

Combating Bribery in Export Credits: the Agenda for 2005.

Paper for special meeting between the Council Working Group on Export Credits and NGOs, 22nd June 2005.

I. Intro

1. 2005 is a key year for seeing real improvement in ECA practice on deterring and combating bribery.
2. The **Commission for Africa** specifically highlighted Export Credit Agencies as one of the three areas relating to corruption that needed attention by developed countries. The Commission stated that
 - ECAs need to be more transparent;
 - ECAs need to require higher standards of transparency;
 - ECAs need to “fully implement the Action Statement on Bribery and Officially Supported Export Credits”;
 - ECAs should adopt and implement the measures outlined in the Best Practices paper developed by the OECD;
 - The OECD Working Party on Export Credits and Credit Guarantees should publish figures on applications turned down on grounds of bribery “so that the international community can determine whether these voluntary measures are working sufficiently well”.¹

The UK government has said that it will be responding to the Commission’s recommendations and how the UK intends to implement them. The recommendations will feature prominently in G8 discussions.

3. A new **OECD Action Statement** is due to be negotiated this autumn. The current Action Statement desperately needs updating because:
 - a. Several ECAs have already gone beyond it in implementing anti-corruption procedures and it is unfair on these ECAs and their customers to therefore keep a weaker Action Statement;
 - b. It is too vague about the precise measures that ECAs should be implementing thus allowing plenty of room for ECAs to interpret the Action Statement in different ways;
 - c. There are several crucial areas it does not address, including disclosure requirements by ECAs on agent’s commission and debarment;
 - d. There have been several corruption scandals in ECA-backed projects since the Action Statement was signed in December 2000, most notably allegations that a consortium paid bribes in relation to an LNG plant in Nigeria, including on an extension of the plant that was supported by four different ECAs, including three European ones in December 2002; allegations with regard to bribes paid by European defence companies in connection with a large defence package in South Africa supported by various European ECAs; and allegations involving payments to officials in Costa Rica by companies on projects supported by two European ECAs during 2001-2002. These allegations suggest that ECA procedures are not

¹ Commission for Africa, “Our Common Interest: report of the Commission for Africa”, March 2005. The first three of these bullet points were highlighted specifically as recommendations by the Commission.

yet strong enough to detect when bribery is occurring on projects to be supported.

The OECD developed a Best Practices to Deter and Combat Bribery paper in October 2003. This paper, and the question of whether there should be a new Action Statement have been on the table at the OECD ECG for nearly two years now. It is really important that a strong new Statement that lays out high standards and reflects the best practice that some ECAs are already implementing is agreed. It is disappointing that more progress has not been made on this and that some countries including EU ones have not yet apparently accepted the need for a new Action Statement or accepted the Best Practices paper.

4. The **OECD Working Group on Bribery** has now completed 16 (out of 36)² of its Phase 2 Reviews of how countries are implementing the OECD Convention and the OECD 1997 Revised Recommendations on Combating Bribery in International Business Transactions. The Working Group is due to produce an evaluation this autumn on what is emerging from the Phase 2 Reviews. Most of the Phase 2 reviews cover the issue of bribery in bilateral aid and export credits, in relation to Section II (v) of the Revised Recommendations.³ However, evaluation of anti-corruption measures by ECAs in the Phase 2 Reviews has been somewhat patchy and inconsistent, with some reviews appearing to give more scrutiny to ECAs than others (see Annex 1). Several of the reviews specifically have a disclaimer that the comments made by lead examiners are not to be interpreted as suggesting that the standards set by the Action Statement have not been met. There does not therefore appear to be a mechanism for evaluating whether ECAs are meeting the Action Statement, aside from the OECD's Survey on measures taken by ECAs to deter and combat bribery. The Survey is extremely useful but may not represent the most effective way of evaluating ECA measures to combat bribery. It is essentially a box-ticking exercise which cannot by its very nature assess whether ECAs are implementing in practice what they have said on paper. The OECD Working Group on Bribery reviews are a good place to assess what ECAs are doing in practice and how they have responded to particular allegations. One option for ensuring that there is more monitoring would be for the OECD Working Groups on Bribery and Export Credits to come up with a more detailed and comprehensive set of questions about ECAs to form part of the remaining Phase 2 Evaluations. It may be appropriate to use the Working Group on Bribery follow-up on Phase 2 Evaluations to ask those countries that have already been reviewed the same questions.
5. Corruption will feature in forthcoming **negotiations at the EU Council Working Group on Export Credit Agencies**. This is a really important forum to develop a

² 16 Phase 2 reports have been published. The OECD has conducted 21 site visits.

³ Currently, the questions on ECAs in the OECD Phase 2 Evaluations are limited to question 15 (under Section C, Application of the Revised Recommendation), which states: "Have you taken steps to ensure that public subsidies, licences, or other public advantages be denied as a sanction for bribery of foreign public officials, pursuant to Section II(v) of the Revised Recommendation? How do you ensure that public subsidies, licences, or other public advantages are not inadvertently granted in cases of bribery of foreign public officials?" This question, because it is broad, theoretically allows examiners to ask questions about whether ECAs are refusing support to companies convicted of corruption and what procedures they have in place to ensure that cover is not 'inadvertently' provided in cases of bribery of foreign officials.

progressive consensus on how European ECAs can be implementing best practice on preventing, deterring and combating bribery. The Communication from the EU Commission on a Comprehensive EU Policy on Corruption in May 2003 called for “clear political determination and an unambiguous stance of EU governments” on corruption. The Communication stated that: “The EU should continue making the fight against corruption an integral part of its external and trade policy”. With regard to ECAs, the Commission invited “Member States to monitor concrete implementation of anti-corruption clauses in the rules applied by relevant national agencies and in line with the OECD “Action Statement” of December 2000.”

Weak anti-corruption procedures by some European ECAs suggest that these ECAs wish their companies to receive a competitive advantage over companies from other countries. This would appear to be in contravention of Article 142 of the EC Treaty, which states that “*Member States shall progressively harmonise the systems whereby they grant aid for exports to third countries, to the extent necessary to ensure that competition between undertakings of the Community is not distorted*”. In the forthcoming negotiations on ECAs in the EU, the Council Working Group on Export Credits needs to ensure that:

- a. there is a progressive harmonisation of the systems for combating bribery in place in Export Credit Agencies towards the best practice already emerging among some EU ECAs; and that
- b. there is clarification of how Member States should be monitoring concrete implementation of anti-corruption rules.

II. Enhancing ECA anti-corruption measures: the key issues

A. Disclosure on agents and agents commission

6. Agents’ commission has long been recognised as a common route through which bribe payments are made. All ECAs with the exception of Greece, Poland and Turkey allow companies to include agent’s commission in the overall contract price to be supported and therefore in effect underwrite commission payments.⁴ If ECAs do not ask questions about agent’s commission and undertaken appropriate due diligence on the commission, they can be construed as deliberately denying themselves information that would enable them to assess whether bribery is taking place in projects they support or not.
7. Many ECAs now say that they actively promote the OECD Guidelines on Multinational Enterprises to their customers.⁵ The Guidelines specifically state that companies must ensure that remuneration to agents is “appropriate and for legitimate services only”. They also say that “where relevant, a list of agents employed in connection with transactions with public bodies and state-owned enterprises should be kept and made available to competent authorities”. It is inconsistent for ECAs to say they promote the Guidelines without checking

⁴ Norway states in the survey that it does not. However, in the ‘comments’ section, Norway states that agent’s commission “is however covered indirectly if it is included as a cost covered by the contract and thus included in the total contractual amount eligible for financing”.

⁵ This includes through: promoting the Guidelines on the web (Australia), in application forms (Germany) or through information brochures (Canada, Spain, Sweden); by requiring companies to sign letters that they are aware of the Guidelines (France) and that they will comply with them to the best of their ability (Netherlands); or checking on the consistency of customer operations with the Guidelines (UK).

- whether agent's commission by companies is indeed appropriate and legitimate, and without asking for the names and details of agents to be provided. The International Chambers of Commerce Rules of Conduct on bribery also state that companies should make available for inspection records of the names and terms of employment of agents ("upon specific request by appropriate, duly authorized governmental authorities under conditions of confidentiality").
8. In the context of the EU,⁶ there is wide variation in ECA practice on what level of disclosure is required of agents and agent's commission. Two EU ECAs (Germany and Sweden) are among the few ECAs not to require any details whatsoever on agents, not even asking for the amount of commission to be paid. Other countries only ask for details of agency commission if a claim is made (Switzerland, Belgium and Luxembourg). Others only ask for information on commissions if they are above a certain percentage (in the case of Finland if it is above 15-20%).
 9. Good practice on agent's commission includes, at application form stage or before a final decision for support is made:
 - a. requiring the amount of commission to be disclosed
 - b. assessing whether level of commission is consistent with standard business practice
 - c. requiring purpose of commission to be clearly identified
 - d. requiring details of agent/s, including their name and address.Italy, Greece, Hungary, Portugal and the Netherlands currently implement this level of disclosure. The UK makes a distinction between commission that is covered by ECGD (on which all details are required) and commission that is not covered by ECGD (on which details are only required if it exceeds 5% of the total contract value). The Netherlands in particular, has very good practice in this area.
 10. Best practice on agent's commission was represented by ECGD's procedures introduced in May 2004 but subsequently modified, which included:
 - a. Requiring details of agent's commission (including the name and address of the agent) on all contracts and any related agreements whether supported by ECGD or not;
 - b. Requiring customers to state whether affiliates, such as a joint venture partner, parent company, sister company or subsidiary had employed an agent and if so requiring details of commission paid by such agents as well as on agents employed by the customer directly;
 - c. Requiring customers to give an explanation if commission was paid outside of the country where the project took place;
 - d. Requiring customers to state what the purpose of the commission was;
 - e. Requiring customers to state if there was any relationship between the agent and the buyer.

An example of why the ECGD's May procedures represent best practice is that they would have picked up significant warning signs about agent's commission in relation to the Nigeria LNG plant (the fact that agency commission was to be paid offshore in Monaco; that the agent was being paid very large sums although still

⁶ While Switzerland and Norway are not formally part of the EU, they have been included in this paper as European ECAs because they are geographically within Europe.

under 5% of the contract value – around \$50 million per contract; and that the agent was based in the UK not Nigeria). The ECGD's modified procedures would not have picked up these signs.

ECA-Watch recommendation:

The EU Council Working Group on Export Credits and EU Member States should develop a common position to push for disclosure on agent's commission on ALL transactions including on agent's commission paid by any other party involved in the transaction (regardless of percentage of contract, and regardless of whether the commission is included in the contract price or not) to be included in the new OECD Action Statement. They should also agree this as common EU ECA practice from early 2006. Export Credit Agencies cannot ensure that bribery is not taking place on projects they support if they do not require this level of disclosure. They also open themselves up to serious allegations of 'wilful blindness' towards bribery if they fail to ask the right questions with regard to agent's commission on projects they support.

B. Introducing a ceiling on commission payments for ECAs:

11. Few ECAs apply a ceiling on agent's commission. However, some do. Spain for instance states categorically that it will never cover commission that is above 5% of the value of total exports. The Netherlands says that it would only normally cover commission over 5% in exceptional circumstances and applies strict additional due diligence where commission is over 5%. Crucially, the Netherlands sets a financial limit alongside the 5% of Euros 4.5 million (10 million guilders). Canada meanwhile says that it "generally expects that agents' commissions will not exceed 10% of the contract price", although it recognises that it may vary according to market, and services provided by the agent.
12. The OECD floated the idea of introducing a cap on commissions for ECAs in its Best Practices paper and applying enhanced due diligence for commissions over 5% of the contract value. Given the size of the transactions that many ECAs cover, 5% of contract value can still be a very large sum indeed. Any percentage cap should therefore also include a set financial threshold as is done by the Netherlands. Furthermore, while enhanced due diligence should apply to commissions over this threshold, it needs to be spelled out clearly that this does not mean that no due diligence should apply under this threshold. As the previous point noted, due diligence on agent's commission should apply to all commission payments regardless of what percentage of the contract price they represent.
13. Such a cap would be a very useful multilateral tool for bringing down the size of commission payments and for reducing the risk of bribes. It may even be welcomed by some parts of the business community, since it would reduce their costs and provide them with a tool to enable them to resist requests for bribes more easily.

ECA-Watch recommendation:

The EU Council Working Group on Export Credits and Member States should agree a cap on commissions of 5% or Euro 4.5 million payable on transactions that they will support and push for a cap to be introduced in the new OECD Action Statement.

C. Withholding support for a transaction where there is suspicion or sufficient evidence of bribery

14. This is the area that the Commission for Africa picked up on as one of the most important indicators of whether ECA anti-corruption procedures are working and whether ECAs are complying with the OECD Action Statement on Combating Bribery in Officially Supported Export Credits.
15. As of January 2006, only three ECAs indicated that they had withheld support for a transaction because of suspicion of bribery (Canada, France and Norway). However, only a handful of ECAs say they would as a matter of practice withhold support where there is suspicion of bribery (Belgium, Denmark, Greece, and Luxembourg) while only one says that it is required practice to withhold support where there is suspicion (Norway).
16. Apart from Poland and the Slovak Republic, all European ECAs say they do either as a matter of practice or as required practice, withhold support for a transaction where there is ‘sufficient evidence’ of bribery. There is no set definition of the term in the Action Statement, so Export Credit Agencies are open to interpret it as they wish. More worrying, a very high threshold of what ‘sufficient evidence’ consists of appears to be emerging. Denmark for instance states that ‘sufficient evidence’ is “a matter to be decided by the courts”.⁷ The UK has said that the term applies first and foremost to where there is “an unappealable conviction in a court of law” but would also take into account “all material matters and all the evidence available to it whether it would be reasonable for ECGD to conclude that bribery had been so involved.”⁸ Hungary has said that ‘sufficient evidence’ usually refers to where “criminal proceedings have been commenced against the person participating in the transaction”.⁹ This suggests that ECAs are tending towards a position whereby they will only withhold support if court proceedings or a legal judgement for corruption are in place.
17. The nature of corruption cases is that it usually takes some years for allegations to emerge, and many more for them to come to court and to reach conviction stage. (In Lesotho, allegations first emerged in 1994; criminal proceedings began in 1999; the official taking the bribes was convicted in May 2002; and the first company was convicted of giving bribes in September 2002. There was thus an 8 year gap between the first suspicions of bribery and the first convictions). Given the reality of corruption cases, if ECAs are saying that they will not withhold support for a transaction until there are court proceedings or a legal judgement, this effectively means that ECAs are saying that in practice they are unlikely to withhold support for a transaction on grounds of bribery at all. Clearly, this is not the spirit of the Action Statement and gives credence to the Commission for Africa’s implied concern that the ‘voluntary measures’ of the Action Statement are not effective.

⁷ OECD Working Group on Export Credits and Credit Guarantees, “Responses to the 2004 Revised Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits – as of 21 January 2005”.

⁸ United Kingdom Hansard, 24/1/05, Column 37W.

⁹ OECD Working Group on Bribery, “Hungary: Phase 2”

18. At the very least, a definition of ‘sufficient evidence’ needs to be agreed that means when a full investigation has begun either in the country concerned or abroad. Law enforcement authorities in most countries need ‘reasonable grounds’ to open an investigation in the first place. So where there is an official investigation, ECAs should commit themselves to not supporting a project. However, this will still be closing the stable door after the horse has bolted, since enough evidence to open an investigation, as noted above, can take months if not years to emerge. ECAs need to commit to withholding support where there is suspicion of bribery until that suspicion has been properly investigated. A suspicion should be defined to include: a credible allegation having been received, and sufficient ‘red flags’ or credible signs to indicate the possibility of bribery.
19. The crux of the matter is to ensure that ECAs commit themselves to undertaking appropriately rigorous anti-corruption due diligence on projects to enable them to pick up on warning signs of bribery in the first place. ECAs are usually asked to support a project either just before a contract is awarded or just afterwards – at the time when bribery is most likely to take place and when appropriate due diligence would alert them to suspicions of bribery. This means: paying close attention to ‘red flags’ particularly on agents and joint venture partners; cross-checking with investigative authorities that a) no suspicious activity or money laundering reports b) no mutual legal assistance request and c) no allegation, has been received with regard to the transaction; asking detailed questions of applicants particularly on agents, subsidiaries and joint venture partners¹⁰; and having and using rights to inspect documents and conduct spot checks, particularly in high-risk projects (such as projects in particularly corrupt countries or industry sectors).
20. It is essential that ECAs have proper audit procedures to monitor whether customers are complying with the anti-bribery warranties that all ECAs now require, in line with the OECD Action Statement. Where this is more difficult, such as where an ECA is a private rather than a public institution, the ECA should explore ways of agreeing independent third parties to audit relevant documents relating to the award of the contract, including agency commission and services provided for such commission. Such audits are essential particularly where ‘red flags’ have been raised.

ECA-Watch recommendation:

The EU Council Working Group on Export Credits and Member States should agree that European ECAs will withhold support for a transaction where there is suspicion of bribery, as is done by Norway and other EU countries already, until that suspicion has been properly investigated and push for this to be included in the new OECD Action Statement. They should also agree a model of anti-corruption due diligence that European ECAs will employ on transactions and to adopt audit procedures to monitor compliance with anti-bribery warranties and to allow further evaluation of ‘red flags’ raised through due diligence.

¹⁰ This may include, as in the case of the UK ECGD’s May 2004 procedures, including joint venture partners and other affiliates (including parent and sister companies and subsidiaries) in the no-bribery warranty that all ECAs now ask their customers to sign.

D. Disclosure of suspicion or sufficient evidence of bribery to national investigative authorities

21. The failure to disclose suspicions or evidence of bribery to investigative authorities has been a constant concern of the OECD Working Group on Bribery in its evaluations (see Canada, France and Luxembourg in Annex 1). Export Credit Agency due diligence checks could be an important source of information on suspicions of bribery that could help allow for proactive enforcement of the OECD Convention on Combating Bribery.
22. Currently only four European ECAs (Czech Republic, the Netherlands, Spain and the UK) state that it is required practice to inform investigative authorities of suspicion or sufficient evidence of bribery before support is given. Two European ECAs state that they would not do this at all, and imply that this option is not available to them (Belgium and Luxembourg). Many European ECAs state that the option is available to them, but is not required practice (Austria, Denmark, Finland, France, Germany, Norway, Poland, Slovak Republic, Sweden, and Switzerland). Others say that they would only do so where there is sufficient evidence but not if it was only a suspicion (Greece, Hungary, Italy and Portugal).

ECA-Watch recommendation:

The EU Council Working Group on Export Credits and Member States should ensure that all European ECAs have the right procedures in place to enable their staff to report allegations of bribery to the national investigative authorities and agree that they will do so as a matter of required internal practice. They should push for this to be included in the OECD Action Statement.

E. Appropriate sanctions by ECAs: debarment

23. This is another concern of both the Commission for Africa and the OECD Working Group on Bribery. The Commission for Africa stated in its Executive Summary: “Firms who bribe should be refused export credits”.¹¹ The 1997 OECD Revised Recommendations on Combating Bribery meanwhile call for ‘public advantages’ to be denied as a sanction for bribery. The lead examiners in various Phase 2 evaluations have recommended that Member countries should consider refusing export credits in future transactions where there has been a conviction for bribery. Only two non-European ECAs (Canada and Australia) say that their required practice is to deny official support where there has been a conviction for corruption before the decision to provide support has been made.¹² Among European ECAs, 4 ECAs (Belgium, Greece, Italy, Luxembourg and Switzerland¹³) say that it is their practice, though not a required practice, to refuse such support where there has been a conviction, and (with the exception of Switzerland), if there is sufficient evidence of bribery. In the US, EXIM is

¹¹ Commission for Africa, *Our Common Interest: report of the Commission for Africa*, March 2005, p 12.

¹² Canada’s blacklisting policy is however conditional on whether a company has put in place international best practice anti-corruption management systems to detect and deter future acts of corruption. If a company previously convicted of corruption has put in place such a management system, EDC has indicated that it will not debar the company.

¹³ Switzerland says that it specifically has an appeals procedure in place for where refusal to provide support occurs.

- required by law to hold a list of companies convicted of violations of the Foreign Corrupt Practices Act (though it is not required to debar them automatically).
24. In the case of one European ECA (Switzerland), the lead examiners for the OECD Phase 2 evaluation specifically recommended that the authorities include a ban from export credits in revisions underway to public procurement law in that country. The opportunity for EU Member States to consider including permanent or temporary bans from export credits in any revisions to public procurement regulations has arisen particularly with regard to the EU Public Procurement Directive 2004/18/EC which must be implemented by the end of January 2006. Article 45 of this Directive states: *“any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract”*. The list includes participation in a criminal organisation, corruption, fraud or money laundering. ECAs are bound by the Directive in so far as they procure goods for themselves. They do not appear to be bound directly by it in terms of the services they provide to exporters. While the Directive is relatively weak because of the derogation allowed from the requirement laid out in Article 45 on grounds of ‘over-riding requirements in the general interest’, it is still important that ECAs follow suit and ensure that they are able to exclude companies convicted of corruption from ECA support. If they do not, it will create the anomaly whereby companies may be refused the right to tender for public procurement contracts in the EU but face no such ban when seeking export credit support to tender for such contracts abroad. This will open the EU to accusations of considerable hypocrisy.
 25. In light of the EU Directive, those ECAs that say they cannot refuse official support for a company convicted of corruption because their policies or regulations are transaction specific, will need to revisit their legal advice in this area. In the UK, legal advice received by the Corner House suggests that the ECGD could have a stricter and more formal debarment policy although the Department has long said that it cannot.
 26. In the past, ECAs have often expressed concern at how they would find out if a company has a conviction. In light of the EU directive, all European national authorities are considering holding such records. ECAs should thus be able to find out fairly easily whether there has been a conviction. Furthermore, they should follow the good practice of the UK in asking all applicants whether they have been convicted of corruption, freely admitted to corruption or been blacklisted by a multilateral development bank or bilateral aid agency (Italy has also now adopted this practice).
 27. Blacklisting is also important because most European ECAs state that their main sanctions involve withdrawing cover and requiring sums to be repaid where the ECA has paid out on a claim. This means in effect that companies only face a direct financial penalty for bribery if there was a loss on the project. It is not always the case that corruption causes losses to occur, and this therefore makes the financial sanctions applied somewhat arbitrary.

ECA-Watch recommendation:

The EU Council Working Group on Export Credits and Member States should agree that all European ECAs will, in line with the OECD Revised Recommendations, the Commission for Africa and the EU Procurement Directive 2004/18/EC, agree to refuse cover to companies who have, or whose senior executives have, been convicted of corruption, fraud, money laundering or participation in a criminal organisation. The EU Council Working Group and Member States should also agree that all European ECAs will ask on their application forms, whether applicants or their senior executives have been convicted of corruption, admitted to corruption or blacklisted by a multilateral development bank or bilateral aid agency. They should also push for both these measures to be included in the OECD Action Statement.

F. Requiring Revenue and Contract Transparency as a condition of cover

28. The Commission for Africa also highlighted the issue of transparency of revenue in the extractive industries as a key to improving governance in Africa. The Commission specifically recommended that *“Developed country governments, company shareholders and consumers should put pressure on companies to be more transparent in their activities in developing countries, and to adhere to international codes and standards for behaviour”*.

The Development Bank Reform and Authorisation Act of 2005 introduced by Senator Lugar in May 2005,¹⁴ if passed by the US Congress, would establish that it is a US policy goal that a government of a resource-dependent country that receives assistance from the multilateral development banks shall have in place or take the necessary steps to establish functioning systems for accurately accounting for all revenues received by a borrowing government in connection with the extraction or export of natural resources; transparency and independent auditing of revenues; transparent verification of government receipts against company payments; public disclosure of contracts between governments and companies; equal and full application of this approach to all extractive companies (including state-owned companies); and the establishment of a legal framework for disclosure of payments and contracts with a person.

29. The Lugar legislation also contains provisions that mandate that private sector clients of Multilateral Development Banks shall also disclose revenues and contracts.

30. These contracts often establish the means by which revenues can be illegitimately diverted by corrupt officials. Civil society organizations have also been concerned that contracts between governments and companies involved in extractive industries can supersede current, and discourage future, environmental and social laws and policies. This can undermine citizens’ rights to participate in policy making that affects their lives, livelihoods and environment. Contracts such as Production Sharing Agreements (PSAs), Power Purchase Agreements (PPAs), and Host Government Agreements (HGAs) contain the formulas necessary to calculate the amount and distribution of revenues generated by extractive, energy and infrastructure projects, which are crucial to determining whether a project will

¹⁴ “Development Bank Reform and Authorization Act of 2005”, (j) (3)

contribute to development and poverty reduction. The importance of disclosure of such contracts is an increasingly recognized by a wide spectrum of actors including civil society organizations, the World Bank's Extractive Industries Review,¹⁵ IMF¹⁶ and the US Government.¹⁷

ECA-Watch recommendation:

The EU Council Working Group on Export Credits and Member States should harmonise European Export Credit Agency transparency requirements with proposals emerging for standards for Multilateral Development Banks by the World Bank's Extractive Industries Review, the IMF and the US government. In particular, in order to meet the recommendations of the Commission for Africa, European ECAs should agree to require applicants for cover to publicly disclose contracts between and revenue payments from companies involved in extractive industries and host governments as a condition of cover. The EU should push for revenue and contract transparency to be included in the OECD Action Statement.

Conclusion

2005 presents a crucial opportunity for a consensus on preventing and combating bribery in Export Credits to be achieved, both in the EU and at the OECD. We urge the EU Council Working Group on Export Credits and Member States to push for a progressive harmonisation of EU Export Credit Agency procedures for dealing with corruption and bribery. We also urge Member States to agree to push for an enhanced OECD Action Statement in the Autumn and for the EU Council Working Group on Export Credits to help develop a consensus among EU Export Credit Agencies about what should be in the Action Statement.

¹⁵ Striking a Better Balance, The Final Report of the Extractive Industries Review, The World Bank Group, December, 2003

¹⁶ Draft Guide on Resource Revenue Transparency, International Monetary Fund, December 15, 2004

¹⁷ U.S. Department of Treasury Statement Concerning the World Bank Extractive Industries Review, August 3, 2004.

Annex 1: OECD Phase 2 assessments of ECAs¹⁸

Canada

“The lead examiners .. recommend that the Canadian authorities review the disclosure policy and procedure at ... EDC with a view to ensuring that there is a consistent and reliable framework for disclosing suspicions forthwith where, in the course of transacting business with a company, credible evidence arises that a violation of the CFPOA has occurred”.

Hungary

“The lead examiners recommend that the Working Group follow up with regard to the practical application of these new rules by officials in the Hungarian export credit agencies”.

France

“The lead examiners recommend that COFACE ... establish[s] procedures for alerting the Public Prosecutor’s Office when there are credible signs, in its business relations with an entity, that a violation of the Act of 30 June 2000 has occurred. They also recommend that these agencies set up policies to evaluate the eligibility of enterprises that have been found guilty in the past of acts of foreign bribery for the financial assistance provided by these agencies”.

Germany

“The lead examiners recognise the importance of the awareness of foreign bribery in the field of export credits, aid based development financing and publicly subsidised projects, and commend the efforts of the relevant agencies in this respect”.

Italy

“Given the contradictions between the views expressed by the SACE representatives interviewed, and the information and texts provided following the on-site visit, the lead examiners recommend that efforts be undertaken to promote the awareness among SACE officials of the foreign bribery offence and of related obligations existing under the law and the SACE code of ethics. They encourage SACE to further develop their internal guidelines to specifically address the issue of the foreign bribery offence, and to deal with client companies suspected of bribing foreign public officials, including revocation of credit and refusal of future applications for credit. The effectiveness of SACE’s code of ethics in preventing foreign bribery should be further monitored”.

Japan

“The lead examiners recommend that the Japanese authorities encourage agencies such as JBIC [and] NEXI ... to revisit their policies on dealing with applicants convicted of foreign bribery, to determine whether these policies are sufficient deterrence”.¹⁹

¹⁸ These do not include Phase 2 assessments for countries such as the US, Finland, Korea and Iceland which had little or no mention and no recommendations about export credit agency practice on bribery.

Luxembourg

*“The lead examiners feel that agencies charged with preventing corruption in the award of export credits and bilateral aid should take forceful measures to reduce the risks of bribery of foreign public officials, by ensuring that personnel responsible for screening applications and enforcing regulations are more fully aware of the offence. The lead examiners also recommend that procedures for alerting the prosecuting authorities should be put in place for personnel of these agencies who are not now subject to article 23.2 of the Code of Criminal Procedure”.*²⁰

Norway

*“The lead examiners ... recommend that further and more proactive action to raise awareness in the corporate sector be taken by institutions such as GIEK ... in view of their particularly important interaction with Norwegian enterprises involved abroad. These institutions should also further develop their internal procedures for dealing with foreign bribery cases in practice”.*²¹

Switzerland

*“In order to strengthen the overall effectiveness of the penalties for the offence of bribery of foreign public officials, the Lead Examiners recommend that the Swiss authorities envisage, in the context of the revision of the federal law on public procurement, measures to temporarily or permanently ban any company convicted of bribery of foreign public officials from participating in public procurement procedures, and that a similar treatment be envisaged for access to export credits”.*²²

¹⁹ NEXI officials during the site visit told the examiners that they would continue to deal with a company convicted of foreign bribery because they had no right officially to reject insurance.

²⁰ In particular, the examiners “questioned the adequacy of the human and technical resources available to Luxembourg DuCroire to verify how the anti-corruption clauses are applied in practice”, saying that the office had only four people to handle more than 2,000 credit insurance contracts a year, that the office had little information available for ensuring that business receiving credits were not or had not been involved in corrupt practices and that it received no information from other government departments or the judicial authorities about suspected bribes.

²¹ The examiners noted that GIEK representatives: were unsure of how and when sanctions should occur in practice; felt they had little power to find out if companies were involved in corrupt practices; suggested that additional information and training within GIEK was necessary to help them detect corruption cases; were unsure about how they could find out if a company had been sanctioned for acts of bribery; and admitted lack of clarity in GIEK rules about when the contract could be suspended (whether it was sentencing in the first instance, appeals or Supreme Court judgements).

²² Examiners noted that decisions at ERG about whether to withhold or withdraw a guarantee were based on “a discretionary not a automatic criterion”. The Examiners also questioned the ability of ERG to detect whether a guarantee has been linked to bribery or whether the applicant has been convicted of bribery. ERG was thinking of setting up a screening mechanism to enable its staff to be more vigilant with regard to high-risk projects. The OECD Survey says that ERG is introducing enhanced due diligence for sensitive transactions.

United Kingdom

“In light of the absence of additional administrative penalties upon persons and entities convicted of the bribery of a foreign public official, the lead examiners recommend that the UK considers revisiting the policies of agencies such as ... ECGD on dealing with applicants convicted of foreign bribery, to determine whether these policies are a sufficient deterrence. The lead examiners consider that the Working Group should follow up on the recent changes of the ECGD procedures to combat bribery and corruption with regard to any weakening of the rules that could reduce the ability of the ECGD to detect and prevent foreign bribery”.