

Holding Corporations Accountable. Impact of OECD Non-judicial Mechanism



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Background

A long time ago in a galaxy far,
far away....

Background

1. The OECD Guidelines for MNEs introduced in 1976 (last updated – 2011; next update – 2023)
2. The network of 51 OECD NCPs responsible for **handling cases** (referred to as “**specific instances**”) as a non-judicial grievance mechanism.



OECD **GUIDELINES**
FOR MULTINATIONAL
ENTERPRISES



Does it ring a bell

F1 in Bahrain

»General policies, Human rights

»Human rights abuses

Does it ring a bell



Voluntariness

Oil exploration in Nigeria

1. Shell
2. Friends of the Earth International, Friends of the Earth Netherlands, and Amnesty International
3. Can NGOs campaign on the specific instance?
4. Do consumer boycotts work?

...but

Kinross Gold Corporation Group in Brasil

- »Environment, General policies, Human rights
- »No link proved but companies declared to help

Netherlands

Climate case Shell

ECLI:NL:RBDHA:2021:5339

In its interpretation of **the unwritten standard of care**, the court follows the **UN Guiding Principles**. The UNGP constitute an authoritative and internationally endorsed 'soft law' instrument, which set out the responsibilities of states and businesses in relation to human rights. The UNGP reflect current insights. They do not create any new right nor establish legally binding obligations. The UNGP are in line with the content of other, widely accepted soft law instruments, such as the **UN Global Compact 'principles'** and the **OECD Guidelines for Multinational Enterprises (the OECD guidelines)**.

Netherlands

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Since 2011, the European Commission has expected European businesses to meet their responsibilities to respect human rights, as formulated in the UNGP. For this reason, **the UNGP are suitable as a guideline in the interpretation of the unwritten standard of care.** Due to the universally endorsed content of the UNGP, it is irrelevant whether or not RDS has committed itself to the UNGP, although **RDS states on its website to support the UNGP.**

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It can be deduced from the UNGP and other soft law instruments that it is universally endorsed that companies must respect human rights. This includes the human rights enshrined in the ICCPR as well as other ‘internationally recognized human rights’, including the ECHR. For example, **the OECD Guidelines for Multinational Enterprises (the OECD guidelines) state the following: [...]**

Are the Guidelines the binding law?

The OECD Guidelines for Multinational Enterprises are:

- **recommendations ... and non-binding principles and standards** for responsible business conduct

but...

- CSRD, ESRS, SFDR, CSDDD, social taxonomy
- Does CSDDD matters?
 - Big corporations vs SMEs

EU green taxonomy

1. **Aims of the regulation** (among others): channel private investments into sustainable activities and address concerns about 'greenwashing'
2. Article 3 Criteria for environmentally sustainable economic activities

For the purposes of establishing the degree to which an investment is environmentally sustainable, an economic activity shall qualify as environmentally sustainable where that economic activity:

- a) **contributes substantially** to one or more of the environmental objectives;
- b) **does not significantly harm** any of the environmental objectives;
- c) is carried out **in compliance with the minimum safeguards**; and
- d) **complies with technical screening criteria**, that have been established by the Commission.

EU green taxonomy

Article 18 Minimum safeguards

- 1. The minimum safeguards** [...] shall be procedures implemented by an undertaking that is carrying out an economic activity to ensure the alignment with **the OECD Guidelines for Multinational Enterprises** and the UN Guiding Principles on Business and Human Rights, including the principles and rights set out in the eight fundamental conventions identified in the Declaration of the International Labour Organisation on Fundamental Principles and Rights at Work and the International Bill of Human Rights.

EU green taxonomy

	Human Rights
EU companies in scope of CSRD should be considered non-compliant if one of the two criteria apply	<ol style="list-style-type: none">1. The company has not established an adequate human rights due diligence process as outlined in the UNGPs and OECD Guidelines for MNEs.2. There are signals that the company did not adequately implement HRDD and/or did abuse HR. These are:<ol style="list-style-type: none">a) The company has finally been found in breach of labour law or human rights.b) The following two indicators signal that the company does not engage with stakeholders although this is an integral part of the UNGPs.<ul style="list-style-type: none">• An OECD National Contact Point has accepted a case, however the company refuses to engage with the party which has initiated it, or the company has been found non-compliant with the OECD guidelines by the NCP.• The Business and Human Rights Resource Centre (BHRRRC) has taken up an allegation against the company, and the company has not answered to it within 3 months, only if these letters are less than 2 years old.



NCP OECD grievance mechanism - underused or ineffective?

It depends...

The significance and legal recognition of the Guidelines and NCPs is rising.

The mechanism cannot be effective without specific instances and engagement of:

1. notifiers;
2. MNEs;
3. NCPs who have to be more decisive and firm.

Main problems:

1. Lack of an effective enforcement procedure.
2. Voluntariness.

Consequences of a violation

1. To date, primarily image consequences;
2. Once the green taxonomy and other ESG regulations come into effect – a potential real financial impact.