

The Normative Transformation of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct into Hard Law

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The increasing "hardening" of soft law is a familiar theme in international law scholarship, but it raises distinct challenges when soft law standards are applied and interpreted through authoritative non-judicial processes. This post examines those challenges in the context of the [OECD Guidelines for Multinational Enterprises on Responsible Business Conduct](#) ("**OECD Guidelines**"), which are enforced through proceedings before OECD National Contact Points ("**NCPs**") rather than courts. With the adoption of the [EU Corporate Sustainability Due Diligence Directive](#) ("**CS3D**"), the substantive norms of the OECD Guidelines have been integrated into binding EU law and will be transposed into domestic law of Member States, blurring the boundary between non-judicial and judicial enforcement. This alignment raises a central question: how, if at all, should determinations made by NCPs influence subsequent judicial or arbitral decision-making? As discussed in **section I**, the transposition effected by the adoption of the CS3D effectuates a substantive alignment of EU and Member State law with the OECD Guidelines. **Section II** argues that, because of this substantive alignment, legal and factual assessments by NCPs applying the OECD Guidelines are likely to be introduced into court and arbitral proceedings involving human rights and environmental due diligence ("**HREDD**") norms. **Section III** concludes that despite an increased effectiveness of the HREDD framework through the CS3D in environmental, social, and governance ("**ESG**") matters, incorporating non-judicial determinations into enforceable outcomes gives rise to due process risks and practical implications.

Alignment of ESG-related substantive norms in judicial and non-judicial proceedings

The OECD Guidelines are one of the most comprehensive frameworks for sustainable and responsible business conduct of multinational enterprises. Despite not being legally binding, they provide normative guidance on responsible business conduct relating to, among other things, human rights and the environment. The substantive rules of the OECD Guidelines are underpinned by the concept of risk-based due diligence and contain detailed policies for responsible business conduct in thematic units, including human rights, employment and industrial relations, environment, bribery and corruption, consumer interests, technology, and taxation. To further the effectiveness of the OECD Guidelines, adherent States are required to set up NCPs. Individual NCPs are nodes of a broader network, in which "functionally equivalent" NCPs cooperate to promote awareness and uptake of the Guidelines. As part of their mission, they also address grievances in so-called "specific instances", based on complaints against multinational corporations. Thus, the NCPs form a sectoral, soft law-based, non-judicial grievance mechanism.

The OECD Guidelines outline a six-step process for effective risk-based due diligence, which includes embedding responsible business conduct into policies and management systems and taking steps to identify, prevent, mitigate, and remedy adverse impacts. The CS3D shares the very same six-step core concept, upon which further subject-specific rules of the Directive rest. The Directive contains operative and supporting articles to comprehensively implement the same core due diligence framework within the EU. Ultimately, the obligations must be formulated with adequate precision to lay down the conduct expected by the addressees; agencies and courts will apply the CS3D- and OECD-derived laws, and their decisions will be coercively enforceable. In essence, through the CS3D, the OECD Guidelines are recast into EU Member State law.

"Importing" factual and legal elements from NCP assessments

As such, it is reasonable to assume that after transposition of the CS3D, courts, agencies, and tribunals applying HREDD norms will rely on NCP determinations in proceedings related to effective risk-based due diligence. As mentioned above, NCPs are also entrusted with offering their "good offices" in specific instances and promoting the resolution of issues raised in complaints against practices of multinational enterprises. Reportedly, between 2001 and 2022, NCPs have concluded over 225 proceedings. Accordingly, over time, a significant amount of NCP determinations, available on several OECD-related databases, have accumulated. These determinations have interpreted core elements of the concept of risk-based due diligence in numerous instances. This includes, for example, the key terms or concepts of "leverage", "meaningful and effective stakeholder engagement", "adverse impacts directly linked to their business operations" or "chains of activities", and "assessing actual and potential impacts".

Novel, technical terms such as the aforementioned are poised to permeate disputes in EU Member States when their outcomes hinge upon compliance with ESG-related norms. Once the governing law - as prescribed by regulation, treaty or contract - is substantively aligned with the core risk-based due diligence framework of the OECD Guidelines, the same legal and factual assessments can be used in judicial and non-judicial proceedings.

Considering the scarcity of domestic and other precedent on the interpretation of HREDD norms, there is a real prospect that counsel, courts, and tribunals will turn to non-judicial legal interpretations to understand the content of those novel norms. Non-judicial proceedings may result into interpretations of HREDD norms, the emergence of relevant facts, and assessments on compliance with the OECD Guidelines. The non-privileged record from NCP proceedings includes witness statements and company disclosures with potentially significant probative value. Non-judicial legal and factual assessments might, thus, influence enforceable outcomes.

Arguably, assessments in non-judicial proceedings facilitated by authoritative institutions, such as the OECD, may carry a special weight when introduced into other proceedings. In the case of NCP determinations, for example, it is reasonable to conclude that the authority of the OECD and the existence of a body of NCP "case law" might induce increased receptiveness by courts and tribunals. As the OECD Guidelines are perceived as leading standards for responsible business conduct, NCPs might be equated with expert bodies. Furthermore, because NCP proceedings are complaint-based, NCPs often emulate judicial reasoning, which increases the usability of their assessments.

Particularly within EU jurisdictions, the case that NCP determinations may influence judicial decision-making of Member State courts can be also made based on the observation that they are generally not opposed to considering soft law instruments in interpreting domestic law, even on precedent-setting points. For example, in one decision in the *Foundation for Environment and People v Shell* proceedings, the Court of Appeal of The Hague found that multinational enterprises contributing to climate change have an obligation to take responsibility for their corporate conduct, and in particular to be held responsible for scope 3 emissions, based on an interpretation of the open "social standard of care" in light of the UN Guiding Principles on Business and Human Rights ("UNGPs") and the OECD Guidelines.

After transposition of the CS3D into domestic law, courts and practitioners will essentially apply the six-step due diligence framework of the OECD Guidelines. Under well-established legal doctrine and practice in the EU, courts interpret domestic laws transposing EU directives in light of the particular directive and in a manner that gives full effect to its aims. After transposition of the CS3D into domestic law, the OECD HREDD framework will crystallize into domestic "hard" law. As a result of the substantive alignment of the OECD Guidelines with EU Member State laws and considering the expressed goal of the CS3D to implement the UNGPs and the OECD Guidelines, EU Member State courts are likely to turn to the numerous existing interpretations by the OECD's NCPs in specific instances to mould the content of the novel domestic HREDD norms.

To sum up, given that courts in EU Member States will be applying laws transposing the CS3D and deriving from the OECD Guidelines, NCP determinations are likely to be considered in disputes hinging upon effective HREDD. In adopting the conclusions of NCPs as to compliance with the OECD Guidelines as well as the underlying reasoning, the results of the NCP process would essentially be rendered enforceable under sovereign seal, and NCP determinations will indirectly ascend to domestic case law, upon which subsequent decisions can rely. This transfer process showcases the blurred lines between the realms of soft law, EU law, and EU Member State law in matters encompassed by the CS3D. The effects of NCP statements would transcend the non-judicial soft law sphere and become part of hard law in tandem with the normative transformation of the OECD Guidelines.

Practical implications and due process risks

Against this backdrop, several legal and practical implications of transferring non-judicial elements into ESG-related disputes can be anticipated.

Although NCP assessments are likely to be deemed admissible in judicial and arbitral proceedings, overreliance on non-judicial assessments might impair procedural integrity and raise due process concerns. Following a favourable outcome in an NCP specific instance, a party might be able to gain an advantage by framing the dispute accordingly, with the potential to create biases or

prompt unjustified inferences or shifts in the burden of proof. Besides other doubts as to the reliability of facts established during the NCP process (e.g. relating to authenticity or hearsay), accepting facts of the NCP process as established without complete and independent scrutiny by the court or tribunal, or without the opposing party having an opportunity to contest them, could create grounds for due process objections. Improperly adopting assessments of compliance or relying on factual assessments by NCPs without full and independent scrutiny might impede procedural fairness in judicial and arbitral proceedings which hinge upon the application of HREDD norms. When confronted with legal, factual, or determinative assessments by NCPs, courts and arbitral tribunals are likely to deem them admissible but ascribe a varying degree of weight to them.

In principle, institutional characteristics of NCPs give rise to objections as to the reliability of their results. First, the level of independence of different NCPs varies significantly. Although some NCPs, such as Denmark's "[Danish Mediation and Complaints-Handling Institution for Responsible Business Conduct](#)", are created by law and act as independent agencies, in most OECD-adherent states, NCPs are integrated in administrative structures. Second, although the OECD Guidelines provide for a framework for "functionally equivalent" NCPs, the expertise and procedural sophistication of different NCPs reveal marked divergence. While, for example, some NCPs include experts in offering their "good offices", others do not. Similarly, procedural rules are established by each NCP and the procedural management is subject to the NCP's discretion. Specific instances where NCPs purportedly denied a party sufficient opportunities to present evidence or relied disproportionately on one party's evidence to make an initial assessment have raised concerns over the integrity of the NCP process (see, for example, [here](#)). The legitimacy of NCP decisions, and the weight ascribed to each by other courts and tribunals, critically relies upon the independence and competence of the authority in question as well as the procedure followed in practice. Idiosyncratic practices will necessitate closer scrutiny of NCP assessments in enforceable proceedings.

Introducing non-judicial assessments to arbitral proceedings, especially when the seat or assets are within the EU or EU law applies, is likely to raise further practical questions. Beyond implications such as the interpretation of novel norms or dealing with parallel (non-judicial) proceedings, NCP and other non-judicial determinations are likely to have an impact on jurisdiction, merits, and enforcement of awards. In investment arbitration, for example, precedent suggests that non-compliance with norms related to HREDD might lead to exclusion of claims or form a basis for state counterclaims. Authoritative assessments can assist favourable party positions as to investor compliance or non-compliance. Supporting legal and factual assessments from non-judicial proceedings might prove crucial in determining liability and quantum, including contributory negligence. Lastly, the prospective influence of non-judicial assessments might prompt parties to seek the most favourable NCP in order to lodge (parallel) complaints and increase their chances of success.

Conclusion

The normative transformation of the OECD Guidelines into EU and EU Member State law is likely to have a significant impact on the adjudication of disputes in court and arbitral proceedings. As courts and tribunals grapple with the novel framework, the usability of non-judicial factual and legal assessments in judicial or arbitral proceedings is likely to prompt parties to make use of non-judicial fora to achieve favourable outcomes. The practical implications of the linkage between non-judicial assessments and sovereignly enforceable outcomes make rigorous assessments on risk exposure across jurisdictions and a global mindset in ESG-related disputes imperative. Practical implications and due process risks will remain. At the current juncture, it is vital to perceive non-judicial proceedings not as isolated voluntary proceedings, but as one piece of an expanding mosaic of diverse grievance fora for corporate misconduct, with yet undefined but evolving connections.

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