Corporate Social Responsibility: What is the Meaning of "Sphere of Influence"?

I just returned from the Norwegian Government Pension Fund - Global Council of Ethic’s Workshop on Corporate Complicity in Human Rights Violations, where I was participating in a session entitled: “In Search of Criteria for Corporate Complicity in Human Rights Violation: Responsibility for acts and omissions of entities outside the ownership structure but possibly within the ‘sphere of influence’”. It was a very interesting and productive workshop with a wonderful line-up of speakers and contributors, including former Secretary of State Madeleine Albright and Professor John Ruggie, UN Special Representative.

Several workshop participants asked me to make the manuscript of my speech available. Here it is (comments welcome):

Dear Colleagues,

I’ve been asked to approach the question of corporate social responsibility for acts and omissions of business entities outside the ownership sphere but possibly within the “sphere of influence” from a legal perspective. Please let me address four issues with emphasis on the second and third questions.

First, I comment briefly on the legal status and relevance of the “sphere of influence”-concept under current law, and provide in a nutshell a summary of the current state of the debate regarding its concretization and specification.

Second, I would like to address the question why, exactly, it is challenging — from a legal perspective — to make the “sphere of influence”-concept more concrete, for example by defining criteria or by establishing some sort of typology regarding situations of influence.

Third, I will map and discuss from a broader angle two alternative approaches to the definition problem: a top-down and a bottom-up approach.

Fourth, I would like to touch upon the question of the virtue of the “sphere of influence”-concept – despite its relative vagueness. The closing remarks will lead over to the ethical perspective — a debate Dr David Rodin will comment on.

1. What is the legal status of the “sphere of influence “concept?

The exact status of the concept and its legal relevance are the subject of an ongoing (and controversial) debate among the stakeholders. From a lawyer’s perspective, I would argue (as it has been argued by Professor Ruggie in the interim report on the issue of human rights and transitional corporations) that the concept — at least at this point in time — is a non-legal or eventually what we might call a pre-legal (“vorrechtliches”) concept. The “sphere of influence”-concept as introduced into the corporate social responsibility discourse by the UN Global Compact and now most prominently mentioned in Art. 1 of the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (“the Norms”) developed outside the legal system and evolved in the political environment. The fact that neither national nor international courts to date seem to have adjudicated on the concept within the corporate responsibility context (as extensive case law searches suggest) also speaks for its non-legal character — although, of course, the notion of “influence” as such plays an important role in many areas of law (including corporate liability law). Similarly, experts have not been able to find extensive definitions or explicit references to the concept in national legislation (except actually one reference in Indonesian environmental law).

However, the qualification of the “sphere of influence”-concept as non-legal does not mean that it is entirely irrelevant from a legal perspective. Even without having a clear legal meaning or being suited to serve as a basis for establishing binding obligations, the notion of “sphere of influence” is itself likely to influence, to some degree or another, the reasoning of law-/policy-makers and courts alike. Cases such as Doe v. Unocal on corporate complicity may serve as early examples in that respect. In addition, a possible future incorporation of the “sphere
of influence”-concept in, for instance, international treaty law or at the level of national legislation would apparently change the current qualification.

Please let me turn now to the second question I would like to address:

2. What makes it so difficult to define the notion of “sphere of influence”?

The “sphere of influence”-concept is not defined by international human rights standards. In fact, a consensus about the definition has yet to be reached. Although the use of vague terminology is by no means new or foreign to law in general and international law in particular, some commentators have expressed some frustration with the continued lack of concrete meaning assigned to key terms in documents such as the UN Norms or Global Compact. Yet, the slow emergence of substantive discussion of the sphere of influence concept may also be linked to the supposition that the definition of each company’s sphere of influence depends on a highly fact-specific evaluation of that company’s operations. As the OHCHR Briefing Paper states, each company’s sphere of influence is in part a function of its political, contractual, economic, and geographical proximity to individuals. It also follows that larger companies will generally have a larger sphere of influence, since they will share proximity with a larger number of individuals (Briefing Paper, at 4). Additional factors that may impact the determination of a particular company’s sphere of influence are the exact nature of the company’s operations, the industry or industries it engages in, as well as its corporate structure. In this way, there is not only a quantitative aspect to a company’s sphere of influence that may be measured in miles or numbers of individuals, but also a qualitative aspect.

It may be useful to take a look at a case study to illustrate how subtle the factual differences with potential (legal and ethical) significance might be if it comes to a business’ sphere of influence.

Cisco, Yahoo!, Microsoft, and Google were all implicated in recent attention to alleged complicity in human rights violations perpetrated by the Chinese government. While the challenges faced by at least three out of the four U.S. corporations are similar – Yahoo!, Microsoft, and Google alike have to deal with issues of individual security and government control of Internet content in China – and although the situation with regard to the “sphere of influence” might appear to be comparable at first glance, the analysis gets much more complicated if one takes a closer look at some of the elements mentioned before, including, for instance, the different ownership structures of the three Internet service companies - as reported in news media - with regard to their Chinese business operations:

- Yahoo!, for instance, formed a long-term strategic partnership in China with Alibaba.com, a Chinese company that owns the Yahoo! China business. According to statements by Yahoo! executives, Yahoo! holds one of the four Alibaba.com board seats, but does not have day-to-day control over Alibaba’s Yahoo! China division.
- Microsoft’s China portal is operated by a local entity, Shanghai Alliance Investment Ltd. (SAIL), through a joint venture agreement. SAIL is reportedly operated by the Chinese government, while the servers which deliver Microsoft’s Chinese services apparently do not reside in China, but rather in the United States.
- As for Google, it evidently operates its “google.cn” business under a license owned by a local company, Ganji.com. The precise nature of the presumably merely contractual relationship between the two entities, however, has not been made public.

What are the consequences of these rather small, but in our context important differences with regard to the “sphere of influence” analysis? Naturally, we can only speculate about it at this point, but a few questions might illustrate some of the issues up for discussion.

- To what extent, for instance, does the corporate separateness between Yahoo! and Alibaba.com that operates Yahoo!’s China businesses limit Yahoo!’s sphere of influence compared to other instances where Yahoo! has direct control over a subsidiary located elsewhere? What does it mean for the sphere of influence analysis that Yahoo! holds one seat out of four on the board of the local partner?
- How is Microsoft’s sphere of influence affected if Reuters’ reports were correct and the Chinese government in fact operates Microsoft’s joint venture partner, Shanghai Alliance Investment Ltd.?
- To what extent is Google’s sphere of influence vis-à-vis the Chinese government larger or smaller given its model of a relatively loose contractual relationship with a local partner — as compared to alternative approaches taken by its competitors?

All of these factors, among many others, weigh into the determination of each company’s sphere of influence.
Therefore, the meaning of “sphere of influence” for each company must be analyzed in detail and on a case by case basis with a holistic view of the company, its partnerships and relationships with other entities and governmental agencies, its legal structure and organization as well as its physical property and operations.

It is this highly fact-specific nature of the “sphere of influence”-concept that makes it so challenging to define it in general terms and on an abstract level. This conclusion leads to the next question:

3. What are possible approaches to the definitional problem given the outlined characteristics of the “sphere of influence”-concept?

Essentially, one might distinguish between two approaches aimed at giving the concept a clear meaning. A top-down approach seeks to address the definition problem authoritatively (or quasi-authoritatively) by introducing a set of criteria such as, for example, the size of a company, and/or to provide a typology of situations that allows the determination of whether an act or omission is within a business entity’s sphere of influence or not. A top-down approach along these lines was apparently envisioned in the Human Rights Resolution 2005/69 by the Commission on Human Rights, where it included in the mandate of the Special Representative [on the issue of human rights and transnational corporations and other business enterprises] the task “to research and clarify the implications … of concepts such as ‘complicity’ and ‘sphere of influence’.”

This leaves open, however, the ways in which criteria or constitutive elements can be identified. One common way to deal with such situations – at least seen from a legal perspective – is to analyze frameworks dealing with structurally similar problems or issues in previous situations and other areas of law, and to derive criteria from these discourses based on their similarities. Such an analogy has recently been proposed in a brief on corporations and human rights in the Asia-Pacific region. The authors of the report, members of Allens Arthur Robinson, argue that the doctrine of duty of care as used in the realm of corporate civil liability is analogous to the concept “sphere of influence”. (Brief, p. 13)

It seems worthwhile to further explore the merits of this analogy and take a closer look into the common law concept of duty of care and its doctrinal counterpart in the civil law system. The rich body of case law on corporate liability for acts and omissions of subsidiaries, for instance, provides a tentative list of criteria and factors that might be considered in the context of the human rights’ “sphere of influence”-concept. These criteria include, among other things,

- profit sharing,
- contributions towards financing the subsidiary,
- degrees of oversight and/or joint control, or
- masterminding a venture,
- etc.

Similarly, case law on third party liability in the context of joint ventures sets forth criteria that may be useful in the corporate social responsibility context. Among the criteria are:

- Shared common interest in the subject matter of the venture;
- shared profits and losses; and
- joint control or the joint right of control over the venue.

Although the proposed analogy might prove to be helpful to further develop and clarify the “sphere of influence” concept, the analogy should in my view not be overstretched. In particular, further research is needed to determine to what extent duty of care mechanisms are normatively appropriate to assess the potential scope of a corporation’s legal sphere of influence in the human rights context as proposed by the authors of the above-mentioned brief on corporations and human rights in the Asia-Pacific Region.

An alternative type of approach aimed at clarifying the meaning of the notion “sphere of influence” would not operate top-down, but bottom-up. Outside the legal realm, corporate policies on human rights issues are the key drivers of such an approach. As pointed out in the interim report by the Special Representative, nearly 8 out of 10 Fortune Global 500 companies report to have an explicit set of principles or management practices regarding the human rights dimensions of their operations (interim Report, para. 33). These policies usually also encompass third parties such as suppliers, contractors, distributors and joint venture partners. A thorough analysis, evaluation, and
multi-stakeholder discussion of this evolving body of norms could ultimately result in broadly accepted industry best practice standards, which may serve as “testing ground” for further norm-setting projects, for instance in the context of the U.N. Global Compact initiative.

The ongoing efforts of leading global providers of information and communication services and technology to create a code of conduct on freedom of expression and privacy in the aftermath of the above-mentioned human rights violations in China illustrate the dynamic as well as the complexity of such a bottom-up process. In these processes, issues like the “sphere of influence” are typically addressed in multi-stakeholder consultations and, eventually, even in negotiations with governmental agencies. Against this backdrop, it does not come as a surprise that a recent consultation draft by key players of the Internet industry explicitly, for instance, addresses their responsibility vis-à-vis business partners in joint ventures or commercial relationships with legal entities where they do not have management control of the operations and may not have final authority for business decisions to apply principles regarding freedom of expression and privacy as they relate to the use of information and communication technologies worldwide.

The structural advantage of a bottom-up approach in the specific context of the “sphere of influence”-concept is straightforward: Emerging industry standards based on respective corporate policies would be grounded in “real world scenarios” and more likely to reflect the actual reach of the businesses involved. Further, businesses are arguably better suited to identify and analyze criteria aimed at clarifying the abstract concept of “sphere of influence,” either by introducing substantive criteria or developing procedural obligations that would ensure that they take into account the scope of their human rights responsibilities while planning and executing their operations. On the other hand, of course, such a bottom-up approach carries an inherent risk that companies aim for the lowest common denominator rather than realistic and best practice-oriented definitions and assessments of their respective “sphere of influence”, or that a consensus cannot be reached at all.

Alternatives to a corporate-policy-driven approach to the “sphere of influence”-concept include, among others, civil litigation over corporate human rights violations. The promises of this alternative type of bottom-up approach largely depends on the question whether the notion of “sphere of influence” itself enters the legal arena or not – for instance in the context of legally binding obligations. While litigation-based mechanisms of making abstract concepts more concrete over time are obviously well-known in law in general and statute-based jurisdictions in particular, this approach has significant drawbacks from the perspectives of some stakeholders (including corporations), because it naturally creates legal uncertainty and bears no guarantee that, in fact, important interpretative issues will ultimately be clarified by courts. In addition, it might be difficult to distill shared criteria and common standards from the jurisprudence of various courts that operate in different jurisdictions and legal cultures.

In closing my remarks, please let me turn now to the fourth and open question I would like to raise at this workshop:

4. Given the discussed uncertainty regarding the contours of the “sphere of influence”-concept and its questionable feasibility in the legal context, does that mean it lacks any virtue?

In my view, the answer to this question is no. The “sphere of influence”-concept has not only what we might call a “factual” or “empirical” dimension that has gained much attention in many of the heated discussions so far, but also an important - probably an even more important - discursive function. From such a normative perspective, the “sphere of influence”-concept is not only the expression, but also among the drivers of the seismic shift from a state-oriented paradigm of human rights to a broader, holistic approach aimed at ensuring and fostering human rights (among private actors). The debate among the stakeholders about the concept’s status, its concretization, and its institutional and procedural implications at various policy levels suggest that the concept “sphere of influence” has indeed “taken on a life of its own” as expressed in the Special Representative’s interim report (para. 40), although it remains to be seen in what direction this evolutionary process will take us.

I now leave it to the next speaker, Dr Rodin, to further comment on this complex theme that oscillates between law and ethics, and I’m looking forward to our open discussion thereafter.

Thank you very much for your attention.

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