

“National Policy Assessment” as a Standard Form of International Organisations

The Example of the OECD Anti-Bribery Policy

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I.	Introduction	396
II.	The Anti-Corruption Monitoring Procedure	399
	1. The OECD’s Approach to Fighting Corruption	399
	2. Governance by Information: The Mode of Governance of the OECD Monitoring Procedure	399
	3. The Legal Framework of the OECD Monitoring Procedure	400
	a) The Institutional Framework	400
	b) The Actors	401
	c) Cooperation	401
	d) The Competences	402
	e) Development and Implementation	403
	f) Accountability	405
	g) The Legal Effect	406
	h) Conclusion	406
III.	Theoretical Foundations for the Legal Conceptualisation of the OECD Monitoring Procedure	407
	1. The Public Law Perspective	407
	a) The Public Law Perspective to Legally Conceptualise Global Governance	407
	b) The Concept of International Public Authority	408
	c) The OECD Monitoring Procedure as an Exercise of International Public Authority	409
	2. Standard Instruments to Conceptualise the Public Law Perspective	410
	a) Standard Instruments	410
	b) Development of a New Standard Instrument	410
IV.	The OECD Monitoring Procedure in the Context of the Standard Instrument “National Policy Assessment” (NPA)	411
	1. The Defining Elements of National Policy Assessment	411
	a) Production of Information on National Policies	411
	b) Assessment of the National Policies of Another Public Actor	411
	c) International Standards	412
	d) Claim to Objectiveness	412
	e) Existence of an Enforcement Mechanism	413
	f) Attributability to an International Organisation	414

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2. The Legal Regime of National Policy Assessments	414
a) Mandate	414
b) Right to Participation and Duty to Give Reason	415
c) General Acceptance of International Standards	416
d) Adherence to Scientific Standards and Representative Expertise	416
e) Accessibility of the Assessment	417
f) National Ownership	417
3. The Legal Bindingness of the Elements of the Legal Regime	418
4. Critique of National Policy Assessment	419
5. Legal Impact of National Policy Assessment on other International Organisations	420
V. Conclusion	420

Abstract

This contribution applies a public-law perspective to the Organisation for Economic Co-operation and Development's (OECD) anti-corruption monitoring procedure, in order to legally conceptualise it as an international standard instrument. In the first part, the OECD monitoring procedure is assessed from governance and legal perspectives respectively. In the second part, the foundations of a legal conceptualisation are discussed. A concept of international public authority is developed and standard instruments are discussed as suitable instruments to theoretically conceptualise governance activities. In the third part, the OECD monitoring procedure is conceived from a public law perspective as a new international standard instrument named "National Policy Assessment" (NPA). The defining elements and the elements of the legal regime of NPAs are discussed.

I. Introduction

The monitoring procedure is a key instrument in the OECD's programme against corruption.¹ The procedure is, according to the OECD, focused on fighting the bribery of foreign public officials in international

¹ Besides the OECD, the Anti-Corruption Network for Eastern Europe and Central Asia (ACN), the Group of States against Corruption (GRECO), the Organization of American States (OAS), the African Union (AU) and the United Nations Office on Drugs and Crime (UNODC) deploy monitoring procedures to fight corruption. Cf. *G. Schuler*, Monitoring Procedures of the International Fight against Corruption in the Light of Public Law, in: S. Wolf/D. Schmidt-Pfister (eds.) *International Anti-Corruption Regimes in Europe – Between Corruption, Integration, and Culture*, 2010, 105 et seq.

business transactions. The monitoring procedure has proven effective in many states. It has triggered future-oriented and profound changes in the legal and political fight against corruption.

Central to the OECD monitoring procedure is the OECD Working Group on Bribery in International Business Transactions (OECD Working Group on Bribery), which both compiles state-specific reports based on questionnaires and on-site visits regarding the anti-corruption measures taken by each state, and formulates state-specific recommendations aiming to induce national decision-makers to implement anti-corruption measures. In response to the OECD monitoring procedure, participating states have enacted legislation to improve cooperation between prosecution and police authorities, expanded existing structures for cooperation and communication between national law enforcement agencies, introduced measures to improve the investigation and prosecution of acts of bribery, introduced training courses on the fight against corruption, launched compliance programmes, and introduced ombudsmen.²

Despite these positive effects on the international fight against corruption, however, the monitoring procedure is questionable from a legitimacy point of view. The state-specific recommendations of the OECD monitoring procedure exceed the wording of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention),³ and are thus not backed by the parliamentary ratified international treaty. Moreover, while the monitoring procedure is characterised by a detailed legal framework, this framework only depicts particular aspects of the monitoring procedure, and not its specific mode of governance.

In order to tackle these concerns, it is the objective of this contribution to draft a public law framework for the OECD monitoring procedure, and to theoretically conceptualise it as a new international standard instrument. As such, legitimacy concerns are discussed as legality issues.⁴ The assessment of the legitimacy of each monitoring procedure must be based on legal stan-

² OECD Working Group on Bribery in International Business Transactions (2005) Germany: Phase 2. Follow-Up Report on the Implementation of the Phase 2 Recommendations on the Application of the Convention and the 1997 Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions, available at <<http://www.oecd.org/dataoecd/8/44/35927070.pdf>>, 5 et seq.

³ OECD (1997) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17.12.1997, 37 ILM 1(1998).

⁴ *A. v. Bogdandy/P. Dann./M. Goldmann*, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities, GLJ 9 (2008), 1380.

dards. By conceptualising the procedure as an international standard instrument, its effectiveness is advanced due to the dual function of public law: i.e. to secure the legitimacy of public power, while enhancing its effectiveness. This dual function is reflected in the concept of standard instruments.⁵ The objective of drafting a public law framework for the OECD anti-corruption monitoring procedure is pursued with the help of three theses. First, the OECD monitoring procedure is founded on a mode of governance also known as “governance by information”.⁶ This mode of governance cannot be grasped by established legal standards. Second, the reports composed in the course of the monitoring procedure are acts of international public authority; the OECD monitoring procedure must therefore be conceptualised from a public law perspective. Standard instruments serve to conceptualise the public law perspective. Third, the OECD monitoring procedure can be conceptualised as a new international standard instrument named NPA.

The plan of this article and the affirmation of these theses mirror the three steps of the development of a standard instrument.⁷ As a first step, the activity in question must be analysed comprehensively (II.). The OECD’s approach to fighting corruption is outlined. The governance-perspective then provides a valuable starting point for the analysis of activities of international organisations because it offers a comprehensive approach that brings to light informal institutional settings and activities, multi-layer aspects, and cooperation between diverse international actors. The subsequent analysis by means of established legal principles and standards highlights the legal aspects of the activity, and provides for a legal view of the specific mode of governance. As a second and third step (IV.), the defining elements of the standard instrument must be outlined and the legal regime defined. The theoretical foundation for the legal conceptualisation is presented subsequent to the empirical analysis of the OECD monitoring procedure (III.).

⁵ E. Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee – Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung*, 2006, 2nd ed., chapter 1, paras. 30 et seq.

⁶ A. v. Bogdandy/M. Goldmann, *The Exercise of International Public Authority through National Policy Assessment – The OECD’s PISA Policy as a Paradigm for a New International Standard Instrument*, *International Organizations Law Review* 5 (2008), 243.

⁷ Cf. E. Schmidt-Aßmann (note 5), chapter 6, paras. 35 et seq.

II. The Anti-Corruption Monitoring Procedure

1. The OECD’s Approach to Fighting Corruption

The OECD Anti-Bribery Convention was adopted on 17.12.1997 and entered into force on 15.2.1999.⁸ To date, 38 states, i.e. the 34 OECD member states and four non-member states – Argentina, Brazil, Bulgaria and South Africa – are parties to the Convention.⁹ The OECD Anti-Bribery Convention criminalises active bribery, i.e. it penalises those who “offer, promise or give any undue pecuniary or other advantage”.¹⁰ The essential aim of the OECD Anti-Bribery Convention is to prevent trade distortion in international business transactions and to establish conditions of fair competition.¹¹

2. Governance by Information: The Mode of Governance of the OECD Monitoring Procedure

The OECD monitoring procedure is based on governance by information, a mode of governance based not on the adoption of legally binding instructions, but rather on the influence exerted on other actors. By “shaping the cognitive framework of policy-making through the collection, processing and dissemination of information in the respective area”¹² specific policy areas are defined or at least influenced. The aim of the OECD monitoring procedure is an improvement of the legal and political fight against corruption in participant states, based on the recommendations formulated in informational reports.¹³ The OECD Working Group on Bribery pursues this aim by researching, evaluating and publishing information on the fight

⁸ OECD Anti-Bribery Convention (note 3).

⁹ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transaction, Ratification Status as of March 2009.

¹⁰ OECD Anti-Bribery Convention (note 3), Art. 1.

¹¹ OECD Anti-Bribery Convention (note 3), Preamble, 1. Recital: “Bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions.”

¹² *A. v. Bogdandy/M. Goldmann* (note 6), 243.

¹³ *F. Pagani*, Peer Review: A Tool for Co-operation and Change, OECD Directorate for Legal Affairs, SG/LEG(2002)1, 11.9.2002, no. 3.

against corruption in participating states, and by recommending measures in relevant policy areas.

3. The Legal Framework of the OECD Monitoring Procedure

a) The Institutional Framework

The OECD was founded in 1961 as the successor of the Organisation for European Economic Cooperation (OEEC).¹⁴ Thirty-four industrialised countries are member states of the OECD.¹⁵ The work of the OECD focuses on economic growth, world trade, and development aid. The OECD carries out its activities mainly in the form of legally non-binding instruments, even though it has the mandate to adopt legally binding instruments.¹⁶

The OECD is a prime example of an international bureaucracy. Bureaucracies are structured hierarchically, they operate rationally and according to legal rules, and their work is performed by experts.¹⁷ Due to their bureaucratic organisational form, international organisations exhibit autonomy from their member states.¹⁸ They increasingly define and shape the structure and modes of action of global governance.¹⁹ The OECD is hierarchically structured. Its highest political organ is the OECD Council, which sets the agenda for the OECD's work, and adopts the documents drafted by the expert committees. The secretariat coordinates the OECD's activities within the framework provided by the Council. The activities are planned and implemented in detail by a large body of experts in the committees and working groups assigned to the divisions of the secretariat. The OECD furthermore implements its activities according to detailed rules of procedure. The rules of procedure are established by the competent committee for each

¹⁴ The OEEC was founded in 1948 to implement the European Recovery Program (Marshall Plan). OECD, Convention on the Organisation of Economic Co-operation and Development, 14.12.1960, 888 U.N.T.S. 179, Art. 15.

¹⁵ OECD, List of OECD Member countries.

¹⁶ OECD Agreement (note 14), Art. 5.

¹⁷ *M. Weber*, Grundriss der Sozialökonomik, vol. I, 2nd ed., 1925, chapter III, § 2 et seq.

¹⁸ *M. Barnett/M. Finnemore*, The Power of Liberal International Organizations, in: *M. Barnett/R. Duvall* (eds.), Power in Global Governance, 2005, 163 et seq.; *R. O. Keohane*, International Institutions and State Power, 1984, 4.

¹⁹ *J. Klabbers*, The Changing Image of International Organizations, in: *J.-M. Coicaud/V. Heiskanen* (eds.), The Legitimacy of International Organisations, 2001, 224.

activity.²⁰ The substantive work of the OECD is carried out by experts, namely by the international experts in the OECD secretariat, and the external experts in the committees.²¹

b) The Actors

The body responsible for the OECD monitoring procedure is the OECD Working Group on Bribery, one of six working groups of the Investment Committee. The Investment Committee itself is assigned to the Directorate for Financial and Enterprise Affairs (DAF) in the OECD secretariat. The OECD Working Group on Bribery is composed of experts from the 34 OECD member states, the four non-OECD states that have signed and ratified the OECD Anti-Bribery Convention, and regular observers from six international organisations active in the fight against corruption. In addition to the Working Group on Bribery, a central role is played by the examination teams, which carry out the on-site visits. They consist of one or two experts from the OECD secretariat, and up to three experts from the participating states.²²

c) Cooperation

The OECD cooperates with its member states, non-member states, other international organisations and non-state actors.²³ Other international organisations and non-member states are invited to the sessions of the OECD committees and working groups as *ad hoc* observers or as regular observers.²⁴

²⁰ J. Salzman, Decentralized Administrative Law in the Organization for Economic Cooperation and Development, IILJ Working Paper 2005/17, Global Administrative Law Series, 2005, 39.

²¹ Experts also furnish the OECD with autonomy because they are not bound by a national mandate. Cf. *J. v. Bernstorff*, Procedures of Decision-making and the Role of Law in International Organizations, GLJ 9 (2008), 1946 et seq.

²² OECD Working Group on Bribery in International Business Transactions (2001) Procedure for Self- and Mutual Evaluation of Implementation of the Convention and the Revised Recommendation – Phase 2, DAF/IME/BR(99)33FINAL, 1.3.2001, Annex no. 6.1.

²³ J. Salzman (note 20), 34. See further A. M. Slaughter, The Real New World Order, Foreign Aff. 76 (1997), 196.

²⁴ The legal basis for the cooperation is laid down in OECD Agreement (note 14), Art. 12; OECD Council (1970) Rules of Procedure of the Organisation, adopted on 30.9.1961 OECD/C(61)21 and amended since that date by the Resolutions of the Council of 24.7.1962

The institutional framework for cooperation on the development and implementation of the OECD monitoring procedure is provided for by the OECD Working Group on Bribery.²⁵ Other international organisations participate in the sessions of the OECD Working Group on Bribery. The aim of this institutionalised cooperation is the coordination of the anti-corruption activities of international organisations working in this field. One particular objective of cooperation is to prevent multiple assessments resulting in more than one report with differing content and recommendations for a given state.²⁶ Cooperation with industry and civil society is foreseen only very rarely due to the reciprocity of the assessments of the monitoring procedure.²⁷

d) The Competences

A catalogue of competences is not included in the Convention on the Organisation of Economic Co-operation and Development (OECD Agreement); there is only a clause on the standard instruments of the OECD, the scope of which is defined in reference to the aims of the organisation.²⁸ The fight against corruption is not articulated as an explicit aim of the OECD. It is nevertheless encompassed within the organisation's aim: "to achieve the highest sustainable economic growth",²⁹ because corruption has an impeding and distorting effect on competition, lowers the efficiency of production and has a destructive impact on a country's economic system.³⁰ The OECD

C(62)115(Final), 24.7.1965 C(65)87 and 29.9.1970 C(70)133(Final), rules 8 a) and 9 a); OECD Council, Resolution of the Council Concerning the Participation of Non-Members in the Work of Subsidiary Bodies of the Organisation, C(2004)132/FINAL, 5.8.2004; OECD Council, Participation of Non-Members in the Activities of the Organisation: Legal Aspects of the Issue, C(98)211, 2.12.1998, no. 3 and 8.

²⁵ The cooperation within the OECD Working Group on Bribery is legally based on OECD Council (1997) Revised Recommendation of the Council on Combating Bribery in International Business Transactions, C(97)123 FINAL, 23.5.1997, sections XII and XIII.

²⁶ OECD Working Group on Bribery in International Business Transactions, Procedure for Self- and Mutual Evaluation of Implementation of the Convention and the Revised Recommendation – Phase 2, II General Issue 6, III no. 27 (note 22).

²⁷ OECD Working Group on Bribery in International Business Transactions, Procedure for Self- and Mutual Evaluation of Implementation of the Convention and the Revised Recommendation – Phase 2 (note 22), no. 28.

²⁸ OECD Agreement (note 14), Art. 5; Art. 1.

²⁹ OECD Agreement (note 14), Art. 1 (a).

³⁰ *J. Graf Lambsdorff*, The Institutional Economics of Corruption and Reform, Theory, Evidence and Policy, 2007, 58 et seq.; *S. Rose-Ackerman*, "Grand" Corruption and the Ethics of Global Business, *Journal of Banking & Finance* 26 (2002), 1892.

monitoring procedure is furthermore based on detailed legal foundations.³¹ The key legal basis is contained in the Revised Recommendation of the Council on Combating Bribery in International Business Transactions,³² which was complemented by the Decision of the Council concerning further Work on Combating Bribery in International Business Transactions.³³ A general legal basis is included in Art. 12 of the OECD Anti-Bribery Convention.

e) Development and Implementation

The states that participated in the negotiations leading to the OECD Anti-Bribery Convention agreed to develop a procedure that would assure the effectiveness of the fight against corruption in each state.³⁴ Art. 12 was included in the OECD Anti-Bribery Convention, in order to establish a legal basis for the mechanism. The OECD Working Group on Bribery developed a monitoring procedure with two regular phases, a follow-up procedure and extraordinary measures, and it designed and published procedural guidelines that outline the distinct steps of the monitoring procedure in detail.³⁵ In the first phase the national legal situation is assessed.³⁶ The aim of this phase is to encourage participating states to align their national laws with the provisions of the OECD Anti-Bribery Convention, the Revised Recommendation of the Council on Combating Bribery in Interna-

³¹ On internal concretisations within the OECD to create a concrete legal foundation G. Schuler, *Effective Governance through Decentralised Soft Implementation: The OECD Guidelines for Multinational Enterprises*, GLJ 9 (2008), 1769 et seq.

³² OECD Council (1997) Revised Recommendation of the Council on Combating Bribery in International Business Transactions (note 25), section VIII.

³³ OECD Council (1997) Decision of the Council concerning further Work on Combating Bribery in International Business Transactions, C(97)240/FINAL, 11.12.1997.

³⁴ N. Bonucci, Article 12. Monitoring and Follow-up, in: M. Pieth/A. L. Low/P. J. Cullen (eds.), *The OECD Convention on Bribery – A Commentary on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21.11.1997*, 2007, 448 et seq.; T. Conzelmann, *Beyond the Carrot and the Stick, State Reporting Procedures in the World Trade Organization and the Organization for Economic Cooperation and Development*, in: J. Joachim/B. Reinalda/B. Verbeek (eds.), *International Organizations and Implementation – Enforcers, Managers, Authorities?*, 2008, 35 et seq.

³⁵ OECD Working Group on Bribery in International Business Transactions (2006) Revised Guidelines for Phase 2 Reviews, DAF/INV/BR/WD(2005)12/REV3, 27.2.2006; OECD Working Group on Bribery in International Business Transactions, *Procedure for Self- and Mutual Evaluation of Implementation of the Convention and the Revised Recommendation – Phase 2* (note 22).

³⁶ N. Bonucci (note 34), 452 et seq.

tional Business Transactions³⁷ and the Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials³⁸. In the second phase, the implementation of national anti-corruption laws and the institutional settings to fight corruption are assessed.³⁹ This phase aims to induce states to implement structural adjustments in accordance with the recommendations of the OECD Working Group on Bribery. Following the phase 2 reports, states' progress is assessed in the follow-up procedure.⁴⁰ Extraordinary measures are carried out in states that are continuously negatively assessed. The most important of the extraordinary measures are the so-called *bis*-procedures, which the OECD Working Group on Bribery can carry out during the first and second phases.⁴¹ The *bis*-procedures repeat the assessment of the preceding phase; the *bis*-procedure of the second phase includes another on-site visit by the examination team. Furthermore, a state may be obliged to report on its anti-corruption measures at each session of the OECD Working Group on Bribery.⁴² This duty to report is distinct from the so-called *tour de table* exercise, where each state orally reports on anti-corruption measures it has recently taken.⁴³ Finally, the OECD Working Group on Bribery may investigate by itself, e.g. by interviewing representatives of the particular state at the highest political level. Public denouncements regarding non-observation of the recommendations are intended in this case.⁴⁴ The first and the second phase, the follow-up procedure and the *bis*-procedures are carried out in three steps: first, collection of data, second, evaluation of the data and composition of the reports, and third, adoption and publication of the reports.⁴⁵ In the first and second phase of the monitoring procedure, data is collected via standardised and

³⁷ OECD Council, Revised Recommendation of the Council on Combating Bribery in International Business Transactions (note 25).

³⁸ OECD Council (1996) Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials, C(96)27/FINAL, 17.4.1996.

³⁹ *N. Bonucci* (note 34), 457 et seq.

⁴⁰ OECD Working Group on Bribery in International Business Transactions, Revised Guidelines for Phase 2 Reviews (note 35), IV E.

⁴¹ OECD Working Group on Bribery in International Business Transactions, Revised Guidelines for Phase 2 Reviews (note 35), VIII and Annex 3: Box on the linkage between the Phase 2 Review, the Follow-up Reports, and the Phase 2bis. See further *N. Bonucci* (note 34), 456 et seq.

⁴² OECD Working Group on Bribery in International Business Transactions, Revised Guidelines for Phase 2 Reviews (note 35), VIII C (i).

⁴³ *N. Bonucci* (note 34), 450 et seq.

⁴⁴ OECD Working Group on Bribery in International Business Transactions, Revised Guidelines for Phase 2 Reviews (note 35), VIII C.

⁴⁵ See *F. Pagani* (note 13), no. 21.

state-specific questionnaires.⁴⁶ In the second phase information is additionally collected during a one-week on-site visit in the assessed state.⁴⁷ The information is assessed in three readings of the OECD Working Group on Bribery.⁴⁸ The final reports are adopted by consensus by all states excluding the examined state.⁴⁹ The reports are published on the internet and the adoption is announced by an OECD press-release.⁵⁰

f) Accountability

Accountability is referred to as the responsibility of an international organisation to give reasoned account for the manner in which it exercises public authority.⁵¹ The actors of the OECD monitoring procedure are not legally accountable. Politically, all OECD committees are bound by their duty to report to the next highest committee. The OECD Working Group on Bribery reports to the Investment Committee, which in turn reports to the OECD Council, which can issue directives.⁵² The Working Group on Bribery is additionally obliged to report to the OECD Council on the progress of the monitoring procedure.⁵³ Moreover, other international organisations obtain insights into the negotiations, modes of operation and procedures of the OECD Working Group on Bribery through their observers. The knowledge gained permits them to politically call the Working Group

⁴⁶ OECD, Phase 1 Questionnaire: First Self-Evaluation and Mutual Review of Implementation of the Convention and 1997 Recommendation, DAF/IME/BR(98)8/ADD1/FINAL, 30.10.1998; OECD, Phase 2 Questionnaire, DAF/IME/BR/WD(2000)36/FINAL, 24.1.2001. Thereto *N. Bonucci* (note 34), 453.

⁴⁷ OECD Working Group on Bribery in International Business Transactions, Procedure for Self- and Mutual Evaluation of Implementation of the Convention and the Revised Recommendation – Phase 2 (note 22), Annex no. 5.1, 7.

⁴⁸ OECD Working Group on Bribery in International Business Transactions, Revised Guidelines for Phase 2 Reviews (note 35), VI B; Annex 5 II.

⁴⁹ OECD Working Group on Bribery in International Business Transactions, Revised Guidelines for Phase 2 Reviews (note 35), VI C.

⁵⁰ OECD Working Group on Bribery in International Business Transactions, Revised Guidelines for Phase 2 Reviews (note 35), VI C.

⁵¹ International Law Association, Berlin Conference (2004) Accountability of International Organisations, reprinted in *International Organizations Law Review* 1 (2004), 221 et seq. (225 et seq.); *R. W. Grant/R. O. Keohane*, Accountability and Abuses of Power in World Politics, *Am. Polit. Sci. Rev.* 99 (2005), 29.

⁵² OECD, Rules of Procedure of the Organisation (note 24), rule 23.

⁵³ OECD Working Group on Bribery in International Business Transactions, Procedure for Self- and Mutual Evaluation of Implementation of the Convention and the Revised Recommendation – Phase 2 (note 22), no. 20.

on Bribery to account. If sensitive information is made public, the general public can also politically call the concerned OECD committee to account by exerting public pressure on the committee.⁵⁴

g) The Legal Effect

Participation in the monitoring procedure is legally binding since the procedure rests on Art. 12 of the OECD Anti-Bribery Convention. However, the procedural guidelines that stipulate the course of action in detail are neither legally binding on participating states, given only the OECD Council has the competence to adopt acts that bind member states,⁵⁵ nor are they legally binding on the OECD Working Group on Bribery, because they are formulated as non-binding recommendations.⁵⁶ While the procedure itself is therefore not legally binding, participating states are legally obliged to disclose information given denial to disclose information would be tantamount to refusal to participate in the monitoring procedure as a whole, and would conflict with Art. 12 of the OECD Anti-Bribery Convention. The reports cannot be considered legal instruments, because they do not contain wording that expresses the intent of the OECD Working Group on Bribery to compose them as such.⁵⁷ The recommendations to national decision-makers are formulated as normative expectations, but due to the lack of competence of the OECD Working Group on Bribery to adopt binding instruments, they are not legally binding.⁵⁸

h) Conclusion

The above analysis depicts governance by information as the OECD monitoring procedure's mode of governance. The analysis indicates that distinct legal aspects of the monitoring procedure can be extracted via established legal parameters. However, the analysis points out that governance by information cannot be grasped by established legal parameters. The ab-

⁵⁴ R. W. Grant/R. O. Keohane (note 51), 37.

⁵⁵ OECD Agreement (note 14), Art. 5, Art. 7 (1).

⁵⁶ J. Bast, *Grundbegriffe der Handlungsformen der EU*, 2006, 306 et seq.

⁵⁷ E. g. "shall", "may", "should" express the intent of the issuing actor to compose a legal instrument.

⁵⁸ According to Art. 5 in conjunction with Art. 7 OECD Agreement (note 14) only the OECD Council can adopt rules that are binding on member states.

sence of legal standards raises legitimacy concerns, since the recommendations of the OECD Working Group on Bribery prompt a significant amount of change in the participating states without their parliamentary consent.⁵⁹ The democratic rights of the citizens are thereby affected. The foregoing analysis thus substantiates the necessity of a legal conceptualisation of the OECD anti-corruption monitoring procedure.

III. Theoretical Foundations for the Legal Conceptualisation of the OECD Monitoring Procedure

1. The Public Law Perspective

a) The Public Law Perspective to Legally Conceptualise Global Governance

The public law perspective is inspired by three approaches that seek to theoretically conceptualise global governance.⁶⁰ These are the constitutionalisation of international public law,⁶¹ approaches aimed at the abstraction of a global or international administrative law,⁶² and research on the law of international organisations.⁶³ The value of the public law perspective in conceptualising the activities of international organisations lies in its double function: limiting public authority and protecting individual freedom, while enabling public authority to be effectively exercised.⁶⁴ These functions meet the needs of the international realm. On the one hand, international organi-

⁵⁹ Cf. on this point below, section III. 1. c) as well as the examples displayed under I.

⁶⁰ *A. v. Bogdandy/P. Dann./M. Goldmann* (note 4), 1390 et seq.

⁶¹ Cf. *C. Tomuschat*, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, 281 RdC, *Collected Courses of the Hague Academy of International Law* (2001), 9 et seq.; *A. Peters*, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, *LJIL* 19 (2006), 579 et seq.

⁶² For a global approach cf. *N. Krisch/B. Kingsbury*, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, *EJIL* 17 (2006), 1 et seq.; *S. Cassese*, *Administrative Law Without a State? The Challenge of Global Regulation*, *N. Y. U. J. Int'l. L. & Pol.* 37 (2005), 663 et seq.; *E. Schmidt-Aßmann*, *Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsbeziehungen*, *Der Staat* 45 (2006), 315 et seq. focuses on internationalised administrative relations and on a developing international administrative law.

⁶³ *H. G. Schermers/N. M. Blokker*, *International Institutional Law*, 4th ed., 2003; *J. Alvarez*, *International Organizations: Then and Now*, *AJIL* 100 (2006), 324 et seq.; *J. Klabbers*, *An Introduction to International Institutional Law*, 2002.

⁶⁴ *E. Schmidt-Aßmann* (note 5), chapter 1, paras. 30 et seq.

sations are important actors in responding to international problems.⁶⁵ On the other hand political freedom and the democratic rights of citizens are affected by international organisations both because the latter's' competences have been expanded and because the lack of transparency and the informality of their actions have been accepted as necessary for their effectiveness.⁶⁶ In order to secure their legitimacy, the actions of international organisations must be theoretically conceptualised from a public law perspective.

b) The Concept of International Public Authority

Since public law unfolds its functions vis-à-vis public authority, a concept of international public authority must be defined. This must be a specifically international and a specifically legal concept of public authority.⁶⁷ It must be specifically international because power relations are much more direct on the international than on the national level and there is no clear division of powers.⁶⁸ It must be specifically legal because the concept of national public authority is based on a sociological concept that equates public authority with the authority to issue legal orders.⁶⁹ This concept is too narrow because international organisations not only prompt effects that are capable of affecting individual freedom through binding law but also by means of soft law and non-legal activities. The authority aspect of international public authority therefore encompasses the legally binding activities of international organisations as well as non-binding, i.e. soft law and non-law law-based activities. Since activities not affecting individual freedom must be excluded from the concept of international public authority, it is essential that the activity provoke a minimum constraint of individual freedom. Decisive for the existence of the public and internationality aspects of international public authority is that the activity derive from an international legal basis, and be undertaken by legitimate holders of public author-

⁶⁵ *M. Barnett/M. Finnemore*, Rules for the World – International Organizations in Global Politics, 2004, 1.

⁶⁶ *J. Klabbers*, Two Concepts of International Organizations, *International Organizations Law Review* 2 (2005), 282.

⁶⁷ *A. v. Bogdandy/P. Dann./M. Goldmann* (note 4), 1381 et seq.; *A. v. Bogdandy/M. Goldmann* (note 6), 261 et seq.

⁶⁸ *E. Benvenisti*, The Interplay between Actors as a Determination of the Evolution of Administrative Law in International Institutions, *Law & Contemp. Probs.* 68 (2005), 320 et seq.

⁶⁹ *M. Weber* (note 17), chapter III, § 3.

ity with the aim of furthering the common good, i.e. usually a founding treaty of an international organisation.

c) The OECD Monitoring Procedure as an Exercise of International Public Authority

The OECD monitoring procedure exhibits the public and internationality aspects of international public authority because it is based on norms concretising the OECD Agreement and because it is attributable to the OECD. It is carried out by the OECD Working Group on Bribery in accordance with the OECD Convention and specific legal foundations.⁷⁰ The monitoring procedure features the authority aspect because it evokes legislative and practical modifications according to the recommendations formulated by the OECD Working Group on Bribery that exceed the wording of the parliamentary ratified OECD Anti-Bribery Convention. For example, the OECD Working Group on Bribery demands that national decision-makers implement compliance programmes and appoint ombudsmen,⁷¹ adopt guidelines that oblige tax auditors to cooperate with law enforcement agencies in the investigation of cases of fraud and bribery,⁷² and establish institutions that coordinate anti-bribery measures,⁷³ change specific laws, such as the Canada Business Corporations Act,⁷⁴ or provide adequate funding to secure sufficient workforce and training programmes for the effective investigation and prosecution of anti-bribery cases.⁷⁵ These demands exceed the provisions criminalising the bribing of foreign officials in international business transactions laid down in the OECD Anti-Bribery Convention and ratified by the national parliaments. In so doing, the OECD monitoring procedure determines the actions of national decision-makers and affects the democratic rights of the citizens. The reports composed as part of the monitoring procedure can thus be conceptualised as acts of international public authority. Since each exercise of public authority must be embedded

⁷⁰ See above section II. 3. d).

⁷¹ OECD, Germany: Phase 2 Report, 4.6.2003, no. 156 et seq.

⁷² OECD, Finland: Phase 2 Report, May 2002, 29.

⁷³ OECD, Canada: Phase 2 Report, 25.3.2004, 38.

⁷⁴ OECD, Canada: Phase 2 Report (note 73), 38.

⁷⁵ OECD, Luxembourg: Phase 2 Report, 28.5.2004, 44 et seq.

in public law,⁷⁶ monitoring procedures must be conceptualised from a public law perspective.

2. Standard Instruments to Conceptualise the Public Law Perspective

a) Standard Instruments

Standard instruments provide for a theoretical framework that not only captures legally binding activities but also law-based soft law and non-law activities.⁷⁷ Due to their systematising and recording functions,⁷⁸ standard instruments reflect the central concern of public law, i.e. the protection of individual freedom while providing for an effective problem-solving capacity.⁷⁹ They are therefore suitable instruments to theoretically conceptualise governance activities.

b) Development of a New Standard Instrument

The admissibility of the development of new standard instruments in the international sphere is founded on isolated considerations of an acting organ's competences on the one hand, and the standard instruments at its disposal to pursue public tasks on the other.⁸⁰ The two principal elements in the development of a new standard instrument are the abstraction of the defining elements and the elements of the legal regime.⁸¹

⁷⁶ See above section III. 1. a).

⁷⁷ *M. Goldmann*, Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority, GLJ 9 (2008), 1879 et seq.

⁷⁸ *O. Mayer*, Deutsches Verwaltungsrecht, vol. I, 3rd ed., 1924, 92 et seq.

⁷⁹ *E. Schmidt-Aßmann*, Die Lehre von den Rechtsformen des Verwaltungshandelns – Ihre Bedeutung im System des Verwaltungsrechts und für das verwaltungsrechtliche Denken der Gegenwart, DVBl 11 (1989), 535 et seq.

⁸⁰ *A. v. Bogdandy/J. Bast/F. Arndt*, Handlungsformen im Unionsrecht – Empirische Analysen und Dogmatische Strukturen in einem vermeintlichen Dschungel, ZaöRV 62 (2002), 81.

⁸¹ *M. Goldmann* (note 77), 1900 et seq.; *E. Schmidt-Aßmann* (note 5), chapter 6, paras. 35 et seq.

IV. The OECD Monitoring Procedure in the Context of the Standard Instrument “National Policy Assessment” (NPA)

1. The Defining Elements of National Policy Assessment

The defining elements of a standard instrument are those that are constitutive for the exercise of public authority. They must be concrete enough to avoid being arbitrary. At the same time they must be abstract enough to include similar activities.⁸² They are obtained on the basis of a comprehensive empirical assessment.⁸³

a) Production of Information on National Policies

The first defining element of NPAs is that information is produced through a comprehensive analysis of national policies and informational documents are composed. Indicators such as “shall” or “may” pointing out that authoritative commands are intended are not included in the documents. Thus, the information itself does not have normative power; however, it can evoke normative effects in the assessed state.

In the framework of the OECD monitoring procedure, information on national anti-corruption policies is produced and information documents are drafted.⁸⁴

b) Assessment of the National Policies of Another Public Actor

The assessment must refer to the national policies of another public actor; a mere self-assessment does not constitute an NPA. The international organisation is required to undertake its own assessment and adopt the informational documents as its own. It is not, however, necessary for the interna-

⁸² *M. Goldmann* (note 77), 1884 et seq.

⁸³ The definition and legal regime of NPAs have hitherto been developed according to the OECD PISA study, *A. von Bogdandy/M. Goldmann* (note 6), 241 et seq., and the OECD anti-corruption monitoring procedure, *G. Schuler*, “Politikbewertung” als Handlungsform internationaler Institutionen – Das Beispiel der Korruptionsbekämpfung der OECD, 2012.

⁸⁴ Rules for the preparation of the reports are laid down in OECD Working Group on Bribery in International Business Transactions, Revised Guidelines for Phase 2 Reviews (note 35), II G.

tional organisation to undertake research for the production of documents solely through its own experts.

In the course of the OECD monitoring procedure, research is conducted by the organisation's experts, and the resulting informational documents are attributable to the OECD.⁸⁵

c) International Standards

NPAs presuppose the existence of international standards that serve as a point of reference for the production, i.e. the collection and assessment of information.⁸⁶ The standards can consist of hard law, soft law or non-normative documents.

The OECD monitoring procedure refers to an international treaty and two non-binding recommendations of the OECD Council.⁸⁷

d) Claim to Objectiveness

NPAs further presuppose a claim to the objectiveness of information, e.g. by grounding the information on empirical data.

The informational documents of the OECD monitoring procedure are based on empirical data that is researched via questionnaires and on-site visits.⁸⁸

⁸⁵ The responsibilities of the OECD secretariat and of the lead examiners are laid down in OECD Working Group on Bribery in International Business Transactions, Revised Guidelines for Phase 2 Reviews (note 35), II, III.

⁸⁶ Thereto *F. Pagani* (note 13), no. 14.

⁸⁷ OECD Council, Revised Recommendation of the Council on Combating Bribery in International Business Transactions (note 25); OECD Council, Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials (note 38); OECD Anti-Bribery Convention (note 3).

⁸⁸ OECD Working Group on Bribery in International Business Transactions, Revised Guidelines for Phase 2 Reviews (note 35); OECD, Phase 1 Questionnaire: First Self-Evaluation and Mutual Review of Implementation of the Convention and 1997 Recommendation (note 46); OECD, Phase 2 Questionnaire, (note 46).

e) Existence of an Enforcement Mechanism

NPAs require an enforcement mechanism to ensure that the authority aspect of international public authority is fulfilled, by requiring a certain effectiveness of the activity in question. A feature of the enforcement mechanism is that it is not triggered by legally binding commands, but by creating a situation for national decision-makers in which they can only ignore the assessment of the international organisation by accepting considerable political disadvantages. Regular repetition constitutes an enforcement mechanism because it exerts pressure on national decision-makers by providing them a timeframe within which they have to improve their performance, and by disclosing non-observance of particular aspects to the general public. Extraordinary repetitions exert even stronger pressure because they are only carried out in cases of continued negative assessment, and given corresponding informational documents are posted on the same website as regular informational documents, it is easy to identify states in which extraordinary repetitions were carried out.

The OECD monitoring procedure provides for regular and extraordinary repetitions.⁸⁹

The formulation of the expectations addressed to national decision-makers constitutes another enforcement mechanism. If they are formulated directly through state-specific recommendations in the informational documents, they allow for a comparison of a particular state's measures before and after implementation of the monitoring procedure. If they are formulated indirectly in the form of rankings, they suggest to states at the bottom of the list that they follow the example of states at the top.

In the reports of the OECD monitoring procedure, the expectations are formulated directly in the form of state-specific recommendations.⁹⁰

Finally, the publication of informational documents constitutes an enforcement mechanism. Publication exerts pressure on national decision-makers, and enables the media to take up the issue.

The OECD publishes informational documents compiled in the course of the monitoring procedure on its homepage.⁹¹

⁸⁹ OECD Working Group on Bribery in International Business Transactions, Revised Guidelines for Phase 2 Reviews (note 35), IV E 2; VI; VII; VIII.

⁹⁰ OECD Working Group on Bribery in International Business Transactions, Revised Guidelines for Phase 2 Reviews (note 35), I C. Pressure on the addressed states via rankings is exerted in the context of the OECD PISA policy, *A. v. Bogdandy/M. Goldmann* (note 6), 288.

⁹¹ OECD, Directorate for Financial and Enterprise Affairs, Country Reports on the Implementation of the OECD Anti-Bribery Convention.

f) Attributability to an International Organisation

Lastly, NPAs require that the activity is attributable to an international organisation. This secures the public aspect of international public authority.

The OECD Working Group on Bribery, which implements the monitoring procedure, is an OECD committee. The monitoring procedure is thus attributable to the OECD.⁹²

The foregoing analysis demonstrates that the OECD monitoring procedure can be conceptualised as NPA.

2. The Legal Regime of National Policy Assessments

The elements of the legal regime are those that are essential for the legitimacy and effectiveness of the standard instrument. They are obtained from theory.⁹³ If these elements are based on a legal foundation and can thus be understood as legal requirements, then the activities of international organisations fulfilling the defining elements of NPAs and the elements of the legal regime are lawful.

a) Mandate

The requirement of a legal basis for all acts of public authority is one of the most fundamental mechanisms of public law.⁹⁴ The existence of a mandate is therefore an essential element of the legal regime of NPAs. The mandate to implement an NPA can be included in the founding treaty of the international organisation. However, in most cases, the founding treaty is not concrete enough to provide a basis for exercising international public authority. In these cases the NPA may be founded in subsequent norms.

⁹² OECD Working Group on Bribery in International Business Transactions, Revised Guidelines for Phase 2 Reviews (note 35), II.

⁹³ *M. Goldmann* (note 77), 1900 et seq.

⁹⁴ *B. Grzeszick*, Article 20, in: Maunz, T./Dürig, G. (eds.), *Grundgesetz, Kommentar*, vol. III – Art. 17-27, 2007, Art. 20, VI, paras. 77 et seq.

The legal basis of the OECD monitoring procedure is contained in a recommendation and a decision of the OECD Council, and in the OECD Anti-Bribery Convention.⁹⁵

b) Right to Participation and Duty to Give Reason

The right to participation must be accorded to affected actors, and international organisations have to state reasons for their expectations of national decision-makers. Participation rights and the duty to give reason are fundamental elements of the legitimacy of public authority; they are decisive in enabling affected actors to influence the procedure at an early stage, to inform themselves, and to make effective use of legal protection if necessary.⁹⁶

The assessed states are directly affected by the OECD monitoring procedure; their respective national civil societies are indirectly affected. The assessed states have the right to comment on the content of draft informational documents in each of the three readings in the OECD Working Group on Bribery. Furthermore, the final informational document is handed on to the affected state so that it is given the opportunity to consider the content and, if necessary, add comments. The state can demand that its comments be included in the final document.⁹⁷ Civil society does not have participation rights during the procedure in the OECD Working Group on Bribery. However, representatives of civil society have the right to a panel during the on-site visits in order to state their opinions and to submit written comments.⁹⁸ The duty to give reasons is fulfilled by the OECD Working Group on Bribery because the informational documents

⁹⁵ OECD Council, Revised Recommendation of the Council on Combating Bribery in International Business Transactions (note 25), section VIII; OECD Council, Decision of the Council concerning further Work on Combating Bribery in International Business Transactions (note 33); OECD Anti-Bribery Convention (note 3), Art. 12.

⁹⁶ International Law Association, Berlin Conference (2004) (note 51); *H. Rossen-Staffeld*, Beteiligung, Partizipation und Öffentlichkeit, in: W. Hoffmann-Riem/E. Schmidt-Aßmann/A. Voßkuhle (eds.), *Grundlagen des Verwaltungsrechts*, vol. II, Informationsordnung, Verwaltungsverfahren, Handlungsformen, 2008, § 29, para. 22.

⁹⁷ OECD Working Group on Bribery in International Business Transactions, Revised Guidelines for Phase 2 Reviews (note 35), Annex 5 paras. 8 b, 13, 18; IV D 1.

⁹⁸ OECD Working Group on Bribery in International Business Transactions, Procedure for Self- and Mutual Evaluation of Implementation of the Convention and the Revised Recommendation – Phase 2 (note 22), no. 28 et seq.; OECD Working Group on Bribery in International Business Transactions, Revised Guidelines for Phase 2 Reviews (note 35), V B.

outline the anti-corruption measures of each state in detail, and the expectations addressed to national decision-makers are based on this information.

c) General Acceptance of International Standards

The international standards that serve as a reference point for the collection and evaluation of data must be accepted by participating states. Their acceptance prevents an arbitrary assessment and is therefore essential for the legitimacy of NPAs. Indeed, it is crucial for the effectiveness of NPAs because a common understanding of the standard of evaluation precludes uncertainties.⁹⁹

All states participating in the OECD monitoring procedure signed and ratified the OECD Anti-Bribery Convention and accepted the soft law instruments.

d) Adherence to Scientific Standards and Representative Expertise

Information must be researched and assessed according to scientific standards by representative expertise, i.e. by experts representing the different cultures of the participating states. The legitimacy and effectiveness of NPAs is enhanced by guaranteeing that information is researched and assessed accurately and objectively. Moreover, information that precisely specifies gaps in national policies enables national decision-makers to locate national policy deficits, and to develop and implement the necessary policy responses.¹⁰⁰ It is essential that experts represent all participating states as well as the diverging cultural and political interests involved because expert knowledge depends to a certain degree on the expert's culture of origin.

The OECD Working Group on Bribery and the examination teams are composed of experts that represent the participating states.¹⁰¹

⁹⁹ *F. Pagani* (note 13), no. 23.

¹⁰⁰ *F. Pagani* (note 13), no. 23.

¹⁰¹ The composition of the Working Group on Bribery is spelled out at OECD, On-line Guide to Intergovernmental Activity, available at <<http://www2.oecd.org/oecdgroups/>>, DAF, Investment Committee, Working Group on Bribery in Business Transactions. On the composition of the examination teams see OECD Working Group on Bribery in International Business Transactions, Revised Guidelines for Phase 2 Reviews (note 35), III.

e) Accessibility of the Assessment

The assessments must be made publicly available. The universal and free accessibility of the assessments furthers the legitimacy and the effectiveness of NPAs by enabling the general public to examine the data, to voice criticism and to exert pressure on decision-makers.

All informational documents of the OECD monitoring procedure are published on the homepage of the OECD.¹⁰²

f) National Ownership

The principle of national ownership characterises the legal regime of NPAs. National ownership suggests that participating states are in control of parts of the international organisation’s activities.¹⁰³ In the case of the OECD monitoring procedure, this applies to the collection, processing and dissemination of information. National ownership is essential for the legitimacy and the effectiveness of NPAs as it ensures that national particularities are included at an early stage of the process, that the international committee bases its assessment and state-specific recommendations on particular national situations, and that concerned states take responsibility for the implementation of the NPA.¹⁰⁴ Notwithstanding the relevance of national ownership in the legal regime of NPAs, it must be considered that international organisations are simultaneously based on the principle of autonomy. An adequate emphasis on each of these two principles must be found in the conceptualisation of an NPA.¹⁰⁵

¹⁰² OECD, Country Reports on the Implementation of the OECD Anti-Bribery Convention and the 1997 Revised Recommendation (note 91).

¹⁰³ The OECD defines national ownership as “the effective exercise of a government’s authority over development policies and activities, including those that rely – entirely or partially – on external resources”. OECD Development Assistance Committee (2006) Guidelines and Reference Series: Applying Strategic Environmental Assessment: Good Practice Guidance for Development Co-operation, available at <<http://www.oecd.org/dataoecd/4/21/37353858.pdf>, 147>.

¹⁰⁴ The OECD Anti Bribery Convention is to be implemented on the basis of functional equivalence. OECD, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 21.11.1997, available at <<http://www.oecd.org/dataoecd/4/18/38028044.pdf>>, No. 2. *M. Pieth*, Introduction, in: *M. Pieth/L. A. Low/P. J. Cullen* (eds.), *The OECD Convention on Bribery – A Commentary*, 2007, 26 et seq.

¹⁰⁵ *T. Conzelmann* (note 34), 38 et seq.

In the OECD monitoring procedure, national ownership and institutional autonomy have been brought into accord by allowing for the best possible realisation of scientific standards and representative expertise. While participating states have a certain degree of freedom concerning the extent of information disclosure, they are legally bound to disclose information and the OECD Working Group on Bribery can take measures to obtain more information.¹⁰⁶ Furthermore, while states have access to the drafts of the informational documents and the right to submit comments and to demand that their comments are included in the informational documents, the OECD Working Group on Bribery remains in charge of their content.¹⁰⁷ Finally, while participant states enjoy broad discretion concerning their observance of the information documents, the OECD Working Group on Bribery retains the possibility to implement extraordinary procedures in order to induce compliance with its recommendations.¹⁰⁸

The above shows that the OECD monitoring procedure fulfils the elements of the legal regime of NPAs and must therefore be considered as lawful.

3. The Legal Bindingness of the Elements of the Legal Regime

In the nation state the *Rechtsstaat* places demands on the organisation and the procedures of public authority holders;¹⁰⁹ at the international level another approach is necessary. The legal bindingness of the elements of the NPAs' legal regime can be anchored in the internal constitutionalisation of international organisations. Internal constitutionalisation aims to develop the international organisation's structure and procedures in light of the values of constitutionalism, by interpreting the often rudimentary requirements of the founding treaty in the context of fundamental international norms but also in light of national requirements towards the acts of interna-

¹⁰⁶ OECD Working Group on Bribery in International Business Transactions, Revised Guidelines for Phase 2 Reviews (note 35), VIII C.

¹⁰⁷ OECD Working Group on Bribery in International Business Transactions, Revised Guidelines for Phase 2 Reviews (note 35), VI.

¹⁰⁸ OECD Working Group on Bribery in International Business Transactions, Revised Guidelines for Phase 2 Reviews (note 35), VIII.

¹⁰⁹ E. Schmidt-Aßmann, Der Rechtsstaat, in: J. Isensee./P. Kirchhof (eds.) Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol. I, Historische Grundlagen, 2nd ed., 1995, § 24, para. 75.

tional organisations.¹¹⁰ In this sense the legal regime is to be understood as a concretisation of the principles of the founding treaty as developed through institutional practice. The statute of the respective international organisation therefore serves as a valuable anchor for the legal bindingness of the elements of the NPA’s legal regime.

4. Critique of National Policy Assessment

Critique is a fundamental element of the theoretical conceptualisation of a standard instrument, as it serves to identify the instrument’s strengths and deficits.¹¹¹ The effectiveness and legitimacy of NPAs must therefore be assessed. NPAs are effective due to the publication of informational documents. By making these documents available to the public via the internet it is possible for civil society, supported by the media, to exert a considerable amount of pressure on national decision-makers to implement the recommendations of the OECD Working Group on Bribery. Furthermore, NPAs gain effectiveness due to the state-specific recommendations for national decision-makers and the repeated and published assessments of their implementation. State-specific recommendations ensure that the particular need for action is identified and presented to the state. The published assessments reveal the extent to which each state has implemented particular recommendations. An important aspect for effectiveness is the participation of experts because they largely ensure correct and objective analyses and recommendations. Experts also design recommendations in such a way that they request the most necessary and suitable measures from national decision-makers. Finally, NPAs gain legitimacy and effectiveness due to national ownership, however, only provided that national ownership and institutional autonomy are brought into accord, while adhering to scientific standards and representative expertise in the best possible way. Any discord between these elements has negative impacts on the credibility and effectiveness of NPAs.¹¹² If the element of national ownership is too strong in the conception of an NPA, this can lead to the inadequate impact of the state on the collection and processing of information, which would nega-

¹¹⁰ *A. v. Bogdandy*, General Principles of International Public Authority: Sketching a Research Field, GLJ 9 (2008), 1925. International Law Association, Berlin Conference (note 51).

¹¹¹ *E. Schmidt-Aßmann* (note 5), chapter 6, para. 36.

¹¹² On that point *F. Pagani* (note 13), no. 23.

tively influence the composition of the informational document and thus the impact of the NPA as a whole.

5. Legal Impact of National Policy Assessment on other International Organisations

Since the informational documents do not have a normative impact in and of themselves, a collision of norms can be ruled out. However, there is a possibility of an “information-collision”¹¹³, i.e. a situation in which one state is confronted with diverging information on the results of its policies. This problem is countervailed by comprehensive cooperation in the field of anti-corruption. The organs of the international organisations that carry out monitoring procedures to fight corruption communicate widely in order to harmonise their activities.¹¹⁴ The reason for cooperating and for preventing information-collisions should be a legal one; the principle of cooperation in the law of international organisations provides a legal basis.

V. Conclusion

NPA is lawfully deployed by the OECD to fight corruption.¹¹⁵ Even though NPAs are in the initial stage of their development, they promise to provide a valuable service towards improving national activities in the international fight against corruption. They call national governments to account and compile specific requirements that aim at an effective fight against corruption. The NPA is thus a suitable standard instrument of international organisations for effecting uniform, future-oriented and profound improvements in the fight against corruption.

¹¹³ A. v. Bogdandy/M. Goldmann (note 6), 296.

¹¹⁴ OECD Working Group on Bribery in International Business Transactions, Procedure for Self- and Mutual Evaluation of Implementation of the Convention and the Revised Recommendation – Phase 2 (note 22), II General Issue 6, III no. 27.

¹¹⁵ NPAs are also deployed by the OAS, the GRECO and the UNODC. The AU and the ACN also developed monitoring procedures, but their procedures do not (yet) fulfil the defining elements of NPAs.