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**DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
COMMITTEE ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES**

Working Group on Bribery in International Business Transactions (CIME)

**PROCEDURE FOR SELF- AND MUTUAL EVALUATION OF IMPLEMENTATION OF THE
CONVENTION AND THE REVISED RECOMMENDATION - PHASE 2**

(Note by the Secretariat)

This note has been approved by the Working Group on Bribery in International Business Transactions.

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**Procedure for Self- And Mutual Evaluation of Implementation
of the Convention and the Revised Recommendation - Phase 2**

(Note by the Secretariat)

I. Introduction

1. In April 1999, the Working Group on Bribery began Phase 1 of the procedure for self- and mutual evaluation of implementation of the Convention and the Revised Recommendation according to the general principles and procedures agreed by the Group in DAFFE/IME(98)17. Part IV of that document set out a preliminary outline of Phase 2 but noted that a number of substantial elements, notably the questionnaire for Phase 2 and the terms of reference for on-site visits would need to be further developed.

2. This note recalls the general issues adopted by the Group which are also relevant to Phase 2 and proposes modalities for carrying out Phase 2 based on the preliminary outline in DAFFE/IME(98)17. It sets out draft terms of reference for on-site visits. This latest revision reflects the comments made by delegates at the 5-7 December 2000 meeting.

II. “General issues”¹

Delegates agree that the monitoring procedure should conform to a number of general principles:

Purpose. The purpose of monitoring is to ensure compliance with the Convention and implementation of the Revised Recommendation. Monitoring also provides an opportunity to consult on difficulties in implementation and to learn from the solutions found by other countries.

Effectiveness. Monitoring must be systematic and provide a coherent assessment of whether a participant has implemented the Convention and 1997 Revised Recommendation.

Equal treatment. Monitoring must be fair and this means equal treatment for all participants. Monitoring performance is an exercise among peers who can be frank in their evaluations. The Secretariat has an important role in ensuring uniform application of the procedures.

Recommendation and Convention. The Recommendation and the Convention are very different instruments: the Convention contains detailed binding commitments in the field of criminal law; the Recommendation has a wider scope and is written in more general terms. Both are important elements of the activity to combat bribery in international business transactions. There are also important interconnections between the two instruments, for example, in the areas of accounting and money laundering.

Cost-efficient. The monitoring procedure should be efficient, realistic, concise and not overly burdensome. It is necessary, however, to ensure that monitoring is effective, since together with the Convention and the Recommendation, it guarantees the level playing field.

Co-ordination with the Council of Europe and other organisations. International organisations such as the Council of Europe, the European Union, and the OAS, share the goal of combating corruption though the scope of their respective efforts and their more specific

¹ The General issues are taken from DAFFE/IME(98)17.

objectives may differ. All participants want to avoid duplication of effort. Since the Council of Europe has launched a procedure to monitor implementation of its anti-corruption principles and instruments, particular efforts should be made to keep abreast of its activities as well as those of other organisations monitoring country commitments.

Public information. The 1997 Revised Recommendation calls on the Working Group to provide regular information to the public on its work and activities and on implementation of the Recommendation. This general responsibility must be balanced against the need for confidentiality which facilitates frank evaluation of performance.”

III. Outline of Phase 2

Objective

3. The purpose of Phase 2 is to study the structures put in place to enforce the laws and rules implementing the Convention and to assess their application in practice. Phase 2 should broaden the focus of monitoring to encompass more fully the non-criminal law aspects of the 1997 Revised Recommendation. Phase 2 would also serve an educational function as participants discuss problems and different approaches.

4. As for Phase 1, the evaluations in Phase 2 will be country examinations in order to obtain an overall impression of the functional equivalence of participants’ efforts. The Group may decide to carry out horizontal analysis of some issues that emerge during Phase 2.

Timing of Phase 2

5. As to the commencement of Phase 2, the Group confirmed that priority should be given to finalising Phase 1 examinations, including analysing those issues emerging from Phase 1 that need further discussion (Phase 1 bis). However, delegates agreed that Phase 2 should not be indefinitely postponed due to countries that may still be lagging in finalising ratification and implementation of the Convention.

6. The Group agreed to begin a Phase 2 examination for one country that could start prior to the next Ministerial; it may not be feasible to finalise the examination until the June 2001 meeting of the Group. In principle, a first cycle of Phase 2 examinations of all participants should be completed by 2005 at the latest.²

Elements in Phase 2 Evaluations:

- (i) Reply to a questionnaire;
- (ii) On-site visits to country examined;
- (iii) Preparation of a preliminary report on country performance;
- (iv) Consultation in the Working Group;
- (v) Adoption by the Working Group of a report, including an evaluation, on country performance;
- (vi) Transmission to the OECD Council.

² This would work out to approximately 7-8 Phase 2 examinations per year.

(i) Questionnaire

7. The Working Group adopted a questionnaire for Phase 2 at its December 2000 session [DAFFE/IME/WD/BR(2000)36/FINAL]. The questionnaire will be sent to the country to be examined shortly thereafter. The time limits for countries to be examined will be fixed by the Secretariat in coordination with the country concerned and the lead examiners.

8. Supplementary questions, specific to the country concerned, would take account of the results of the evaluation of that country in Phase 1 in order to follow up on issues identified in its review. The questionnaire should also elicit information concerning implementation of the Revised Recommendation.

(ii) On-site visits by the Secretariat and lead examiners

9. On-site visits, which would be approximately 2-3 days, would be carried out in accordance with pre-determined terms of reference. The terms of reference for all on-site visits is set out in the Annex to this note. During on site visits, a country should not be required to disclose information that is otherwise protected by a country's laws and regulations.

10. On-site visits by the Secretariat and lead examiners would be an effective way to obtain information on practice with respect to a number of elements such as enforcement and prosecution. It also offers the possibility to talk with magistrates, police, tax and other authorities responsible for applying the law. The on-site visits would also be an opportunity to consult on other matters covered by the Recommendation.

11. Taking account of the considerations in paragraphs 28-29, there would be an overall benefit in Phase 2 from an informal exchange of views with key representatives of the private sector and civil society which could contribute to determining the impact that the laws and enforcement have had on behaviour, including compliance schemes. Each country would be consulted on the best manner of obtaining input from the private sector and civil society.

12. Two lead examiners for each country undergoing evaluation would be chosen, in consultation with the country examined. The countries acting as lead examiners will choose the experts who take part in the on-site visits as well as preparation of the preliminary report and the conduct of the examination in the Group.

(iii) Preliminary reports assessing performance

13. As for Phase 1, the report would have a standard format that follows the order of issues raised in the questionnaire. The format could include sections on description, evaluation and recommendations for improvement. The preliminary report would be based on the reply to the questionnaire and information obtained during the on-site visit to the examined country. The country undergoing evaluation would have an opportunity to comment on the preliminary report.

14. The preliminary report would be drafted by the Secretariat together with the lead examiners.

(iv) Consultation in the Working Group

15. The mutual evaluation would be undertaken through a consultation in the Working Group. The consultation would provide an opportunity to discuss difficult issues, to listen to the country evaluated explain its legal system and approach, and to formulate the recommendations that the Group would agree to make.

16. The examined country may bring a number of experts to the session, including from the enforcement community, in order to be able to respond to questions from the Group.

(v) Adoption of a report on the performance of the country evaluated

17. The Working Group would formulate an evaluation concerning the country's performance which would be incorporated in a report. Discussions in the Working Group, as well as interaction between Secretariat, lead examiners, and the country examined, should ensure that the evaluation reflects the fullest possible understanding of the country's approach. The examined country will not block the Group's decision to adopt the evaluation. However it has the right to have its views, comments, and explanations fully reflected in the report and the evaluation.

18. Clear, well-structured questionnaires and reports would be important to achieving a qualitative assessment of the country's performance which could be accepted as the result of a fair process applying an equal standard to all countries.

19. The Working Group will adopt reports according to the rules set out in the terms of reference.

(vi) Transmission to the OECD Council

20. The Working Group should report to the Council annually on the progress made in the Phase 2 evaluations. This report should include an agreed summary of individual country reports adopted by the Working Group in the course of the year, and would also attach individual country reports. The Working Group, via the CIME, should transmit the report to the Council.

Budget for on-site visits

21. The cost of on-site visits includes the travel and per diem of the Secretariat which is charged to the budget of the Organisation. A request for increased resources will be necessary in the Organisation's budget for 2001 to provide for sufficient funding for Phase 2, including the travel and per diem expenses of the Secretariat.

22. In principle, each country will take part in evaluations of two other countries, Parties to the Convention, over the period of the complete review cycle. For each country they evaluate, countries acting as lead examiners would bear the costs of travel and expenses for 1-3 experts from their countries.

23. The examined country would bear the cost of replying to the questionnaire and preparing the on-site visits.

Mutual review

24. Lead examiners shall be chosen, in the first instance, from countries for which a Phase 1 examination has been completed by the Group. The discussions and consultations in the Working Group would be open to both full participants and observers (if any). Only full participants, however, could take part in the adoption of the report, including the evaluation of whether the examined country had fulfilled the obligations of the Convention.

Other OECD Bodies

25. The Working Group is responsible for overall review of performance in implementing the Convention and the 1997 Revised Recommendation.

26. The monitoring of practical applications of broader issues might require specific expertise that may be found in the other parts of the Organisation. In conducting its evaluation, the Working Group would draw on information and expertise developed by other OECD bodies, particularly the Committee on Fiscal Affairs, the Development Assistance Committee, and the Working Party on Export Credits and Credit Guarantees, on implementation of elements of the Revised Recommendation in their respective fields.

Council of Europe and other Organisations

27. The OECD Secretariat will communicate regularly with the Secretariats of the Council of Europe, the European Union and other organisations, with a view to avoiding duplication among respective exercises to monitor commitments to combat corruption in international business transactions. Contacts with these organisations should be particularly attentive to avoiding burdening a particular country with multiple on-site visits.

Civil Society

28. Because peer review is an intergovernmental process, business and civil society groups would not be invited to participate in the formal evaluation process, in particular, in the evaluation exercise and the consultation in the Working Group.

29. Participants agreed that while civil society does not take part in the formal evaluation exercise, there should be an opportunity for their views to be expressed and reflected in Phase 2 where enforcement in the private sector will also be examined. Providing public information on the schedule of the country examinations would permit such groups to provide information or opinions in a timely way. Different options for involvement, or opportunity to express views, could be considered by the country to be examined. The country concerned would be consulted on the programme for on-site visits.

Public information - Confidentiality

30. Given the interest of the business sector and the public in this matter, transparency of the monitoring process is important. The Working Group therefore should consider making as much information available, including dissemination of the questionnaire. Participants emphasised, however, that the mutual review itself needed confidentiality if it were to be frank and efficient. If the examined country makes available to the examiners information it considers confidential, confidentiality of this information will be respected. In principle, reports on country performance would remain confidential until such time that they have been transmitted to the Council. A country concerned could, however, take whatever steps it felt appropriate to release information concerning its report, or to make it publicly available.

Annex

Terms of Reference for On-Site Visits

1. Aim of Phase 2 Self- and Mutual Evaluation

The aim of Phase 2 self- and mutual evaluation of implementation of the Convention and the Revised Recommendation is to improve the capacity of Parties to the Convention and the Recommendation to fight bribery in international business transactions by following up, through a dynamic process of self- and mutual evaluation and peer pressure, compliance with their undertakings in this field.

2. Functions of Phase 2 Self- and Mutual Evaluation

2.1 In order to achieve the aim in paragraph 1 above, the Working Group shall monitor the implementation of the Convention and the Revised Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions, in conformity with the provisions contained in such instruments.

2.2 Phase 2 Self- and Mutual Evaluation should include on-site visits to be carried out in accordance with these terms of reference.

3. Evaluation Procedure

3.1 The Working Group will conduct a self- and mutual evaluation procedure, including on-site visits, for each country that has already completed a Phase 1 examination.

3.2 The evaluation for each country will be conducted within a period of time determined by the Working Group.

3.3 The evaluation will be based on the replies by the country evaluated to the Phase 2 questionnaire, the results of the on-site visits, and the consultation in the Working Group.

4. Phase 2 Questionnaire

4.1 The Working Group shall adopt a questionnaire for Phase 2 evaluation which shall be addressed to all members of the Group.

4.2 The questionnaire will provide the framework of the evaluation procedure.

4.3 The time limits for replying to the questionnaire and for commenting on the preliminary report will be fixed by the Secretariat in co-ordination with the country concerned and the lead examiners. The replies, in English or French, should be sent to the Secretariat together with supporting material.

5. On-Site Visits

5.1 Each country agrees to allow an on-site visit of approximately 2-3 days.³ for the purpose of providing information concerning its law or practice, including enforcement and prosecution, which is useful for Phase 2 evaluation.

5.2 The Working Group should give a minimum of two months notice to the country concerned prior to carrying out the on-site visit.

5.3 The country undergoing evaluation will play an active role in fixing the date for and preparing the visit.

5.4 The on-site visit should be carried out in accordance with a programme agreed between the country undergoing evaluation and the on-site visit team, taking account of the specific requests expressed by the on-site team.

6. Composition and functions of Evaluation Teams

6.1 On-site visit teams will be composed of 1-2 members of the Secretariat and up to 3 experts from each lead examining country chosen in consultation with the country examined. The composition of the team would ensure adequate expertise for the areas to be examined. Lead examiners shall be chosen, in the first instance, from countries for which a Phase 1 examination has been completed by the Group.

6.2 The on-site visit teams will examine the replies given to the questionnaire and may request, where appropriate, additional information from the country undergoing evaluation, to be submitted either orally or in writing.

6.3 The on-site teams will consult with the country concerned on the possibility of meeting with representatives of the private sector and civil society to ascertain their views.

6.4 Costs of experts taking part in on-site teams will be funded in accordance with the provisions of paragraph 10.2, below.

7. Evaluation Reports

7.1 On the basis of the information gathered from the questionnaire and the on-site visits, the Secretariat and the lead examiners (the evaluation team) will prepare a preliminary draft report on the state of enforcement and application of the law implementing the Convention and on measures taken to implement the provisions of the Revised Recommendation.

7.2 The preliminary draft report should be transmitted to the country undergoing evaluation for comments. These comments shall be taken into account when finalising the preliminary report.

7.3 The preliminary report will be submitted to the Working Group.

3. It is envisaged that there would be at least one visit per round (five years).

8. Discussion and Adoption of Reports by the Working Group

8.1 The Working Group, in plenary, will discuss the preliminary report submitted by the evaluation team.

8.2 The country undergoing evaluation can submit observations orally, and or in writing, to the plenary.

8.3 After full discussion, the Working Group will adopt the preliminary report, including an evaluation, in respect of the country evaluated.

8.4 After modification to take account of the discussion in the Working Group, the revised report will be adopted by the Group in plenary or under written procedure.

8.5 The Working Group will adopt evaluation reports on the basis of consensus. The country undergoing evaluation shall not block the decision to adopt the evaluation but has the right to have its views and opinions fully reflected in the report.

8.6 Only full participants in the Working Group can take part in the decision to adopt the evaluation reports.

8.7 The evaluation reports may contain recommendations addressed to the country concerned in order to improve its domestic laws and practices to combat bribery of foreign public officials in international business transactions.

9. Confidentiality

9.1 Consultations and discussions of the Working Group on the self- and mutual evaluations shall take place *in camera*. Non-governmental groups will have a possibility to express their views and submit information to the Working Group.

9.2 Evaluation reports shall be confidential until their transmission to the Council. They would then be made publicly available.

10. Funding for Phase 2 On-Site Visits

10.1 The budget of the Organisation will bear the expenses for the travel and per diem expenses for the members of the Secretariat part of the on-site visit teams.

10.2 The countries taking part in the evaluations as lead examiners will bear the costs of travel and per diem expenses for their experts assigned to the on-site visit teams.

10.3 The country undergoing evaluation will bear the cost of replying to the questionnaire and preparing the on-site visits.