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Or. Eng.

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THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES - ISSUES IN THE REVIEW

This note is for consideration by the CIME at its meeting on 23 November 1998. It is also for discussion at the Conference on the OECD Guidelines for Multilateral Enterprises which will be held in Budapest on 16-18 November 1998.

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Or. Eng.

The OECD *Guidelines for Multinational Enterprises* - Issues in the Review

1. A background analytical paper (DAFFE/IME(98)15) contains a history of the OECD *Guidelines for Multinational Enterprises*, as well as an annotated summary of recent experience with them. This issues paper will focus on the main features of the *Guidelines*, address areas of current debate, outline their potential contribution to relations between MNEs (multinational enterprises) and host governments in the current international investment environment, and pose questions for discussion.

2. The current *Guidelines* review occurs at an important time for investment issues on the international stage - particularly important given the financial instability and debates surrounding international investment and globalisation over the past eighteen months. The review offers an opportunity to examine what changes may need to be considered to ensure that, within the framework of a stable yet flexible instrument, the *Guidelines* respond to the aspirations of both governments and social partners, including labour, business, and other groups, with regard to international corporate responsibility. At present the *Guidelines* do not have the international profile they deserve. The challenge of the review is to develop their full potential.

Section 1 - Main Features of the OECD Guidelines

3. With respect to both their substantive provisions and the institutional arrangements that make them operational, the main features of the *Guidelines* have evolved over the years. The *Guidelines* are reminders to MNEs that on a broad range of issues they should operate in harmony with the policies of countries in which they invest. They have been endorsed by representatives of international business and labour, and reaffirmed during each review. They are not a substitute for domestic laws, but rather complement national legislation. Established as part of a package of OECD investment instruments under the rubric of the *OECD Declaration and Decisions on International Investment and Multinational Enterprises* (the *Declaration*) they are intended to reinforce the contribution of MNEs to economic and social progress.

4. Chief attributes of the *Guidelines* include the following:

- (a) **Balance.** Balance is manifested in the first instance with respect to the expectations of MNE conduct contained in the *Guidelines* vs. the commitments of governments inherent in other OECD investment instruments. In their *Declaration on International Investment and Multinational Enterprises*, the 29 OECD Members -- and three non-Members -- have undertaken political commitments on national treatment, international investment incentives, and conflicting requirements on MNEs. The OECD Codes of Liberalisation contain binding commitments on cross-border capital movements and current invisible operations.

Balance is also achieved through procedural elements in the *Guidelines*. In particular, the roles of National Contact Points, the social partners BIAC (Business and Industry Advisory Council) and TUAC (Trade Union Advisory Council), and the CIME (OECD Committee on International Investment and Multinational Enterprises) have facilitated adaptability of the *Guidelines* to changing conditions. Indeed to be truly effective, the *Guidelines* rely on the support of social partners. In addition, they address a much broader range of issues than, for instance, sector- or firm-specific codes of conduct.

- (b) Scope. The *Guidelines* now cover a wide range of issues, including chapters on General Policies, Disclosure of Information, Competition, Financing, Taxation, Employment and Industrial Relations, Environmental Protection, and Science and Technology. Breadth on each of these issues can be considerable, and in some cases, where areas of overlap with other instruments occur, language has been co-ordinated or duplicated to avoid conflict.¹

Updates to the *Guidelines* in the form of formal reviews are a key procedural component, and have taken place in 1979, 1984, and 1991. The most recent review in 1991 resulted in a new chapter on environmental protection.

All OECD governments support the *Guidelines*, and have reaffirmed their commitment at each review stage. Furthermore, they have attracted non-Member adherence when the latter have adhered to the OECD *Declaration* (e.g. Argentina, Brazil, and Chile). In addition, the *Guidelines* complement national legislation and reinforce MNEs' contributions to economic and social progress in host and home countries.

- (c) Their voluntary nature has permitted broader acceptance and contributed to their widespread endorsement. The voluntary nature of the *Guidelines* is also valuable because of a concomitant "demonstration effect" that they enjoy.² In addition, while non-binding, OECD Governments have nonetheless committed themselves to encouraging their observance. Furthermore, debate over excessively legalistic terminology, the scope of the provisions, and the difficult extraterritorial questions that would be inherent in the event of a conflict between the *Guidelines* and national laws - indeed the risks to the current instrument as a whole through debate over a more coercive instrument - has been avoided. Also, the value of an instrument as a precedent and a set of international legal norms should be recognised, as issues such as bribery and taxation, for example, move from the realm of principles to domestic and international law.

The *Guidelines* enjoy a long-standing tripartite endorsement by governments, labour, and business virtually unique among voluntary codes of conduct. Seeking to recognise and encourage the positive contributions that multinational enterprises can make to economic and social progress, the upholding of the *Guidelines* by social partners as well as governments is one of their greatest sources of strength. This is especially important when recalling the divisive and counterproductive debates over the *UN Draft Code of Conduct on Transnational Corporations* in the 1970s and 1980s.

- (d) Follow-up procedures. The *Guidelines* incorporate procedures to make them operational. These include the role of National Contact Points, usually government offices, who are the first point of contact in member states on the *Guidelines*, and are responsible for dissemination, promotional activities, and problem solving. In addition, BIAC and TUAC, whose role, along with other interested parties, vis-à-vis National Contact Points has been noted in the decision of

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1. The International Labour Organisation (ILO) adopted a Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy in 1977, a year after the OECD *Guidelines* were instituted. Wherever the ILO Tripartite Declaration refers to the behaviour expected from enterprises, they parallel the OECD *Guidelines* and do not conflict with them.
 2. The OECD *Guidelines* have recently been re-identified as having "the most impact" among universal codes of conduct. See Ashay B. Desai and Terri Rittenburg, "Global Ethics: An Integrative Framework for MNEs", *Journal of Business Ethics*, (Kluwer: June 1997).

the Council, as well as their role with respect to their views on the guidelines, is a further unique attribute in the processes surrounding the *Guidelines*.³ Finally, the role of the CIME as a focal point for international co-operation, including clarifications, is of course fundamental to the operations of the *Guidelines* as well.

These features have evolved since the Guidelines were instituted 22 years ago. The reviews are an important element in updating the *Guidelines* to ensure their continuing relevance. In this regard, it should be noted that while there is broad support in the CIME for the review, in December 1997 delegations also noted that implementation and efforts to promote awareness of the *Guidelines* may be at least as important as updating the text.

Section 2 - The International Environment

5. The climate for international investment has changed significantly since the last review of 1991. In general, there continues to be a widespread acceptance of foreign direct investment and multinational enterprises, evidence for which consists in continued liberalisation, deregulation, less state intervention, and competition for FDI that characterised the late 1980s and 1990s. Nonetheless, more recently, concern has been expressed about some of the ramifications of these policies on, for example, state sovereignty, the impact of short term capital flows, and social issues, including the environment, labour rights, and human rights in general. Globalisation, which has been viewed by some as an almost unstoppable force, has as its corollary led to MNEs being criticised as therefore "unaccountable" to domestic or even international social and legal norms.

6. MNEs have not been insensitive to these charges, as the recent proliferation to sector and firm specific voluntary codes of conduct has demonstrated. Indeed voluntary codes of conduct provide one indication that corporate citizens are eager to confirm their *bona fides* as law-abiding and socially responsible entities. The *Guidelines* may be argued to offer a complementary and universal Code, applicable throughout the OECD and beyond, with the added feature that it can encompass many of today's firms' multifaceted and multinational operations, and contribute to international co-operation.

7. Thus, following a successful review, governments and social partners should be in a position to affirm important principles and to send a powerful message that the *Guidelines* can remain a relevant and adaptable instrument. The *Guidelines* may also be viewed as a model, subject to modification, that can assist in the search for balance between openness to investment flows and corporate responsibility - an element of the recent debate over globalisation that has also attracted countries' attention.

Section 3 - Issues for Consideration in the Current Review

8. In endorsing the current review of the *Guidelines*, CIME delegations have identified possible changes - without prejudice to others - in the chapters on environment and employment and industrial relations. Equally, it was noted that the stability of the *Guidelines* is important, and, as noted above, that implementation and efforts to promote awareness of the *Guidelines* may be at least as important as updating the text. Finally, it was recognised that the review should be undertaken in co-operation with other OECD Committees, and that the continued support of TUAC and BIAC should be sought throughout

3. See: "The Guidelines for Multinational Enterprises: Second Revised Decision of the Council" (amended, June 1991, in *The OECD Declaration and Decisions on International Investment and Multinational Enterprises - Basic Texts*, OECD document OCDE/GD(97)36 for general distribution, 1997, p. 23.

the review process. Thus procedural issues, such as improving the *Guidelines* dissemination, for example, or addressing the role of National Contact Points and the social partners, are recognised as a fundamentally important part of this review. We examine these elements in turn:

(i) *Text*

9. While the *Guidelines* may have been viewed as comprehensive when they were drafted, do they remain so today? Textual revision may mean updating the wording in some provisions to take account of changes affecting the context of the existing chapters since the last review in 1991 - on issues covered by the Rio Earth Summit and Kyoto conference with respect to the environment, for example, or the recent ILO Declaration on Fundamental Principles and Rights at Work in the chapter dealing with employment and industrial relations. Competition and tax chapters may also warrant revisiting, and it is possible that new provisions reflecting other concerns - on human rights, for example - may be examined.⁴

10. Questions have also been raised in some quarters about the *Guidelines*' voluntary nature. We have noted the reasons why this has been traditionally been considered one of the key attributes of the *Guidelines* in Section 1. There has never been any real prospect of consensus on a coercive instrument that would have negative implications for sovereignty of states and conflicting requirements on enterprises. In addition, the prospect of unfair competition (binding foreign but not domestic firms to an international Code), as well as undermining the balance inherent in all the instruments of the OECD *Declaration* also suggests that this tack may prove ultimately unproductive during the current review. There is a substantial recognition that a binding code, if one could be agreed, would lose much of its content and reduce standards to the lowest common denominator. It may be that improved procedures, including an enhanced role for National Contact Points (NCPs) and civil society partners, may be more effective than attempting to negotiate binding text recommendations to governments in regard to the *Guidelines* as a source of inspiration for national law or for international negotiations on legal instruments where justified by a need for international co-operation.

(ii) *Promotion and Implementation*

11. To be effective, the *Guidelines* need to be more widely known and better understood. Again, evidence for the necessity of improving promotion may lie in the recent proliferation of sector- and firm-specific voluntary codes, some of which address issues already covered by the *Guidelines*. Some firms have found it to their advantage to subscribe to a set of norms, and/or pledge themselves to commitments on various standards, that contribute to the profile of firms as good corporate citizens. Rewards for so doing may be viewed as more immediate or more noticeable when agreed to individually rather than collectively, or on specific issues rather than a comprehensive set of principles.

12. Thus greater or more effective dissemination, monitoring, and explanation of the *Guidelines* in this context is important; this may affect the roles of the National Contact Points in particular, who are already responsible for the most important aspects of these activities, as well as that of the social partners. Similarly, CIME's role as a forum for consideration of issues of principle, providing clarifications, responding to request from Members and the social partners on aspects of the *Guidelines*, may also be addressed in this context.

4. While the defence and promotion of human rights is primarily the responsibility of governments, where human rights intersect with corporate responsibility, issues concerned could be reviewed in the context of the Employment and Industrial Relations chapter of the *Guidelines*.

13. In addition, processes associated with the implementation of the *Guidelines*, which are relatively diffuse and include roles for National Contact Points and social partners, may also warrant attention. All issues involved in *Guidelines* implementation, including information gathering, handling enquiries, and assisting in solving problems which may arise between business and labour in matters covered by the *Guidelines* may warrant a closer examination of procedural issues. Reflecting long-standing practice, the roles of National Contact Points and social partners will be crucial here, and consideration of updating and broadening participation and responsibility may be useful.

Questions for Discussion

Given this background, then, what changes need to be considered during the current review? More specifically:

- (a) Do participants consider that the Guidelines for Multinational Enterprises have had a positive effect on corporate conduct? What have been their most visible effects?*
- (b) Is there agreement that the Guidelines can contribute to favourable economic relations between MNEs and governments?*
- (c) What are the most important elements of the Guidelines to consider during the current review, and how should they be addressed?: text? legal status? procedures? profile and dissemination?*
- (d) In addition to the provisions already identified (employment and labour relations, the environment and competition policy), are there others that need particular attention? What specific issues need to be addressed, and why? Is there any major omission from the current text?*
- (e) How can awareness of the Guidelines be improved?*
- (f) Is the role played by CIME sufficiently effective as a forum for policy discussion? If not, how can it be improved?*
- (g) Is the role of the National Contact Points sufficiently developed? Would the development of common terms of reference be helpful in this respect?*
- (h) Should NGOs be given a more explicit role in the implementation procedures of the Guidelines, taking account of the existing roles of BIAC and TUAC?*
- (i) Are additional efforts needed to strengthen co-operation on the Guidelines with non-Members?*