

Strengthening the OECD Action Statement on Combating Bribery in Officially Supported Export Credits – a historic opportunity

ECA-Watch network

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Introduction

1. 2005 is a historic opportunity for the OECD to negotiate a new and strengthened Action Statement on Combating Bribery in Officially Supported Export Credits. The Commission for Africa specifically recommended that Export Credit Agencies improve their anti-corruption procedures, particularly by adopting and implementing measures outlined in the OECD's Best Practices on Combating Bribery paper from December 2003.¹ The G8 meanwhile committed in July 2005 to "strengthening anti-bribery requirements for those applying for export credits and credit guarantees".

2. The current Action Statement desperately needs updating because:
- a. the Action Statement is too vague about the precise measures that ECAs should be implementing;
 - b. there are several crucial areas which the Action Statement does not address, including debarment and disclosure requirements by ECAs on agents commissions, extractive industry revenues and investment contracts;
 - c. several ECAs have already gone beyond the Action Statement in various ways, which shows that good practice in implementing anti-corruption procedures can be achieved. The preservation of weak anti-corruption procedures by other ECAs, meanwhile, creates an unlevel playing field leading to competitive disadvantage for companies from countries where ECAs are adopting good practice;
 - d. There have been several corruption scandals in ECA-backed projects since the Action Statement was signed in December 2000, which suggest that ECA procedures are not yet strong enough to detect when bribery is occurring on projects to be supported.

3. The OECD developed a Best Practices to Deter and Combat Bribery paper in October 2003. This paper, and the question of whether or not there should be a new Action Statement have been on the table at the OECD ECG for nearly two years. It is vital that a strong new Action Statement lays out high standards and reflects the best practice that some ECAs are already implementing. It is also vital that there is adequate monitoring of how ECAs are implementing the Action Statement

¹ Commission for Africa, "Our Common Interest: report of the Commission for Africa", March 2005.

Enhancing the Action Statement: the key issues

I. Disclosure on agents and agents commissions

5. Agents commissions have long been recognised as a common route through which bribe payments are made. Export Credit Agencies cannot ensure that bribery is not taking place on projects they support if they do not require full disclosure on and have rigorous due diligence of agent's commission. 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.

6. Several ECAs already require fairly high levels of disclosure for agent's commission at application form stage or before a final decision for support is made. Italy, Greece, Hungary, Portugal and the Netherlands for instance:

- require the amount of commission to be disclosed;
- assess whether level of commission is consistent with standard business practice;
- require purpose of commission to be clearly identified;
- require details of agent/s, including their name and address.

The UK requires this information except on commission that is not directly supported by it and does not exceed 5% of the total contract value. The Netherlands in particular, has very good practice in this area.

7. ECA-Watch recommendation:

The Action Statement must include a commitment by Export Credit Agencies to require full disclosure on agent's commission on ALL transactions at application stage. Disclosure should be required regardless of percentage of contract, and regardless of whether the commission is included in the contract price or not. It should be also required on agent's commission paid by any other party involved in the transaction. Disclosure should require customers to state the purpose of the commission, the place of payment (including an explanation if commission is paid outside of the country where the project is to take place), and whether there is any relationship between the agent and the buyer.

II. Introducing a ceiling on commission payments for ECAs:

8. A few ECAs apply a ceiling on agent's commission. The Netherlands for instance says that it would only normally cover commission over 5% in exceptional circumstances and applies strict additional due diligence where commission is over 5%. The Netherlands also sets a financial limit alongside the 5% of Euros 4.5 million (10 million guilders).

9. In its Best Practices paper, the OECD floated the idea of introducing a cap on commissions for ECAs 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. ECA-Watch believes that due diligence should take place on all commission regardless of the percentage of contract value, and that enhanced due diligence should apply according to risk factors, of which the percentage value of a commission is only one indicator. However, ECA-Watch also believes that introducing a cap could be a very useful multilateral tool for bringing down the size of commission payments and for reducing the risk of bribes.

10. ECA-Watch recommendation:

The Action Statement should commit ECAs not to provide support to agent's commission that exceeds 5% or US \$5 million/Euro 4 million payable on transactions that they will support.

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

11. The extent to which ECAs refuse support for projects on grounds of suspicion or evidence of bribery is a key test of their commitment to combating bribery in export credits, as was noted by the Commission for Africa.

12. Most ECAs claim to withhold support where there is 'sufficient evidence' of bribery. However, it is emerging that ECAs are applying a very high threshold for what 'sufficient evidence' consists, with several ECAs suggesting that 'sufficient evidence' means a court decision, or initiation of court proceedings.² Given that corruption cases usually take years to come to court, and given that ECAs are involved in projects at a very early stage when a conviction is highly unlikely, this is totally unsatisfactory. Law enforcement authorities in most countries need 'reasonable grounds' to open an investigation in the first place. A sensible definition of 'sufficient evidence' would therefore be where an official investigation has begun. However, this will still be closing the stable door after the horse has bolted, since enough evidence to open an investigation can take months if not years to emerge.

13. If ECAs are going to commit to stamping out bribery in projects they support, they need to agree to withhold support where there are detailed and credible suspicions of bribery until that suspicion has been clarified beyond doubt or properly investigated. 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). 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) and one ECA (Norway) says that

² Denmark states that 'sufficient evidence' is "a matter to be decided by the courts" (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"). 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." (United Kingdom Hansard, 24/1/05, Column 37W). Hungary has said that 'sufficient evidence' usually refers to where "criminal proceedings have been commenced against the person participating in the transaction" (OECD Working Group on Bribery, "Hungary: Phase 2")

it is required practice to withhold support where there is suspicion. This is clearly best practice and should be adopted by all ECAs.

14. ECA-Watch recommendation:

The Action must include a commitment by ECAs to withhold support where there are detailed and credible suspicions of bribery and where an official investigation has been opened.

IV. Anti-corruption due diligence procedures

15. In order to prevent bribery, ECAs need to have in place appropriately rigorous anti-corruption due diligence that will pick up on warning signs of bribery. 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; asking detailed questions of applicants particularly on agents, subsidiaries and joint venture partners; 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).

16. ECA-Watch recommendation:

The Action Statement should commit ECAs to having in place rigorous anti-corruption due diligence procedures and audit procedures that will allow spot checks on customer documentation.

V. Disclosure of suspicion or sufficient evidence of bribery to national investigative authorities and whistleblower protection

17. 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.³ 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. Many ECAs still do not inform investigative authorities of suspicions or evidence of bribery as required practice. It is important that ECAs are committed to referring suspicions and evidence of bribery automatically and also that they have proper procedures in place to enable reports to be made in confidence by both internal and external whistle-blowers.

18. ECA-Watch recommendation:

The Action Statement should commit ECAs to informing national investigative authorities of suspicions or evidence of bribery as a matter of routine and required practice, and to put in place appropriate whistle-blower procedures to enable people both within the Export Credit Agency and outside it to raise concerns about corruption in projects supported by the ECA.

³ See OECD Phase 2 reports particularly for Canada, France and Luxembourg.

VI. Appropriate sanctions by ECAs: debarment

19. The Commission for Africa stated in its Executive Summary: “Firms who bribe should be refused export credits”.⁴ 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 OECD Working Group on Bribery Phase 2 evaluations have, in line with the Recommendations, suggested that Member countries should consider refusing export credits in future transactions where there has been a conviction for bribery.

20. Two ECAs (Canada and Australia) say that it is 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 (although in the case of Canada, a company is able to escape this sanction by putting in place an anti-corruption management system). Several other ECAs (Belgium, Greece, Italy, Luxembourg and Switzerland⁵) say that it is their practice, though not a required practice, to refuse support in these circumstances.

21. International experience shows that debarment is a powerful deterrent for combating corruption and an important sanction. Debarment is used by the Multilateral Development Banks. It is also used by the US government (though not in practice by US Exim, despite the fact that Exim is required to hold a list of companies convicted of violations of the Foreign Corrupt Practices Act). From January 2006, EU Member States will have to implement a Public Procurement Directive (2004/18/EC) that requires contracting authorities to exclude individuals and companies convicted of corruption, fraud, money laundering and participation in a criminal organisation, which effectively introduced debarment into EU countries.

22. ECAs will be increasingly out of step with emerging international best practice in this area if they do not commit to debar companies convicted of corruption for a set period of time. Several ECAs suggest that they cannot refuse official support for a company convicted of corruption because their policies or regulations are transaction specific. However, legal advice in the UK suggests that the UK’s ECA could, for instance, have a stricter and more formal debarment policy than it has previously said it could have, and it seems likely that the same would hold true for other countries taking this line.

23. The easiest way for ECAs to find out about convictions is to follow the good practice adopted by the UK and now also by Italy, of 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.

24. ECA-Watch recommendation:

The Action Statement should include a commitment by ECAs to refuse cover

⁴ Commission for Africa, *Our Common Interest: report of the Commission for Africa*, March 2005, p 12.

⁵ Switzerland says that it specifically has an appeals procedure in place for where refusal to provide support occurs.

to companies who have, or whose senior executives have, been convicted of corruption or bribery. ECAs should also commit to ask on their application forms whether applicants, senior executives, agents, subsidiaries or joint venture partners have been convicted of corruption, admitted to corruption or blacklisted by a multilateral development bank or bilateral aid agency.

VII. Requiring Revenue and Contract Transparency in the extractive industry sector as a condition of cover

25. Revenue transparency in the extractive industry sector has been highlighted by various international initiatives, including the Commission for Africa, the Extractive Industries Transparency Initiative and most recently the US Senate Foreign Relations Committee, as a crucial way of preventing the loss through corruption or misuse of the revenues from extractive industries. Transparency of contracts in relation to the sector is equally important. Investment 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 abet corruption or contribute to development and poverty reduction. Required ex-ante transparency of contracts and of resulting revenues to host governments is supported by a growing number of civil society organizations involved in the international Publish What You Pay campaign. ECAs will be left falling behind international best practice if they do not take measures to ensure such transparency in extractive industry projects that they support.

26. ECA-Watch recommendation:

The Action Statement should commit ECAs to develop transparency requirements with regard to extractive industries in line with emerging standards for Multilateral Development Banks as recommended by the World Bank's Extractive Industries Review, the IMF and the US legislature and government. It should commit ECAs to require applicants for cover to publicly disclose investment contracts between and revenue payments from companies involved in extractive industries and host governments as a condition of cover.

VIII. Monitoring implementation

27. The OECD Working Party on Export Credits and Credit Guarantees Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits, while extremely useful, is in danger of becoming a box-ticking exercise that does not always reflect reality on the ground. This means that there is insufficient monitoring of how ECAs are implementing the Action Statement. Some Phase 2 reviews by the OECD Working Group on Bribery have looked in detail at ECA practice and made recommendations for improvements. However, not all reviews have done so, nor have the areas they have looked at been consistent. Phase 2 reviews would be a very good place to monitor implementation of the Action Statement in practice and how ECAs have responded to particular allegations.

28. ECA-Watch recommendation:

The OECD Working Groups on Bribery and Export Credits should agree a model for more comprehensive monitoring of implementation of the Action Statement, including developing a detailed set of questions for ECAs for the remaining Phase 2 Evaluations, and as part of on-going monitoring and evaluation of those countries that have already been reviewed.