolution (ODR) rules including different dispute settlement processes (negotiation, conciliation, arbitration) and describing substantive legal principles (such as equitable treatment, procedural matters, etc.).<sup>46</sup>

Similarly to the OECD Guidelines, public involvement with its additional challenges for dispute resolution also plays a role in the context of the UN Guiding Principles on Human Rights and Business (UNGP) based on the so-called Ruggie Framework.<sup>47</sup> The third pillar, access to remedy, contains a reference to State-based traditional mechanisms (Principle 26): “States should take appropriate steps to ensure the effectiveness of domestic traditional mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.” Such legal barriers can consist in the way in which legal responsibilities are attributed, in denial of justice problems, in the high costs for bringing claims to court or in the difficulty of securing legal representation.

In practice, more important are State-based non-judicial grievance mechanisms and non-State-based grievance mechanisms that are described in Principle 27-30 of the UNGP. Effective and appropriate non-judicial and non-State-based grievance mechanisms must be part of a comprehensive system for the remedy of business-related human rights abuse. In order to facilitate access to these grievance mechanisms, businesses are requested to establish or participate in effective operational-level mechanisms for individuals and collaborative initiatives are seen as a good approach for making these mechanisms available to civil society. The concretization of these elements of grievance mechanisms is left to the national legislation, to the industry self-regulation and to soft law instruments („smart mix“).

Of particular importance is Principle 31 of the UNGP defining the effectiveness criteria for non-judicial grievance mechanisms. The provision refers to the following characteristics: legitimate, accessible, predictable, equitable, transparent, and rights-compatible procedure. These criteria should equally play an important role in the context of the revision of the OECD Guidelines.

So far not much experience with the application of the UN Guiding Principles has been gained but certain aspects that merit attention can be mentioned.<sup>48</sup> Preliminary research shows that the values of the criteria contained in Principle 31 of the UNGP are often not implemented in practice;<sup>49</sup> but the best guidelines are only as good as their effectiveness

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<sup>46</sup> See UNCITRAL, Online Dispute Resolution for Cross-Border Electronic Commerce Transaction, U.N. Doc. A/CN.9/WP.105 (Oct. 13, 2010); UNCITRAL, Report of Working Group III (Online Dispute Resolution) on the Work of Its 22nd Session, U.N. Doc. A/CN.9/716 (Jan. 17, 2011).

<sup>47</sup> Human Rights Council, Guiding Principles on Business and Human Rights, A/HRC/17/31 of 21 March 2011.

<sup>48</sup> Gabriela Schwarz, Alternative Streitbeilegung bei Menschenrechtsbeeinträchtigungen durch Unternehmen, in: L. Marschner/P. M. Zumsteg (Hrsg.), Risiko und Verantwortlichkeit, Zürich 2016, pp. 205 et seq.

<sup>49</sup> Schwarz (supra note 48), p. 223; see also the slightly older publications of Caroline Rees, Mediation in Business-Related Human Rights Disputes: Objections, Opportunities and Challenges, Corporate Social Responsibility Initiative Working Paper No.5, Cambridge/MA 2010; Barbara Linder/Karin Lukas/Astrid

and enforcement in practice.<sup>50</sup> The actual observance of the principles increases the credibility of the complaints procedures as well as the trust of the concerned persons in these mechanisms.<sup>51</sup>

## 2. Key Lessons from Experiences with Other Mechanisms

During the 2011 revision of the OECD Guidelines there was a consensus between the involved governments that a strengthened NCP approach could prevent conflicts from escalating by bringing parties together in mediation or conciliation processes; since mediation is by its very nature consensual, it provides an opportunity for, but not requiring, parties to engage in a facilitated dialog with the objective to resolve a dispute.<sup>52</sup>

(a) As mentioned, the OECD Guidelines have introduced four substantive principles that contribute to the functional equivalence in the activities of NCP.<sup>53</sup> As experience in other mechanisms shows, two criteria are of particular importance:

(i) *Transparency* about the exact functioning of the dispute settlement procedures and in respect of the involved mediators/arbitrators must be achieved. In addition, the contents of decisions, if not covered by particular confidentiality reasons, should be made public in order to give guidance for the future behavior of the concerned stakeholders.<sup>54</sup> In general, transparency is also critical for the credibility of the system.<sup>55</sup>

(ii) As in many other segments of markets and society, *accountability* is a key element of the relations between different stakeholders in organizational structures. Accountability is the acknowledgement and assumption of responsibility for policies, actions, and decisions taken in a designated role; any form of accountability is based on the assumption that objectives and standards are available against which an action or decision may be assessed.<sup>56</sup> The above compared dispute settlement rules in private markets – especially in financial markets – contribute to accountability by including a “carrot and stick” approach. Firstly, stronger parties (e.g. financial intermediaries) are obliged to take part in the respective resolution services; secondly, before the disputes go to arbitration or court, the weaker party (e.g. customer) may unilaterally accept the proposed settlement which has binding effect on the

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Steinkellner, *The Right to Remedy: Extrajudicial Complaint Mechanisms for Resolving Conflicts of Interest between Business Actors and Those Affected by their Operations*, Vienna 2013; Felix Steffek, *Principled Regulation of Dispute Resolution: Taxonomy, Policy, Topics*, in: F. Steffek/H. Unberath (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford 2013, pp. 33 et seq.

<sup>50</sup> Schwarz (supra note 48), p. 223; Linder/Lukas/Steinkellner (supra note 49), pp. 91/92; Barbara Linder/Karin Lukas, *Aussergerichtliche Streitbeilegung im Fall von Menschenrechtsverletzungen durch Unternehmen*, in: A. Bockley et al. (eds.), *Nichtstaatliche Akteure und Interventionsverbot*, Frankfurt 2015, p. 73, pp. 80/81.

<sup>51</sup> Schwarz (supra note 48), p. 223.

<sup>52</sup> OECD Watch (supra note 6), p. 22, p. 30.

<sup>53</sup> OECD Guidelines (supra note 1), p. 79.

<sup>54</sup> See above III.4.

<sup>55</sup> See above IV.1 and OECD Watch (supra note 6), p 37.

<sup>56</sup> Rolf H. Weber/Rainer Baisch, *Liability of Parent Companies for Human Rights Violations of Subsidiaries*, EBLR 2016, p. 669, p. 677.

financial intermediary. Since non-participation may have economic or reputational disadvantages the required incentives are given.

According to the OECD Guidelines, involved stakeholders should be accountable for their actions;<sup>57</sup> in reality, however, accountability does not seem to play a major role in the NCP proceedings. Only a limited number of NCP may assume an adjudicatory role and make a determination as to whether the OECD Guidelines were complied with or not. Such determinations, however, may have a similar impact as a (court) ruling since it could lead to altered conduct by the company concerned or other groups (suppliers, customers, end users).<sup>58</sup> Furthermore, with one single exception, there are no material consequences imposed by governments, in cases of non-cooperation by a company with a NCP or a negative finding against a company. Canada, being the one exception, announced a new Corporate Social Responsibility (CSR) strategy in 2014, which encourages reluctant companies to take part in the NCP proceedings. If companies refuse to take part in the NCP process, the Government of Canada's support in foreign markets may be withdrawn.<sup>59</sup> In 2015 Canada's NCP has issued its first final statement based on the new strategy.<sup>60</sup>

Assessing the situation from a general perspective, it is so far also rather unclear what actual remedy a complainant receives as a result of the NCP findings and/or mediation. The latter is amplified by the fact that the Guidelines themselves do not address the forms of relief. Probably, the "only" clear result could be a declaratory statement by the NCP. Hence, even if a few countries tend to introduce a carrot and stick approach, there is still potential to strengthen the remedy regulation.<sup>61</sup>

(b) Some basic principles also govern the *procedural rights* of the NCP dispute settlement regime; the OECD Guidelines state that the proceedings must be impartial, predictable, and equitable.<sup>62</sup> As experience in private markets complaints mechanisms shows, it is imperative that these criteria are thoroughly observed: the persons conducting the complaints procedures need to be neutral, not only in the procedures as such, but also in the general

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<sup>57</sup> OECD Guidelines (supra note 1), p. 79.

<sup>58</sup> See Baseline Study (supra note 18), p. 63; NCP Norway, Final Report FIOH v. Intex 2011.

<sup>59</sup> See <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng> (09.12.2016); John Ruggie/Tamaryn Nelson, Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges, Corporate Social Responsibility Initiative Working Paper No. 66, May 2015, Cambridge, MA: John F. Kennedy School of Government, Harvard University, p. 21. For further details see Above Ground et al, "Canada is back." But still far behind – An Assessment of Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises, 2016.

<sup>60</sup> See Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region, 2015.

<sup>61</sup> See e.g. Ruggie/Nelson (supra note 59), p. 21: "Forty years of pure voluntarism should be a long enough period of time to conclude that it cannot be counted on to do the job itself".

<sup>62</sup> OECD Guidelines (supra note 1), p. 82.

appearance and perception by the stakeholders of the procedures. The same holds true for the NCP system.<sup>63</sup>

In addition, the basic procedural principles applied in ordinary courts are to be observed (i.e. equal treatment, right to be heard, fairness principle).<sup>64</sup> The significance of these basic principles becomes especially apparent when looking at the dispute settlement rules in the financial markets. Different systems attempt to equalize the existing power imbalances between the parties by either offering their services free of charge or cheaper for the weaker party. Such attempts are not only enhancing a fairer procedure, but are equally particularly conducive to the core criteria of accessibility. Since resource constraints appear to be an obstacle to accessibility in the NCP system, such attempts could have positive effects. The latter may inter alia include the reimbursement of travel, translation and external legal representative expenses.<sup>65</sup>

With regard to accessibility other key lessons can be drawn from experiences with online dispute resolution services. ODR services would save travel expenses, allow for a broader stakeholder involvement or even create an advisory board online. Additionally, risky procedures for affected communities could be avoided or at least partially anonymized. The functioning of such ODR services, however, requires a certain level of digital literacy. Moreover, an ODR platform – similar to the EU ODR platform – might enhance a more uniform functioning of the NCP system due to its increased transparency.

Furthermore, a prevention hurdle against frivolous complaints makes sense; the substantiation standard in the Procedural Guidance is based on the *bona fide* notion. As a consequence, on the one hand unfounded allegations are not to be heard, but on the other hand the factual allegations submitted by the complainant should “only” be plausible at the beginning of the proceedings and strict evidence cannot be requested at that stage.<sup>66</sup> An additional question concerns the implementation of an oversight body (such as the appeals procedures in the United Kingdom).

Finally, a very important element must be seen in the *monitoring* and the *follow-up* of ongoing proceedings. The above described national peer reviews have their merits, however, they cannot substitute an overarching monitoring done by OECD representatives.

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<sup>63</sup> See e.g. Norway National Contact Point Peer Review Process, Final Report of the Peer Review Delegation, 2014, pp. 34, 37, where the independent structure of the Norwegian NCP was deemed essential in order to act impartially, especially where a state-owned enterprise is party to the proceedings; see also OECD, Denmark NCP Peer Review Report, pp. 2, 11, 15. The Danish and Dutch NCP may involve external (co-)mediators to assist the NCP where deemed necessary.

<sup>64</sup> See above III.4.

<sup>65</sup> See Evaristus Oshionebo, The OECD Guidelines for Multinational Enterprises as Mechanisms for Sustainable Development of Natural Resources: Real Solutions or Window Dressing?, 2013 (2) Lewis & Clark Law Review, p. 582; Robert McCorquodale, Survey of the Provision in the United Kingdom of Access to Remedies for Victims of Human Rights Harms Involving Business Enterprises, British Institute of International and Comparative Law (BIICL), 17 July 2015, p. 32: By paying for external mediators, the UK NCP provides a considerable assistance to victims.

<sup>66</sup> See also OECD Watch (supra note 6), p. 26.

Only if the stakeholders are aware of the “risk” that regular reviews take place which assess and evaluate their activities, the incentive remains strong to fully comply with the OECD Guidelines. In addition, an undesirable forum shopping becomes less attractive if a higher degree of similarity in the NCP procedures is realized. The monitoring and follow-up is a measure that also helps improving the quality of the proceedings.<sup>67</sup> In order to increase the degree of acceptability of such “surveillance”, the activities of the OECD bodies should rather be designed as support and not as critical intervention.

## V. OUTLOOK

The OECD Guidelines and the already conducted NCP proceedings have contributed to a better observance of the substantive principles of the Guidelines at stake. However, as evidenced by two recent studies, some weaknesses (being judged as critical to a different degree) need to be overcome during the next years.

From the two studies the conclusion can be drawn that the most critical problems are now identified. In respect of the substantive principles, more attention should be paid to the accessibility, transparency and accountability criteria. The three principles are addressed in the Procedural Guidance, however, it would be worthwhile to amend the commentary to the Procedural Guidance by outlining in more detail the contents of accessibility, transparency and accountability. Thereby, valuable input can be drawn from dispute settlement mechanisms in private markets.

The procedural principles appear to be generally acceptable (for example impartiality and neutrality of mediators/arbitrators); insofar, problems exist more in their implementation than in the theoretical acknowledgment. As a consequence, thorough monitoring and follow-up activities need to be introduced and/or improved. If the OECD would become more active in this context, an impact on the sovereignty of States cannot be excluded, however, this “price” must possibly be paid in order to increase the efficiency of the NCP proceedings and to avoid forum shopping.

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<sup>67</sup> See also Schwarz (supra note 48), p. 212; Linder/Lukas (supra note 49), p. 80.

