

REVIEW OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

Framework for the Review

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This document by the OECD Directorate for Financial, Fiscal and Enterprise Affairs provides a broad indication of the issues addressed in the current Review of the OECD Guidelines for Multinational Enterprises. The views expressed reflect extensive discussions by the OECD's Committee on International Affairs and Multinational Enterprises and include contributions from BIAC, TUAC and other interested parties.

TABLE OF CONTENTS

I.	Introduction.....	3
II.	General Considerations.....	5
	a) The Applicability of the Guidelines Outside the OECD.....	5
	b) The Relationship of the Guidelines to Other Codes of Corporate Conduct.....	6
	c) References to Other Agreements in the Text.....	7
III.	Textual Matters.....	7
	Chapter 1. Introduction.....	7
	Chapter 2. General Policies.....	8
	Chapter 3. Disclosure of Information.....	10
	Chapter 4. Competition.....	11
	Chapter 5. Financing.....	12
	Chapter 6. Taxation.....	12
	Chapter 7. Employment and Industrial Relations.....	12
	Chapter 8. Environmental Protection.....	12
	Chapter 9. Science and Technology.....	13
IV.	Procedural Issues.....	13
	a) Promotion – The Guidelines in the Public Eye.....	13
	b) Implementation – Accountability and Credibility.....	14
	c) Functional Considerations – The Roles of CIME, National Contact Points (NCPs), BIAC, TUAC, and Other Entities.....	15
V.	Next Steps.....	17

The OECD Guidelines for Multinational Enterprises: Framework for the Review

I. Introduction

1. Foreign direct investment has grown rapidly and its economic and social benefits are now widely recognised. However, it is also a channel through which countries' different legal systems and social and economic values confront one another. The *OECD Guidelines for Multinational Enterprises* (MNEs) establish voluntary norms for the behaviour of MNEs. In many cases, these norms call simply for adherence to host country or international law. But they also provide guidance in instances where such laws are absent or when they are deemed insufficient as a standard for MNE behaviour.

2. Following the 1998 Ministerial, the Committee on International Investments and Multinational Enterprises (CIME) launched a Review of the *Guidelines* to update and improve them so as to reflect developments in the MNEs and in the world economy. The Review also considers procedural and textual changes that might promote the visibility and effective implementation of the *Guidelines*. CIME discussions over the past year have been enhanced by the contributions of the social partners (BIAC, TUAC) and those of NGOs and other interested parties. A major conference was held in Budapest in November 1998 and consultations at OECD were held on 19 April 1999. These discussions have also been accompanied by wide-ranging consultations in member countries and by considerable contact with other OECD Committees working on subjects addressed by the Guidelines. The goal is to conclude the Review by the time of the annual meeting of the OECD Council at Ministerial level to be held in Spring 2000

3. This document provides a broad indication of the issues to be addressed in the Review which is to be carried by the CIME, with the support of its Working Party on the Guidelines and in co-operation with other interested OECD Committees. The Review process will be open and transparent, and will include opportunities for input by non-governmental bodies and representations of non-OECD countries. This document begins with a brief background section that summarises developments in international investment and MNEs and draws out a number of strategic considerations based on these developments.

Background Strategic Considerations

4. International investment has strengthened and deepened the ties that bind OECD economies to each other. Many OECD countries are now both hosts to and home of multinational enterprises. Trends in the evolution of multinational enterprises have reflected broader developments in OECD economies. The rise of service and knowledge-intensive industries has been associated with a push by service and technology firms into the international marketplace. Thus, MNEs play a role in the dissemination of technology, know-how and values. In the European Union, the successful creation of a single European market has created unprecedented opportunities and needs for cross border investments. While large multinationals continue to dominate international investment, numerous smaller firms now play a more visible role on the multinational scene. There is now a widespread recognition in the OECD that access to international markets is crucial to the long-term commercial success of many types of large and small enterprises.

5. The OECD policy environment for international investment is, on the whole, favourable for international investment and countries now compete for such investments. But many suspicions and concerns remain, with the focus of public debate about MNEs shifting toward such areas as environmental issues, the transfer of technology, protection of culture, potential loss of employment and other labour

issues as well as, more generally, the ability of national governments to regulate or tax economic activity in the public interest.

6. Developing countries share many of these concerns and they also now generally welcome foreign investment. In their relations with the developing world, MNEs have diversified away from primary commodity production and extractive industries (though these remain important) into manufacturing, assembly and domestic market development. As the MNEs broaden and deepen their involvement with developing countries, the absence of basic legislation in some areas (human rights, labour relations, and environmental protection) and the highly uneven capacity to enforce laws can pose problems. In particular, it means that MNEs sometimes conduct business in the absence of legal frameworks that, elsewhere, would shape their decisions. Governments, the public, non-government organisations and the MNEs themselves are all interested in how international firms handle this challenge. In countries where instruments for macroeconomic and regulatory control are rudimentary, the role that multinationals play in contributing to or detracting from this capacity for control is potentially important (especially in light of recent financial crises).

7. A wide variety of actors are interested in these issues. MNEs themselves are keenly interested and many have taken steps to preserve and enhance their reputation as responsible corporate citizens. This reflects a growing recognition that responsible conduct can be good for long term profitability. An increasing number of MNEs have adopted corporate codes of conduct in order to influence the behaviour of their employees, subsidiaries, and contractors and sub-contractors. Indeed, an extensive set of private standards has emerged since the *Guidelines* were adopted. But this attempt at self-regulation by MNEs cannot be viewed as more than a partial substitute for more formal regulation or for the more co-ordinated approach to ethical and behavioural standards embodied in the *Guidelines*. The positioning of the *Guidelines* in relation to these corporate standards will nevertheless be a key strategic consideration in the Review.

8. Representative organisations from business (BIAC – Business and Industry Advisory Council) and labour (TUAC – Trade Union Advisory Council) supported the *Guidelines* at their inception in 1976, and at every Review since then. The success of the current Review will also depend to an important degree on continued support from the business community. Recently, other actors have also become involved in monitoring MNE behaviour. NGOs now provide very focused scrutiny of MNE behaviour and some publish their own standards or assessments of existing standards (including the *OECD Guidelines*). Governments have also published such standards or are planning to do so (e.g. the United States, Canada and Australia have published voluntary standards, while the EU Parliament has recommended one).

9. Given economic and social developments since the publication of the *Guidelines* in 1976, it is useful to consider what role they can be expected to play relative to the public concerns of today and to the benchmark provided by other standards, public and private. The value added of *OECD Guidelines* (relative to corporate codes) stems in part from their potential for alleviating some of the inherent problems from self-regulation. International standards such as the *OECD Guidelines* have the advantage that the MNEs of all OECD countries would be subject to them. In addition, the positioning of the *Guidelines* relative to public and private standards needs to be considered: should the Review seek to set a standard that is “best practice”, “good practice” or “minimally acceptable practice” relative to other public or private norms? Here, the objective should be to set the *Guidelines* at a level that leaves room for individual companies to do better while encouraging others to catch up. The *Guidelines* also entail a distinctive approach to monitoring compliance (relative to those established by corporations, business associations or other international institutions).

10. In this context, procedures attached to the text of the *Guidelines* have a strong potential to enhance these norms. They can provide an “arms-length”, independent means of encouraging and

verifying that the *Guidelines* are promoted and implemented, and as such can address some of the perceived limitations of self-regulated and self-monitored codes of conduct. This is not to say that the procedures change the character of the *Guidelines*; rather that they lend credibility to international standards which governments support and businesses endorse.

11. The Review of the *Guidelines* also aims to improve their relevance and to ensure that they are an effective tool for continued international co-operation. Two broad inter-related considerations are brought up by the review exercise:

12. What should be the territorial applicability of the *Guidelines*? The current text of the *Guidelines* is ambiguous concerning their geographical applicability outside the OECD. It would seem, however, that the *Guidelines* could have a significant impact outside the territory of member states. Within the OECD countries, many of the norms defined in the *Guidelines* are already part of domestic laws and regulations. By contrast, many developing countries have not yet adopted a comparable set of rules in all areas. If the *Guidelines* are deemed to be applicable outside the OECD area, how should business concerns about possible adverse competitive effects be addressed (that is, relative to domestic competitors not subject to the *Guidelines*)? If they are applied globally, do the text and procedures need to be adapted to the circumstances and concerns of non-member countries?

13. If the visibility of the *Guidelines* is to be enhanced, what does this mean for their language and coverage? Does the current scope, content and language of the *Guidelines* make them an effective instrument for dealing with public concerns about possible adverse impacts of MNE activity? What needs to be done at the national or international level to ensure that the *Guidelines* are effective and credible? Is there a trade-off between the need to enhance credibility and the desire for stability of the *Guidelines* in a rapidly-changing world?

14. These issues are taken up in the discussion below, and will need to be addressed in subsequent discussions of the CIME and with other interested parties as the Review proceeds.

II. General Considerations

15. Some issues already identified for examination in the current Review lie outside the domain of exclusively textual or procedural matters, or indeed warrant consideration in the broader context of the *Guidelines* and other issues on the international investment agenda. Three of these are addressed below. The first of these is the question of the applicability of the *Guidelines* outside the OECD, which in particular also raises a number of important questions. CIME has recommended that consultations take place on this issue with non-Members and other interested parties by the autumn – some of the initial issues for analysis are noted below. Secondly, the relationship of the *Guidelines* to other corporate codes of conduct also warrants further attention given the recent proliferation of corporate codes and the increasing attention they are attracting. Thirdly, the question of the desirability of references to other agreements in the text of the *Guidelines* has also been identified as an important issue.

a) *The Applicability of the Guidelines Outside the OECD*

16. The sensitive issue of clarifying the applicability of the *Guidelines* in countries outside the OECD was addressed at length by the Committee in February. It is evident that many MNEs from OECD countries have established extensive global networks which are well beyond the boundaries of OECD countries. While most delegations agreed that this should be reflected in the *Guidelines*, others were more reticent. Since the operation of the *Guidelines* implies a delicate interplay of national rules, international

standards, and corporate behaviour, some maintain that a confirmation of the applicability of the *Guidelines* to countries which do not adhere to the instrument could encroach on the sovereignty of these countries. On the other hand, many MNEs already apply their standards world-wide, and that, taking into account international co-operation and agreement, the *Guidelines* may be said to represent “best practice” in all countries in which they operate (e.g. Paragraphs. 3 and 9 of the Introduction, and the Environmental chapter). In addition, many delegations made the point that not to confirm global applicability would imply that OECD Members would effectively endorse standards for corporate conduct that were lower than those of the *Guidelines*, as long as they were outside the OECD. All delegations agreed that this issue was an important one and bore closer examination, including consultations with non-Members, by the autumn.

17. Clarifying the territorial applicability would not only mean clarifying the text, but would raise fundamental implementation issues as well. Given that the possibility of non-Member *Guidelines* adherence, and participation in follow-up procedures, are implied by confirming global applicability, procedural matters, including the role of entities such as CIME and/or relevant National Contact Points, would also have to be discussed.

18. Several questions immediately arise in this context. Should non-Members be allowed to sign on to the *Guidelines* without agreeing to other instruments in the OECD Declaration (the National Treatment Instrument, and the instruments on International Investment Incentives and Disincentives, and on Conflicting Requirements)?¹ If this is allowed, by they are not allowed to participate in the work of CIME as observers, what formal role in the *Guidelines* will they have? Should non-Members have access to NCPs or the CIME? How will this role be differentiated from non-Members who have not adhered to the *Guidelines* when or if cases involving non-Members arise? Who will represent non-Member interests when clarifications involving non-Members who are not adherents to the *Guidelines* are addressed? These questions all bear further examination particularly when delegations, social partners, and non-Members are consulted on the issue in the autumn.

19. Finally, aside from the broader question as to the geographical reach of the *Guidelines*, the question of whether domestic and foreign enterprises should both be subject to the *Guidelines* has also been raised. BIAC has argued that essentially all companies should commit themselves to the *Guidelines* on the same terms in the interests of a level playing field. In this vein they suggest that paragraph 9 of the introduction to the *Guidelines*, which suggests that the *Guidelines* are relevant for both multinational and domestic enterprises, should be interpreted broadly, a view that has been echoed by some delegations.

b) The Relationship of the Guidelines to Other Codes of Corporate Conduct

20. As noted in the introduction to this paper, there has been a recent proliferation of voluntary codes of conduct by enterprises. These codes have also been the subject of investigation by the Working Party of the Trade Committee at the OECD. An oral report on this work based on “Codes of Corporate Conduct – An Inventory” [TD/TC/WP(98)74] was presented to the CIME at its February meeting. In March the Working Party will consider whether to continue its work on codes by carrying out more focussed analysis on the role and operation of codes with respect to environmental, labour and other social issues in the context of trade policy and multilateral liberalisation.

1 Three current CIME observers - Argentina, Brazil, and Chile (though not the Slovak Republic) have adhered to all parts of the 1976 Declaration and can thus be regarded as full participants in the *Guidelines* follow-up procedures. All three have established National Contact Points.

21. As far as this work vis-à-vis the *Guidelines* is concerned, the question immediately arises, can company codes be viewed as complementary rather than rivals? At first glance, the answer to this must be yes. To begin with, differences between them suggest this: company codes tend to be more company specific than the broad, multilaterally focused *Guidelines*. Notably, one national business federation allied to BIAC has written recently of the complementary potential of voluntary codes, whether they be individual, sectoral, or multilateral, and the *OECD Guidelines* were mentioned in this context²

22. Another way in which the *Guidelines* may be said to complement company codes is the different purposes served through their implementation procedures. The *Guidelines* include longstanding implementation procedures that are by definition and design at “arm’s length” from the company concerned, which is not usually the case for company specific codes. Furthermore, these implementation procedures are part of an instrument that although they apply to companies, are agreed to by governments and endorsed by social partners, including business.

23. Some delegations have recommended investigating further the complementarity between these codes and the *Guidelines*, and whether this complementarity should be explicitly noted in the *Guidelines*. The CIME will also consider possible synergies between CIME and Trade Committee work on voluntary codes.

c) *References to Other Agreements in the Text*

24. While a good deal of interest exists in adapting the text of the *Guidelines* to recent developments in international rule making, cautions have been expressed about importing guidelines by direct reference from other instruments, for two main reasons: (i) the desirability of maintaining the *Guidelines* as a user-friendly, “stand alone” instrument. Reading the *Guidelines* should not necessarily demand a familiarity with a host of other international treaties and conventions; and (ii) the existence of follow-up procedures, such as the role of the CIME in clarifying the *Guidelines*, or other prospective roles, should not be compromised through incorporating other legal instruments in the *Guidelines*. This could put the CIME in the impossible position of interpreting other conventions, including those with their own monitoring procedures. Importantly, these points apply to other issue areas in which new conventions and treaties exist, such as, say, the OECD Corporate Governance Principles, OECD Bribery Convention, the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, and many others. This does not necessarily mean, however, that concepts that arise in other conventions and treaties cannot be used in the *Guidelines*; rather that the avoidance of wholesale references is desirable. Finally, this issue is also related to the importance of the *Guidelines* as a public and “user-friendly” document as a result of the Review.

III. Textual Matters

Chapter 1. Introduction

25. The introductory chapter sets the stage for the *Guidelines* as a whole, and states the expectations of the governments which are parties to this instrument. It opens by noting the positive contribution of MNEs and international investment, and then places these attributes in a social context. In the event of differences between social goals or national policies and enterprise activity, wherever it occurs, cooperation is advocated amongst all parties, including OECD bodies, in particular with respect to the

2 See United States Council on International Business (USCIB) - Position Paper on Codes of Conduct, 21 Dec. 1998 at www.uscib.org/policy/codstat.htm

Declaration and Decisions on international investment, of which the *Guidelines* are an integral part. As a statement by governments, it implicitly recognises the responsibilities of governments in developing a favourable framework for investment.

26. Given the general character of the introductory chapter, many CIME delegations have also suggested that a reference to sustainable development be included here. While some have suggested that this is an issue that should be referred to in chapter eight on environmental protection, others have argued that its importance means that it should be addressed earlier. One suggestion is for a reference to sustainable development to be added to chapter one, which focuses on the role of governments in setting the stage for the *Guidelines*. Another suggestion is for it to appear in chapter two on general policies, which focuses on broad goals for enterprises.

27. Another example in this regard is human rights. The question raised by these two issues is as follows: if it is decided that this is a concept that should be referred to in the *Guidelines*, should it be addressed in chapter one or two? How this is resolved depends to some degree on how much responsibility for these issues may be said to lie within the domain of governments, and how much lies with enterprises. If sustainable development or human rights should be seen to be a priority that is part of the overall “framework” in which enterprises operate, then it could be argued that a reference should be incorporated in the Introduction (chapter one) of the *Guidelines*. If, however, they are seen to be important business responsibilities, then they could be noted in chapter two on general policies. Finally, this chapter may also need to be reviewed to ensure that the new international context for MNE activity is adequately reflected.

Chapter 2. General Policies

28. The general policies chapter may be said to give weight to the fact that MNEs, although often transnational in outlook, establish roots and have responsibilities in the communities in which they operate. Since the last Review of the *Guidelines* in 1991, both corporate and social responsibilities have been increasingly recognised as suitable topics for MNEs to take into account in their operations. The recent proliferation of individual corporate codes of conduct reflects this. Thus subjects such as corporate governance, bribery, human rights, consumer protection, and sustainable development have become part of the discourse in the evolving discussions of suitable relations between MNEs and the societies in which they operate. CIME has discussed these subjects in connection with the Review of the *Guidelines* chapter on general policies (chapter two), and varying degrees of support is in evidence for further examination of these issues.

29. Another issue that may bear further examination is the conduct of corporate subcontractors, which is an issue that has received a good deal of consideration in individual company codes. It is not currently mentioned in the *Guidelines*, but recent attention to the issue may reflect changes in the relative importance of contracting and sub-contracting to the way enterprises do business.

Corporate Governance

30. Corporate governance is particularly topical given the Corporate Governance Principles, which are scheduled to be endorsed by OECD Ministers at their next meeting in May 1999. The Corporate Governance Principles are addressed to governments and are primarily concerned with shareholder value. Nevertheless, they do address company responsibilities to “stakeholders”. One chapter of the Corporate Governance Principles – chapter IV on disclosure and transparency has attracted particular attention in the context of the *Guidelines* Review. It should be noted that the content of the disclosure and transparency chapter of the Corporate Governance Principles differs in both scope and intention from the existing

disclosure of information chapter in the *Guidelines*. Among the disclosure items which are included in the draft corporate governance Principles but missing in the *Guidelines* are: information regarding members of boards and key executives (including qualification and levels of remuneration), material foreseeable risks, material issues regarding employees and other stakeholders and corporate governance structures and policies. In addition, the current *Guidelines* chapter on disclosure of information contains a lengthy preamble, as well as language that pertains more directly to accounting principles and disclosure items. In 1988 a comprehensive brochure was produced with this in mind - *Multinational Enterprises and Disclosure of Information: Clarification of the OECD Guidelines*. Finally, CIME will also have to consider whether other concepts addressed in the Corporate Governance Principles (e.g. broad responsibilities) should also be addressed in the *Guidelines*.

Bribery

31. Chapter two of the *Guidelines* contains language on bribery (para. 7), which CIME considers may need updating. This language, plus arguably that of paras. 8 and 9, needs review given considerable recent work on the issue by the a number of international bodies, in particular the OECD and its Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which formally entered into force on 15 February 1999. The 1997 OECD Council Recommendation on Combating Bribery may also be relevant to many aspects of the *Guidelines*, including accounting and auditing practices dealt with mostly in chapter 3 on disclosure of information.

Human Rights

32. Possible references to human rights in the *Guidelines* were discussed by CIME in February, with some participants at the Budapest conference noting that human rights provisions have been included in some voluntary corporate codes of conduct. Language pertaining to some provisions of the Universal Declaration of Human Rights has also been supported by a few delegations – in particular concepts contained in Article 3, for example, on the right of life, liberty, and security of person, as well as a Article 5 condemning of torture and cruel, inhuman or degrading treatment of punishment have been noted.

33. Some observers have also noted that the provisions contained in the Employment and Industrial Relations chapter already covered many aspects of Human Rights. Following from this, it has been asked whether the defence and promotion of human rights other than those of the employees of enterprises (which are in turn the subject of the Employment and Industrial Relations chapter), and which have traditionally been considered a prime responsibility of governments, should also be explicitly required of enterprises. Indeed, given the role of the introductory chapter in governments setting the stage for the *Guidelines*, the appropriate reference to Human Rights could be made in this introductory chapter as well or instead. Not all delegations are convinced of the need for any explicit treatment of human rights issues in the *Guidelines*.

Consumer Protection

34. Consumer protection is noted only briefly in the *Guidelines* - in paragraph 2 of Chapter Two on General Policies, whereby enterprises are called on to give due consideration to a number of country aims and priorities, including “consumer interests”. This wording was added to the *Guidelines* as a result of the 1984 Review. CIME has supported further consideration of this issue in light of contemporary protection of consumer interests as reflected in corporate codes and in the legislation and practices in OECD Member countries.

35. Important aspects of consumer protection that could be added to the *Guidelines* in this regard are consumer safety and health, neither of which is mentioned at present.

Sustainable Development

36. CIME has signalled the importance of including references to Sustainable Development in the *Guidelines*. As noted previously, some delegations have advocated placement in chapter one, others in chapter two³, some have noted its obvious relevance to chapter eight on environmental protection, while still others have advocated that the concept be included wherever it appears relevant.

37. At the request of the CIME, EPOC (the OECD Environment Policy Committee) is currently considering the issue of Sustainable Development in the context of their examination of environmental concepts in the *Guidelines*, and a background paper [CNV/EPOC(99)5] is under consideration by this Committee. Other Committees involved in the sustainable development issue may also express their views on sustainable development in due course.

38. Chapter 30 of Agenda 21 (“Strengthening the Role of Business and Industry”), is relevant to MNEs with respect to many aspects of relevant behaviour. In addition, the ICC’s Business Charter for Sustainable Development, offers several suggestions concerning potential contributions of business to the achievement of sustainable development. As in the case of human rights, however, questions remain about including sustainable development in the *Guidelines* (a) if sustainable development is primarily a goal for governments, and (b) if sustainable development were found to be too imprecise a concept to be included in any “practical” set of *Guidelines* addressed to MNEs.

39. Finally, CIME has also indicated that it may also re-examine paragraph 2 of the General Policies chapter again as the Review progresses, since some elements (the environment, sustainable development, consumer interests, employment opportunities, transfer of technology) relate to other chapters or issues under consideration. Also, as noted earlier, an examination of issues in chapter two (primarily addressed to firms) vs. chapter one (primarily the “setting of the stage” by governments), may also involve reconsidering the placement of some items.

Chapter 3. Disclosure of Information

40. As noted above in the discussion of Corporate Governance, disclosure of information and transparency are important to the development of a mutually supportive and beneficial relationship between firms in the societies in which they operate. Despite differences in wording, both the Corporate Governance Principles and the *Guidelines* sections on disclosure issues encourage greater transparency. The *Guidelines* also emphasise concepts that are more specific to accounting standards, and delegations will have to address whether these issues remain of fundamental importance to the chapter or whether a broader approach similar to that of the Corporate Governance Principles should be taken.

41. Some delegations have indicated that the accounting principles inherent in the existing text should continue to be emphasized (see also the clarifications in this regard, consolidated in Multilateral Enterprises and Disclosure of Information: Clarification of the *OECD Guidelines* (OECD, 1988)). As there continue to be significant developments in the areas of international standards for disclosure and accounting, help by outside experts will likely be required to update these aspects of this chapter.

3 Many MNEs have embraced the desirability of the goal of sustainable development. See, e.g. Chapter 30 of Agenda 21 (“Strengthening the Role of Business and Industry”) and the work of the World Business Council on Sustainable Development (WBCSD - www.wbcscd.ch/).

Chapter 4. Competition

42. Developments in the field of competition have been considerable since the *Guidelines* first appeared in 1976. All OECD countries now have comprehensive competition legislation. Argentina has adopted a new competition law and in Brazil legislation has significantly expanded the scope and enforcement powers conferred to the competition agency.

43. In particular, since the last *Guidelines* Review of 1991 OECD members have achieved significant progress in improving international co-operation in the competition policy domain. In 1995 a revised OECD Council Recommendation was adopted, together with procedural guidelines which provide for notification of investigations which may affect other countries' interests, exchange of information among competition authorities and the possibility for consultations. The OECD Committee for Competition Law and Policy (CLP) has recently adopted a common format for merger notifications. At the beginning of 1998 the Council adopted a Recommendation calling for action against hard core cartels including price fixing, market sharing arrangements, output restrictions and collusive tenders. A report submitted to Ministers in 1994 shows large areas of convergence of national competition policies and a recent paper by the Joint group on Trade and Competition identifies competition core principles and common approaches that could be incorporated into a multilateral framework.

44. In view of these developments the competition chapter of the *OECD Guidelines* no longer reflects current practice with respect to international competition law and policy, and some of its provisions are even in contradiction with current competition analysis. CIME, as well as BIAC, has expressed support for updating the language in the Competition chapter of the *Guidelines*. The input of the Committee on Competition Law and Policy (CLP) will be essential and that Committee has begun its review of the issues.

45. Among the issues identified in DAFPE/IME(99)1 warranting updating are restrictive agreements, mergers, industrial property rights, transfer pricing, and confidential information:

46. Potentially restrictive agreements should take into account developments such as the 1998 OECD Council Recommendation on Effective Action Against Hard Core Cartels.

47. With respect to mergers and acquisitions, current *Guidelines* wording on anti-competitive M&As as a form of abuse of a dominant position is not in conformity with modern merger analysis, which focuses on the impact of the proposed operation on the relevant market structure. A merger is anti-competitive if it is likely to create or to strengthen a dominant position in the relevant market whereas in cases of an abuse of a dominant position it is the conduct of the dominant firm rather than its position itself which is prohibited.

48. "Intellectual property rights" encompass industrial property rights, and is also clearer with respect to the growing importance of these sorts of rights to contemporary enterprises.

49. With respect to transfer pricing, while such intra-group transactions will continue to trigger antitrust actions whenever they infringe rules against discriminatory or predatory pricing by dominant firms, mainstream legal and economic thinking in the field of competition policy does not regard them as raising any distinct problems. Thus, a separate provision on transfer pricing sends a misleading message.

50. With this latter point in mind, the reference to transfer pricing in the taxation chapter (chapter six, para. 2), and the related concept of intra-group pricing in the disclosure of information chapter (chapter 3, section h) may also need to be addressed, including by the OECD's Committee on Fiscal Affairs given their 1995 transfer pricing guidelines.

51. Finally, CLP may also wish to comment on other matters relevant to competition policy found elsewhere in the *Guidelines*. These include references to “the abuse of concentrations of economic power” in Chapter 1, para. 1, and “sound commercial practice” in Chapter 2, para. 5.

Chapter 5. Financing

52. Although this chapter has received little attention during the current (or indeed previous) reviews, interest has been expressed in updating the concepts in this chapter to better reflect the important relationship between firms and the societies in which they operate with respect to finance issues. This may be a relatively more important issue with respect to non-Member economies, which tend to experience more acute financial difficulties than OECD members.

Chapter 6. Taxation

53. The Committee on Fiscal Affairs (CFA) has begun to review Chapter 6 in light of recent developments such as the 1995 OECD Transfer Pricing Guidelines, as well as the (1998) Report on Harmful Tax Competition. (Note, however, that the 1995 Transfer Pricing Guidelines are addressed to both enterprises and governments, addressing broader issues such as transparency and consistency of rules, as well as those specific to transfer pricing.) CIME will need to ensure consistent treatment of the concept of transfer pricing in the competition and tax domains. Examining this chapter in conjunction with chapter 3 (Disclosure of information) may also be necessary.

Chapter 7. Employment and Industrial Relations

54. The *Guidelines* chapter on employment and industrial relations is arguably the most comprehensive in the instrument; it has certainly been the object of most cases brought before the Committee and subsequent clarifications. While supporting an update of limited areas of the text, as well as on implementation matters, TUAC indicated early on that the substance of this chapter remained a progressive statement of good practice in industrial relations in OECD countries [DAFFE/IME(97)14]. Some delegations have pointed out that labour practices and policies in a number of OECD countries have changed since the *Guidelines* first appeared in 1976, particularly with respect to flexible workplace relations, and that this should be reflected in the text as well. The CIME has indicated that it would support further discussion of the chapter in light of recent work in this field, in particular by the International Labour Organisation and its 1998 Declaration on Fundamental Principles and Rights at Work.

55. Many delegations have pointed out that with respect to core labour standards and the 1998 ILO Declaration, while freedom of association and the elimination of discrimination are mentioned in the *Guidelines*, the elimination of forced or compulsory labour, and the effective abolition of child labour are not. The OECD’s Employment, Labour and Social Affairs Committee (ELSAC) discussed these matters during its meeting on 29-31 March 1999, based on a consultant’s report [DEELSA/ELSA(99)4]. Other issues that have been singled out for attention in the context of this chapter include gender discrimination, information and consultation rights, and “reasonable notice” of changes in operations, which has been the subject of past clarifications.

Chapter 8. Environmental Protection

56. Along with chapter 7 on employment and industrial relations, CIME has noted that the environmental protection chapter may require particular attention during this Review. The environmental

protection chapter was added to the *Guidelines* following the last Review in 1991. Since then, CIME has noted that many developments and international instruments on the environment make an update to this chapter likely. Some delegations have advocated that the *Guidelines* go further and adopt “state of the art” environmental standards.

57. The 1992 Rio Declaration on Environment and Development (and the related Agenda 21, especially Ch.30) includes articles on a number of environmental issues not addressed in the *Guidelines*, including the recognition of environmental management as a high corporate priority. Since Rio, this has been echoed in several corporate codes, both individual and collective, including the ICC’s Business Charter for Sustainable Development (International Chamber of Commerce), the CERES Principles (Coalition for Environmentally Responsible Economies), and the Responsible Care Programme (international chemical industry).

58. In 1998, the OECD Council approved a recommendation on environmental information. Among its provisions is a call to governments to provide environmental information “in response to any reasonable request...taking into account protection of privacy, industrial and commercial confidentiality, national security, or other legitimate causes as provided under national law”. Whether such a recommendation should also apply to private entities in the context of the *Guidelines* remains to be explored; it perhaps may also be relevant to the discussion of chapter three on disclosure of information. Nonetheless, several delegations consider than such principles as the “precautionary” and “polluter pays” principles be incorporated in the *Guidelines* (as in the Rio Declaration). CIME has endorsed close collaboration with EPOC, which has been asked to consider the *Guidelines* in light of recent developments in environmental protection. As noted, EPOC discussed these issues based on a Secretariat document [ENV/EPOC(99)5] at its March 1999 meeting.

59. Finally, among other issues to be explored in this context is sustainable development (discussed above in Chapter 2).

Chapter 9. Science and Technology

60. Like chapter 5 (Financing) this chapter could be of particular interest to non-Members. Chapter 9 furthers the goals of technology transfer, and while the wording may be argued to be outdated, conceptually it could encompass forward-looking issues such as information technology and electronic commerce, which could also be of interest to OECD members as well as enterprises. Some delegations have advocated that issues contained in this chapter be considered in the context of OECD outreach activities. These matters will be looked at by the Committee on Science and Technology Policy (CSTP).

IV. Procedural Issues

a) Promotion – The Guidelines in the Public Eye

- Dissemination and Explanation

61. CIME has recognised that the *Guidelines* are not well known, and that this remains a serious drawback to their effectiveness. Translation of the *Guidelines* into numerous national languages and mentioning the *Guidelines* in informational packages about countries’ foreign investment regimes has been undertaken but can only be considered first steps in promoting awareness.

62. Promotion has become particularly important as new players (countries and companies) have emerged in the international investment arena. New players in particular may not be familiar with the potential contribution of the *Guidelines* in facilitating economically sound and socially advantageous investment.

63. The Internet has unquestionably facilitated the promotion of the *Guidelines*. Again, however, a “hot link” to the *Guidelines* web page somewhere on a Member’s website is only the beginning of such a process; in the first instance this could be echoed by putting the *Guidelines* on social partner websites, and a campaign to promote the *Guidelines* among individual firms at the conclusion of the Review should be considered. This effort may include social partners and National Contact Points as well.

64. Some delegations have suggested that further consideration be given to ways of encouraging enterprises to express their support for the *Guidelines*. Several aspects of such an approach have been identified. One would be a system whereby enterprises would signal in their promotional and required publications (annual reports, websites, brochures) that they support the principles contained in the *OECD Guidelines for Multinational Enterprises*, in much the same way that they signal support for various environmental initiatives. This could be mirrored by the OECD, which would compile statements of support and publicise them in their promotional material, particularly that associated with international investment initiatives.⁴ This could be complemented by including positive evidence of the continuing use and relevance of *Guidelines* provisions in proposed annual reports by the CIME

b) Implementation – Accountability and Credibility

- *Information Gathering, Handling Enquiries, Avoiding Conflict, and Follow-up Procedures*

65. Implementation procedures are fundamental to the *Guidelines* as a credible instrument for managing and improving the relationship between enterprises and the societies in which they operate. These procedures have also been singled out for attention during the Review, the CIME noting as early as December 1997 that implementation and efforts to promote awareness of the *Guidelines* may be at least as important as updating the text.

66. Implementation procedures are currently defined as information gathering, handling enquiries, avoiding conflict, and other follow-up procedures, including Reviews. As with promotional efforts, National Contact Points, CIME, and the social partners all have a role to play.

67. The implementation procedures attached to the *Guidelines* are virtually unique among codes of corporate conduct – indeed only a small minority of codes of conduct encompass independent, arm’s length procedures. Nonetheless, it may also be said that aside from the adoption of National Contact Points few changes to these procedures have occurred since the inception of the *Guidelines*, and several delegations and observers have argued that changes and improvement are fundamental to enhancing the credibility of the *Guidelines*.

68. Suggested changes to implementation procedures are best captured through changes to the functions of responsible entities under the *Guidelines* (CIME, National Contact Points, BIAC, TUAC, and “other interested parties”), which is the subject of the following section. Suggested changes to

4 In the mid-80s an annex to The *OECD Guidelines for Multinational Enterprises* (OECD: 1986) was published, listing business federations “having expressed support for the *Guidelines*”. It numbered 38 national business federations in 17 of the then 24 OECD members.

implementation procedures focus on how enquiries are handled, which currently is one of the prime responsibilities of the National Contact Points, and follow-up procedures.

c) *Functional Considerations – The Roles of CIME, National Contact Points (NCPs), BIAC, TUAC, and Other Entities*

CIME

69. There has been general support for additional promotional activities for the CIME, not least with respect to its “oversight” role concerning National Contact Points. CIME annual meetings on the *Guidelines* have been advocated by many, although others have suggested that annual meetings of National Contact Points take place. Annual meetings of both the CIME and NCPs exclusively on the *Guidelines* may be warranted; delegations may wish to consider whether a meeting of one or both of these entities exclusively on the *Guidelines* would be the most productive in terms of enhancing the role of the *Guidelines*. An annual report on the *Guidelines* from the CIME has also been advocated, which would serve to highlight experiences with respect to instances of non-compliance as well as evidence of “best practice” and the benefits of the *Guidelines*.

70. With respect to implementation procedures, the CIME exercises a key role, including (a) responding to requests from members on specific or general aspects of the *Guidelines*; (b) exchanging views periodically on the role and functioning of the *Guidelines*; (c) clarifying the provisions of the *Guidelines*; and (d) where necessary proposing changes in the *Guidelines* and/or the procedural Decisions. CIME’s role in responding to requests for clarifications, or to provide explanatory comments, arises when initial contacts with NCPs do not succeed in clarifying relevant issues. Clarifications by the CIME could be more accessible and use more transparent, user-friendly language.

71. The practice of requiring unanimity in formulating CIME clarifications has been called into question by some delegations. This would essentially mean that countries having a direct interest in the case concerned would no longer be able to prevent the CIME from adopting a clarification.

72. Some delegations, as well as TUAC, have called for individual companies to be named in CIME deliberations on *Guidelines* cases. This could serve for clearer and arguably stronger position-taking by the CIME. It would also change CIME’s role to provide clarifications with respect to issues rather than reaching conclusions on the conduct of individual enterprises.

National Contact Points (NCPs)

73. Member countries are required to establish National Contact Points (NCPs) to ensure follow-up at a national level. NCPs are expected to conduct activities such as dissemination, promotion and, to the extent necessary, explanation of the *Guidelines*, and assist in solving problems which may arise between business and labour in matters covered by the *Guidelines*.

74. While some have cautioned about the standardising a role for NCPs among countries with different approaches vis-à-vis MNE relationships with governments and social partners, virtually all delegations and social partners agree that there is greater scope for NCPs in the promotion of the *Guidelines*. This could presumably be enhanced by closer contact between NCPs and social partners.

75. Currently, National Contact Points are responsible for a number of activities connected with the implementation of the *Guidelines*, including the collection of information concerning experience with the *Guidelines* at the national level, and the provision of a forum for discussion, particularly with business and

trade unions, on problems which may arise in relation to the *Guidelines* and of facilities which could contribute to their solution. However many delegations and other observers have noted that in practice few enquiries or other demands on NCPs have taken place.

76. The National Contact Points in several countries (Belgium, Sweden, Norway) function on a tripartite basis, with business, labour, and government officials each assuming a role on the NCP, supported where relevant by a representative of the environmental community. Some delegations believe that the tripartite model should be adopted generally, while the delegations have suggested leaving room for countries to adopt alternative models adapted to their cultural traditions.

77. Monitoring the use and profile of the *Guidelines* has also been identified as an area for potential improvement to NCPs in the Review. Consideration could be given to establishing common terms of reference for the action of NCPs. Annual reports and/or annual meetings of National Contact Points -- advocated by many delegations in the context of promotion efforts -- could also address implementation procedures. The CIME could take responsibility for the monitoring of NCPs, with annual reports and/or annual reports linked to this process.

BIAC and TUAC

78. BIAC and TUAC became associated with *Guidelines* work since the time of the 1976 Declaration and have formally confirmed their support since then at every Review. They have both signalled their support for enhancing promotional efforts associated with the *Guidelines*. Their support and efforts to promote the *Guidelines* are fundamental to their ultimate effectiveness

79. While consultations between CIME and BIAC and TUAC are held at least once a year, a meeting with the CIME to discuss *Guidelines* matters may be requested at any time. Discussions usually take place during CIME's regularly scheduled meetings, often via informal meetings with the Bureau or an enlarged Bureau.

80. With respect to clarifications, only TUAC has made requests. Concerning BIAC, past reviews have addressed such questions as whether parent companies and/or subsidiaries should be invited by CIME to make statements supporting the *Guidelines*, the frequency with which such statements should be made, how else support for the *Guidelines* should be expressed, and what types of experience companies could report. Most recently, BIAC has expressed support for modernising and promoting the *Guidelines* as principles of good business practice.

81. Delegations are invited to consider other possible BIAC and TUAC efforts. For example, what recommendations would social partners propose to improve *Guidelines* promotion, in particular the actions they themselves could undertake, including support for a tripartite NCP structure? Would it be useful to consider establishing a register of enterprises ready to commit themselves directly to observance of the *Guidelines*?

Non-Governmental Organisations (NGOs)

82. FDI now takes place in an environment where more people have access to information much more quickly than used to be the case. In order to improve accountability and credibility in the *Guidelines* procedures, some changes to implementation procedures to take account of this fact may be warranted, including clarifying the standing of citizens to bring issues to the attention of NCPs. It should be noted that the OECD Council has already indicated that NGOs (more specifically "other interested parties") have

access to facilities related to National Contact Point activities.⁵ Nonetheless, NGOs have no procedural right to bring forward issues directly to the CIME, and the Committee may wish to consider if NGO involvement should be explicitly stated. Delegations may wish to seek further input from NGOs on *Guidelines* implementation procedures.

83. Many delegations have indicated that they support a closer, and in some cases, a more formal role for NGOs in the future. Some delegations have supported a more formal role for NGOs, including a role for them in National Contact Points, particular when environmental questions are considered. The OECD is currently examining its relations with the NGO community in a broader context.

Other Organisations

84. Suggestions have also been made to develop more formalised links to other OECD committees, as well as international organisations when additional expertise would assist in deliberations. For example, when environmental issues are under consideration, the OECD's EPOC as well as the United Nations Environment Programme (UNEP) could be invited to participate in discussions, and ELSAC and ILO representatives when labour issues are considered.

V. Next Steps

85. The Review will be carried out by the CIME, with the support from its Working Party on the Guidelines. Taking into account the framework for the Review of the *OECD Guidelines for Multinational Enterprises* established by the CIME, the Working Party will examine the text, implementation procedures and other features of the *Guidelines* and make proposals to the CIME designed to update them to ensure their relevance and effectiveness. The Working Party will consider the views expressed by the relevant OECD Committees, as well as those put forward by BIAC, TUAC and other interested parties.

5 The relevant Decision appears in the Second Revised Decision of the Council on the *Guidelines for MNEs* (amended June 1991), and reads as follows: "THE COUNCIL....DECIDES: 1. Member Governments shall set up National Contact Points for undertaking promotional activities, handling inquiries and for discussions with the parties concerned on all matters related to the *Guidelines* so that they can contribute to the solution of problems which may arise in this connection. The business community, employee organisations and other interested parties shall be informed of the availability of such facilities." (See Annex 2, "The *OECD Guidelines for Multinational Enterprises*" [OCDE/GD(97)40], p. 50.)