

OECD publishes update to its Guidelines for Multinational Enterprises

June 22, 2023

The Organisation for Economic Co-operation and Development’s (“**OECD’s**”) Guidelines for Multinational Enterprises (the “**MNE Guidelines**”¹) are widely considered one of the most important “soft law” frameworks for responsible business conduct, and provide a reference point for certain legislation such as, for example, the EU Taxonomy Regulation.² They contain guidance on a number of areas (e.g., human rights, employment and industrial relations, or the environment), and provide for a mechanism for the settlement of disputes relating to the implementation of the MNE Guidelines, in the form of National Contact Points for Responsible Business Conduct (“**NCPs**”).

On June 8, 2023, the OECD published an update to its MNE Guidelines, amending existing guidance, as well as adding new guidance, on a number of issues.

This alert memorandum analyses the most important amendments to the MNE Guidance in respect of climate change and biodiversity, due diligence obligations and the NCPs, and explores the wider implications of the OECD’s update.

If you have any questions concerning this memorandum, please reach out to the authors or to your regular firm contact, including

PARIS



Laurie Achtouk-Spivak
+33 1 40 74 68 24
lachtoukspivak@cgsh.com



Robert Garden
+33 1 40 74 84 03
rgarden@cgsh.com

LONDON



Andreas Wildner
+44 20 7614 2248
awildner@cgsh.com

¹ The MNE Guidelines are accessible [here](#).

² Regulation (EU) 2020/852 (the “**EU Taxonomy Regulation**”), Articles 3(c) and 18 of which provide that an economic activity may qualify as environmentally sustainable only where it is carried out in compliance with certain minimum safeguards, including the procedures implemented by an undertaking to ensure alignment with the MNE Guidelines. For our analysis of the EU Taxonomy Regulation, please see our dedicated alert memorandum [here](#).



I. Context

The MNE Guidelines, adopted originally in 1976, are recommendations jointly addressed by governments to multinational enterprises to enhance the business contribution to sustainable development and address adverse impacts associated with business activities on people, planet, and society.

Since 1976, the MNE Guidelines have been revised on several occasions to address emerging issues and challenges. On June 8, 2023, the OECD published an update to the MNE Guidelines to reflect “*a decade of experience since [the MNE Guidelines’] last review in 2011 and responds to urgent social, environmental, and technological priorities facing societies and businesses.*”³

II. Updates

a. Climate change and biodiversity

The MNE Guidelines provide that enterprises should “[c]ontinually seek to improve environmental performance, at the level of the enterprise and, where appropriate, entities with which they have a business relationship,” and set out examples how enterprises may approach this. The 2023 update adds further recommendations especially in respect of climate change and biodiversity.

On climate change, the revised MNE Guidelines emphasise that enterprises should ensure that their greenhouse gas emissions and impact on carbon sinks are consistent with internationally agreed global temperature goals based on best available science. Further, according to the revised guidelines, enterprises should introduce and implement science-based policies, strategies and transition plans⁴ on climate change mitigation and adaptation, including adopting, implementing, monitoring and reporting on mitigation targets. These targets should be updated regularly, based on the latest available scientific evidence, and take into account different national or industry-specific transition pathways being developed

and updated. The MNE Guidelines also note that enterprises should prioritise eliminating or reducing sources of emissions over offsetting, compensation, or neutralization measures.

In addition to climate change goals, the revised MNE Guidelines emphasise the importance of conservation of biological diversity. Pursuant to these revised guidelines, enterprises’ first priority in this respect should be to *avoid* damage to biodiversity. Where avoidance is impossible, enterprises should reduce or minimise it, and use offsets and restoration only as a last resort for adverse impacts that cannot be avoided. Where appropriate, enterprises should also contribute to sustainable land and forest management.

b. Due diligence

The 2023 update added additional detail to existing guidance on due diligence expected from enterprises. In particular, due diligence should be commensurate to the severity and likelihood of the adverse impact, an approach that is similar to that of other existing and emerging due diligence frameworks, such as the proposed EU Corporate Sustainability Due Diligence Directive (the “**proposed CS3D**”).⁵ Moreover, enterprises should engage in meaningful consultation with individuals or groups who may be adversely affected by their activities. Where it is not feasible to address *all* identified impacts at once, an enterprise should *prioritise* the order in which it takes action based on the severity and likelihood of the adverse impact. Where an enterprise does not itself cause or directly contribute to an adverse impact but is (through a business relationship) directly linked to such impact, it should use its leverage to influence its business partner (the entity causing the adverse impact) to prevent, mitigate or remediate that impact. Again, this is reflective of the approach taken in the proposed CS3D, where requirements for in-scope companies to take ‘appropriate measures’ take into account, amongst

³ MNE Guidelines, p. 3.

⁴ For a discussion of transition-plan related requirements across the US, EU and UK, please refer to our dedicated alert memorandum, accessible [here](#).

⁵ The proposed CS3D is accessible [here](#). For our detailed analysis of the proposed CS3D, please see our dedicated alert memorandum [here](#).

other things, a company's influence on relevant business relationships.

The 2023 update also added a reference to the 2018 OECD Due Diligence Guidance for Responsible Business Conduct⁶ and OECD sector due diligence guidance.

c. National Contact Points

The MNE Guidelines require its adherents (i.e., national governments) to set up NCPs. NCPs are agencies with a twofold mandate: (i) to promote awareness and uptake of the MNE Guidelines, and (ii) to provide a non-judicial grievance mechanism by contributing to the resolution of issues that arise in relation to the implementation of the MNE Guidelines in Specific Instances (as defined below).

The 2023 update partly aims at improving the visibility, effectiveness and "functional equivalence" of NCPs (meaning that all NCPs operate with an equivalent degree of effectiveness regardless of their structure, aiming to achieve a certain predictability of outcome). Amongst other things, the MNE Guidelines strengthen requirements on adhering countries to make available human and financial resources to their NCPs and require NCPs to develop and maintain stakeholder relations. Moreover, the current system of voluntary NCP peer reviews will be replaced with mandatory periodic peer reviews.

The 2023 update would also introduce a mechanism whereby the OECD's Investment Committee can make recommendations to an adhering country whose NCP has manifestly not been operating in a way consistent with the MNE Guidelines. To date, the OECD Investment Committee had played some role in providing assistance to NCPs regarding the interpretation of the Guidelines, and in one example in Australia, concluded that an NCP had failed to act in an accessible and impartial fashion.⁷ However, a strengthened and more consistent role for the Investment Committee internationally is likely to help

achieve more consistent outcomes and increase the accountability of NCPs moving forward.

Further, the 2023 update aims to ensure effective and efficient handling of grievances ("Specific Instances"). Where other NCPs are concerned due to the characteristics of the Specific Instance (e.g., between host and home state of the enterprise), NCPs should coordinate in good faith to choose the lead/supporting NCPs, which may bolster the NCPs' effectiveness. NCPs should also develop and publish case handling procedures, and should consult with stakeholders during the process of developing these.

The revised MNE Guidelines also clarify the criteria for initial assessment of Specific Instances (e.g., definitions of the criterion that issues should be 'material' and 'substantiated') and how NCPs should interpret whether applicable law and/or parallel proceedings limit the NCP's ability to contribute to the resolution of the issue and/or the implementation of the Guidelines.

While putting greater emphasis on transparency of the Specific Instance process, the revised MNE Guidelines also create new mechanisms for ensuring confidentiality of information shared by one party, and recommend that NCPs take steps to address risks of reprisals against parties to a Specific Instance.

Where no agreement between the parties is reached or when a party is unwilling to participate in the proceedings, the NCP's final statement should set out the parties' respective positions, include information on parties' engagement in the proceedings, and, at the NCP's discretion, set out the NCP's views on whether the enterprise observed the MNE Guidelines. Although such changes are not, strictly speaking, novel and certain NCPs do issue determinations, these changes provide much-needed clarity on NCP best practices, which is likely to strengthen the mechanism and lead to greater predictability of outcomes moving forward.

...

CLEARY GOTTlieb

⁶ The OECD due Diligence Guidance for Responsible Business Conduct is accessible [here](#).

⁷ See L. Aichtouk-Spivak, R. Garden, "OECD National Contact Point Specific Instances: When 'Soft Law' Bites?", *Journal of*

International Dispute Settlement (Vol. 13, Issue 4, 2022), Section IV.2.