



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE**

DAF/INV/WP(2010)5
For Official Use

Working Party of the Investment Committee

**UPDATE OF THE GUIDELINES FOR MULTINATIONAL ENTERPRISES:
PROCEDURAL ISSUES**

(Note by the Secretariat)

The present document invites National Contact Points to provide their views on possible ways of addressing the procedural issues singled out for consideration under the agreed terms of reference for the update of the Guidelines [DAF/INV(2010)5/FINAL].

The document is for consideration under item 5 of the agenda of the 2010 Annual NCP meeting [DAF/INV/NCP/A(2010)1].

Contact person: Tabe van Hoolwerff (tabe.vanhoolwerff@oecd.org) and Marie-France Houde (marie-france.houde@oecd.org).

JT03286125

I. Introduction and proposed course of action

1. On 30 April 2010, the 42 adhering governments to the OECD Guidelines for Multinational Enterprises agreed on the terms of reference (TORs) for carrying out an update of the Guidelines [DAF/INV(2010)5/FINAL]. They also agreed to start the work on the update on the occasion of the June 2010 Annual Meeting of the National Contact Points (NCPs) with the broad aim of completing the update in 2011 by the time of the 2011 Annual NCP Meeting.¹

2. The present Note invites NCPs to discuss possible ways of addressing the procedural issues singled out for consideration during the update under Part III of the TORs,² taking into account their own experience with the implementation of the Guidelines since the 2000 Review. It is recalled that at their last year's meeting, NCPs expressed their readiness to actively contribute to any future update of the Guidelines.³

3. Paragraph 19 of the TORs relating to the procedural provisions of the Guidelines provides that "the update should consider how the implementation procedures could be further improved to enhance awareness, visibility and a more widespread and effective use of the Guidelines, including in non-adhering countries. This consideration should take due account of the experience, challenges and lessons learned during the past nine years of implementation of the Guidelines as well as proposals made by business, trade unions and NGOs, and the recommendations formulated by the UN Secretary-General for Business and Human Rights (UNSRSG) for non-judicial redress mechanisms, including on institutional issues and the functioning of the NCP mechanism."

4. The Note proposes a discussion of the main procedural issues singled out for examination by the TORs. Each issue is presented by first recalling the relevant part of the TORs. A short reminder of the main proposals submitted by stakeholders follows, together with possible considerations to be taken into account for reviewing these proposals. The presentation ends with questions for discussion.

5. A summary of the discussion would be prepared by the Secretariat after the meeting for comment by NCPs under the written procedure and transmission to the Investment Committee Working Party for its consideration in October, when adhering governments are expected to engage in a discussion on possible revisions, additions, or clarifications to the Procedural Guidance and related Commentary. NCPs are also invited to submit written responses to the questions raised in the present note no later than Monday 19 July 2010. These responses will be posted on the NCP Clearspace.

II. Functional equivalence and respect of individual circumstances

6. Paragraph 21 of the TORs provide that "the update should discuss how the Procedural Guidance could be clarified or supplemented by more detailed provisions or commentaries to give greater guidance to the institutional structure and functioning of NCPs while maintaining the rights of adhering countries to adopt the NCP structure that best fits their individual circumstances." The areas singled out in this paragraph for special attention are addressed below.

¹ DAF/INV/INV(2010)5/FINAL, paragraphs 1 and 4.

² *Ibidem*, paragraphs 19 to 26.

³ 2009 Annual Report on the Guidelines for Multinational Enterprises, Sections 1 and 6, www.oecd.org/daf/investment/guidelines.

Core criteria of visibility, accessibility, transparency and accountability

7. According to the Procedural Guidance, NCPs should operate in accordance with core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence. In his 2008 Report to the Human Rights Council, Professor John Ruggie, the Special Representative of the UN Secretary-General for Business and Human Rights (UNSRSG) has identified four additional principles that non-judicial grievance mechanisms should meet to be credible and effective, namely that of:

- *Legitimacy*: defined as providing for clear, transparent and sufficiently independent governance structures to ensure that no party to a particular grievance process can interfere with the fair conduct of that process.
- *Predictability*: defined as providing for a clear and known procedure with a time frame for each stage and clarity on the types of process and outcome it can (and cannot) offer, as well as a means of monitoring the implementation of any outcome.
- *Equitability*: defined as ensuring that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms.
- *Rights-compatibility*: defined as ensuring that outcomes and remedies are in accordance with internationally recognized human rights standards.⁴

8. Both TUAC and OECD Watch consider that the adoption of these additional criteria would provide NCPs with helpful guidance on how to perform their duties.

9. Under the principle of functional equivalence, governments are accorded flexibility in the way they organise NCPs in recognition of the differences that may exist between adhering countries in addressing corporate responsibility issues. The current NCP structures consist of 19 NCP single government departments;⁵ 8 NCP with multiple government departments participating;⁶ 1 bipartite NCP;⁷ 10 tripartite NCPs (involving governments, business and trade unions);⁸ 1 quadripartite NCP (involving governments, business, trade unions and NGOs);⁹ and 2 mixed structure of independent experts and government representatives.¹⁰

⁴ These are the Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development. See *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, April 2008, p. 24.

⁵ Argentina, Australia, Austria, Chile, Czech Republic, Egypt, Germany, Greece, Ireland, Israel, Italy, Mexico, New Zealand (with a Liaison Group consisting of government, business and trade unions representatives), Peru, Poland, Slovak Republic, Spain, Switzerland and United States.

⁶ Brazil, Canada, Hungary, Iceland, Japan, Korea, Portugal and United Kingdom.

⁷ Romania's NCP is comprised of government and business representatives.

⁸ Belgium, Denmark, Estonia, France, Latvia, Lithuania, Luxembourg, Slovenia, Sweden and Turkey. Several of these countries also have multiple governmental department NCPs.

⁹ Finland.

¹⁰ Norway is currently in the process of restructuring their NCP to reflect a mixed structure of four independent appointed experts, including a leader, and two full-time secretariats, all localized outside of the government, while administrative responsibility and financial resources for the NCP will rest with the government.

Questions:

- **Would the inclusion of the above performance criteria be helpful in clarifying the duties of NCPs under the Guidelines?**
- **Do the NCPs consider that these performance criteria are consistent with more generally applicable principles for the operation of public service agencies promoted by adhering countries in the broader context of improving public governance?**

Potential conflict of interests

10. The 2007 report on the review of NCP Performance extensively discussed the different advantages and disadvantages of various NCP structures, including the risks of possible conflicts of interests in NCPs, notably those located in government departments tasked with promoting business, trade and investment.¹¹

11. Questions about potential conflicts of interest appear to have been part of the considerations which led to the re-structuring of the Dutch NCP in 2007 and the Norwegian government's decision to engage in the re-structuring of the Norwegian NCP.¹²

Questions:

- **How do NCPs address the issue of potential conflict of interests? Does the mandate of your NCP address this question? If so, please describe?**
- **Should the Procedural Guidance explicitly identify this issue and suggest possible ways for addressing it?**

Degree of inclusiveness of stakeholders

12. The Procedural Guidance provides in this regard that whatever their composition, NCPs must develop and maintain relations with representatives of the business community, employee organisations and other interested parties that are able to contribute to the effective functioning of the Guidelines. Since the 2000 Revision of the Guidelines, the inclusion of stakeholders into NCP structures and activities has markedly increased.¹³

Question:

- **Do NCPs see a need to include additional provisions in the Procedural Guidance concerning the inclusion of stakeholders? Is so, please elaborate?**

¹¹ "Review of NCP Performance: Key Findings", reproduced in Annex 1.A4 of the 2008 Annual Report on the OECD Guidelines for Multinational Enterprises.

¹² See textbox 1 of the Report by the Chair of the 2010 Annual Meeting of the National Contact Points [DAF/INV/NCP(2010)1].

¹³ As stated in the 2009 Annual Report on the Guidelines, the number of NCPs with tri- or quadri-partite organisations has increased, and advisory committees or permanent consultative bodies involving non-government partners have become widespread in countries with government-based NCP structures. Meetings with business, trade unions and civil society have also become more frequent.

Oversight of NCP performance

13. The UK has created a special mechanism – the Steering Board – to oversee the effectiveness of the NCP and ensure that the established NCP procedures are followed. The Steering Board has the broad mandate of providing advice on issues of general and specific application of the Guidelines and promoting their use. It is chaired by a senior official of the Business, Innovation and Skills Department and includes representatives from 8 other ministries. There are also a number of external members representing business, labour and NGOs stakeholders.

Question:

- **Should the Procedural Guidance contain special provisions on oversight of NCP performance? Or do existing NCP procedures ensure this oversight in other ways?**

III. Information and promotion

14. Key to the contribution of the Guidelines is ensuring that they are sufficiently promoted and brought into actual use by companies and stakeholders. The proliferation of corporate responsibility instruments and initiatives has increased this need. Promotional activities are no longer limited to raising awareness or good communication with stakeholders. Paragraph 22 of the TOR provides that the update should discuss ways of strengthening the information and promotion provisions of the Procedural Guidance, including the provision of training and capacity-building.

15. This year's draft Annual Report on the Guidelines show a continuous rise and diversification in NCP promotional activities of NCPs and a greater involvement and support from stakeholders. NCPs have also been working more closely with other leading corporate responsibility instruments such as the ILO's core conventions and its Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.¹⁴ However, the extent to which the Guidelines are embedded in government policies regarding responsible business conduct differs between adhering countries. Some countries have made a clear choice by taking the Guidelines as a starting point for the promotion of responsible business conduct. Other countries leave the choice to enterprises because they have not established a clear preference over other initiatives (UN Global Compact, ISO 26000...) and do not distinguish between government-agreed instruments, such as the Guidelines, and other initiatives. The now called UN Framework for business and human rights developed by the SRSG has also attracted great interest and support from adhering governments to the Guidelines.

16. Rather than bringing forward suggestions for amending the provisions in the procedural guidance, BIAC suggests to the adhering countries to “develop a much condensed version of the Guidelines next to the full version and to develop a ‘user-friendly web tool for the Guidelines and their implementation.”¹⁵

¹⁴ Annex 1.A4 to the 2008 Annual Report on the OECD Guidelines for Multinational Enterprises, *Review of NCP Performance: Key Findings*, Section 4.

¹⁵ DAF/INV/RD(2009)10/REV1, page 6.

17. The report on the Dutch peer review suggests a number of ways for strengthening NCP promotional activities. These include NCP information sharing among NCPs; stakeholders events; communication plans that coincide with the implementation cycle of the Guidelines; stressing the importance of the Guidelines in international forums; and giving the OECD a central ‘clearing house’ function with regard to promotional activities of NCPs, where NCPs can go to learn from other NCPs’ efforts and practices.

- **Should the Procedural Guidance or Commentary refer to emerging proactive practices for promoting the Guidelines?**
- **Should the Procedural Guidance encourage a greater involvement of business and stakeholders in NCP promotional activities?**
- **Should the Procedural Guidance encourage increased co-operation between NCPs and the implementation mechanisms of other initiatives and instruments (such as the local networks of the UN Global Compact and the ILO Tripartite Declaration)?**

IV. Implementation in specific instances

18. Paragraph 23 of the TORs provides that “the update should discuss the role and tasks of NCPs in considering specific instances with a view to enhancing the credibility and efficiency of the specific instance facility. In particular, it could develop, in light of emerging practices, more detailed guidance on the various steps and timeframes for considering a specific instance, and clarify the standards of transparency and confidentiality to be applied in the process, and third party involvement. It could also clarify the distinction between mediation and adjudication and discuss ways of strengthening the NCP’s mediation function as well as the NCP’s role of NCPs in monitoring the implementation of final statements’ recommendations.”

Steps and timeframes

19. The 2007 report on NCP performance had already noted that a growing number of NCPs have set indicative timeframes for the three main phases of a specific instance -- initial assessment (1-3 months); the ‘further consideration stage’ (6-9 months); and the drafting of a final statement (3 months). Other NCPs indicated that they had not set timeframes because of the very limited number of cases raised or because a more flexible approach allows them to better take into account the individual circumstances of a case.

20. In their submissions, TUAC and OECD Watch have called for pre-set timeframes, the latter recommending a 12-month period for the whole procedure.

Questions:

- **Since “predictability” is an important component of “due process”, would it be appropriate that the Procedural Guidance provide further guidance or clarity on the respective timeframes and content of the different stages for considering a specific instance? If so, would it be appropriate that this guidance refer to general principles or provide indicative recommended timeframes?**
- **Should additional guidance be developed regarding communication with the parties at the various stages of the process?**

Transparency and confidentiality

21. As noted by the 2007 report on NCP performance, confidentiality is not incompatible with good communication. Several NCPs report to actively encourage a two-way exchange of information between the parties involved in a specific instance as a means of building confidence and resolving the issues at hand. It should also be noted that the Procedural Guidance already enables NCPs to take appropriate steps to protect sensitive information.¹⁶

22. TUAC advocates clearer guidance on transparency because NCP practice seems to differ greatly with some NCPs publishing their initial assessments and final statements and others do none of the two.¹⁷ A separate but related issue is the protection of notifiers or whistleblowers (an issue also raised by the Working Group on Bribery in International Business Transactions).¹⁸ The current lack of provisions for protecting people who notify specific instances was also mentioned by the Dutch labour union participating in the peer review of the Dutch NCP.¹⁹

Questions:

- **Is greater guidance needed for determining when information can be made publicly available, such as at the initial phase of a specific instance? Should the Procedural Guidance encourage NCPs to publicly acknowledge acceptance or rejection of a specific instance?**
- **Should the Procedural Guidance contain specific provisions on whistle blower protection?**

The involvement and role of third parties

23. The involvement of third parties in a mediatory attempt may prove to be the key to success in certain situations. Example in this respect could be the situation in which the involved enterprise operates in a joint venture construction with other (local) enterprises which initially were not involved, or the situation in which representation of other stakeholders, next to the party notifying the specific instance, could lead to a better balanced landscape of interests in which an agreement can more easily be found. Paragraph 16 of the Commentary on the Implementation Procedures already creates room for the involvement of third parties,²⁰ but so far NCPs have not yet sought to involve third parties, because this may prove difficult, particularly regarding cases arising in non-adhering countries.

¹⁶ DAF/INV/RD(2009)10/REV1, p. 8.

¹⁷ Ibidem, paragraph 15.

¹⁸ DAF/INV/WP(2009)5/REV2, page 12.

¹⁹ DAF/INV/WP/RD(2010)1, page 20.

²⁰ “16. Where the issues raised merit further consideration, the NCP would discuss the issue further with parties involved and offer “good offices” in an effort to contribute informally to the resolution of issues. Where relevant, NCPs will follow the procedures set out in paragraph 2a) through 2d). *This could include seeking the advice of relevant authorities, as well as representatives of the business community, labour organisations, other non-governmental organisations, and experts.* Consultations with NCPs in other countries, or seeking guidance on issues related to the interpretation of the Guidelines may also help to resolve the issue [emphasis added].”

Question:

- **Should the procedural guidance cover the involvement of third parties to a specific instance procedure?**

Mediation versus adjudication

24. One of the main comparative strengths of the NCP mechanism is to provide a non-judicial avenue for resolving investment issues. This avenue may involve two distinct processes. The first is often referred to as the “mediation” phase when the NCP seeks to facilitate the resolution of the disputes between the parties. If successful, the NCP may issue a statement on the mediated agreement. If mediation is unsuccessful, the NCP may end the case with a statement as to whether the Guidelines have been observed, which is sometimes referred to as “adjudication”. The NCP may also make recommendations as appropriate on the implementation of the Guidelines.²¹

25. As it was already noted in the 2007 report on NCP performance, the content of final statements seemed to differ between NCPs, as some NCPs in their final statements may make general remarks on the issue(s) raised, whereas other NCPs issue statements in which the enterprise’s activities are evaluated on the basis of the OECD Guidelines.²²

26. TUAC and OECD Watch have stated that NCPs should first seek resolution of the specific instance through mediation and, when this fails, should move to the adjudication stage in order to give its impartial assessment of the case.²³ They have also argued that implementation of the recommendations should be closely monitored and that there should be “consequences” if the NCP’s recommendations are not followed.

Questions:

- **How could the distinction between “mediation” and “adjudication” be further clarified?**
- **What role should NCPs play in monitoring the implementation of final statement’s recommendations?**
- **Would it be appropriate that the Procedural Guidance provide that NCPs should have the necessary resources to carry out their duties as recommended by the OECD Council in 2008?**

Strengthening Mediation

27. Tips of good practice for a successful mediation include good communication between the parties, careful stage-management of the process, discretion, access to outside expertise and setting realistic expectations from the outset of the process. A capacity building event on mediation was sponsored by the Consensus Building Institute on 28 June 2010.

²¹ Annex 1.A4 to the 2008 Annual Report on the OECD Guidelines for Multinational Enterprises, *Review of NCP Performance: Key Findings*, Box I.A4.2, p. 11.

²² Vide e.g. the Statement by the German NCP on the Complaint Filed against Bayer CropScience by German Watch, Global March, and Coordination gegen Bayer-Gefahren, August 2007, and the Statement by the UK NCP on Afrimex (uk) Ltd., August 2008, both available at the OECD website for the OECD Guidelines: http://www.oecd.org/document/59/0,3343,en_2649_34889_2489211_1_1_1_1,00.html

²³ DAF/INV/WP(2009)5/REV2, pages 17 and 24.

28. In support of its mediation function, the UK NCP can appoint independent mediators when a notification merits further consideration. The UK NCP may also include monitoring provisions in its final statements, both where mediation has failed and succeeded. In the latter case, the monitoring provisions are agreed upon by the parties involved.

- **What conclusions do NCPs draw from the capacity building event on mediation held on 28 June, 2010, regarding possible ways to reinforce the mediation function of NCPs?**
- **Should the Procedural Guidance include special additional guidance on mediation?**

Parallel proceedings

29. The existence of parallel proceedings is one of the most frequently cited reasons for not considering or delaying consideration of a specific instance. Neither the Procedural Guidance nor the related Commentary provides guidance to NCPs on how to deal with parallel proceedings. While NCPs reached agreement in 2006 on general points and a list of considerations for NCPs dealing with specific instances involving parallel proceedings, practice among NCPs in handling parallel proceeding stills differs significantly.²⁴

30. Some NCPs and stakeholders have developed guidance on how to handle situation of parallel legal proceedings situations.

- The key elements of the guidance issued in September 2009 by the UK NCP are: (a) the existence of a parallel procedure should not in itself cause a suspension of consideration of a case; (b) the UK NCP will suspend a complaint only when where it is satisfied that this is necessary in order to avoid serious prejudice to a party to parallel proceedings and appropriate in all the circumstances.
- The Dutch NCP has the duty to investigate if the reasons alleged by an enterprise for not cooperating with the NCP are valid given the contents and involved parties in the parallel and specific instance procedures. When procedures do not overlap, the NCP will propose to continue the procedure.
- TUAC has proposed a four-step approach on parallel proceedings that includes: (a) protection of the parties where there are reasonable indications that criminal activities are involved; (b) evaluation of the convergences and divergences between a specific instance and a parallel proceeding; (c) consideration of the results of a parallel proceeding insofar as it provides relevant source of fact and information for a specific instance; (d) engaging in a dialogue, especially where there is indication that the parallel legal proceeding is exposed to extensive delays²⁵.
- OECD Watch has acknowledged the desirability for the NCP to defer examination of relevant parts of a complaint subject to a legal proceeding should this assist the NCP in making its assessment. When progress is not forthcoming within a reasonable time period, however, the NCP procedures should be resumed.

²⁴ 2006 Annual Report on the OECD Guidelines for Multinational Enterprises, Box I.1, p.29-30, and Annex I.A5, p. 94.

²⁵ *10 Years on*, OECD Watch report, June 2010, page 47 in which TUAC's proposal is cited.

31. Paragraph 24 of the TORs provide that “the update should develop further guidance on this issue in the Procedural Guidance or Commentary, taking into account the guidance issued in September 2009 by the UK NCP as well as other relevant experiences.” BIAC, TUAC and OECD Watch consider that the treatment of parallel proceedings is a very important issue for the update.

Questions:

- **What elements of the above approaches for addressing situations of parallel proceedings might serve as a basis for developing guidance on this issue in the Procedural Guidance or Commentary?**

V. Peer learning and review

32. Peer review is a traditional and well tested working method at the OECD. A variant of peer review "peer learning" has been used in an informal and *ad hoc* way in NCP and Working Party meetings. The Dutch NCP has volunteered to be the first NCP to subject its performance to a review by its peers, which was conducted in fall 2009-spring 2010. The findings and lessons learned from this trial exercise were presented to the Working Party of the Investment Committee in March and will be discussed by NCPs at their Annual Meeting of 29 June 2010. Delegations have confirmed the value of peer reviews as learning tool for improving performance.

33. Stakeholders support the introduction of a peer review mechanism in the Procedural Guidance. Both TUAC and OECD Watch call for a mandatory peer review mechanism ‘in order to secure improvements in performance across the board’. They also recommend that this peer review process be “rigorous, transparent, participatory and adequately resourced, with published country reports, setting out recommendations.”²⁶

34. Paragraph 26 of the TORs acknowledges that “the update will provide the opportunity to discuss the merits of adopting peer review provisions in the Procedural Guidance or Commentary, as well as OECD’s future supporting role in this area”.

Questions:

- **Should the Guidelines adopt a peer review process as a learning tool for NCPs? Should this process be voluntary or mandatory?**
- **What supporting role could the OECD play in this regard?**

VI. NCP co-operation

35. Specific instances should in principle be first resolved by the NCP in whose country the issues have arisen, but the effectiveness of the NCP mechanism may in some cases rely on the involvement of the parent company via co-operation with the NCP of the home country. The importance of home country NCPs has increased, as the increased complexity of multinational operations has led to a significant increase in the number of multi-jurisdiction specific instances, a trend which is most likely to continue in the future. Also, it has been argued that parent companies bear responsibility in relation to questions on responsible business conduct by their subsidiaries, because the parent companies set out the business policies and general codes of conduct for the enterprise as a whole.

²⁶ DAF/INV/WP(2009)5/REV2, p. 16 (TUAC).

36. It might be recalled that in June 2008, the NCPs agreed on the following guiding principles for addressing multi-NCP specific instances. First, it was recognised that the NCPs involved need to retain the necessary flexibility to address the merits and circumstances pertaining to such complex cases. Second, multi-NCP specific instances involving the same allegations of non-compliance should be dealt with through one single process to avoid potential inconsistencies between the handling of instances by the various NCPs concerned. Third, to enable this unified approach, a “leader NCP” should be designated to manage the whole process. Furthermore, the NCP receiving the first instance should take on the responsibility of obtaining an agreement on an appropriate leader NCP and the process of handling the specific instance. Lastly, the leading NCP should maintain effective communication at all times with other concerned NCPs and involve them in any decision on the case.

37. TUAC and BIAC support revising the Procedural Guidance to give the home NCP specific greater responsibility for liaising with parent companies of enterprises involved in non-observance of the Guidelines.²⁷ OECD Watch also deems it necessary to hold companies more accountable of the actions of their subsidiaries and thus stresses the need for involvement of home country NCPs in specific instances involving both a parent company and a subsidiary.

38. Paragraph 25 of the TOR provides that “the update should develop further guidance in the Procedural Guidance or Commentary on how NCPs should co-operatively handle multi-jurisdictional cases. It could also clarify the role of a home NCP for liaising with the parent company of the enterprise that is party to a specific instance.”

Questions:

- **Would it be desirable to incorporate the guiding principles developed in 2008 for handling multi-party NCP specific instances into the Procedural Guidance or the Commentary?**
- **Should the Procedural Guidance provide additional guidance on the role of home NCPs?**
- **How could the OECD further facilitate closer co-operation between NCPs?**

²⁷ DAF/INV/RD(2009)10/REV1, page 17.

ANNEX

TEXT OF PROCEDURAL GUIDANCE AND COMMENTARY

PROCEDURAL GUIDANCE

I. National Contact Points

The role of National Contact Points (NCP) is to further the effectiveness of the Guidelines. NCPs will operate in accordance with core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence.

A. *Institutional Arrangements*

Consistent with the objective of functional equivalence, adhering countries have flexibility in organising their NCPs, seeking the active support of social partners, including the business community, employee organisations, and other interested parties, which includes non-governmental organisations.

Accordingly, the National Contact Point:

1. May be a senior government official or a government office headed by a senior official. Alternatively, the National Contact Point may be organised as a co-operative body, including representatives of other government agencies. Representatives of the business community, employee organisations and other interested parties may also be included.

2. Will develop and maintain relations with representatives of the business community, employee organisations and other interested parties that are able to contribute to the effective functioning of the Guidelines.

B. *Information and Promotion*

National Contact Points will:

1. Make the Guidelines known and available by appropriate means, including through on-line information, and in national languages. Prospective investors (inward and outward) should be informed about the Guidelines, as appropriate.

2. Raise awareness of the Guidelines, including through co-operation, as appropriate, with the business community, employee organisations, other non-governmental organisations, and the interested public.

3. Respond to enquiries about the Guidelines from:

a) Other National Contact Points.

- b) The business community, employee organisations, other non-governmental organisations and the public; and
- c) Governments of non-adhering countries.

C ***Implementation in Specific Instances***

The NCP will contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances. The NCP will offer a forum for discussion and assist the business community, employee organisations and other parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law. In providing this assistance, the NCP will:

1. Make an initial assessment of whether the issues raised merit further examination and respond to the party or parties raising them.
2. Where the issues raised merit further examination, offer good offices to help the parties involved to resolve the issues. For this purpose, the NCP will consult with these parties and where relevant:
 - a) Seek advice from relevant authorities, and/or representatives of the business community, employee organisations, other non-governmental organisations, and relevant experts.
 - b) Consult the National Contact Point in the other country or countries concerned;
 - c) Seek the guidance of the IC if it has doubt about the interpretation of the Guidelines in particular circumstances;
 - d) Offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist in dealing with the issues.
3. If the parties involved do not reach agreement on the issues raised, issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines.
4. a) In order to facilitate resolution of the issues raised, take appropriate steps to protect sensitive business and other information. While the procedures under paragraph 2 are underway, confidentiality of the proceedings will be maintained. At the conclusion of the procedures, if the parties involved have not agreed on a resolution of the issues raised, they are free to communicate about and discuss these issues. However, information and views provided during the proceedings by another party involved will remain confidential, unless that other party agrees to their disclosure.
 - b) After consultation with the parties involved, make publicly available the results of these procedures unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines.
5. If issues arise in non-adhering countries, take steps to develop an understanding of the issues involved, and follow these procedures where relevant and practicable.

D. ***Reporting***

1. Each National Contact Point will report annually to the Committee.
2. Reports should contain information on the nature and results of the activities of the National Contact Point, including implementation activities in specific instances.

EXTRACT OF COMMENTARY ON THE IMPLEMENTATION PROCEDURES OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

I. Procedural Guidance for NCPs

“6. National Contact Points have an important role in enhancing the profile and effectiveness of the *Guidelines*. While it is enterprises that are responsible for observing the *Guidelines* in their day-to-day behaviour, governments can contribute to improving the effectiveness of the implementation procedures. To this end, they have agreed that better guidance for the conduct and activities of NCPs is warranted, including through annual meetings and IC oversight.

7. Many of the functions in the Procedural Guidance of the Decision are not new, but reflect experience and recommendations developed over the years (e.g. the 1984 Review Report C/MIN(84)5(Final)). By making them explicit the expected functioning of the implementation mechanisms of the *Guidelines* is made more transparent. All functions are now outlined in four parts of the Procedural Guidance pertaining to NCPs: institutional arrangements, information and promotion, implementation in specific instances, and reporting.

8. These four parts are preceded by an introductory paragraph that sets out the basic purpose of NCPs, together with core criteria to promote the concept of “functional equivalence”. Since governments are accorded flexibility in the way they organise NCPs, NCPs should function in a visible, accessible, transparent, and accountable manner. These criteria will guide NCPs in carrying out their activities and will also assist the IC in discussing the conduct of NCPs.

Core Criteria for Functional Equivalence in the Activities of NCPs

Visibility. In conformity with the Decision, adhering governments agree to nominate National Contact Points, and also to inform the business community, employee organisations and other interested parties, including NGOs, about the availability of facilities associated with NCPs in the implementation of the *Guidelines*. Governments are expected to publish information about their contact points and to take an active role in promoting the *Guidelines*, which could include hosting seminars and meetings on the instrument. These events could be arranged in co-operation with business, labour, NGOs, and other interested parties, though not necessarily with all groups on each occasion.

Accessibility. Easy access to NCPs is important to their effective functioning. This includes facilitating access by business, labour, NGOs, and other members of the public. Electronic communications can also assist in this regard. NCPs would respond to all legitimate requests for information, and also undertake to deal with specific issues raised by parties concerned in an efficient and timely manner.

Transparency. Transparency is an important criterion with respect to its contribution to the accountability of the NCP and in gaining the confidence of the general public. Thus most of the activities of the NCP will be transparent. Nonetheless when the NCP offers its “good offices” in implementing the *Guidelines* in specific instances, it will be in the interests of their effectiveness to take appropriate steps to establish confidentiality of the proceedings. Outcomes will be transparent unless preserving confidentiality is in the best interests of effective implementation of the *Guidelines*.

Accountability. A more active role with respect to enhancing the profile of the *Guidelines* -- and their potential to aid in the management of difficult issues between enterprises and the societies in which they operate -- will also put the activities of NCPs in the public eye. Nationally, parliaments could have a role to play. Annual reports and annual meetings of NCPs will provide an opportunity to share experiences

and encourage “best practices” with respect to NCPs. IC will also hold exchanges of views, where experiences would be exchanged and the effectiveness of the activities of NCPs could be assessed.

Institutional Arrangements

9. The composition of NCPs should be such that they provide an effective basis for dealing with the broad range of issues covered by the *Guidelines*. Different forms of organisation (e.g. representatives from one Ministry, an interagency group, or one that contained representatives from non-governmental bodies) are possible. It may be helpful for the NCP to be headed by a senior official. NCP leadership should be such that it retains the confidence of social partners and fosters the public profile of the *Guidelines*. NCPs, whatever their composition, are expected to develop and maintain relations with representatives of the business community, employee organisations, and other interested parties.

Information and Promotion

10. The NCP functions associated with information and promotion are fundamentally important to enhancing the profile of the *Guidelines*. These functions also help to put an accent on “pro-active” responsibilities of NCPs.

11. NCPs are required to make the *Guidelines* better known and available by appropriate means, including in national languages. On-line information may be a cost-effective means of doing this, although it should be noted that universal access to this means of information delivery cannot be assured. English and French language versions will be available from the OECD, and website links to the OECD *Guidelines* website are encouraged. As appropriate, NCPs will also provide prospective investors, both inward and outward, with information about the *Guidelines*. A separate provision also stipulates that in their efforts to raise awareness of the *Guidelines*, NCPs will co-operate with a wide variety of organisations and individuals, including, as appropriate, the business community, employee organisations, other non-governmental organisations, and the interested public.

12. Another basic activity expected of NCPs is responding to legitimate enquiries. Three groups have been singled out for attention in this regard: (i) other National Contact Points (reflecting a provision in the Decision); (ii) the business community, employee organisations, other non-governmental organisations and the public; and (iii) governments of non-adhering countries.

Implementation in Specific Instances

13. When issues arise relating to implementation of the *Guidelines* in specific instances, the NCP is expected to help resolve them. Generally, issues will be dealt with by the NCP in whose country the issue has arisen. Among adhering countries, such issues will first be discussed on the national level and, where appropriate, pursued at the bilateral level. This section of the Procedural Guidance provides guidance to NCPs on how to handle such situations. The NCP may also take other steps to further the effective implementation of the *Guidelines*.

14. In making an initial assessment of whether the issue raised merits further examination, the NCP will need to determine whether the issue is *bona fide* and relevant to the implementation of the *Guidelines*. In this context, the NCP will take into account:

- the identity of the party concerned and its interest in the matter;
- whether the issue is material and substantiated;
- the relevance of applicable law and procedures;

how similar issues have been, or are being, treated in other domestic or international proceedings; whether the consideration of the specific issue would contribute to the purposes and effectiveness of the *Guidelines*.

15. Following its initial assessment, the NCP is expected to respond to the party or parties having raised the issue. If the NCP decides that the issue does not merit further consideration, it will give reasons for its decision.

16. Where the issues raised merit further consideration, the NCP would discuss the issue further with parties involved and offer “good offices” in an effort to contribute informally to the resolution of issues. Where relevant, NCPs will follow the procedures set out in paragraph 2a) through 2d). This could include seeking the advice of relevant authorities, as well as representatives of the business community, labour organisations, other non-governmental organisations, and experts. Consultations with NCPs in other countries, or seeking guidance on issues related to the interpretation of the *Guidelines* may also help to resolve the issue.

17. As part of making available good offices, and where relevant to the issues at hand, NCPs will offer, or facilitate access to, consensual and non-adversarial procedures, such as conciliation or mediation, to assist in dealing with the issues at hand, such as conciliation or mediation. In common with accepted practices on conciliation and mediation procedures, these procedures would be used only upon agreement of the parties concerned.

18. If the parties involved fail to reach agreement on the issues raised, the NCP will issue a statement, and make recommendations as appropriate, on the implementation of the *Guidelines*. This procedure makes it clear that an NCP will issue a statement, even when it feels that a specific recommendation is not called for.

19. Transparency is recognised as a general principle for the conduct of NCPs in their dealings with the public (see para. 8 in “Core Criteria” section, above). However, paragraph C-4 recognises that there are specific circumstances where confidentiality is important. The NCP will take appropriate steps to protect sensitive business information. Equally, other information, such as the identity of individuals involved in the procedures, should be kept confidential in the interests of the effective implementation of the *Guidelines*. It is understood that proceedings include the facts and arguments brought forward by the parties. Nonetheless, it remains important to strike a balance between transparency and confidentiality in order to build confidence in the *Guidelines* procedures and to promote their effective implementation. Thus, while para. C-4 broadly outlines that the proceedings associated with implementation will normally be confidential, the results will normally be transparent.

20. As noted in para. 2 of the “Concepts and Principles” chapter, enterprises are encouraged to observe the *Guidelines* wherever they operate, taking into account the particular circumstances of each host country.

In the event *Guidelines*-related issues arise in a non-adhering country, NCPs will take steps to develop an understanding of the issues involved. While it may not always be practicable to obtain access to all pertinent information, or to bring all the parties involved together, the NCP may still be in a position to pursue enquiries and engage in other fact finding activities. Examples of such steps could include contacting the management of the firm in the home country, and, as appropriate, government officials in the non-adhering country.

Conflicts with host country laws, regulations, rules and policies may make effective implementation of the *Guidelines* in specific instances more difficult than in adhering countries. As noted in the

commentary to the General Policies chapter, while the *Guidelines* extend beyond the law in many cases, they should not and are not intended to place an enterprise in a situation where it faces conflicting requirements.

The parties involved will have to be advised of the limitations inherent in implementing the *Guidelines* in non-adhering countries.

Issues relating to the *Guidelines* in non-adhering countries could also be discussed at NCP annual meetings with a view to building expertise in handling issues arising in non-adhering countries.

Reporting

21. Reporting would be an important responsibility of NCPs that would also help to build up a knowledge base and core competencies in furthering the effectiveness of the *Guidelines*. In reporting on implementation activities in specific instances, NCPs will comply with transparency and confidentiality considerations as set out in para. C-4.”