Responsible Business in a Digital World – What's International Law Got to Do With It?

Christine Kaufmann*
University of Zurich, Zurich, Switzerland
christine.kaufmann@uzh.ch

Abstract 782
Keywords 782
Introduction 782
I. Features of Digitalisation and Their Impact on Responsible Business Conduct 784
1. General Features of Digitalisation 784
a) Networks and Connectivity 784
b) Data 786
c) Big Data Analytics 787
2. Specific Business-Related Aspects 787
a) Digital Infrastructures: Blockchain 788
b) Digital Business Models 788
II. International Framework for Responsible Business: The OECD Guidelines for Multinational Enterprises 789
1. Legal Nature 789
2. Scope 791
a) Comprehensive Standard for Responsible Business Conduct (RBC) 791
b) Remedy Mechanism 792
c) Territorial Scope 794
d) Digitalisation and Responsible Business Conduct 796
3. Beyond Hard and Soft Law: Accommodating a Changing World 797
a) Distinctive Features of the Guidelines 797
b) Accommodating New Developments and New Actors 800
III. Interactions Between Digitalisation and Responsible Business Conduct 800
1. New Notion and Models of Business 800
a) Online Platforms 800
b) Accommodating New Business Models – Can the Guidelines Deliver? 803
2. Supply Chains and Due Diligence 803
a) Applying Due Diligence to Digital Technologies 804
b) Applying Digital Technologies for Conducting Due Diligence 807
IV. Conceptual Implications of Complex Interactions 808
1. Mind the Gap: Responsibilities of States and Business 809
2. Responsible Business Conduct by Design – In Regulation and Technology 811
V. Conclusion: A Call for a New Interface 813

* Professor of Public International Law, European and Constitutional Law at the University of Zurich. I am grateful to Rolf H. Weber, Patricia A. Vargas León and the anonymous reviewers for their valuable comments and feedback. While this article benefits from my insights in my role as the Chair of the OECD Working Party on Responsible Business Conduct, all views and opinions expressed are solely my own.

DOI 10.17104/0044-2348-2021-3-781 ZaöRV 81 (2021), 781-815

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

Abstract

The observation that digital transformation challenges some of the underpinnings of traditional international law and regulation also applies to responsible business conduct. The Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises are the most comprehensive international standard on responsible business conduct. This article discusses the impacts of digitalisation on responsible business conduct and the relevant case law by OECD National Contact Points and shows that as a *sui generis* instrument of international law the Guidelines can play an important role in accommodating business as the key driver of digital transformation and in addressing the related risks on people, the environment and society. However, several shortcomings of the existing regulatory framework are identified, particularly with regard to the imbalance of state and business responsibilities and the challenges for adequate regulatory responses in a highly dynamic environment where developments are driven by the private sector. Therefore, a holistic approach, based on 'Responsible Business Conduct by Design' both in technology and regulation is suggested. Given the specific features and impacts of digitalisation on responsible business conduct, such an approach would need to be of a hybrid nature by including a variety of actors and models of regulation beyond the state. To create a safe space for experimenting and testing new regulations and for mutual learning the article concludes with call for a new interface and for exploring a 'regulatory sandbox' at the international level.

Keywords

digitalisation – human rights – responsible business conduct – online platforms – supply chains

Introduction

'The algorithms of the law must keep pace with new and emerging technologies' is the opening sentence in a judgement of the High Court of Justice Divisional Court in Cardiff (UK) regarding the question whether current law in the United Kingdom adequately protects citizens' right to privacy when facial recognition software is used by public authorities.[1]

[1] High Court of Justice, *R v. The Chief Constable of South Wales Police and Others*, Judgement of 4 September 2019, EWHC 2341, para. 1.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

At a time when cyberspace is permeating all aspects of life, blurring boundaries between material and virtual worlds,[2] the statement by the High Court can be interpreted in two ways. On the one hand, as a need for the law to 'give in' to new technologies by lowering the level of legal protection for those whose rights are negatively affected by these technologies. On the other, it can be seen as a call for upgrading and reconceptualising the existing (domestic) legal framework to accommodate new technological developments such as digitalisation.[3] Often heard calls for more suitable approaches which would afford 'better' protection in a digital environment can go both ways: They can lower the level of protection by for example referring to voluntary, industry-led mechanisms instead of judicial scrutiny or result in innovative approaches to preserve legal protection while at the same time accommodating the specific features of digitalisation.[4]

This contribution will leave the domestic sphere and explore the role of international law in accommodating business as a key driver of digital transformation. In particular it will shed light on the role of the OECD Guidelines for Multinational Enterprises.[5]

The argument is structured as follows: First, selected *key features of digitalisation* and their impact on responsible business conduct are discussed with a focus on digital business models and digital infrastructures (I.). The second part (II.) analyses the OECD Guidelines and their distinctive features which qualify them as a *sui generis* instrument of international law that departs from the traditional focus on the state and provides flexibility to address new actors and new substantial issues. Against this background, the *interactions between digitalisation and responsible business conduct* are explored further in the third part (III.) with a discussion of relevant case law of OECD National Contact Points. The following section (IV.) identifies the conceptual implications of these interactions with a view to clarifying state and business responsibilities and suggests a 'Responsible Business by Design' approach. The article concludes with a call for a new interface (V.).

---

2 Laura DeNardis, *The Internet in Everything: Freedom and Security in a World with No Off Switch* (New Haven/London: Yale University Press 2020), 3.

3 The High Court's findings were to a large extent overturned by the Court of Appeals, South Wales Court of Appeals, Bridges, *R (On the Application Of) v. South Wales Police*, Judgement of 11 August 2020, EWCA Civ 1058, para. 58: 'The fact that this case involved the trial of a new technology does not alter the need for any interference with Article 8 rights to be in accordance with the law.'

4 A particularly challenging issue is the application of the rule of law in a digital context (below III.2.b)). Chris Reed and Andrew Murray, *Rethinking the Jurisprudence of Cyberspace* (Cheltenham (UK)/Northampton (USA): Edward Elgar Publishing 2018), 226-230.

5 OECD Guidelines for Multinational Enterprises 2011 edition (Paris: OECD Publishing 2011).

DOI 10.17104/0044-2348-2021-3-781 ZaöRV 81 (2021)

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

I. Features of Digitalisation and Their Impact on Responsible Business Conduct

Digitalisation includes both the *technical process* of converting physical, analogue information into a digital format and a *societal and social* dimension as the resulting interconnection affects our lives in manifold ways. This article will approach digital technologies by looking mainly at two concepts: digital *infrastructures* such as distributed ledger technologies and digital *services*, including the technical aspects of artificial intelligence and machine learning.

For the topic of this contribution networks and connectivity, data and new possibilities to process and analyse data are particularly relevant as they feed *inter alia* into the use of digital infrastructures in a business context, for example blockchain, and new digital business models such as online platforms. The following section summarises the relevant elements of these features.

1. General Features of Digitalisation

a) Networks and Connectivity

Networks allow for information to be passed between computers regardless of their physical location. Connectivity ensures the access to such networks for machines as well as humans. The Internet can be defined as the network of interconnected computer networks.[6] For the purpose of this article, *social networks and platforms* and the *Internet of Things (IoT)* are of particular interest. According to the International Telecommunications Union (ITU) the Internet of Things is 'a global infrastructure for the information society, enabling advanced services by interconnecting (physical and virtual) things based on existing and evolving interoperable information and communication technologies'.[7] The Internet of Things thus extends the internet connectivity to physical objects, ranging from smart home devices to advanced applications like utilities, manufacturing lines, health monitoring systems or drones.[8]

6 Matthias Kettemann, *The Normative Order of the Internet* (Oxford: Oxford University Press 2020), 22-23.

7 International Telecommunications Union (ITU), Recommendation Y.2060: Overview of the Internet of Things, 15 June 2012, para. 3.2.2.

8 Rolf H. Weber and Evelyne Studer, 'Cybersecurity in the Internet of Things: Legal Aspects', Computer Law & Security Review 32 (2016), 715-728 (718-719); OECD, 'The Internet of Things: Seizing the Benefits and Addressing the Challenges', OECD Digital Economy Papers No. 252, 2016; DeNardis (n. 2), 29-31.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

In all networks interoperability is essential for their functioning and accessibility because it is a perquisite for seamlessly transferring data and other information across different platforms, systems and applications.[9] Besides its manifold benefits, for example with convenient single consumer sign-on systems like Facebook's 'Login with Facebook', interoperability can also come with risks for instance on consumers' privacy and data security if such single sign-on identity is stolen.[10] From a responsible business conduct perspective, this raises questions about the governance of interoperability and the related accountability of states and business. Often, interoperability is driven by private actors and industry initiatives. To whom should a user in the mentioned Facebook single sign-on example turn for compensation if her credentials are abused by a third party, such as an advertiser, with whom she has no contractual relationship?[11] Is it Facebook as the digital identity provider? What role is there for state regulation and responsible business conduct standards?

In fact, some of these questions have been addressed in national laws: The United States introduced legislation with the Communications Decency Act in 1996 to address specific aspects of online publishers' responsibility which states immunity from civil liability for providers and users of an interactive computer service.[12] A more general provision shielding media editors from criminal liability for the content of published contributions can be found in Swiss criminal law and the Swiss Federal Court recently held that social media platforms can fall within the scope of this norm.[13] In March 2021, Australia introduced legislation on News Media and Digital Platforms which links the convenience of easily accessing news posted by Australian media on social platforms such as Facebook or Google with an expectation that these platforms share the benefits they earn from such content with the producers of the content.[14]

---

9 Urs Gasser, 'Interoperability in the Digital Ecosystem', ITU Global Symposium for Regulators (GSR) discussion paper 2015, 2.

10 Gasser (n. 9), 12-13.

11 Gasser (n. 9), 14.

12 Section 230 (c) US Communications Act of 1934, 47 USC § 230. Several bills for amending (H. R. 2154, H. R. 2000, H. R. 277) or repealing (S. 1384) this provision are pending in Congress as of 15 August 2021.

13 Article 28 para. 1 Swiss Criminal Code of 21 December 1937 (Systematische Sammlung 311.0): 'If an offence is committed and completed through publication in a medium, then, subject to the following provisions, only the author is liable to prosecution.' (unofficial translation); Swiss Federal Court, Decision of 18 November 2020, BGE 147 IV 65, 71, paras 5.4.4 and 5.5.

14 Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021 No. 21: An Act to amend the Competition and Consumer Act 2010 in relation to digital platforms, and for related purposes (2 March 2021).

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

These regulatory initiatives and reactions to digital developments illustrate the complex environment that states are faced with: squaring the enormous potential of digital technologies for sharing and accessing information, for communication and collaboration across borders and for innovation with their inherent risks of spreading misinformation and infringing on human rights to name just a few.

Since the technology is to a large extent driven by private actors, particularly tech companies, regulators will often be lagging behind. As a result, there is a need for not only ensuring *technical* interoperability but also what has been called *normative or legal interoperability*, which will be explored further in section IV.[15]

b) Data

At the heart of the networks described above are *data*. Before the digital age, data essentially meant information regarding content, collected by people. This changed with digitalisation: Data is now a 'container' for information.[16] Today, most data is collected by machines and digital technologies fundamentally enhanced the value that can be taken or construed from *metadata*. Metadata as 'data about data' provide structured information about different aspects of data, such as for example the use of mobile phones or access to websites. Metadata thus facilitates targeted access to data and the analysis of large data samples. Moreover, with the increase in available data, handling and protecting *personal data* has become a more sensitive issue than ever before.[17]

Thanks to the internet, data can flow through cyberspace between people, businesses and machines across borders and the globe.[18] Hence, since the impact of data is on real people and societies, questions about the territorial and legal attribution of such activities in an increasingly fragmented regulatory environment arise.[19]

15 Kettemann (n. 6), 214-215, 225.

16 Rolf H. Weber, Christian Laux and Dominic Oertly, *Datenpolitik als Rechtsthema: Agenda für Open Government Data* (Zürich/Basel/Genf: Schulthess 2016), 11; Florent Thouvenin, Rolf H. Weber and Alfred Früh, 'Data Ownership: Taking Stock and Mapping the Issues' in: Matthias Dehmer and Frank Emmert-Streib (eds), *Frontiers in Data Science* (Boca Raton: Taylor & Francis 2017), 111-145.

17 For different types of data see OECD, *Enhanced Access to Data: Reconciling Risks and Benefits of Data Sharing and Re-use* (Paris: OECD 2019), 25-27.

18 OECD, *Going Digital: Shaping Policies, Improving Lives* (Paris: OECD 2020), 23.

19 Rolf H. Weber, *Shaping Internet Governance: Regulatory Challenges* (Zürich: Schulthess 2009), 4.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

c) Big Data Analytics

The third key feature is *new possibilities to process and analyse vast amounts of data* covering not only economic or business activities but all aspects of life. The value of large quantities of data depends substantially on the capacity to extract specific, consolidated information such as for example profiles, with *big data analytics*. The original concept of 'Big Data'[20] which relates to the high volume, velocity and variety of information assets is however limited as it does not cover important other factors such as the reliability of data.[21] This is particularly relevant when data analysis is increasingly not being undertaken by humans only, but based on algorithms which are trained to 'learn': artificial intelligence and machine learning. Artificial intelligence can be defined as the ability of machines and systems to acquire and apply knowledge by performing a variety of cognitive tasks such as pattern recognition, making decisions and predictions.[22] Machine learning means a set of techniques that allow machines to learn in an automated manner through patterns and inferences and adjust their own parameters to improve the reliability of their predictions. For this purpose, machine learning systems are trained on large amounts of data.[23]

2. Specific Business-Related Aspects

All these features lead to business operating in a new ecosystem of interdependent digital technologies. Of particular relevance are big data analytics, artificial intelligence, and distributed ledger technologies (DLT) – all supported by new forms of computer power which allow for processing information at an unprecedented speed.[24] With a view to preparing the ground for the discussion on the impacts of digitalisation on responsible business conduct, digital infrastructures and new digital business models warrant some further exploration.

---

20 Viktor Mayer-Schönberger and Kenneth Cukier, *Big Data: A Revolution That Will Transform How We Live, Work and Think* (Boston/New York: Houghton Mifflin Harcourt 2013), 123-149.

21 Annabeth Aagaard, 'The Concept and Frameworks of Digital Business Models' in: Annabeth Aagaard (ed.), *Digital Business Models Driving Transformation and Innovation* (Cham: Palgrave Macmillan 2019), 1-26 (2).

22 OECD, *Recommendation of the Council on Artificial Intelligence*, OECD/LEGAL/0449 (2020), para. I; OECD (n. 18), 20.

23 OECD, *Digitalisation and Responsible Business Conduct: Stocktaking of Policies and Initiatives* (Paris: OECD 2020), 9; Ashley Deeks, 'High-Tech International Law', Geo. Wash. L. Rev. 88 (2020), 574-653 (582-583).

24 OECD (n. 18), 18-22.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

a) Digital Infrastructures: Blockchain

As a distributed ledger technology, blockchain technology allows for the storage, distribution or exchange of values between different entities, including business and its stakeholders, on shared transaction ledgers. Since all transactions are automatically spread and synchronised among all participants of the network, blockchain facilitates the anonymous flow of information between stakeholders and can reduce information asymmetry and the related inefficiencies. From a business perspective and with a view to responsible business conduct, blockchain can improve the accuracy of supply chain information due to its immutability and decentralisation.[25] This leads to the question discussed in section III.2.b) whether blockchain could play a role in supply chain due diligence, i. e. in ensuring responsible business conduct across the whole supply chain.

In addition, so called *smart contracts* are often used to facilitate the execution of a business transaction. A smart contract is neither smart nor a contract. Rather it can be described as a computer routine which automatically executes the contractual terms between two or more parties without their intervention.[26] This additional layer of legal security also warrants to be considered in the context of supply chain due diligence (below III.2.b).

b) Digital Business Models

Recent research in management studies indicates that new digital technologies can on the one hand enhance or reshape existing business models: Examples are the use of big data analytics to better identify consumer preferences and adjust production accordingly or use a system of sensors based on Internet of Things technology to track goods while they are being shipped from the factory to consumers.[27] From the perspective of international law and international responsible business standards, such a scenario calls for applying *existing norms* to existing business which uses new instruments and tools – in other words, the analysis and particularly due diligence requirements will apply to *new issues (objects)*.

---

25 OECD, *Is There a Role for Blockchain in Responsible Supply Chains?* (Paris: OECD 2019), 7-8.

26 Rolf H. Weber, 'Smart Contracts: Do we Need New Legal Rules?' in: Alberto De Franceschi and Reiner Schulze (eds), *Digital Revolution – New Challenges for Law: Data Protection, Artificial Intelligence, Smart Products, Blockchain Technology and Virtual Currencies* (Baden-Baden: Nomos/Beck 2019), 299-312, para. 12.

27 Mirko Presser, Qi Zhang, Anja Bechmann and Michail Beliatis, 'The Internet of Things as Driver for Digital Business Model Innovation' in: Annabeth Aagaard (ed.), *Digital Business Models Driving Transformation and Innovation* (Cham: Palgrave Macmillan 2019), 27-55 (39).

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

On the other hand, digital technology has the potential to foster the development of *entirely new business models* where the underlying technologies are at the core of the value creation and delivery process.[28] Online platforms are a prime example in this regard. Typically, an online platform is a digital service which facilitates interactions between two or more distinct but interdependent sets of users (whether firms or individuals) who interact through the service via the Internet. A unique feature of this interaction is the generation and work with user data which sets online platforms apart from other business models.[29] A broad variety of services is provided via online platforms including online marketplaces, social media, search engines, communication services, and specific platforms supporting the gig economy (e. g. Uber and TaskRabbit), among others.

From the perspective of international law and international responsible business conduct standards, this scenario of creating new business models is different from enhancing existing business models as it introduces *new actors (subjects)* and thus raises first the question on their legal status with regard to their nature as business: Is for example an online advertising platform a business? Second, their jurisdictional attribution to one or several states needs to be clarified: Which state is responsible for overseeing the mentioned online advertising platform's activities? And third the substance and potential need for redefining respective state responsibilities and obligations needs to be explored:[30] What exactly is a state required or expected to do regarding online advertising platform activities? Cases handled by the Polish and the French National Contact Point discussed in section III. will illustrate the relevance of these questions.

II. International Framework for Responsible Business: The OECD Guidelines for Multinational Enterprises

1. Legal Nature

By 1976, the year in which the OECD Guidelines for Multinational Enterprises were adopted as part of the OECD Declaration on International

28 Zsolt Ugray, David Paper and Jeffrey Johnson, 'How Business Value Is Extracted from Operational Data: A Case Study' in: Annabeth Aagaard (ed.), *Digital Business Models Driving Transformation and Innovation* (Cham: Palgrave Macmillan 2019), 117-145 (119); Aagaard (n. 21), 6.

29 OECD, *An Introduction to Online Platforms and Their Role in the Digital Transformation* (Paris: OECD 2019), 20.

30 Kettemann (n. 6), 5; Deeks (n. 23), 640-643.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

Investment and Multinational Enterprises,[31] discussions on regulating the behaviour of multinational enterprises were in full swing after the number of reports about unethical and illegal activities undertaken by multinational corporations had increased significantly in the 1970 s.[32] In the same year, the newly formed United Nations (UN) Commission on Transnational Corporations decided to engage in the drafting of a code of conduct for multinational enterprises – an endeavour which would eventually fail. Also in 1976, the International Labour Organization (ILO) started negotiations which led to the adoption of the ILO Tripartite Declaration on Principles Concerning Multinational Enterprises and Social Policy by the ILO Governing Body in 1977.[33]

The OECD Guidelines were not drafted as a stand-alone instrument but as part of balanced approach to international investments which aimed at connecting protection, non-discriminatory treatment and responsible investor conduct. While the 1976 Guidelines contained strong provisions on employment and labour relations and addressed the main labour and social concerns regarding investors' behaviour of the day, they were nevertheless framed as a non-binding instrument. They were – and still are – framed as recommendations by governments to business. As one of the participants in the negotiations noted, OECD countries were giving a signal that they were willing 'to go far but not further',[34] i. e. not to commit to legally binding rules.

Since their adoption in 1976, the Guidelines were revised five times. With regard to their legal status a Decision adopted by the OECD Council in 2000 is particularly relevant. With this Decision, the OECD Council requires countries adhering to the Guidelines to establish so called National Contact Points (NCPs) with the double mandate to promote the implementation of the Guidelines and to serve as a grievance mechanism.[35] Since Decisions by the OECD Council are binding, countries adhering to the legally non-binding OECD Guidelines for Multinational Enterprises have now a legal obligation to establish a NCP (see below II.2.b)).

---

31 OECD, Declaration on International Investment and Multinational Enterprises, adopted on 21 June 1976, OECD/LEGAL/014.

32 Christine Kaufmann, *Globalisation and Labour Rights* (London: Hart/Bloomsbury 2007), 156.

33 Kaufmann (n. 32), 166. The Declaration was last amended in 2017 to include, among others, developments in the UN and the OECD.

34 Kari Tapiola, 'The OECD Guidelines as a Balanced Instrument' in: Nicola Bonucci and Catherine Kessedjian (eds), *40 ans de lignes directrices de l'OCDE pour les entreprises multinationales – 40 Years of the OECD Guidelines for Multinational Enterprises* (Paris: Pedone 2018), 29-32 (30).

35 OECD, Decision of the Council on the OECD Guidelines for Multinational Enterprises, adopted on 27 June 2000, OECD/LEGAL/0307.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

As a result, the Guidelines are still soft law for business but have in parts become hard law for governments.[36]

2. Scope

a) Comprehensive Standard for Responsible Business Conduct (RBC)

The revision in 2011 substantially expanded the scope of the Guidelines in three ways: First, the revision incorporated the UN Guiding Principles (UNGP)[37] by adding a new specific human rights chapter and updated other parts of the Guidelines.

Second, governments agreed to apply the Guidelines across the *whole* value chain. Companies are therefore expected to act responsibly and comply with the Guidelines not only in their own actions but also in their business relationships across the whole value chain. This also implied a departure from what was previously known as the 'investment nexus': Before the 2011 revision, only cases with a link to foreign direct investment could be handled by National Contact Points.

Third, according to the General Policies chapter of the Guidelines, supply chain due diligence applies to *all* topics covered by the Guidelines except for the chapters on science and technology, competition and taxation which were at the time considered not to be linked to negative impacts.[38] The Guidelines thus expand the scope of the due diligence framework beyond human rights to cover almost all areas of business activities.[39] The due diligence process entails six steps that business should follow: (1) embed responsible business conduct into policies and management systems; (2) identify and assess adverse impacts in operations, supply chains and business relationships; (3) cease, prevent or mitigate adverse impacts; (4) track implementation and results; (5) communicate how impacts are addressed; and (6) provide for or

36 Roel Nieuwenkamp, '40 Years Guidelines and National Contact Points: A Beautiful Glass, But Only Half Full' in: Bonucci and Kessedjian (n. 34), 35-41, (36).

37 UN, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, 21 March 2011, UN Doc A/HRC/17/31, adopted by UNHRC Res 17/4: Human Rights and Transnational Corporations and Other Business Enterprises, 16 June 2011, UN Doc A/HRC/RES/17/4.

38 OECD Guidelines for Multinational Enterprises, Commentary on General Policies, 2011 edition, OECD/LEGAL/0144, para. 14.

39 John G. Ruggie and Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges', Brown Journal of World Affairs 22 (2016), 99-127 (106).

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

cooperate in remediation when appropriate. To support enterprises in the implementation of due diligence on the ground, the OECD Due Diligence Guidance for Responsible Business Conduct provides plain language explanations on the relevant provisions and applies to all enterprises across all sectors.[40] The (legal) standing of this Guidance was strengthened with its inclusion in a Recommendation by the OECD Council and by the strong support it received from all institutional stakeholders at the OECD.[41] In addition, sector-specific guidance has been agreed for the minerals, extractive, garment and footwear, agricultural, and financial sectors. Except for the guidance for the financial sector, all have become the topic of Council Recommendations.[42]

As a result, the Guidelines are now a comprehensive, government-backed RBC standard, covering essentially all areas where business interacts with society, including disclosure requirements, human rights, employment and industrial relations, corruption, consumer interests, science and technology, competition and taxation. With a view to digitalisation, it is particularly important to note that the Guidelines are conceived as a 'living instrument' by calling on governments to 'participate in appropriate review and consultation procedures to address issues concerning interpretation of the Guidelines in a changing world'.[43]

b) Remedy Mechanism

The OECD Guidelines are currently the only international comprehensive standard on responsible business conduct that is equipped with a

40 OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (Paris: OECD 2018); OECD, Recommendation of the Council on the OECD Due Diligence Guidance for Responsible Business Conduct, adopted on 30 May 2018, OECD/LEGAL 0443.

41 OECD, Recommendation of the Council on the OECD Due Diligence Guidance for Responsible Business Conduct, adopted on 30 May 2018, OECD/LEGAL/0443.

42 OECD, Recommendation of the Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, adopted on 25 May 2011, amended on 17 July 2012, OECD/LEGAL/0386; OECD, Recommendation of the Council on the Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, adopted on 13 July 2016, OECD/LEGAL/0427; OECD, Recommendation of the Council on the OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, adopted on 17 May 2017, OECD/LEGAL/0437; OECD, Recommendation of the Council on the OECD-FAO Guidance for Responsible Agricultural Supply Chains, adopted on 13 July 2016, OECD/LEGAL/0428; OECD, *Responsible Business Conduct for Institutional Investors: Key Considerations for Due Diligence Under the OECD Guidelines for Multinational Enterprises* (Paris: OECD 2017).

43 OECD Guidelines (n. 38), Chapter I, Concepts and Principles, para. 11.

 DOI 10.17104/0044-2348-2021-3-781

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

state-based, non-judicial remedy mechanism, the National Contact Points for Responsible Business Conduct. OECD member states and countries adhering to the OECD Investment Declaration and the Guidelines have a legally binding obligation to establish a functioning NCP.[44] As of August 2021, all 38 OECD members and 12 non-member-countries have adhered to the Guidelines.[45]

National Contact Points are responsible for furthering the effectiveness of the Guidelines. They have existed since the 1983 update of the Guidelines and they have had the ability to receive cases, so called 'specific instances' related to the non-observance of the Guidelines since the year 2000.

The last revision of the Guidelines in 2011 not only brought about significant changes in the substantive chapters such as the inclusion of a new human rights chapter, but also with regard to the implementation procedures.

The Guidelines do not prescribe a model for establishing an NCP. Instead, a government has autonomy and flexibility in choosing the form and structure of its NCP as long as it complies with the Guidelines and ensures the effectiveness and functioning of the NCP. In line with the provisions for non-judicial grievance mechanisms in the UNGP,[46] the Guidelines require all NCPs to be visible, accessible, transparent and accountable. In addition, when handling cases NCPs must do so in a way that is impartial, predictable, equitable and in accordance with the Guidelines.[47] Since 2000, the NCPs have handled over 500 specific instances.[48]

As a recent report illustrates, the Guidelines' approach to square adherent countries' sovereignty by leaving the institutional set-up in their hands with the need for a coherent grievance system that operates based on principles common to all NCPs, has only been partially successful. Some NCPs lack adequate government support in terms of institutional, financial and human resources which would enable them to address complex issues such as digital developments effectively. Some apply higher procedural bars than others,

44 OECD, Decision (n. 35), para. I. 1.

45 Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Latvia, Lithuania, Luxembourg, Mexico, Morocco, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Tunisia, Turkey, Ukraine, United Kingdom, United States, Uruguay.

46 UNGP 31 (n. 37).

47 OECD Guidelines (n. 38), Procedural Guidance, paras I. and I. C.

48 OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2019* (Paris: OECD 2020), 24.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

making them less accessible. Finally, guaranteeing equitable and safe proceedings is an ongoing challenge.[49]

c) Territorial Scope

In traditional international law, based on the concept of sovereignty a state is competent to establish (prescribe), apply (adjudicate), and enforce rules of conduct in respect of persons, property or events within its territory. From this perspective, *enforcing* rules extraterritorially is generally prohibited under international law unless permitted by specific rules or with the consent of the respective state.[50] Hence, domestic law can be *established* and *applied* on extraterritorial events provided that there is a sufficient territorial connection between the state and the extraterritorial event and no rule of international law prohibits such extraterritorial application.[51] In contrast to this traditional general approach,[52] extraterritorial legal practices have always been applied in competition and antitrust law based on the doctrine of effects[53]. Moreover, they have recently rather become the rule than the exception in other areas of law, particularly in a digital context where they align at the *legal* level with developments aiming at *technical* interoperability as discussed above (I.1.a)).[54] Examples include regulations of transboundary data flows and data protection such as the General Data Protection Regulation (GDPR), which protects European users' data regardless of the jurisdiction it is processed in.[55] In other

49 OECD, *National Contact Points for Responsible Business Conduct Providing Access to Remedy: 20 Years and the Road Ahead* (Paris: OECD 2020), 28-35.

50 PCIJ, *The Case of the S. S. Lotus (France v. Turkey)*, judgment of 7 September 1929, PCIJ Reports Series A No. 10, 18-19.; PCA, *Netherlands v. United States of America (Island of Palmas)*, award of 4 April 1928, Reports of International Arbitration Awards II, 829-871 (838).

51 PCIJ, *S.S. Lotus* (n. 50), 19; Christine Kaufmann, Christoph Good, Sabrina Ghielmini and Charlotte Blattner, *Extraterritorialität im Bereich Wirtschaft und Menschenrechte: Extraterritoriale Rechtsanwendung und Gerichtsbarkeit in der Schweiz bei Menschenrechtsverletzungen durch transnationale Unternehmen* (Bern: Schweizerisches Kompetenzzentrum für Menschenrechte (SKMR)/Swiss Center of Expertise in Human Rights 2016), paras 28-29.

52 Menno T. Kamminga, 'Extraterritoriality' in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn., Oxford: Oxford University Press 2012), para. 3.

53 Roger P. Alford, 'The Extraterritorial Application of Antitrust Laws: The United States and the European Community Approaches', Va. J. Int'l L. 33 (1992-1993), 1-50 (5, 8-27).

54 Lorenz Langer, 'Cyberspace Does not Lie Within Your Borders – Jurisdiktion und Menschenrechte im digitalen Raum', Swiss Review of International and European Law 20 (2019), 3-21.

55 EU Regulation 2016/679 (2016) on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) applies to companies from outside the EU that use the personal data of European citizens.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

words, legal protection should follow the data as it travels through interconnected networks and ideally provide an equal level of protection across technical systems and platforms.

Turning to the OECD Guidelines, their territorial scope may seem rather limited with 50 countries adhering to them. However, the reach of the OECD Guidelines goes beyond in two regards: First, they apply to all companies operating *in and from* the territory of the 50 adherents.[56] Second, cases of suspected non-compliance with the Guidelines can be filed with the NCP of the country *where the issues have arisen.*[57] The term 'issue' refers not only to impacts but can also entail policy decisions taken at company headquarters.

As a result of this broad scope, any NCP can address various scenarios involving companies

(a) based in the NCP's country and operating in it; or

(b) based in any other country, whether adherent or not, and operating in the country of the NCP; or

(c) based in the NCP's country and operating in any other country, whether adhering or not.[58]

A third element that contributes to the expansion of the scope is the fact that the Guidelines cover the entire value chain and thereby allow for accommodating all relevant actors whether private or public, at home or abroad.

As a result of this broad scope, NCPs have since 2000 addressed cases involving issues arising in over 100 countries and territories, including over 50 non-adhering countries.[59] An example in this regard is a case filed with the United Kingdom (UK) NCP alleging that a UK based company had breached the general policies and human rights provisions of the Guidelines by supplying surveillance equipment to agencies of the Bahrain government which had used it to target pro-democracy activists.[60]

In sum, the Guidelines take up the mentioned concept of 'connection' and allow for a deterritorialisation[61] to the extent that they can apply to actors and issues beyond an adhering country's territory.[62] This is particu-

56 See para. 1, OECD Declaration on International Investment (n. 31).

57 OECD, *Guide for National Contact Points on Coordination when Handling Specific Instances, OECD Guidelines for Multinational Enterprises* (Paris: OECD 2019), 6.

58 OECD, 20 years (n. 49), 19.

59 OECD, 20 Years (n. 49), 19; OECD Annual Report 2019 (n. 48), 45.

60 UK National Contact Point for the OECD Guidelines for Multinational Enterprises, *Privacy International & Gamma International UK Ltd.: Final Statement after Examination of Complaint*, December 2014 <https://www.gov.uk/government/organisations/uk-national-contact-point>.

61 On the notion of deterritorialisation see Kettemann (n. 6), 298-302.

62 OECD, Guide on Coordination (n. 57), 6.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

larly important in the context of digital technologies which by design do not fit traditional categories of territorial jurisdiction. The fact that NCPs are framed as national institutions does not change this finding because the possibility of applying the Guidelines beyond an adherent's territory is part of the binding Council Decision on NCPs.[63] However, as mentioned (II.2.b)) NCPs apply different standards for accepting specific instances which may result in different practices for considering cases with an extraterritorial dimension and in the long term result in a risk for forum shopping.

d) Digitalisation and Responsible Business Conduct

While the Guidelines do not mention digitalisation, there are manifold links between the Guidelines' key topic responsible business conduct and digitalisation. On the one hand, digital tools can foster responsible business conduct as they support business in implementing the Guidelines, for example by allowing for assessing risks more effectively with artificial intelligence and big data analytics or tracing the origins of a product with the help of blockchain.[64]

On the other, digitalisation can lead to new ways of business being associated with human rights infringements or social and environmental harms. Three main categories of such negative business impacts can be identified: First, *digital technologies themselves* may have negative impacts, for example a software based on artificial intelligence that applies criteria which lead to discriminatory results in recruiting.[65] A second group for such impacts relates to the *use or abuse of digital technologies by buyers*

63 OECD, Council Decision (n. 35), para. I. 1 and the related Guidance on Coordination (n. 57), 6.

64 OECD, *Digitalisation and Responsible Business Conduct: Stocktaking of Policies and Initiatives* (Paris: OECD 2020), 8-10; OECD, *Is There a Role for Blockchain in Responsible Supply Chains?* (Paris: OECD 2019), 13-15; Martijn Boersma and Justine Nolan, 'Can Blockchain Help Resolve Modern Slavery in Supply Chains?', Academy of International Business (AIB) Insights, 20 (2020), <https://doi.org/10.46697/001 c.13542>; Kai Behnke and Marijn F. W. H. A. Janssen, 'Boundary Conditions for Traceability in Food Supply Chains Using Blockchain Technology', International Journal of Information Management 52 (2020), 101969, 4-5.

65 An example is Amazon stopping the use of an AI-based recruitment tool because it discriminated against female applicants. Reuters, 'Amazon Scraps Secret AI Recruiting Tool that Showed Bias Against Women', 18 October 2018 <https://reut.rs/2Od9fPr>; Prasanna Tambe, Peter Cappelli and Valery Yakubovich, 'Artificial Intelligence in Human Resources Management: Challenges and a Path Forward', California Management Review 61 (2019), 15-42 (16).

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

and consumers.[66] Examples include surveillance software which is used for privacy invasions[67] or the use of artificial intelligence with recognition tools for racial profiling leading for instance International Business Machines Corporation (IBM) to sunset its general purpose facial recognition and analysis software products.[68] The abuse of social media platforms by users for hate speech falls within the same group. In the environmental context, the substantial rise in energy consumption of applying digital tools such as blockchain mentioned before (I.2.a)) with its negative impact on the climate can be noted.[69] In these examples the question arises, who is responsible. The vendor or the buyer or both? The provider of the digital infrastructure such as the online platform or the blockchain? A third category of negative impacts can be identified with regard to *new digital business models and digital business methods*. For instance, online platforms can come with lower levels of worker protection, and automation as a digitalised means of production can displace jobs with negative effects on some workers while creating new opportunities and jobs for others.[70]

Several cases filed with NCPs included a digital component; they will be discussed in more detail in section III.

The question thus remains how the Guidelines and international soft and hard law in general can accommodate this complex web of actors involved and attribute specific responsibilities to them to effectively ensure responsible business conduct.

3. Beyond Hard and Soft Law: Accommodating a Changing World

a) Distinctive Features of the Guidelines

Compared with other non-binding instruments on responsible business conduct addressed to states,[71] the OECD Guidelines' regulatory approach is

66 In the context of Artificial Intelligence seven use cases or patterns have been identified. See OECD, *Artificial Intelligence & Responsible Business Conduct* (Paris: OECD 2019), 1-2 <http://mneguidelines.oecd.org/rbc-and-digitalisation.htm>.

67 South Wales Court of Appeals (n. 3).

68 IBM CEO's Letter to Congress on Racial Justice Reform, 8 June 2020, <https://www.ibm.com>.

69 Steffen Lange, Johanna Pohl and Tilman Santarius, 'Digitalization and Energy Consumption. Does ICT Reduce Energy Demand?', Ecological Economics 176 (2020), 106760, 3.

70 International Labour Organization (ILO), *World Employment and Social Outlook 2021: The Role of Digital Labour Platforms in Transforming the World of Work* (Geneva: International Labour Office 2021).

71 E.g. UNGP (n. 37); ILO Tripartite Declaration (n. 33).

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

unique from an international law perspective because it not only combines binding obligations and soft law for states with non-binding 'hard expectations' on business but also adds a binding obligation for states to establish a grievance mechanism. This is to a large extent a continuation of efforts departing from traditional state-centred international law in order to acknowledge business as a relevant actor with specific responsibilities in international law. The discussions in the UN on a Code of Conduct on Transnational Corporations started in the 1970 s but after decades eventually failed, and the following discussions on 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' resulted in the UN Human Rights Commission taking note of them but not approving them and stating explicitly that they had no legal standing.[72] The major breakthrough happened with the adoption of the UNGP in 2011 and the related revision of the OECD Guidelines in 2011: Business is acknowledged as a relevant actor with specific responsibilities. These responsibilities are framed in a legally non-binding instrument. With the OECD Guidelines, this lack of enforceability is partially compensated with the legally binding obligation for states to establish National Contact Points as a grievance mechanism.[73]

While the combination of binding obligations on states with non-binding expectations on business is a well-known concept to overcome the conceptual difficulties in accommodating business as actors in international law, the way in which the NCP grievance mechanism is added to the substantive standards results in a rather puzzling picture: The non-binding Guidelines call on adhering governments to state clear expectations on business to act responsibly by conducting due diligence across the whole supply chain. The legally binding Decision by the OECD Council requires adhering countries to establish functioning National Contact Points to not only promote the Guidelines but also serve as a grievance mechanism for handling complaints. As a result, governments have a legal obligation to establish a National Contact Point as a grievance mechanism for the Guidelines, but companies are not required to participate in these procedures given that the Guidelines themselves are not binding for business.

However, the perspective of being affiliated with an alleged breach of the Guidelines and a respective NCP procedure adds some teeth to what may at first glance look like a purely voluntary instrument. In addition, apart from

72 UN Human Rights Commission, Decision 2004/116, Responsibilities of transnational corporations and related business enterprises with regard to human rights.

73 Above n. 35 and accompanying text.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

incorporating parts of the Guidelines and their due diligence concept in binding national law,[74] some governments, including among others Canada, Germany, and the Netherlands decided to tie their (soft) expectations on companies with 'hard' consequences in case of non-fulfilment such as the denial of trade diplomacy benefits or the consideration of responsible business conduct compliance in public procurement.[75]

A final special feature of the OECD Guidelines relates to policy coherence. With the increasing demand on business to follow responsible business conduct standards, the role of governments has also gained attention. Internationally agreed RBC standards touch upon a range of policy areas including *inter alia* human rights, trade and investment policies, and health issues. Accordingly, the UN Guiding Principles and the OECD Guidelines have included provisions on policy coherence.[76] In their implementation governments are therefore called upon to mainstream responsible business conduct across relevant national policies to ensure coherence with the international standards they have agreed to. In addition, the OECD Council emphasised at various occasions the role of governments in fostering policy coherence on responsible business conduct[77] and explicitly included 'promoting national and international policy coherence on responsible business conduct' as an overarching objective in the renewed mandate for

74 Countries that are considering or have already introduced mandatory due diligence requirements based on the OECD Guidelines include France (Loi no. 2017-399 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre of 27 March 2017), Finland, Germany, (Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten of 16 July 2021, BGBl 2021 I Nr. 46, 2959), The Netherlands, Norway, and Switzerland.

75 Canada: 'There are consequences if Canadian companies do not participate, or do not engage in good faith and constructively, in the NCP dispute resolution process. Consequences are withdrawal of Government of Canada trade advocacy support abroad. Further, non-participation or the lack of good faith participation will also be taken into account in the Corporate Social Responsibility-related evaluation and due diligence conducted by the Government of Canada's financing crown corporation, Export Development Canada, in its consideration of the availability of financing or other support.' <https://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/>; In the Netherlands endorsement of and compliance with the OECD Guidelines have been a hard requirement for companies applying for a grant or private sector support under the foreign trade and development budget. See NL Ministry of Foreign Affairs, From Giving Information to Imposing Obligations: A new Impulse for Responsible Business Conduct (The Hague: Ministry of Foreign Affairs, Policy note, 16 October 2020 <https://www.government.nl/topics/responsible-business-conduct-rbc/evaluation-and-renewal-of-rbc-policy>), 9-10.

76 UNGP 8 (n. 37), OECD Guidelines (n. 38), preface, para. 9.

77 For example in the Recommendation of the Council on the Policy Framework for Investment adopted on 13 May 2015, OECD/LEGAL/0412 and the Policy Framework for Investment, adopted on 12 May 2015, C/MIN(2015)5.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

the Working Party on Responsible Business Conduct which entered into force on 1 January 2019.[78]

b) Accommodating New Developments and New Actors

With the mentioned features the Guidelines hardly fit the traditional categories of binding hard law on the one hand and non-binding, voluntary standards on the other. Instead, their non-binding format combined with hard expectations and sometimes hard consequences places them somewhere in between and allows them to overcome the dichotomy between binding and non-binding rules. This *sui generis*, *hybrid regulatory model* and the fact, that the Guidelines address both public and private actors and include global value chains contribute to a *holistic responsible business conduct approach*. Such a hybrid, holistic approach can respond to new developments in a more flexible and timely manner than traditional instruments of international law.

Still, the question remains whether and how these distinct features succeed in addressing the new challenges that digitalisation poses on responsible business conduct, or whether a new regulatory design is needed. The following section will look at some key effects of digitalisation and the related challenges for responsible business conduct.

III. Interactions Between Digitalisation and Responsible Business Conduct

Until March 2021, 14 cases with a digital component were submitted to National Contact Points. This section presents the cases that address the key issues discussed in this article, it is based on publicly available information only.[79]

1. New Notion and Models of Business

a) Online Platforms

As outlined above (I.2.b)), online platforms are still a relatively recent phenomenon and they raise specific questions with regard to responsible

78 Mandate of the Working Party on Responsible Business Conduct, revised on 27 November 2018, DAF/INV/RBC(2018)26, published in the On-Line Guide to OECD Intergovernmental Activity <https://oecdgroups.oecd.org>.

79 OECD database on specific instances <http://mneguidelines.oecd.org>.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

business conduct:[80] What is the distinction between online platforms as tech companies and physical, real-world companies?[81] Is Uber an online platform or a transport company, or both?[82] Can such platforms be considered a multinational enterprise under the OECD Guidelines and therefore be responsible for conducting due diligence and be subject to proceedings before National Contact Points? What are the specific duties and responsibilities of platform operators towards platform users? How far do due diligence requirements for platform operators go?[83]

The Polish National Contact Point recently addressed some of these issues in a case submitted by a non-governmental organisation (Frank Bold Foundation) against a company (Grupa OLX) located in Poland and operating an online advertising platform.[84] The company is a member of the OLX Group with its headquarters in the Netherlands. The NGO argued that the company had breached several provisions of the OECD Guidelines by placing advertisements on its portal concerning sale offers for furnaces for, *inter alia*, burning processed oil and discarded wooden railway sleepers. Since burning such hazardous waste would result in negative environmental impacts and was prohibited by law, the company should take actions to prevent users of its portal to post such sale offers.

---

80 For the manifold regulatory challenges see European Law Institute, *Model Rules on Online Platforms* (Vienna: European Law Institute 2019), 7; Alain Strowel and Wouter Vergote, 'Digital Platforms: To Regulate or Not to Regulate? Message to Regulators: Get the Economics Right First, then Focus on the Right Regulation' in: Bram Devolder (ed.) *The Platform Economy: Unravelling the Legal Status of Online Intermediaries* (Cambridge: Intersentia 2019), 3-30; Manfred Weiss, 'The Platform Economy, the Main Challenges for Labour Law' in: Lourdes Mella Méndez (ed.), *Regulating the Platform Economy: International Perspectives on New Forms of Work* (London/New York: Routledge Taylor & Francis Group 2020), 11-20.

81 DeNardis (n. 2), 12.

82 The European Court of Justice qualified Uber as a 'service in the field of transport' within the meaning of Article 58(1) TFEU and thus outside of the scope of Article 56 TFEU and the Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178/1): ECJ, *Asociación Profesional Élite Taxi v. Uber Systems Spain SL*, judgment of 20 December 2017, case no. C-434/15, ECLI:EU:C:2017:981 and ECJ, *Uber France SAS v. Nabil Bensalem*, judgment of 10 April 2018, case no. C-320/16, ECLI:EU:C:2018:221. In contrast, it considered Airbnb as an 'information society service' under Directive 2000/31: ECJ, *X v. Airbnb Ireland and others*, judgment of 19 December 2019, case no. C-320/18, ECLI:EU:C:2019:1112.

83 Karin Buhmann and Roxana Olivera, 'Human Rights and Social Media Platforms: The Corporate Responsibility to Respect Human Rights in Regard to Privacy Infringements Involving Photo Posting', Australian Journal of Human Rights 26 (2020), 124-141, (134-137).

84 Polish National Contact Point for the OECD Guidelines for Multinational Enterprises, *Grupa OLX Sp. z o. o. and Frank Bold Foundation*, <http://mneguidelines.oecd.org/database/instances/pl0005.htm>.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

In its initial assessment, the Polish NCP qualified the company as a multinational enterprise operating in the Polish market. For the following procedure, two questions were of particular relevance for the Polish NCP: First, the responsibilities of entities operating online advertisement portals, and second the responsibility of entities marketing products the use of which has an adverse impact on the environment.[85]

From the outset, the parties had agreed that the company in its role as provider of the online platform was not directly responsible for the sale of the products but that it should seek to prevent the posting of sale offers for products which are highly probable to violate the provisions on the environmental protection. As a result of the mediation, the company accepted its responsibilities under Chapters II (General Principles), VI (Environment) and VIII (Consumer Interests) of the OECD Guidelines and the parties agreed on a set of measures to prevent the publication of advertisements concerning products and services which might have an adverse impact on the environment. Following-up on the NCP procedure, more than 16'000 advertisements were eventually removed by the company, and in more than 6'500 cases advertisers were reminded by the company to take environmental issues into account.

Another case relating to new digital business models was submitted to the French National Contact Point in March 2020 by a French business association in the tourism and hospitality sector concerning activities of the online platform Airbnb in France. While the submission raises issues about the application of the Guidelines' Chapter XI on Taxation, the French NCP also had to consider the nature of Airbnb, i. e. the question of whether it qualifies as a multinational enterprise under the Guidelines. The qualification is relevant because the Guidelines with their specific expectations for due diligence and their grievance mechanism are only applicable to 'multinational enterprises'. However, the Guidelines deliberately do not provide a definition and even state that 'a precise definition of multinational enterprises is not required for the purposes of the Guidelines'.[86] In the absence of an authoritative interpretation[87] there is room for considering new phenomena such as online platforms. Accordingly, in its Initial Assessment the French NCP refers to Airbnb as a 'digital company' within the scope of the Guidelines.[88]

85 Polish OECD NCP (n. 84), Final Statement of alleged non-observance of the OECD Guidelines for Multinational Enterprises, 13 June 2019, 4.

86 OECD Guidelines (n. 38), para. I. 4.

87 Which would be with the Investment Committee: OECD Guidelines (n. 38), Procedural Guidance, para. II. 1.

88 French National Contact Point for the OECD Guidelines for Multinational Enterprises, Initial Assessment *Airbnb in France*, 14 December 2020, para. 4.2 and the related Statement of 4 June 2020, acknowledging receipt of the specific instance. The Final Statement was issued on 1 June 2021. <http://mneguidelines.oecd.org/database/instances/fr0031.htm>.

 DOI 10.17104/0044-2348-2021-3-781

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

b) Accommodating New Business Models – Can the Guidelines Deliver?

The Polish case is one of the few cases related to digital technologies that have been handled by National Contact Points. While statements by individual NCPs do not serve as precedent for others, the Polish case is nevertheless particularly relevant because it shows that the Guidelines with their broad unspecified notion of multinational enterprise can in principle accommodate *new business models* such as online platforms. However, it may be more complex to determine which National Contact Point should take the lead when several countries are involved in the provision of a digital service[89] or in business models based on distributed ledger technologies (blockchain) and smart contracts (above I.2.a)).

A second interesting conclusion is the role of the Guidelines in fostering *policy coherence* which was emphasised in the Polish case: The due diligence requirements of the online platform provider were interpreted with a view to align them with the goals of the environmental protection law. This is an important finding with regard to ongoing regulatory efforts to address online platform providers' responsibility, particularly in Europe. New regulations such as the GDPR,[90] the Regulation on platform-to-business relations[91] and the European Commission's plans to address the development of new digitally-based business models in its Digital Service Act package[92] illustrate that a more holistic approach in defining online platforms' responsibilities and protecting their users is gaining momentum. Such a holistic approach has also been developed by Australian regulators with a call for reforming the public sector data infrastructure with an integrated, comprehensive framework that would enhance data access and use and foster innovation and competition while at the same time establishing new corresponding consumer rights.[93]

2. Supply Chains and Due Diligence

Digital technologies, services and infrastructures such as artificial intelligence, distributive ledger (blockchain) or big data affect the structure of

89 French OECD NCP, *Airbnb France* (n. 88).

90 Above n. 55.

91 EU Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

92 Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final, 15 December 2020.

93 Australian Government Productivity Commission, 'Data Availability and Use', Inquiry Report, No. 82, 31 March 2017, 173-175, <https://www.pc. gov.au>.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

global supply chains and as well as methods and instruments for conducting due diligence. In addition, using these technologies can lead to more efficient transactions and facilitate adjustments to changing environments such as consumer demands.

a) Applying Due Diligence to Digital Technologies

The following selected cases brought before National Contact Points illustrate how the OECD Guidelines due diligence requirements can apply to digital products and services.

The German National Contact Point was seized with the question whether a company assuming maintenance responsibilities for surveillance technology for the Bahraini government contributed to human rights violations through the prosecution and government authorities in Bahrain. The NCP rejected the complaint as far as it alleged that the company was partly responsible for human rights violations in Bahrain but offered its help to resolve the questions raised in the context of the allegation that the company did not have a management system in place to analyse the risk of any possible negative effects of its business activities on human rights. However, the complainants decided not to take part in the process offered by the NCP.[94]

A related case received by the UK National Contact Point in the same context against the UK based company Gamma led to interesting findings.[95] The submitting NGO argued that Gamma supplied to the Bahrain authorities 'malware' products which allowed them to access and record private conversations, correspondence, and other records (e. g. address books) of individuals involved in pro-democracy activities in Bahrain. In a first step, the NCP concluded that while neither party had provided direct evidence about a supply by Gamma to Bahrain, the evidence provided suggested that the company's product may have been used against Bahraini activists. For this reason, the NCP decided to accept the case for further consideration regarding the company's obligations to conduct appropriate due diligence and to address its impacts.[96]

94 German National Contact Point for the OECD Guidelines for Multinational Enterprises, *ECCHR et al. and Trovicor GmbH*, <http://mneguidelines.oecd.org/database/instances/de0015.htm>, Final Statement, 21 May 2014.

95 UK OECD NCP, *Specific Instance Notified by the NGO Privacy International Regarding the Activities of Gamma International UK Operating in Bahrain*, <http://mneguidelines.oecd.org/database/instances/uk0034.htm>.

96 UK OECD NCP (n. 95), Initial Assessment, June 2013, para. 25.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

After mediation had taken place, the NCP published its Final Statement. This Statement is remarkable in several regards: First, it contains – as it seems for the first time in a digital context – a section on the 'UK NCP's understanding of the product'. In this section, the NCP identifies the elements of the technology which are relevant for determining the company's due diligence requirements.[97] Among them were the design of the software tools, their targets and the underlying contracts. While the NCP could not verify the allegations that Gamma was linked to human rights abuses through a supply to Bahrain, it concluded that the company's due diligence did not comply with the Guidelines and that its approach was not consistent with the Guidelines general obligation to respect human rights. Interestingly, the NCP acknowledged, although in rather general terms, the sector's specific needs for limiting the information publicly available about products, customers, and operating standards.[98]

The case illustrates that in the absence of a company's engagement it is very difficult if not impossible for the NCP to establish the facts and obtain a more thorough understanding on how the technology works. In an area where developments are mainly driven by the private sector as mentioned afore the lack of a corporate obligation to engage in the process and provide information is particularly challenging. The UK NCP reflected on this unsatisfactory situation in its Follow-up Statement. The NCP clearly stated that software providers are not dispensed from complying with the Guidelines and that the company's 'failure to engage was therefore an individual choice rather than an unavoidable result of the nature of the business'.[99] Turning back to the quote at the outset of this article, the UK NCP thus gave a clear answer.

Another case relates to the Internet of Things (above I.1.a)) and specifically to drone attacks in Yemen in 2012 and 2013 in which allegedly communication technology developed by a German company was used via a US company supplying the drones for the US armed forces. Since the German company had only entered an agreement with the US company about supplying radio transmitters in 2014, the German NCP did not consider the specific human rights violations taking place in 2012/13 but the German company's general due diligence policy. In this context, it analysed whether supplying the radio transmitters could establish a 'direct link' to potential human rights abuses as defined in Chapter IV (Human Rights), para. 3 of the OECD Guidelines, i. e. the question whether the company caused or con-

97 UK OECD NCP (n. 95), Final Statement, December 2014, paras 29-31.
98 UK OECD NCP (n. 95), Final Statement, December 2014, para. 63.
99 UK OECD NCP (n. 95), Follow-up Statement, February 2016, para. 11.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

tributed to such abuses. After examining the functioning of the drones and the role of the radio transmitters, it came to the conclusion that a direct link could be ruled out since the radio transmitters covered by the agreement were unable to navigate drones, particularly over greater distances. As a result, the case was not accepted for further consideration.[100]

In June 2020, the Swiss NCP received a specific instance from an NGO against Union Bank of Switzerland (UBS), an investment bank and financial services company, concerning alleged human rights violations in the context of UBS' business relationship with the Chinese company Hikvision. According to the submitting party, Hikvision manufactures technology used to monitor Uighurs in the Chinese province of Xinjiang. The Swiss NCP decided in its initial assessment that some of the issues raised merit further consideration.[101] The case concerns complex questions about the development and use of facial recognition software and thus an application of artificial intelligence (above I.1.c)) and the alleged involvement of an investor in related human rights abuses.

The examples confirm that the Guidelines' due diligence framework is not limited to analogue business, products and services but applies to the digital world as well. This expands the extraterritorial reach of the Guidelines and the related due diligence expectations considerably, given that as outlined before, digital services and platforms are inherently of a transboundary nature. At the same time, applying due diligence in a specific case that relates to digitalisation provides several challenges: Unlike in the analogue world, private companies and actors are the main drivers of digital innovation, and state regulation will by design in many cases lag behind.[102] In addition, new developments are often protected by business confidentiality regulations and National Contact Point procedures are of a voluntary nature. As a result, establishing the facts, including the key operational facts of digital product or service may be challenging for National Contact Points and government authorities at large. For example, determining whether the use of facial recognition software may have discriminatory effects requires insights in the criteria which are programmed into the algorithm and thus a feature which

100 German OECD NCP, *NGO in the UK and Communication Technologies*, Final Statement, 13 July 2015, <http://mneguidelines.oecd.org/database/instances/de0024.htm>.

101 Swiss National Contact Point for the OECD Guidelines for Multinational Enterprises, *Society for Threatened Peoples Switzerland and UBS*, Initial Assessment, 20 January 2021, <http://mneguidelines.oecd.org/database/instances/ch0021.htm>.

102 A notable exception is the new Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 COM (2020) 593 final, 24 September 2020, which *inter alia* aims at Facebook's Libra (now Diem) project and thus a crypto-currency that does not yet exist.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

may be essential for a company's competitive advantage and be protected by business secrecy rules.[103]

b) Applying Digital Technologies for Conducting Due Diligence

Digital technologies are not only subject to due diligence themselves but can also play a role in facilitating due diligence. In this regard, *big data analytics* feature prominently in corporate risk management systems as they allow for gathering large quantities of data which could not be analysed by humans. As recent studies indicate machine learning and artificial intelligence could further assist companies in assessing risks related to their supply chains.[104] Including a responsible business conduct lens in the application and the development of such instruments would allow for an integrated approach as it has been suggested by scholars.[105]

In addition, due to its specific features mentioned above (I.2.a)), *blockchain* can play an important role in conducting due diligence.[106] It can support business in addressing some of the supply chain challenges such as the lack of transparency due to inconsistent or missing data, inaccuracy of risk information, fragmented supply chains due the lack of interoperability of data systems between the different actors and the complexity of tracing the origin and provenance of goods.[107] Due diligence projects using blockchain have been successfully initiated in various sectors, including garment, agriculture, minerals and information and communications technology (ICT).[108]

Moreover, *smart contracts* (above I.2.a)) are important to note from a responsible business conduct perspective because of the reduced risk of tampering and the added layer of legal security given that a change of the

103 Moritz Büchi, Eduard Fosch Villaronga, Christoph Lutz and Aurelia Tamò Larrieux, 'The Chilling Effects of Algorithmic Profiling: Mapping the Issues', Computer Law & Security Review 36 (2020), 105367.

104 George Baryannis, Sahar Validi, Samir Dani and Grigoris Antoniou, 'Supply Chain Risk Management and Artificial Intelligence: State of the Art and Future Research Directions', International Journal of Production Research 57 (2019), 2179-2202.

105 Alessandro Mantelero, 'AI and Big Data: A Blueprint for a Human Rights, Social and Ethical Impact Assessment', Computer Law & Security Review 34 (2018), 754-772; Rolf H. Weber, 'Socio-ethical Values and Legal Rules on Automated Platforms: The Quest for a Symbiotic Relationship', Computer Law & Security Review 36 (2020), 105380.

106 Sina Rafati Niya, Danijel Dordevic, Atif Ghulam Nabi and Tanbir Mann, 'A Platform-independent, Generic-purpose, and Blockchain-based Supply Chain Tracking', *2019 IEEE International Conference on Blockchain and Cryptocurrency (ICBC)* (Seoul: 2019), 11-12.

107 OECD, Blockchain (n. 64), 10-11.

108 OECD, Blockchain (n. 64), 15.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

contractual terms on a blockchain is – by its technical design – hardly possible.[109]

As a result, it has been argued that blockchain technology can increase overall confidence in the proper operation of a particular system such as a supply chain and eliminate the need for a centralised trusted authority or even trust in the participants of a blockchain network. However, this requires an underlying system of good governance to prevent actors from acting in a way that undermines confidence in the system as a whole.[110] The obvious option of applying principles of rule of law to the digital world has already been discussed in the broader context of Internet Governance.[111] Yet it is complex with regard to blockchain because of the inherent tension between the rule of law as a principle defined and enforced by states on the one hand, and the 'rule of code' defined and enforced by technology on the other.[112] With a view to existing international standards on responsible business conduct it therefore needs to be explored how rule of law principles can be applied in the context of a blockchain based system that is by definition decentralised with neither a central coordination authority nor a mechanism for enforcing the rules on all participants. Finally, while applying blockchain in this context seems promising, the tremendous levels of energy consumption required for operating at least some distribute ledger technologies and their impact on the climate also need to be part of the analysis.[113]

IV. Conceptual Implications of Complex Interactions

As the previous sections show, digitalisation introduces new actors, new notions and models of business and new types of impacts on peoples' daily lives that are relevant in a responsible business context. While the OECD Guidelines for Multinational Enterprises with their *sui generis*, hybrid nature are on the one hand strongly anchored in international law and on the other designed as a flexible living instrument, the question still arises whether they are able to fully accommodate new developments in the digital world and

109 Weber (n. 26), para. 16.

110 Primavera de Filippi, Morshed Mannan and Wessen Reijers, 'Blockchain as a Confidence Machine: The Problem of Trust & Challenges of Governance', Technology in Society 62 (2020), 101284, 8-9.

111 Rolf H. Weber and R. Shawn Gunnarson, 'A Constitutional Solution for Internet Governance', Columbia Science and Technology Law Review 14 (2012), 1-71.

112 De Filippi, Mannan and Reijers (n. 110), 9.

113 For a nuanced view: Johannes Sedlmeir, Hans Ulrich Buhl, Gilbert Fridgen and Robert Keller, 'The Energy Consumption of Blockchain Technology: Beyond Myth', Business and Information Systems Engineering 62 (2020), 599-608.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

what lessons can be drawn from the discussion so far for the role of international law in this context.

1. Mind the Gap: Responsibilities of States and Business

As mentioned before, innovation and technological progress in a digital world is to a large extent driven by private actors, including industry and individuals. Recent examples illustrate how challenging it is for states to keep up with digital developments both in applying such technologies as well as in regulating them in an environment where the underlying interconnected technology and infrastructures (networks) do not stop at national borders due to their interoperability.[114] And still, under current international law the main legal responsibility for implementing responsible business conduct, including the business and human rights agenda, is on states. Therefore, the observation of a conceptual gap which originally triggered the debate on complementing business' influence on international relations and peoples' lives with corresponding responsibilities under international law is again relevant in the digital age[115] and also – on a broader scale – at the heart of the discussions on a binding instrument on business and human rights in the UN.[116]

The OECD Guidelines address this gap in a general manner as they attempt to balance state and business responsibilities in two ways: Similar to the UN Guiding Principles' corporate responsibility to respect human rights, they first contain a set of clear expectations on business to act responsibly. Second, they strengthen the soft character of the non-binding Guidelines with a legally binding obligation for states to establish a grievance mechanism, the National Contact Points. However, they stop somewhere half-way since business is not required to participate in NCP procedures. This is particularly relevant because NCPs could play an important role in addressing negative impacts of business activities in a digital context. Given that the development in this sector is driven by industry, public institutions, including courts and state-based non-judicial remedy mechanisms depend on the private sector's knowledge and information when assessing digital technologies

114 Rikke Frank Jorgensen, 'When Private Actors Govern Human Rights' in: Ben Wagner, Matthias C. Kettemann and Kilian Vieth (eds), *Research Handbook on Human Rights and Digital Technology* (Cheltenham: Edward Elgar 2019), 346-363 (359).

115 Jay Butler, 'The Corporate Keepers of International Law', AJIL 114 (2020), 189-220 (207-209).

116 United Nations Human Rights Council, Mandate for an open-ended Intergovernmental Working Group (IGWG) to elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights, 25 June 2014, A/HRC/26/L.22/Rev.1; IGWG, Third revised draft, 17 August 2021.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

and their impacts. As the selected examples of NCP cases illustrate, business engagement, both in the dialogue itself as well as in sharing information is a key factor of success. This leads to the interim conclusion that by complementing a soft law instrument with a binding requirement for states to establish an effective grievance mechanism with the National Contact Points and the resulting *sui generis* nature of the Guidelines, they partially bridge the gap between business impacts on the ground and the existing substantive international standards on responsible business conduct. These standards are contained in three aligned international instruments,[117] the UN Guiding Principles, the OECD Guidelines, and the ILO Tripartite Declaration.[118] However, the OECD Guidelines' approach to complement a soft law instrument with a binding requirement for states to establish an effective National Contact Point without a corresponding duty for business to engage will not succeed in fully accommodating digital developments.

In this regard, a new instrument developed by the Dutch government with the goal to bridge the gap between its own binding obligations under international law and the non-binding nature of international responsible business conduct standards for business is highly interesting. Since 2014 the Dutch government has concluded nine out of 13 planned agreements on responsible business conduct with Dutch industry sectors and civil society organisations.[119] The agreements set out how companies can work with civil society organisations and government to prevent abuses in the areas of human rights, labour rights, and the environment and they are equipped with independent monitoring mechanisms. While participating in these agreements is voluntary the government made it clear from the outset that it would consider declaring these agreements binding at a later stage. A recent evaluation of these agreements shows that despite some remarkable successes more action is needed, particularly with regard to monitoring and setting incentives for companies to participate.[120] In essence, the regulatory agenda needs to be connected with the contractual model more effectively.

---

117 OECD, ILO and UNOHCHR, *Responsible Business: Key Messages from International Instruments* (Paris, Geneva 2019) <http://mneguidelines.oecd.org/RBC-Key-Messages-from-International-Organisations-ENG.pdf>.

118 Above II.1. and II.2.a).

119 Dutch Agreement on Sustainable Garments and Textile; Dutch Banking Sector Agreement; Agreement to Promote Sustainable Forestry; Responsible Gold Agreement; Agreement for the Food Products Sector; Agreement for International Responsible Investment in the Insurance Sector; Agreement for the Pension Funds; RBC TruStone Initiative; RBC Agreement for the Metals Sector <https://www.government.nl/topics/responsible-business-conduct-rbc>.

120 Verena Bitzer et al., *Evaluation of the Dutch RBC Agreements 2014-2020: Are Voluntary Multi-Stakeholder Approaches to Responsible Business Conduct Effective?* (Amsterdam: KIT Royal Tropical Institute 2020).

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

2. Responsible Business Conduct by Design – In Regulation and Technology

Collaboration among stakeholders is essential for addressing the responsible business challenges in digital context and it relates to what has been outlined before on interoperability of not only systems and actors but also standards and regulations (above I.1.a)). Noteworthy for the purpose of this article are specific proposals that have recently been launched by business and public authorities to foster collaboration in a regulatory context to address data portability and data sharing (mutualisation).[121]

Since NCP procedures are – in contrast to court proceedings – designed as a flexible process to find a solution for specific issues and prevent future harm, they leave room for creative solutions, including cooperative approaches as seen in the Polish case with the company and the submitter working together in the implementation of the agreed measures.[122] The same is true for the substance of the Guidelines themselves. Given that they call on states to ensure that the instrument remains fit for purpose they underline their character as a living instrument.[123]

In addition, decisions by National Contact Points do not serve as precedent; it is for the Investment Committee to provide authoritative interpretation of the Guidelines if required.[124] This leaves room for NCPs in addressing new developments in the digital context. 'Digitalisation' does not appear in the Guidelines but as the selected cases illustrate NCPs were able to apply them to new digital phenomena. In practice, NCPs benefit from exchanges with their peers and they are supported by the OECD Secretariat.[125]

With this framework the Guidelines provide a space which in the broader regulatory landscape can serve as a laboratory to explore the impacts of digitalisation on responsible business conduct and identify potential lacunae in existing regulation. This is particularly relevant in the light of the increasing regulatory uptake of the Guidelines and their due diligence concept in

121 For example Facebook, *Charting a Way Forward on Privacy and Data Portability*, White Paper, September 2019 and Bank of England, *Transforming Data Collection from the UK Financial Sector,* Discussion Paper, January 2020.

122 Polish OECD NCP (n. 84), 2-4.

123 OECD Guidelines (n. 38) Chapter I Concepts and Principles, para. 11.

124 OECD Guidelines (n. 38), Procedural Guidance to the Council Decision pertaining to NCPs, para. C. 2 c.

125 For this purpose, a special seminar was organised in November 2019 to explore the impacts of new technologies on responsible business conduct.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

binding national[126] and regional[127] legislation. Referring to the Guidelines supports national regulators in addressing the imbalance of state and business responsibilities under international law and at the same time fosters regulatory coherence. In other words, it allows for including a comparatively flexible international instrument in national law.

Since legislation will notoriously lag behind when it comes to capture risks associated with digital developments, integrating responsible business conduct considerations in the technology right from the start, thus '*Responsible business conduct by design*', is essential. This requires engagement with the industry and other stakeholders and calls for new forms of legislation which better accommodate the dynamics of technological development as well as the variety of actors and drivers.

At the national level, so called *regulatory sandboxes* are increasingly being established for this purpose.[128] They are particularly common in the financial sector to address new developments in Fintech.[129] At the regional level, in the EU, two proposals which contain regulatory sandboxes are currently on the way: a Regulation on Markets in Crypto-Assets (MiCA) combined with a Pilot Regime for Market Infrastructures based on Distributed Ledger Technology (PDMIR)[130] and a Regulation on Artificial Intelligence (Artificial Intelligence Act, AIA).[131] Regulatory sandboxes are set up by the legislator or a public regulator and serve as safe spaces for innovative regulation. In the context of responsible business by design, new regulation and new technologies for privacy by design could be tested for a limited time, usually with a clearly defined number of actors and under close regulatory supervision. In

126 Above n. 74.

127 For example the EU Regulation 2017/821 on Conflict Minerals; EU Regulation 2019/2088 on sustainability-related disclosures in the financial services sector.

128 Dirk Zetzsche, Ross P. Buckley, Douglas W. Arner and Janos Nathan Barberis, 'Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation', Fordham Journal of Corporate and Financial Law 23 (2017), 31-103.

129 The first regulatory sandbox was launched by the UK Financial Conduct Authority (FCA) in November 2015, since then more than 50 countries followed: Giulio Cornelli, Sebastian Doerr, Leonardo Gambacorta and Ouarda Merrouche, *Inside the Regulatory Sandbox: Effects on Fintech Funding*, BIS Working Papers No. 901, November 2020, 2.

130 Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, COM(2020) 593 final, 24 September 2020; Proposal for a Regulation of the European Parliament and of the Council on a pilot regime for market infrastructures based on distributed ledger technology COM(2020) 594 final, 24 September 2020. PDMIR creates a sandbox for private sector participants which will be reviewed after 5 years of its entry into force and complements the review which is scheduled in MiCA to take place 3 years after its entry into force.

131 Proposal for a Regulation of the European Parliament and of the Council on Laying down Harmonised Rules on Artificial Intelligence (Artificial Intelligence ACT) and Amending Certain Union Legislative Acts, COM(2021) 206 final, 21 April 2021.

 DOI 10.17104/0044-2348-2021-3-781

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

this scenario, the sandbox would on the one hand benefit participating companies to better understand how to navigate the complexities of regulations with regard to their new technology. On the other, public authorities including regulators can learn about new digital technologies and emerging trends which allow them to better identify potential risks and anticipate future trends.

Stakeholder engagement as a prerequisite for collaboration is a key feature of the Guidelines and reflected in the institutional set-up of the OECD.[132] Business, trade unions and civil society are institutionally represented with Business at OECD (BIAC), the Trade Union Advisory Committee (TUAC), and OECD Watch. The last revision of the Guidelines in 2011 and the development of the various Guidances on Due Diligence[133] which involved all stakeholders illustrate the potential of this institutional framework for tackling also new issues such as digitalisation and the need for RBC by design.

Building on the Guidelines as a comprehensive international standard for responsible business conduct which is supported by all stakeholders and equipped with a grievance mechanism together with the lessons learnt from national approaches in addressing new technologies from a regulatory perspective could result in creating a flexible regulatory space inspired by international law within a stable (national) framework. Such a model would share some characteristics of regulatory sandboxes.[134]

V. Conclusion: A Call for a New Interface

Where does this leave us with regard to the role of international law? The role of business and its responsibilities have been a topic of intense discussions since the 1970s. The UN Guiding Principles on Business and Human Rights and the revised OECD Guidelines for Multinational Enterprises entered new territory in overcoming the traditional dichotomy of binding state obligations on the one and voluntary business engagement on the other hand with their concept of expected business behaviour. While this approach led to successful outcomes in the analogue world its limitations become obvious in a digital context: Industry is the main driver in the development

132 Christine Kaufmann, 'From Profit to People and Planet: Rethinking the Purpose of the Corporation' in: Rolf H. Weber, Walter A. Stoffel, Jean-Luc Chenaux and Rolf Sethe (eds), *Aktuelle Herausforderungen des Gesellschafts- und Finanzmarktrechts,* Festschrift für Hans Caspar von der Crone zum 60. Geburtstag (Zürich/Basel/Genf: Schulthess 2017), 3-20 (8-9).

133 See n. 40 and n. 42.

134 Zetzsche, Buckley, Arner and Barberis (n. 128), 58-70.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

of new technologies which impact on all aspects of life and are developed and adjusted at a speed that states and state regulation can hardly keep up with. The crucial role of industry in new technologies therefore adds another dimension to the existing imbalance between state and business responsibilities. Traditional international law with its focus on the sovereign state and the related sharp divide between binding and non-binding rules is inadequately suited to accommodate this development.

However, international law is in motion: *Hybrid* instruments such as the OECD Guidelines which combine existing concepts and standards of international law with a new notion of business responsibility could be an option to overcome this dilemma. Still, a link is missing to bridge the conceptual gap between states as acknowledged subjects of international law on the one hand and the private sector as the main driver of digital innovation which is currently not included in this equation on the other. In fact, to keep pace with new technological developments and address their impacts, traditional regulatory instruments such as state-based national regulation and international treaties are increasingly being replaced by more flexible policies, principles, or non-binding soft law instruments.[135] Given their non-binding nature, their effective implementation heavily depends on all actors' commitments. This is also true for the OECD Guidelines, but in contrast to other soft law instrument, the OECD's approach to add some teeth to the Guidelines with a binding requirement on states to establish a grievance mechanism seems to be a step in the right direction. Still, this obligation only applies to states, not to companies. The result is a somewhat imbalanced system which calls for levelling the playing field regarding corresponding business responsibilities.

We therefore need a *new interface* for better linking new concepts of responsible business conduct in a digital world with international law and accommodate the intrinsic dynamics of digital developments. Such a regulatory interface will have to be conceptualised outside traditional categories of binding and non-binding international law. Inspiration could be drawn from the regulatory uptake of the Guidelines at the national level and innovative regulatory instruments such as the Agreements on International Responsible Business Conduct which the Netherlands introduced in the form of contractual agreements between the government, business, trade unions, and civil society[136]. Experiences with regulatory sandboxes at the national level and

135 Shin-yi Peng, 'The Rule of Law in Times of Technological Uncertainty: Is International Economic Law Ready for Emerging Supervisory Trends?', Journal of International Economic Law 22 (2019), 1-27 (4-9); Christine Kaufmann, 'Rechtsstaatlichkeit und Internationalisierung' in: Oliver Diggelmann, Maya Hertig Randall and Benjamin Schindler (eds), *Verfassungsrecht der Schweiz* (Zürich: Schulthess 2020) Vol. 2, IV.3, n. 16-20.

136 See n. 119.

 DOI 10.17104/0044-2348-2021-3-781

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

new approaches in the European Union can serve as a further source of inspiration. Framing such an interface as a new type of international regulatory sandbox would allow for evaluating the results and move towards smart regulation over time.[137]

Such an interface at the international level could include three elements: First, a binding international framework which – other than the currently discussed legal instrument on business and human rights[138] – would not focus on detailed provisions of conduct but outline the general principles of government obligations regarding RBC in the digital age. Second, a model contract for a binding agreement to be concluded at the national level by governments, business and civil society organisations which could draw from the experience with the Dutch Agreements[139] and include the internationally agreed responsible business conduct standards of the OECD Guidelines as a reference. Third, non-binding industry and multistakeholder initiatives could complement this regulatory package.

In sum, such an interface would apply a *translational* approach[140] which draws on the advantages of hybrid regulatory models[141] and combine a binding regulatory framework at the national and international level with contractual elements as well as non-binding instruments anchored in them. Creating this interface as a safe space in terms of an *international regulatory sandbox* would allow all actors to test new regulatory approaches and learn along the way towards smart regulation. It may be a promising step for international law to stay fit for purpose in an era of digitalisation and ensure that its algorithms keep pace with new and emerging technologies.

137 Zetzsche, Buckley, Arner and Barberis (n. 128), 58-70.

138 See n. 116.

139 See n. 119.

140 Christine Kaufmann, 'The Covenants and Financial Crises' in: Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present and Future* (Oxford: Oxford University Press 2018), 302-333 (329-333).

141 A similar approach with regard to a future Treaty on Business and Human Rights is proposed by Anne Peters, Sabine Gless, Chris Thomale and Marc-Philippe Weller, 'Business and Human Rights: Making the Legally Binding Instrument Work in Public, Private and Criminal Law', Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2020-06, 37.

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

https://doi.org/10.17104/0044-2348-2021-3-781 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA