

**Enhancing the ECG's Action Statement on Bribery
and Officially Supported Export Credits (December 2000)**

**Submission to the OECD - ECG
Transparency International
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SUMMARY

1. TI believes that the Action Statement needs to be materially enhanced. Enhancement is a complex process, and requires not only changes to the Action Statement wording, but also agreement on how the changes will be implemented in practice in a uniform manner by all ECAs.
2. TI recommends a 2 stage approach to reflect this complexity:
 - a) That the ECA Working Group agree on an enhanced Anti-Corruption Action Statement that contains the agreed principles.
 - b) That the ECA Working Group agree that the detailed procedures and clarifications necessary to support such an upgraded Action Statement be drafted and agreed within a specified time frame. A maximum of 12 months would be adequate to agree these procedures.
3. The specific principles which TI believes need to be included in the draft Action Statement in upgraded form include the following:
 - a) upgraded undertakings to be provided by the applicant;
 - b) upgraded due diligence to be undertaken by the applicant;
 - c) increased disclosure by the applicant, particularly in relation to agents;
 - d) disclosure by the ECA of the name of applicants, the amount applied for, and the country into which the goods or services will flow;
 - e) upgraded due diligence by the ECA, which is divided into two categories:
 - i) standard due diligence,
 - ii) enhanced due diligence;
 - f) clear remedies to be implemented by the ECA (e.g. refusal of cover, suspension of cover, debarment or other remedy).
4. The detailed best practice guidelines which TI believes should be agreed by the ECAs within a specified period (e.g. 12 months), include:
 - a) the due diligence which an applicant would be expected to have undertaken;
 - b) the anti-bribery procedures which an applicant would be expected to have implemented;
 - c) the actions which should be taken as part of the ECA's standard due diligence;
 - d) the actions which should be taken as part of the ECA's enhanced due diligence;
 - e) the circumstances which should lead to enhanced due diligence being used;
 - f) the circumstances and necessary evidence which could lead to refusal of cover, suspension of cover or other remedy by the ECA, and the actual remedies to be implemented in different circumstances;
 - g) the implementation of a fair, proportionate and transparent debarment system.
5. These suggestions are elaborated in further detail below.

THE UNDERLYING PRINCIPLES OF AN EFFECTIVE ANTI-BRIBERY SYSTEM

6. In order to be effective, anti-corruption mechanisms need to comply with the following principles:
 - a) They should be **comprehensive**. All material areas of risk need to be adequately addressed.
 - b) They should be **fair**. If application or enforcement procedures place an unfair burden on business, business will be damaged, and ECAs will cease to perform their role of supporting export transactions.
 - c) They should be **proportionate**. Small or low risk transactions should not attract the same level of due diligence as large or high risk transactions. Minor or accidental transgressions should not attract the same level of penalty as major, or deliberate or reckless breaches.
 - d) They should be **transparent**. All interested parties should be aware in advance of the extent and nature of anti-corruption mechanisms and enforcement procedures.
 - e) They should be **uniformly applied**. ECAs should apply their procedures uniformly so as to ensure a level playing field, not only between applicants to one ECA, but also between applicants to different ECAs.

ETHICAL COMPANIES WANT ECAS, BANKS AND OTHER ORGANISATIONS INVOLVED IN PROJECTS TO ENHANCE ANTI-CORRUPTION MECHANISMS

7. Responsible business will support enhanced anti-corruption mechanisms being introduced by the ECAs which fall within the above parameters. From the frequent discussions which TI has had with many international companies and business associations, it is clear that business is becoming increasingly concerned about corruption. Many companies have adopted effective anti-corruption policies, and are therefore being compelled to withdraw from some corrupt markets. These markets may therefore only be accessible to companies which have not adopted anti-corruption policies.

THE ECA WORKING GROUP SHOULD AGREE ON AN ENHANCED ACTION STATEMENT AND A SET OF GUIDELINES FOR IMPLEMENTING IT

8. The Action Statement has fallen significantly behind what would be regarded as international best practice, and material enhancement is necessary. It is not sufficient merely to change the wording of the Action Statement. It is necessary also to agree guidelines that will help ECAs in their implementation, and guarantee uniformity across ECAs. The development of these guidelines could also include adequate consultation between interested parties. In order to give time to prepare these guidelines, TI has proposed the 2-stage approach referred to in paragraph 2 above.

TI'S RECOMMENDATIONS FOR ENHANCEMENT OF THE ACTION STATEMENT AND THE DEVELOPMENT OF GUIDELINES

9. In order to facilitate such approach, TI has submitted with this document suggested amendments to the Action Statement so as to incorporate the principles which TI believes are necessary. We have also referred in the Action Statement to the issues which we believe need to be agreed in detail over a specified period. References to the corresponding ordinals of the amended Action Statement are indicated in each paragraph.
10. In making its proposed amendments to the Action Statement, TI is not maintaining that the wording it has used is perfect, or that the order of the provisions is optimum. We have put forward the amendments for discussion in the belief that the underlying principles are vital, but with full realisation that the detailed wording and order could be improved.
11. TI comments below in summary form on the draft amendments to the Action Statement, and on the proposed development of best practice guidelines.

Undertakings/declarations by the applicant

12. The applicant must be required to provide adequate anti-corruption undertakings/declarations to the ECAs. These have several effects:
 - a) They form part of the contractual basis on which the credit is provided. Breach of the undertakings/declarations can lead to termination of the cover, or other remedy by the ECA.
 - b) They encourage best practice by the applicant, in requiring it to undertake due diligence, and impose adequate anti-corruption controls.
13. TI's suggestions in relation to these declarations are contained in **paragraph 4b)** of the amended draft Action Statement.

4b)i) It is appropriate that the applicant gives an anti-corruption declaration on behalf of itself and its affiliated companies. Affiliated companies form part of the same group, and ECAs should not support applicants which do not impose strict anti-bribery policies throughout their group.

4b)ii)&iii) Applicants should perform due diligence on their agents, joint venture and consortium partners, and should operate appropriate anti-bribery controls. An applicant does not normally have management control over agents, joint venture and consortium partners, major sub-contractors, and anyone acting on its behalf. Therefore, the applicant needs to ensure that these parties implement effective anti-bribery policies by a combination of due diligence and contractual controls. This lack of management control is recognized by the qualification of the declaration in paragraph 4b)ii) by the words "to the best of our knowledge and belief". However, these words are defined in such a way as to require adequate due diligence by the applicant. The specified controls in paragraph 4b)iii) include imposing prohibitions on bribery on these entities, and appropriate monitoring and enforcement. Due diligence is an extremely complicated area, and both applicants and ECAs would benefit by the development by ECAs of due diligence guidelines.

4b)iv) The applicant should be required to report instances of bribery, both to the appropriate authorities and to the ECA. Corruption can only be dealt with if it is reported.

4b)v) ECAs should obtain the right to inspect and audit relevant information. Corruption is hidden. The right of the ECA to audit the relevant books and records is a vital tool. It is preventive, as the knowledge that the ECA may audit helps to deter bribery. It also aids enforcement, as the ECA will need to inspect the records in relation to any enforcement action. Corruption can often be undertaken by agents, joint venture partners etc., so it is vital that the ECA's right to audit extends also to these parties. The applicant can obtain such a right in its contracts with these entities.

The applicant's anti-bribery procedures

14. Applicants should be required to have implemented anti-bribery procedures, and to submit copies of them to the ECA. It is now usual for reputable companies to adopt written anti-bribery procedures. **Paragraph 4c)** requires the applicant to disclose a copy of these procedures to the ECA. Upon receipt of these procedures, the ECA should compare them against best practice. Both applicants and ECAs would benefit by the development of best practice guidelines in relation to anti-bribery procedures. Many such procedures exist (e.g. TI's "Business Principles for Countering Bribery"), and the ECAs could recommend compliance with these principles as a minimum standard.

Disclosure of the applicant's due diligence and relevant information relating to agents

15. **(Paragraph 4d)** ECAs should obtain the right to require disclosure by the applicant of due diligence findings. A responsible applicant will always undertake due diligence on its agents, joint venture and consortium partners, major sub-contractors, and anyone acting on its behalf. It will therefore be possible for the applicant to disclose these details to the ECA. Requiring the applicant

to disclose all due diligence may be unnecessarily onerous. However, the ECA should obtain the right to require disclosure (e.g. in the event of enhanced due diligence by the ECA).

16. Applicants should always be required to disclose to the ECA details in relation to its agents, and the agents of its affiliated entities, joint venture or consortium partners, or major sub-contractors. The risk of bribery through agents is well documented. **Paragraph 4d** specifies minimum disclosure in this regard.

Disclosure of debarments and convictions, and their effect on cover

17. **Paragraph 4e).** Applicants should be required to disclose existing debarments, charges, convictions or other criminal proceedings. This obligation should extend to affiliated entities, agents, joint venture or consortium partners, major sub-contractors, anyone acting on its or their behalf, or any of their senior executives. If there have been any such convictions or debarments, this should lead to enhanced due diligence by the ECA, and the possibility of rejection of cover. This type of self-reporting (together with the declaration under paragraph 4b)) should ease data protection concerns in many countries.
18. **Paragraph 4f).** ECAs should not provide cover to applicants who are debarred by the World Bank or any other multi-lateral or bi-lateral financial institution until after expiry of such debarment.

Disclosure by ECAs of specified details in relation to applications

19. **Paragraph 4g).** We recommend that all ECAs adopt what is already excellent practice in several ECAs, namely the public disclosure, by the ECA, of the name of applicants, the approximate amount applied for, details of the goods or services, and the country into which the goods or services will flow. This information should at latest be made publicly available after the support has been approved, but we would recommend that this disclosure is made at the time of application. The internet offers an easy technical solution for such a practice.

Due diligence by ECAs

20. **Paragraph 4j).** We believe that all applications for cover should be subject to **standard due diligence** by ECAs, and that certain applications should be subject to **enhanced due diligence**. Standard due diligence should be performed at the moment of application for cover. Enhanced due diligence should be performed when there is a higher corruption risk in the project concerned. For guidance on this point we refer back to our contribution of April 22nd on the subject.
21. The following situations should result in enhanced due diligence:
 - a) Debarment of a party connected with the project. This should include debarment not only by the World Bank or other multilateral or bilateral financial institutions, but also by countries' debarment systems as these are increasingly being implemented.
 - b) Conviction for bribery of a party connected with the project.
 - c) Potentially suspicious circumstances. By way of example, these could include the following:
 - Excessive agent's commissions.
 - Unexplained, vague or open-ended agent's tasks.
 - Public allegations or credible information that indicate the potential presence of corruption.
 - The project has a high market value or represents a high market stake (in terms of the applicant's total earnings, or market share).
 - Use of subsidiaries, intermediaries or other third parties under obscure conditions.
 - The project is located in a country known for its high prevalence of corruption.
22. In order to ensure uniform implementation of these mechanisms across ECAs, TI recommends the development of guidelines in relation to:
 - a) standard due diligence;
 - b) enhanced due diligence;
 - c) the issues of potential concern which should lead to enhanced due diligence.

ECAs remedies in the event of corruption

23. **Paragraph 4k). Before credit or support is granted.** In cases where there is credible evidence of corruption, it is appropriate for the ECA to take action, such as suspend processing of the application, refuse coverage, credit or other support, or take other corrective or preventive actions. This should be complemented by the obligation to submit the information to the appropriate authorities.
24. It is important for ECAs to develop a common understanding of what is meant by "credible" evidence. For guidance on this point we refer back to our contribution of April 22nd on the subject. We recommend that ECAs agree guidelines on this point. We also recommend that ECAs agree guidelines on what action an ECA would take in specified circumstances so as to ensure transparency, and uniform application of ECA's procedures.
25. **Paragraph 4l). After credit or support has been granted.** Credible evidence should lead to an appropriate remedy such as denial of coverage or refund, and information should be disclosed to the appropriate authorities. It is vital that the remedial mechanisms of the ECAs are fair, proportionate and transparent. They should take account of mitigatory factors such as the genuine steps taken by the applicant to prevent bribery, the genuine steps taken by the applicant to deal with the bribery once discovered, and whether or not the applicant itself discovered and reported the bribery. As stated above, guidelines should be developed on what evidence is necessary, and what results would follow. It is also important to consider bribery while the contract is being executed. This is a common form of corruption that is concealed under the appearance of a clean procurement process.

Debarment by ECAs

26. **Paragraph 4m).** Debarment is increasingly being used internationally as a vital weapon against corruption. ECAs should develop and implement a fair, proportionate and transparent debarment system which will be consistently implemented by all ECG Member Countries.

Equivalent action by non-OECD ECAs

27. **Paragraph 4n).** It is an understandable concern by applicants that their competitors obtaining export credit cover from non-OECD ECAs may not be subject to the same anti-bribery controls as an OECD applicant. So as to help achieve a level international playing field, we consider it desirable that the ECG Member Countries encourage the official export credit or export credit insurance providers of non-ECG Member Countries to adopt equivalent measures to those above.

Independent Project Monitoring

28. **Paragraph 4o).** Corruption is concealed. It is very difficult for anyone not directly involved in a project to be able to identify corruption. Increasing consideration is being given internationally to the benefits of independent project monitoring. The monitor would represent all the parties involved, including the project owner, banks, ECAs and the exporter. We recommend that the ECG Member Countries consider whether independent project monitoring can help prevent bribery, and, if so, that they develop and implement monitoring procedures jointly with other interested parties such as multi-lateral and commercial banks.

TI welcomes the opportunity to discuss these points in detail with the Working Group. TI would also welcome the opportunity to be involved in the detailed drafting of the proposed best practice guidelines.

ANNEX

AMENDED ACTION STATEMENT

4. To take appropriate measures to deter bribery in officially supported export credits and, in the case that bribery as defined by the Convention was involved in the award of the export contract, to take appropriate action, including:
- a) All official export credit and export credit insurance providers shall inform applicants and exporters requesting support about the legal consequences of bribery in international business transactions under its national legal system including its national laws prohibiting such bribery.
 - b) The applicant/exporter shall be required to provide the following declarations to the official export credit and export credit insurance provider:
 - i) Neither it, nor any affiliated entity¹, has engaged, or will engage, directly or indirectly, in bribery in relation to the award or execution of the export contract or any related agreement.
 - ii) It has undertaken appropriate due diligence² in relation to its agents, joint venture and consortium partners, major sub-contractors, and anyone acting on its behalf³. To the best of its knowledge and belief⁴, none of these entities has engaged, or will engage, directly or indirectly, in bribery in relation to the award or execution of the export contract or any related agreement.
 - iii) It maintains appropriate anti-bribery controls. Pursuant to these controls, (1) it shall require its employees, affiliated entities, agents, joint venture and consortium partners, major sub-contractors, and anyone acting on its or their behalf, not to engage, directly or indirectly, in any bribery in relation to the award or execution of the export contract or any related agreement; (2) it shall take reasonable steps to monitor compliance with that requirement; and (3) it shall take appropriate action against anyone found to have engaged, directly or indirectly, in any bribery.
 - iv) If it becomes aware that any entity or person has engaged, directly or indirectly, in any bribery in relation to the award or execution of the export contract or any related agreement, it shall promptly notify the appropriate authorities and the official export credit and export credit insurance provider, and shall supply full details of the bribery.
 - v) It will permit the official export credit or export credit insurance provider to inspect and audit its relevant accounts and records, and those of its affiliated entities, agents, joint venture and consortium partners, sub-contractors, and anyone acting on its or their behalf.
 - c) The applicant/exporter shall provide a written copy of its anti-bribery procedures⁵ to the official export credit and export credit insurance provider.
 - d) The applicant/exporter shall be required upon request to supply details of the due diligence referred to in paragraph 4b)ii) to the official export credit or export credit insurance provider. The applicant/exporter shall in all cases be required to disclose to the export credit or export credit insurance provider the following details in relation to any agent acting on its behalf, or on behalf of any affiliated entity, joint venture or consortium partner, or major sub-contractor in connection with the transaction:
 - i) the name and address of such agent;
 - ii) the amount and currency of commissions and fees payable or paid to the agent in connection with the transaction (whether or not the commission or fees are covered by the export credit);
 - iii) the services for which these commissions and fees are being paid;
 - iv) details of the bank account into which these commissions and fees are to be paid;
 - v) whether there is any known direct or indirect connection between the agent and any representative of the buyer or a public official in the buyer's country;
 - vi) whether the amount of the commission payable to the agent is a legitimate and reasonable amount for the services in question.

- e) The applicant and exporter shall be required to disclose to the official export credit and export credit insurance provider (i) any debarment of the applicant or exporter, or any affiliated entity, agent, joint venture or consortium partner, major sub-contractor, or anyone acting on its or their behalf, or any of their senior executives⁶ by the World Bank or any other multi-lateral or bi-lateral financial institution, or any national government entity, as a result of having engaged in bribery, and (ii) any conviction, charge or civil or administrative determination, penalty, order or settlement involving the applicant or exporter, or any affiliated entity, agent, joint venture or consortium partner, major sub-contractor or anyone acting on its or their behalf, or any of their senior executives for violations of laws against bribery of foreign public officials of any country, that have occurred in a seven year period preceding the application.
- f) If an applicant or exporter has been debarred by the World Bank or any other multi-lateral or bi-lateral financial institution as a result of having engaged in bribery, no application for export credit or export credit insurance by such applicant or exporter shall be approved until after expiry of such debarment.
- g) The official export credit and export credit insurance provider shall make publicly available at the time of the application the name of the applicant for cover, the approximate amount applied for, an outline of the goods and services to be provided, and the country to which the goods or services will be supplied.
- h) The applicant, exporter and other parties receiving or benefiting from support remain fully responsible for the proper description of the international business transaction and the transparency of all relevant payments.
- i) The applicant, exporter and other parties involved in the transaction remain fully responsible for compliance with all applicable laws and regulations, including national provisions for combating bribery of foreign public officials in international business transactions.
- j) All official export credit and export credit insurance providers should apply standard due diligence⁷ in relation to all export credit and export credit insurance applications. Enhanced due diligence⁸ should be applied if an applicant, exporter, or any affiliated entity, agent, joint venture or consortium partner, major sub-contractor or anyone acting on its or their behalf, or any of their senior executives has been: (i) debarred by the World Bank or any other multi-lateral or bi-lateral financial institution, or any national government entity, as a result of having engaged in bribery, (ii) found guilty in a national court, criminally charged, or the subject of a civil or an administrative determination, penalty, order or settlement, for violations of laws against bribery of foreign public officials of any country in a seven year period preceding the application. Enhanced due diligence will also be applied if standard due diligence reveals any issues of potential concern⁹.
- k) If, prior to approval of the credit, cover or other support, there is credible evidence¹⁰ that bribery was, or may be, involved in the award of the export contract, the official export credit or export credit insurance provider, or their guardian authority as provided under national law, shall promptly inform the appropriate national investigative authorities, in accordance with the legal system of each ECG Member Country, and shall take appropriate action¹⁰, such as suspending processing of the application, refusing to approve credit, cover or other support, or any other corrective or preventive action.
- l) If, after credit, cover or other support has been approved, there is credible evidence that bribery was, or may be, involved in the award or execution of the export contract, the official export credit or export credit insurance provider, or their guardian authority as provided under national law, shall promptly inform the appropriate national investigative authorities, in accordance with the legal system of each ECG Member Country, and take appropriate action, such as denial of payment or indemnification, refund of sums provided, or any other corrective or preventive action.
- m) The ECG Member Countries will develop and implement a fair, proportionate and transparent debarment system which will be consistently implemented by all ECG Member Countries¹¹.

- n) The ECG Member Countries will encourage the official export credit or export credit insurance providers of non-ECG Member Countries to adopt equivalent measures to those above.
- o) The ECG Member Countries will consider whether independent project monitoring can help prevent bribery, and, if so, will develop and implement monitoring procedures.

These actions are not prejudicial to the rights of other parties not responsible for the illegal payments.

Footnotes

1. As used in this Action Statement, "affiliated entity" means (a) any company that holds, directly or indirectly, a majority of the shares or the voting rights of the applicant or exporter, and (b) any other company the majority ownership of whose shares or voting rights is held by the applicant or exporter, and (c) any company in the same group of companies as those referred to in (a) and (b).
2. ECG Member Countries will agree best practice guidelines in relation to the due diligence which an applicant would be expected to have undertaken.
3. As used in this Action Statement, persons acting on behalf of an applicant and/or exporter shall be understood to include, but not be limited to, employees, representatives and consultants.
4. As used in this Action Statement; "to the best of the applicant/exporter's knowledge and belief" means that the person signing the declaration on behalf of the applicant/exporter has:
 - a) made reasonable enquiries so as to satisfy himself that the matters being declared are correct; and
 - b) is not in possession of any facts or information which should have put him on notice that the matters being declared are incorrect; and
 - c) honestly believes that the matters being declared are correct.
5. ECG Member Countries will agree best practice guidelines in relation to the anti-bribery procedures which an applicant would be expected to have implemented.
6. As used in this Action Statement, "senior executive" means a director of the board, or a person with senior management responsibility over the whole or any part of the export contract or related agreement.
7. ECG Member Countries will agree best practice guidelines for standard due diligence.
8. ECG Member Countries will agree best practice guidelines for enhanced due diligence.
9. ECG Member Countries will agree best practice guidelines in relation to the issues of potential concern which should lead to enhanced due diligence.
10. ECG Member Countries will agree best practice guidelines in relation to what would constitute credible evidence, and the resultant remedial action which could be taken.
11. ECG Member Countries will agree best practice guidelines in relation to a fair, proportionate and transparent debarment system.

(TI Explanatory note: it is suggested that the Action Statement incorporates a deadline for agreement of the best practice guidelines referred to in notes 2, 5, 7-11; for example October 2006).