

Anna Mokrysz-Olszyńska

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Anna Mokrysz-Olszyńska*

OECD GUIDELINES AS AN ATTEMPT TO REGULATE FOREIGN INVESTORS' BEHAVIOR

INTRODUCTION

Among the five pillars on which the *Responsible Development Plan* is based – approved by the government on 16 February 2016¹ at least two directly concern foreign investments. As a result of the implementation of the plan, the Polish economy should get out of the trap of imbalances between foreign and domestic capital employed in the market (third pillar)², as well as develop foreign expansion, in

* Dr hab.; The Department of Administration and Management, Humanitas University in Sosnowiec.

¹ *Plan na rzecz Odpowiedzialnego Rozwoju*. Annex to Resolution No. 14/2016 of the Council of Ministers dated 16 February, http://www.mr.gov.pl/media/16403/uchwala_plan_odp_rozw_16022016.pdf [access: 4.09.2017].

² *Plan na rzecz Odpowiedzialnego Rozwoju* Annex to Resolution No. 14/2016 of the Council of Ministers dated 16 February, http://www.mr.gov.pl/media/16403/uchwala_plan_odp_rozw_16022016.pdf [access: 4.09.2017].

particular through direct investments by Polish companies, including mergers and acquisitions (fourth pillar)³.

The prospect of both a potential foreign investor and a host country (today - above all, however, for the latter) indicates an interest in the issue of international regulation of investor behavior. A truism seems to be a statement that the economy based on competition mechanisms functions only efficiently when, as pictured in George Akerlof's words, 'the game is played on a court where the state rules and acts as a judge'⁴ globalism is not an easy task. In fact, more and more often it seems to exceed the capabilities of individual states.

With sufficiently strong economic and non-economic power, transnational corporations function in practice as sovereign entities in the modern world economy and are able to control market mechanisms by ignoring the host countries, and host states' jurisdictions.

However, if it is assumed that significant market power is to be provided by analogous responsibility, the definition of the principles of this responsibility and their effective enforcement creates the need for transnational solutions, given the transnational nature of the activity.

Hence, *inter alia*, efforts to introduce a structured system in which it would be possible to solve economic, social and political problems that are too complex to be tackled by nation states by developing the idea of global governance⁵. On the other hand: 'Neoliberal corporate-driven globalization through unregulated, so-called free markets as the foremost stage of profitable business, while demanding to deepen regulations that guarantee the state's ownership of and the conditions of free competition'⁶. 'In any case, the creation of a global administrative law does not seem to be a real project at this stage'⁷.

³ *Plan na rzecz Odpowiedzialnego Rozwoju* Annex to Resolution No. 14/2016 of the Council of Ministers dated 16 February, http://www.mr.gov.pl/media/16403/uchwala_plan_odp_rozw_16022016.pdf [access: 4.09.2017].

⁴ G. Akerlof, R. Shiller, *Zwierzęce instynkty*, Warsaw 2010, p. 224.

⁵ According to the official definition, global governance refers to 'joint efforts to identify, understand or name global problems that go beyond the capabilities of a single state' and include 'the whole of formal and informal institutions, mechanisms, relationships and processes that take place between individual states and their markets, citizens and organizations, both intergovernmental and non-governmental, through which international interests are represented and the rights and obligations laid down' UN (2006), *Definition of basic concepts and terminologies in governance and public administration*, New York, <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan022332.pdf> [access: 4.09.2017]. According to the Report of the German Bundestag (Enquete Kommission), global governance, in its simplest form, is the political shaping of the process of globalization: 'Leaving aside the details for further refinement, the following definition can be adopted: Global Governance can be understood in a broad sense as a political project to help eliminate negative economic, social and environmental trends.' - *Enquete Kommission des Deutschen Bundestages: Globalisierung der Weltwirtschaft – Herausforderungen und Antworten*, Deutsche Bundestag 14. Wahlperiode, Drucksache 14/9200, 12.06.2002, p. 418; compare also: T.G Weiss, NGOs, *the UN and Global Governance*, London 1996, p. 17.

⁶ C. Braunmühl, U. Winterfeld, *Global Governance – eine begriffliche Erkundung im Spannungsfeld von Nachhaltigkeit, Globalisierung und Demokratie. Welche Globalisierung ist zukunftsfähig?*, Wirtschaftszentrum Nordrhein-Westfalen, Wuppertal Institut für Klima, Umwelt, Energie GmbH, Oktober 2003, No. 135, p. 4.

⁷ C. Braunmühl, U. Winterfeld, *Global Governance – eine begriffliche Erkundung im Spannungsfeld von Nachhaltigkeit, Globalisierung und Demokratie. Welche Globalisierung ist zukunftsfähig?*, Wirt-

Historically, as a result of the decolonization processes that took place in the 1950s and 1960s in Africa and Asia, the concept of treaties has been developed as a tool to reduce the risk of undertaking business in politically fragile countries. Such treaties were also commonly agreed with the post-communist countries at the turn of the 1980s and 1990s as reciprocal support and protection of investment, so called BIT agreement. A significant feature of these contracts is the possibility of the investor to claim compensation directly to the receiving country, while the possibility of making claims by arbitration makes investors independent from the national courts. Poland now has 60 agreements on mutual support and protection of investments, mainly concluded in the 1990s. There are over 3,000 such contracts in the world. These contracts are perceived as a manifestation of a certain imbalance of the parties. There is currently a heated debate on reforming the regulatory system⁸. It is also worth noting that the European Commission questioned the compliance with EU law of BIT agreements concluded between EU Member States⁹.

As a result of heterogeneous processes, in the atmosphere of conflicting interests, under the influence of disputed economic theories, with the declining role of states (as a result of the progressive erosion of national decision-making power¹⁰ and political deregulation) and the increasing involvement of non-state subjects in the process of establishing norms and principles and control of their use - the current state of regulation of the activities of transnational corporations, including the behavior of foreign investors on the markets of the host countries was created.

The OECD Guidelines for Multinational Enterprises, adopted by the Declaration on International Investment and Multinational Enterprises of 27 June 2000 by the Governments of the Member States applying the Declaration, are the specific source of regulation adopted in the form of recommendations jointly administered by national governments, OECD member states, Argentina, Brazil, Chile and Slovakia¹¹.

schaftszentrum Nordrhein-Westfalen, Wuppertal Institut für Klima, Umwelt, Energie GmbH, Oktober 2003, No. 135, p. 4.

⁸ See for more: D. Gaukrodger, *The balance between investor protection and the right to regulate in investment treaties*, OECD Working Papers on International Investment 24 Feb. 2017, http://www.oecd-ilibrary.org/finance-and-investment/the-balance-between-investor-protection-and-the-right-to-regulate-in-investment-treaties_82786801-en [access: 4.09.2017].

⁹ On 18 July 2017, the draft law on termination of the agreement between the Government of the Republic of Poland and the Government of the Portuguese Republic on the promotion and mutual protection of investment. Print No 1775, <http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1775> [access: 4.09.2017]. Referring to the position of the Commission is in the justification for the abovementioned draft law, *ibidem*. It is believed that this act will initiate the process of extinguishing similar agreements concluded by Poland with other EU countries – as eg. Cezary Wiśniewski, Alicja Zielińska-Eisen, *Ochrona inwestycji: czy Polska wypowie umowy BIT zawarte z państwami unijnymi?* “Rzeczpospolita”, 31.08.2017, <http://www.rp.pl/Opinie/308319978-Ochrona-inwestycji-czy-Polska-wypowie-umowy-BIT-zawarte-z-panstwami-unijnymi.html#ap-2> [access: 4.09.2017].

¹⁰ J. Habermas, *Die postnationale Konstellation und die Zukunft der Demokratie*, [in:] *Die postnationale Konstellation*, ed. J. Habermas, Frankfurt a. M. 1998, p. 120.

¹¹ In addition to the OECD Guidelines, a similar initiative is under way: Secretary General Kofi An-

They are a code of conduct - a collection of voluntary principles and standards of responsible corporate conduct, formulated in accordance with the applicable laws. Adherence to *the Guidelines* by companies is not mandatory and is not enforceable by law¹².

In May 2010, ie after 10 years since the preparation of the basic document¹³, during which significant changes took place on the world market, among others related to the economic crisis - the governments of the countries that have adopted *the Declaration* started work on updating the *Guidelines*. As a result of the work and extensive consultations, an updated version of *the Guidelines* has been developed, which, together with the revised *Council Decision*, was adopted as the new *Declaration on International Investment and Multinational Enterprises* by 42 governments¹⁴ on 25 May 2011 at the Ministerial Meeting on 50th Anniversary of the OECD.

Although *the Guidelines* outlining the principles and recommendations for multinational enterprises for responsible business attitudes are voluntary, States Parties to the Declaration have made a binding commitment to implement these principles in line with *the OECD Council Decision on OECD Guidelines for Multinational Enterprises* [OECD (2011), Foreword].

According to *the Declaration*, governments adhering to the provisions of *the Declaration* should provide in their territory companies from other countries that adhere to *the Declaration* treatment in accordance with national and international law, on a par with national companies („national treatment“). *The Declaration* does not restrict the freedom of States to regulate the flow of foreign investment or to determine the conditions for the establishment of foreign enterprises and the

nan in 2000, encouraging the observance of 9 universal principles in the business (the rules of the Universal Declaration of Human Rights, the Basic Charter of Fundamental Rights of the International Labor Organization and the findings of the Earth Summit in Rio de Janeiro) under the name UN Global Impact; In addition, the norms and standards developed by independent centers for corporate social responsibility (CSR) and the verification and validation of its use - in particular the ISO 26000 norm prepared by the International Organization for Standardization (Guidance on social responsibility) and the SA 8000 (Social Accountability International) standard and the like.

¹² Wytyczne OECD dla przedsiębiorstw wielonarodowych, Przegląd 2000, OECD 2000, I/1 ; original title: *The OECD Guidelines for Multinational Enterprises, Meeting of the Council At Ministerial Level, 2000*; translation by the Ministry of Economy, Department of Economic Strategy, 2000.

¹³ In fact, the original Guidelines document was created in 1976 and was updated five times in 1976-2000. In 2016, the 40th anniversary of the Guidelines was celebrated; On this occasion on 6.10.2016 in Warsaw international conference 'Responsible development - responsible business' took place. 40 years of OECD Guidelines. 20 years of Poland in the OECD <https://www.mr.gov.pl/strony/aktualnosci/odpowiedzialny-biznes-odpowiedzialny-rozwoj/> [access: 4.09.2017].

¹⁴ Ie. 34 OECD member countries and 8 others: Argentina, Brazil, Egypt, Lithuania, Latvia, Morocco, Peru and Romania.. Text: OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, <http://dx.doi.org/10.1787/9789264115415-en>; text in Polish: https://www.mr.gov.pl/media/41372/Wytyczne_OECD_dla_przedsiębiorstw_wielonarodowych_01.pdf; further: OECD (2011); [access: 4.09.2017]. At the end of 2016, the number of signatory States increased to 46, including 35 OECD member countries and 11 non-member states; vide: OECD (2017), *Annual Report on the OECD Guidelines for Multinational Enterprises 2016*, <http://mneguidelines.oecd.org/2016-Annual-Report-MNE-Guidelines-EN.pdf> [access: 4.09.2017].

conditions of operation of multinational corporations within their jurisdiction, in accordance with international law, but includes the obligation of governments to cooperate - mutual consultations, periodic verifications – to avoid or minimize the phenomenon of imposing conflicting requirements on multinational enterprises [OECD (2011), Declaration].

Looking from the perspective of Polish companies participating in the internationalization process, *the Guidelines* are not only an element that co-determines the conditions of their activity on foreign markets, informing them what expectations they should meet on the markets of host countries, but also a measure to safeguard the quality of competition and equal opportunities. On the other hand, the national legislator should be aware that the regulations govern both domestic and international businesses operating on the Polish market - including those who specialize in choosing the lowest standards of environmental protection, consumers, etc., and the searching gaps in law.

The aim of this paper is to analyze the behavior of foreign investors in the host countries market through the recommendations of *the OECD Guidelines for Multinational Enterprises*, and to assess the effectiveness of these solutions and their adequacy to the needs and challenges of globalization. This will be achieved by answering the following research questions:

- whether and to what extent the substantive scope of the OECD Guidelines takes into account the needs of solving the most critical problems in the area of transnational business operations, in particular - in the field of investment activity?
- whether the investor behavior regulation system based on *the Guidelines* adequately ensures compliance with the rules; And if there is no obligation to comply and legal sanctions for breaking them, it is a significant limitation of effectiveness - are there any other, non-valid sources of motivation on the part of companies that make them comply with *the Guidelines*?

The answer to the above questions is subordinated to the layout of this paper.

IMPACTS AND THREATS OF GLOBALIZATION – REGULATION REQUIREMENTS

Without discussing globalization in general, its advantages and disadvantages, it is worth recalling certain evidences which, however, have priority for the analyzed subject. International corporations are the leading actors in the global market. They are also the main beneficiaries of globalization processes, resulting in reduced transaction costs, rationalization of the supply chain, economies of scale, increased efficiency of resource allocation, etc. At the same time, due to the extraordinary mobility of capital in increasingly liberalized and integrated financial markets and the inclusion of new regions of the world in the capitalist market system, there are fundamental transformations in the way people

work and live, leading to increasing social polarization between North, South and East, as well as in the group of OECD countries itself. There is no doubt that globalization is undermining sustainable development. Dissemination of Western consumption patterns threatens to increase the consumption of raw materials to an unsustainable level. The negative effects of globalization are particularly evident in the increasing burden on the environment, both locally and globally (climate, sea and oceans). For example the development of transport, especially air, results in a disproportionate increase in air pollution, etc. Investors' interests often collide with the vital interests of local farmers, entrepreneurs, forest users, fishermen and the entire community, whose existence may be threatened by investment projects.¹⁵ The need to tackle the negative effects and counteract the dangers posed by globalization sets the goals, tasks and directions of policy orientation for the global market economy, most commonly declared as sustainable development, and requires linking economic processes with economic, social and environmental policies.

The most vital issues that need to be resolved in the field of investor activity in host countries are the most frequently addressed issues of working conditions and, in general, human rights violations, including the use of forced labor, especially children and minors, the need to protect against robbery against local resources and the devastation of the environment, and to shift the burdens associated with the environmental burden on the local population, including the risk of natural disasters. There are problems with using the lower level of market experience of local consumers (which makes them particularly susceptible to all kinds of unfair market practices), the use of unfair ways of competing and abusing one's position (often dominating) against local businesses, and finally the phenomenon of corruption and disloyalty to the national fiscal system.

Such problems were noticed in the 1970s, which led to the OECD's first attempt at creating international standards and the preparation of the 1976 document *Guidelines on Multinational Enterprises*. The *OECD Guideline* for 2011 is yet another sixth edition of this document, reflecting both existing experience and the development of economic and social relations that reveal new issues that need to be solved.

THE SCOPE OF REGULATION COVERED BY THE OECD GUIDELINES

The OECD Guidelines 2011, an annex to the Declaration signed on 25 May 2011, contains recommendations from governments to multinational corporations, aiming, in line with section 1 'Foreword': ensuring compliance of these companies with their policies, improving the investment climate to increase the contribution of multinational enterprises to sustainable development.

¹⁵ Among numerous publications see: Ha-Joon Chang, *Żli Samarytanie. Mit wolnego handlu i tajna historia kapitalizmu*, Warsaw 2016.

The Guidelines consists of two parts, the first of which comprises 11 chapters, with recommendations for responsible business conduct in a global context, and the second part deals with implementation procedures. As stated in Chapter 1 and 2 of the General Concepts and Principles, the overriding duty of enterprises is to comply with the law in force in the receiving state (Chapter 1, p. 2). Further - *inter alia* - companies should ,refrain from applying for exemption or acceptance of exemptions not included in the statutes or laws relating to human rights, environmental protection, health, safety, work, taxation, financial incentives' (Chapter 2, p. 5)¹⁶; they should ,adhere to the principles of good corporate governance and develop and implement good corporate governance, including in the corporate sector' (2, p. 6); and ,develop and implement effective internal control practices and management systems that increase mutual trust in business relationships with the communities in which they operate' (2, p. 7).

These recommendations clearly align with the corporate social responsibility (CSR) and encourage the development of self-regulation and self-control, promoted traditionally by the International Chamber of Commerce in Paris, as well as in the EU's Better Regulation Program, in. also in cooperation with the OECD¹⁷.

The following chapters contain detailed rules for specific topics. Chapter 3 (,Disclosure') establishes the obligation for companies to disclose reliable information about core business, organizational, financial, performance, ownership and corporate governance issues. It specifies exactly what information should be disclosed and additional recommendations are made in this regard. In order to determine the minimum information to be disclosed, the criterion of relevance is taken into account- information that omission or deception may have an impact on the economic decisions made by its customers. The recommended annual independent audit aims to streamline controls and ensure compliance of the company with legal requirements.

Chapter 4 (,Human Rights') was added during the 2011 update of *the Guidelines*. It refers to the UN Model on Business and Human Rights under the slogan ,Protect, respect and repair'¹⁸. On p. 5 companies are encouraged to undertake a detailed analysis of their human rights compliance activities, formulated primarily in the International Charter of Human Rights.

¹⁶ In the commentary to the General Principles (p. 6), however, it is noted that there are cases where such exemptions are justified by the public good and lawful. In general, the addressees of such provisions are the States, in which case they are addressed to multinational enterprises.

¹⁷ As so called: *The EU 15 Project*; <http://www.oecd.org/gov/regulatory-policy/betterregulationineuropeeu15countryfinder.htm> [access: 7.09.2017].

¹⁸ The Framework "Protect, Respect and Remedy" is a framework document adopted by the UN Human Rights Council on 4 April 2008, updated on 1 September 2010, prepared by Professor Ruggie (document available on: <http://198.170.85.29/Ruggie-protect-respect-remedy-framework.pdf>). See also: Rutledge B., *Protect, Respect and Remedy: what does Ruggie's framework mean for ethical trade in 2017?* - <http://www.ethicaltrade.org/blog/protect-respect-and-remedy-what-does-ruggie-framework-mean-ethical-trade-in-2017> [access: 7.09.2017].

Chapter 5 (‘Employment and employee relations’) refers to the fundamental principles and rights of work that are contained in the ILO (International Labor Organization) Declaration of 1998 and the ILO Tripartite Declaration on Multi-national Enterprises and Social Policy, 2006 Edition. The provisions of this chapter reflect the relevant provisions of the Declaration, among others respect for freedom of association and the right to negotiate collective bargaining, the abolition of child labor, the elimination of discrimination in employment and occupational activity. It is worth noting, however, the distinctive characteristic of the entire *Guideline* document, especially in this chapter, the ‘soft’ formulation of the recommendations: “Companies should, within the framework of applicable laws, regulations and existing employment relationships, employment practices and international labor standards (...) effectively abolish child labor and take immediate and effective measures to prevent the worst forms of child labor” (5, p. 1c).

It is clear from the “Comment” (p. 57) that the employment and occupational standards to be observed “to a degree comparable to that of the comparable employer in the host country” (5, p.4a) comprise remuneration and working time arrangements. Multinational companies are expected to comply with legal and industry standards, in particular with regard to health and safety at work.

Chapter 6 (Environment) largely reflects the principles and objectives of the Rio de Janeiro Declaration on Environment and Development, in Agenda 21 and other environmental and management conventions (ISO). As emphasized in “Commentary” (p. 70), *the Guidelines* do not, however, re-interpret existing instruments, but indicate their proper implementation at enterprise level.

The basic message of *the Guidelines*, addressed to companies, is that enterprises should take measures to avoid serious and irreversible environmental damage resulting from their activities, in particular ‘having contingency plans to prevent, reduce and control the major impacts of the environment and health, related to the business, including accidents and emergencies, as well as the mechanisms for immediate reporting of such situations to the competent authorities’ (6, p. 5).

Chapter 7 (‘Combating corruption, persuading to corruption and extortion’) was significantly expanded during the update of *the Guidelines*. This undoubtedly affected a number of international issues, including the announcement by the US Department of Justice of the outcome of a lawsuit against the Johnson & Johnson¹⁹

¹⁹ Johnson & Johnson is a manufacturer of medical devices, pharmaceuticals and cosmetics. The company has nearly 250 branches in 57 countries. In the proceedings it was proved that for several years they gave bribes to doctors and the administration of hospitals for choosing, despite higher prices, their products. As a result, the group achieved additional profits, including: in Greece in 1998-2006 - \$ 24 million, in Romania in the years 2000-2007 - about \$ 3.5 million, in Poland in 2000-2006 - 4, \$ 3 million. The company has also paid Iraqi authorities to receive contracts under the UN’s “Oil for Food” program. As a result of the US Corruption Practices Act 1977, Johnson & Johnson paid \$ 21.4 million in fines imposed by the US Department of Justice and waived more than \$ 48.6 million of illegally obtained profits (a total of about \$ 70 million) – after: US Department of Justice, Office of Public

pharmaceutical company, which created an atmosphere conducive to tightening anti-corruption regulations. As a result of the update the chapter has been expanded; there are more details on recommendations for the development and implementation of appropriate internal control programs and measures to detect and prevent corruption (added p. 2). They go hand in hand with *the Recommendations on the further fight against corruption by foreign officials in international trade transactions of 2009*, which highlight the role of ethics and good practice in preventing corruption, in addition to the United Nations Convention against Corruption (UNCAC), which entered into force on 14 December 2005²⁰.

The next chapter, 8 (“Consumer interests”), contains the general requirements laid down in consumer law- compliance of goods and services with the required law or agreed standards for the health and safety of consumers, reliability of information (here is a supplement to point 2, ‘Where possible, information should be provided in a way that makes it easier for consumers to compare products’, a sign of growing awareness of the importance of market transparency and the rationale for consumer decisions), the availability of effective out-of-court dispute resolution, privacy protection. It also includes a general ban on fraudulent practices and recommends cooperation with state authorities to prevent and combat fraudulent market practices and to address major threats to public health and safety or the environment. In relation to the 2000 version, two points were added to *the Guidelines*: recommendation to support consumer education activities, including - increasing their capacity to make informed market decisions and promoting sustainable consumption (8, p. 5) as well as the call for considering the problems faced by e-commerce consumers (8, p. 8). It seems, however, that this supplement, formulated in such a very general way, meet the purpose of fulfilling the new challenges in a purely formal way, practically without bringing any concrete content.

In Chapter 9 (‘Science and Technology’), the demands for multinational enterprises to develop innovation in host countries are extremely cautious. Each of the 5 points of this chapter is subject to appropriate reservations, essentially aimed at safeguarding the interests of the company, which is recommended “where appropriate, contribute to the development of local and national innovation potential” (9, p. “Taking into account intellectual property rights” (9, p. 2) and, employ local scientific and technical workers and provide them with training opportunities, taking into account the needs of the enterprise’ (9, p. 3). “Licenses for the exercise of intellectual property rights or other transfers of technology should take place under

Affairs, <http://www.justice.gov/opa/pr/2011/April/11-crm-446.html> [access: 8.04.2011].

²⁰ United Nations Convention against Corruption, adopted by the United Nations General Assembly on 31 October 2003, signed by Poland on 10 December 2003 and ratified on 15 September 2006. - <http://www.antykorupcja.gov.pl/ak/prawo/organizacja-narodow-zj/1671,Konwencja-Narodow-Zjednoczonych-Przeciwko-Korupcji.html> [access: 7.09.2017].

reasonable conditions, in circumstances and in a way that favors the long-term perspectives of the host country's sustainable development" (9, p. 4). „If it is in line with the objectives of the company, it is necessary to establish contacts with local universities and public research institutions and cooperate with local industry or industry associations in the implementation of research projects" (9, p. 5). There is an impression of uselessness (superfluity!) of so enigmatically given recommendations²¹.

Chapter 10 („Competition") contains clear recommendations for compliance-companies should operate in a manner consistent with all applicable antitrust laws and regulations. Such a general referral is probably due to the fact that not only competent authorities, but also competing companies, and compliance with legally established „rules of the game" are in this area particularly important for the avoidance of legal risk by the company. In addition, cooperation with competition authorities is encouraged, as well as the promotion of knowledge of the applicable competition law among employees, including „training of management in the field of competition issues" (10, p. 4).

Chapter 11, the last one („Taxation") deals with matters of great importance. At the same time, it can serve as an exemplification of the gap between the wishful nature of the recommendations of *the Guidelines* and the practical reality. Just to mention the issue of transfer pricing and the scale of their use in the strategy of maximizing the net profit of transnational corporations at the expense of local inefficiencies. According to the Tax Justice Network²², about one third of global income, mostly transnational corporations, is taxed in tax havens, which in fact means huge losses in the budgets of many countries. This is still happening, although the problem has already been addressed more extensively in OECD work. The OECD Fiscal Committee is constantly analyzing the subject and updating its 1995 *OECD Transfer Pricing Guidelines for Multinational Enterprises and Fiscal Institutions* and adopted in 2008. *OECD Council Recommendations on Transfer Pricing between Affiliated Companies* [OECD 2011, Commentary 105]. On 10 July 2017, the OECD published another update of the Transfer Pricing Guidelines²³. Past experience indicates that the topic discussed in the last chapter clearly indicates the ineffectiveness of the regulatory solutions that *the Guidelines* provide.

²¹ It is worth emphasizing in the context of the strategy of the Ministry of Development: “We are interested in possibly the largest possible inflow of foreign investments in areas that require modern technologies and know-how. In co-operation with Polish companies and universities, a network of business links will be created, which will be a strong pro-development momentum, while at the same time making Poland more attractive in the global value chain “- <https://www.mr.gov.pl/strony/zadania/wspolpraca-miedzynarodowa/wspolpraca-gospodarcza> [access: 7.09.2017].

²² Tax Justice Network, http://www.taxjustice.net/cms/upload/pdf/The_Price_of_Offshore_Revisited_Presser_120722.pdf; see also: World Bank report (2013): „*The Puppet Masters. How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It*”, <http://issuu.com/world.bank/publications/docs/9780821388945?e=1107022/2698080> [access: 7.09.2017].

²³ OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017.

As is clear from the above review, *the OECD Guidelines* take into account the most important issues identified in the area of foreign investors' functioning in the host countries, calling for a solution. The way to formulate specific rules and recommendations - the result of compromise - usually does not go beyond general slogans. Where, on the one hand, it touches 'hotspots' (eg. propagation versus commercialization of technology, know-how, innovation, tax compliance), the generally well-made recommendations to businesses are carefully protected against reservations protecting their interests. The effectiveness of *the Guidelines*, however, depends not only on the substance of the recommendations contained in them, but also on the practicality of their application.

ASSURANCE SYSTEM FOR THE COMPLIANCE WITH THE OECD GUIDELINES (2011) – NATIONAL CONTACT POINTS

According to *the OECD Council Decision on the OECD Guidelines for Multinational Enterprises*, the signatory States of the Declaration undertake a binding obligation to implement the content of *the Guidelines*. The procedures for implementing *the OECD Guidelines* are the subject of Part 2 of the document under examination.

According to *the Decision*, the States committed to comply with *the Declaration* will create National Contact Points (NCPs) with the task of carrying out promotional activities, providing information and engaging in solving possible problems related to the implementation of *the Guidelines*. The National Contact Points will hold regular meetings to share experiences and report to the International Investment and Enterprise Committee (CIME), which is based in Paris. The Investment Committee is responsible for implementing *the Guidelines*, interpreting their provisions, and supervising implementation.

National Contact Points maintain contacts with business representatives, non-governmental organizations and other parties. They promote *the Guidelines*, especially among future foreign investors in home countries and abroad. In special cases, they participate in settling disputes related to the implementation of the *Guidelines*.

Governments have been given the freedom to organize National Contact Points, but defining the basic criteria for 'functional balance' to characterize their actions, ie: visibility, accessibility, disclosure and accountability for the creation of an image of *the Guidelines*; Their main task is to provide information to the business community, workers' organizations, non-governmental organizations on the availability of measures to implement *the Guidelines*.

The NCP also has the power to mediate in the handling of complaints filed against companies violating *the Guidelines*. After a specific case has been reported, it is assessed on the basis of a thorough explanation of the views of the participating parties to determine whether there is a justification for the further mediation

procedure. The evaluation is carried out in co-operation with the NCPs with relevant ministries and the OECD Guidance Unit. The prerequisites for launching the further procedure are the ability of the parties to participate in the procedure, the locality of the particular Point, and the subject matter of *the OECD Guidelines*.

In case of refusal, both parties are informed about the reasons, and the short form with the justification is published. If further proceedings are considered justified, the mediation proceeding will be opened for a constructive joint solution. At this stage, the NCP becomes a neutral forum, whereby a separate solution, by means of separate and joint, confidential hearings, consultations and talks, is developed. The conduct of the proceedings shall take into account the views of the parties and, where appropriate, the relevant authorities, experts, representatives of the economy, non-governmental organizations and possibly other national contact points. Interpretation issues may also be included in the Committee on International Investments and International Enterprises.

Many of the functions included in *the Procedural Guidelines* are the result of years of experience. During the 2011 update, transparency requirements in the functioning of the NCP have been increased, in particular as regards the publication of communications terminating mediation proceedings in the NCP forum. A significant positive change is the introduction of the principle that the results of mediation, together with adequate justification, must be published, irrespective of whether the complaint has been dismissed, the conclusion of the settlement or the dispute has ended with no agreement²⁴.

The principle of independence of interests, non-party and equal treatment has been introduced. Governments, workers' unions and business associations, as well as non-governmental organizations, can now apply for initial interpretations to the Committee for International Investments and International Business²⁵.

According to the text of the amended *Guidelines*, complaints in the NCP forum may also be adopted if the dispute in question is parallel to the court or administrative body. It is noted that in such cases it is important to check carefully whether there is 'added value' in mediation and whether mediation will not adversely affect parallel conduct.

In practice, there are different organizational forms. National Contact Points operate most often in a specific ministry. In several cases, they are interdepartmental. Including interest groups they may have a single, double or multiple structures²⁶.

²⁴ OECD *WatchStatement on the update of the OECD Guidelines for Multinational Enterprises*, Mai 2011; https://www.oecdwatch.org/publications-en/Publication_3675; see also: Germanwatch, *Überarbeitung der OECD-Leitsätze für multinationale Unternehmen*, <https://germanwatch.org/de/download/2215>. pdf [access: 7.09.2017].

²⁵ Ibidem.

²⁶ B. Utz, *Update oder Upgrade? Eine Bilanz zur Revision der OECD-Leitsätze für Multinationale Unternehmen*, Internationale Politikanalyse, Friedrich-Ebert-Stiftung, Berlin 2011, p. 8.

In Poland the OECD National Contact Point was established in 1998. Since 2001 it has been operating in the Polish Information and Foreign Investment Agency S.A. (PAIiIZ), mainly as a forum for dialogue between government, non-governmental and business sectors. Its main functions were focused on promoting the guidelines through seminars, conferences, answering questions. In 2009 it initiated the action *I implement the OECD Guidelines. Responsible Business 2009*²⁷.

On 1 June 2016, due to structural changes in the Polish government administration, it was decided to move the OECD NCP from the Polish Information and Foreign Investment Agency to the Ministry of Development. Currently, the Point is run by the CSR Team and Stakeholder Contacts in the Office of the Minister of the Ministry of Development²⁸.

Despite the positive changes in the area of application in 2011, the effectiveness of the implementation of *the Guidelines* has so far remained limited. The results of the update of *the OECD 2011 Guideline* are clearly summarized by the OECD Watch, *Improved content and scope, but procedural deficiencies remain*²⁹.

In fact, the lack of obligation to apply *the Guidelines* raises the need to use or even create other, non-motivated sources of motivation for businesses. The National Contact Points look for them in the corporate social responsibility (CSR) concept, pointing to the relationship between the implementation of *the Guidelines* and the building of goodwill, creating a positive image, customer trust, loyalty and employee engagement. CSR ideas remain largely in the sphere of wishful thinking, and corporate social responsibility is used by companies primarily for marketing purposes, and the practical application of them is to the extent whether they are profitable for the company in the long run. It is worth pointing out that the power of non-legal motivation, referring to moral criteria and social responsibility, is much stronger in societies with a higher level of awareness and expectations of responsible behavior from business. At the present stage of development, however, the lack of sufficient social pressure on responsible business attitudes is predominant, and this is due to insufficient transparency and market information asymmetries.

²⁷ Within the framework of the action, jointly with the Responsible Business Forum (FOB) and CSR-Info, an evaluation questionnaire was prepared to carry out a self-assessment to determine whether an enterprise complies with the OECD Guidelines for Multinational Enterprises, and for companies that have successfully passed the survey A certificate was prepared which allows using the logo "I implement the OECD Guidelines", including the placement of the company on the PAIiIZ website as a company operating according to the standards of the OECD Guidelines. <http://odpowiedzialnybiznes.pl/aktualno%C5%9Bci/korzysci-stosowania-wytucznych-oecd-przez-przedsiębiorstwa-międzynarodowe-w-polsce/> [access: 7.09.2017]; see also: Kościeszka K., *Co zostało zmienione i dlaczego? Prezentacja aktualizacji Wytucznych OECD*, unpublished paper presented at the conference "Responsibility & Efficiency. OECD guidelines in the context of supply chain management, PAIiIZ, Warsaw 28 June 2012.

²⁸ <https://www.mr.gov.pl/strony/zadania/wsparcie-przedsiębiorczosci/spoleczna-odpowiedzialnosc-przedsiębiorstw-csr/krajowy-punkt-kontaktowy-oecd/> [access: 8.09.2017]; For example, in Germany, the National Contact Point (Nationale Kontaktstelle) is located in the Bundesministerium für Wirtschaft und Technologie in the Department of Foreign Investment.

²⁹ OECD Watch, *Statement on the update of the OECD Guidelines for Multinational Enterprises*, Mai 2011. https://www.oecdwatch.org/publications-en/Publication_3675 [access: 8.09.2017].

In general, the result of the limited effect of formal and informal motivation is the low interest of enterprises in the implementation of *the Guidelines*. On the Polish ground, this demonstrates, for example, the effects of the action *I implement the OECD Guidelines* carried out by the Polish NCP³⁰, and even the level of interest in conferences organized on this subject. In fact, data concerning knowledge on the Guidelines among enterprises across the world, despite many years of OECD activity in this field, are also not optimistic³¹.

CONCLUSION

Therefore, while responding to the above questions, it should be noted that while the content of the recommendations contained in *the OECD Guidelines 2011* takes into account the most pressing issues commonly seen in the field of transnational business operations, particularly in the area of investment activities, the non-legally binding nature of the rules makes an investor behavioral regulation system based on *the Guidelines* not ensure that they are sufficiently effective. Attempts to develop other than the legal obligation of motivational sources, encouraging companies to adhere to the guidelines of the Guidelines - based on the use of corporate social responsibility (CSR) to build goodwill - are not at this stage of development sufficiently effective against a hard economic account.

The essence of the enterprise is the goal of its business- maximizing profit³², and contributing to the goal the cost extraction becomes an element of effective strategy. Protecting the interests of the environment (other economic players, consumers, the environment – ‚blind market participant’) and the public interest - can and should be effectively safeguarded by explicitly defining the rules of the game and delineating the area of business freedom. It is important to ensure effectiveness by consistently enforcing legally binding rules.

Non-mandatory recommendations and specific actions do not, in general, provide the necessary effectiveness of regulating the activities of undertakings in the competition system. Voluntary submission by the company, in accordance with the rules of rationality, will ultimately depend on the outcome of the cost and benefit account. If the benefit of the use of certain rules is derived from the account they will be respected. However, if the gains made by ignoring them are overwhelmed -

³⁰ K. Kościeszka, op. cit.

³¹ Ibidem.

³² For large corporations (corporations acting in the form of limited companies), the shareholder value formula is no different than the maximization of profit for shareholders. While it is recommended that the Director take into account all relevant factors that are of practical importance for this purpose, including the care of the company's good name, there is no doubt that the obligation to take the environment into account only in the category of the measure to achieve the target according to the classic shareholder value. See D. Bedkowski, *Gesetzliche Pflichtenkatalog für Geschäftsleiter versus Generalklausel*, „Recht der internationalen Wirtschaft“ (RIW) 2003, n. 2, p. 105 and following.

a strategic mistake in a competitive battle would be to limit ourselves to competitors who do not follow the rules! The effectiveness of informal regulation, based directly or indirectly on moral principles, is conditioned primarily by the universality of their application, the transparency of the market and the dissemination in society of their knowledge and the development of social assessments and attitudes, and - at any rate at the present stage of development - is limited.

Therefore, generally, voluntary codes of conduct are not a sufficient form of regulation - they can not replace or be an alternative to existing and consistent law enforcement.

Various forms of soft law, including the so-called self-regulation in the form of codes of conduct (codes of good practice, codes of ethics) can, however, play a positive role, particularly where they complement or comply with the legal framework, but with certain conditions and above all, the universality of their application. In fact, however, the more developed and more effective the regulation is, the more effective the self-regulation becomes, the more precise the general legal principles for particular activities or sectors (good practice codes) appear. With regard to *the OECD 2011 Guidelines*, this idea was expressed in the statement: "The capacity of multinational enterprises to promote sustainable development is much greater when trade and investment are carried out in open, competitive and properly regulated markets"³³.

In this context, there are concepts to support soft regulation of responsible business conduct through appropriate legislative solutions, including settlements for CSR compliance by introducing a reporting obligation (so-called non-financial reporting)³⁴. This obligation is intended to motivate businesses to take into account the impact of their activities on the environment, and to publish CSR reports - to develop public awareness and moral pressure on businesses and to convince them of the value of socially responsible business also in terms of economic accountability. The direction of strengthening the effectiveness of *the Guidelines* is now a priority: improving the cost-benefit measurement system of responsible business is the content of the development plan for *the OECD Guidelines for Multinational Enterprises*³⁵.

³³ OECD (2011). Foreword, 5.

³⁴ Vide: Directive 2014/95 / EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34 / EU on the disclosure of non-financial information and diversity information by certain large entities and groups (Non-Financial Information Disclosure Directive) and implementing to the Polish law Act of 15 December 2016 amending the Act of 29 September 1994 on Accounting, Journal of Laws No. 1994 No. 121 pos. 5. More on this subject: M. Strzelczak, *Nowe obowiązki prawne związane z ujawnianiem informacji niefinansowych i polityki dotyczącej różnorodności*, Thematic analysis 2017/1, www.mf.gov.pl/c/document_library/get_file?uuid=2d9f133c-75a9-4541 [access: 9.09.2017].

³⁵ See: *Measuring the impact of responsible business conduct*, rozdział VI Raportu: OECD (2017), *Annual Report on the OECD Guidelines for Multinational Enterprises 2016*, <http://mneguidelines.oecd.org/2016-Annual-Report-MNE-Guidelines-EN.pdf> [access: 9.09.2017]; see also: M. Suska, *Spółeczna odpowiedzialność biznesu – studium porównawcze reżimów prawnych*, "Yearbooks of Administration and Law" XVI/2, p. 299 and following.

Globalization processes need global solutions. In this field, soft law solutions have much better chances of implementation than difficult and often impossible to agree and introduce legal solutions according to traditional methods, eg by conventional means. The undoubted merit of *the OECD Guidelines* is their complex character - they point to the most important problems in the field of foreign investors in host countries, which should be of interest to the national legislature. Their core value is related to the dissemination of knowledge, especially among future foreign investors in Poland and abroad, as well as local communities affected by the undertaken economic undertakings. In this area the National Contact Point has a lot to do.

It is worth pointing out that the current developments in Poland- increased interest in both foreign investments in Poland and investments of Polish companies abroad, and at the same time growing criticism of Poland's agreements on mutual support and protection of investment, will probably increase interest in regulating this area, through the "soft" regulation system proposed by *the OECD Guidelines* and improving its functioning on the Polish market.

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Summary: The subject of the article is the analysis of the regulation of the behavior of foreign investors on the markets of the host countries by the recommendations contained in the *OECD Guidelines for Multinational Enterprises* and attempt to assess the effectiveness of such solution and its adequacy to the needs and challenges connected with the processes of globalization. Analysis leads to the conclusion that, while the content of the recommendations included in the *OECD Guidelines 2011* takes account of the most pressing issues in the area of the functioning of the transnational enterprises, in particular in the field of investment activity, however, legally non-binding nature of the rules makes this system not sufficiently effective.

Keywords: the OECD guidelines, multinational enterprises, foreign investments, corporate social responsibility

WYTYCZNE OECD JAKO PRÓBA REGULACJI ZACHOWAŃ INWESTORÓW ZAGRANICZNYCH

Streszczenie: Przedmiotem opracowania jest analiza regulacji zachowań inwestorów zagranicznych na rynkach krajów przyjmujących poprzez zalecenia zawarte w *Wytycznych OECD dla przedsiębiorstw wielonarodowych* oraz próba oceny skuteczności takiego rozwiązania i jego adekwatności do potrzeb i wyzwań, jakie niosą z sobą procesy globalizacji.

Przeprowadzona analiza prowadzi do wniosku, że wprowadzie treść zaleceń zamieszczonych w *Wytycznych OECD 2011* uwzględni najbardziej palące problemy występujące w obszarze funkcjonowania przedsiębiorstw transnarodowych, w szczególności – w zakresie działal-

ności inwestycyjnej, jednak niewiążący prawnie charakter przyjętych zasad powoduje, że system regulacji zachowań inwestorów, którego podstawę stanowią *Wytyczne*, nie zapewnia dostatecznie skutecznie ich przestrzegania.

Słowa kluczowe: wytyczne OECD, przedsiębiorstwa wielonarodowe, inwestycje zagraniczne, społeczna odpowiedzialność biznesu