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Perspectives on topical foreign direct investment issues

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The revised OECD Guidelines: a strengthened forum for resolving ESG disputes?

by

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In June 2023, the Ministerial Council of the OECD amended the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (Guidelines), widely considered the most authoritative and comprehensive soft law framework for responsible business conduct. The amendments include recommendations for MNEs to align with international goals on climate change and biodiversity, and recommendations on conducting due diligence.

Although this soft law framework is non-binding, distinct from other soft law frameworks, the Guidelines provide for a self-contained mechanism for the settlement of disputes related to their implementation by the 51 National Contact Points for Responsible Business Conduct (NCPs) established by adhering States. If a "specific instance", or complaint, is brought before an NCP, the NCP may agree to provide "good offices" to facilitate the non-adversarial resolution of the dispute, via mediation or conciliation. NCPs are required to issue a public final statement, in which they may either outline any agreement reached (if the parties agree), or they may assess why no agreement was reached and assess MNEs' compliance with the Guidelines and make recommendations regarding the implementation of the Guidelines. NCPs may subsequently follow up regarding compliance with such recommendations. According to the OECD, over 650 such procedures have been commenced (mainly by individual stakeholders, trade unions and NGOs) since 2000.

The revised Guidelines aim to "ensure the visibility, effectiveness and functional equivalence" of NCPs (Guidelines, p. 3), aiming for all NCPs to operate with an equivalent degree of effectiveness. To that end, key changes to the mechanism include:

- *Recommendations and follow-up.* The revised Guidelines provide that "NCPs will carry out follow up on agreements they facilitate or recommendations they make where

relevant" (Implementation Procedures, para. 46). While parties can decline follow-up, the revision ensures that follow-up is the default position where relevant (rather than a discretionary tool of NCPs, as previously). This revision, if applied consistently by NCPs, would allow NCPs to oversee changes to MNEs' conduct and policies in the wake of disputes, and assess whether appropriate reparation is made.

- *Determinations on compliance.* Previously, certain NCPs made determinations regarding compliance by enterprises with the Guidelines, but not universally so. The revisions provide that "[i]f allowed by applicable law and the NCP's case-handling procedures, the NCP may, at its own discretion, set out its views in its final statement on whether the enterprise observed the Guidelines" (p. 60). Such determinations are likely to be crucial to the effectiveness of the NCP mechanism and its ability to "bite" moving forward, including given that parties may seek to rely upon such determinations in binding judicial proceedings. Such determinations can also impact businesses through the interaction of the Guidelines with legally binding domestic or European legislation. For example, the EU Taxonomy Regulation classifies environmentally sustainable activities as those carried out in alignment with the OECD Guidelines and the UN Guiding Principles on Business and Human Rights. In a similar vein, the EU Corporate Sustainability Due Diligence Directive proposal (February 2022) refers favorably to the Guidelines (Directive Proposal, Preamble, para. 6), which may have significant normative value under this legislation in its final form. Thus, determinations may potentially impact compliance with, or the interpretation of, these emerging EU frameworks. Further, the Guidelines also provide that "the NCP may inform relevant government agencies of the good faith engagement, or absence thereof, of the parties" (Implementation Procedures, para. 44). NCP statements in this regard could be considered in the context of public procurement, foreign trade assistance or export credit, providing further serious impacts for MNEs.

The NCP revisions are far from transformational, and instead generally codify existing best practices applied—albeit inconsistently—by a number of NCPs. The likely result is a step toward predictability and consistency of outcome, if adhering States and NCPs apply the revisions boldly and consistently.

The NCP mechanism's impact under the revised Guidelines cannot be underestimated, particularly in its revised form. Its strengthened ability to issue recommendations and follow up on them, and make determinations on compliance with the Guidelines, may "bite" corporations in various ways, particularly where stakeholders anxious to access remedies continue to try to do so in judicial fora and seek to rely on any such determinations. Given the scope for parallel proceedings, NCP-specific instances may be initiated alongside court or arbitration proceedings, including under the recently published Hague Rules on Business and Human Rights Arbitration.

With a further update of the Guidelines unlikely to be imminent, the extent to which the revised mechanism will "bite" in the near future is likely to hinge on the practice of NCPs under the

revised Guidelines. There is significant potential to "bite", particularly through the active and consistent use of recommendations, determinations and follow-up, and through the interaction of NCPs with judicial proceedings and with domestic and European legislation.

However, in an increasingly litigious environmental and social and governance (ESG) landscape, it remains to be seen whether adhering States and their NCPs will have the resolve to strengthen the mechanism in line with the OECD's revisions and provide a bespoke forum for negotiated or focused solutions of disputes—or face being eclipsed by the explosion of ESG litigation in binding fora.

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