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### Working Party on Export Credits and Credit Guarantees

#### BRIBERY AND OFFICIALLY SUPPORTED EXPORT CREDITS: BEST PRACTICES TO DETER AND COMBAT BRIBERY IN OFFICIALLY SUPPORTED EXPORT CREDITS

3 (afternoon) and 4 November 2003

*This document is for consideration at the 100th Meeting of the Working Party on Export Credits and Credit Guarantees to be held on 3 (afternoon) and 4 November 2003.*

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## **BRIBERY AND OFFICIALLY SUPPORTED EXPORT CREDITS: BEST PRACTICES TO DETER AND COMBAT BRIBERY IN OFFICIALLY SUPPORTED EXPORT CREDITS**

### **I. Introduction**

1. At the 98<sup>th</sup> Meeting of the Working Party on Export Credits and Credit Guarantees (ECG) held on 23 April 2003, ECG Members considered the latest update of the responses to the *Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits* [TD/ECG(2003)7] in the context of a presentation from Transparency International (TI) which presented its ideas on how export credit agencies could improve their policies and practices to deter and combat bribery. At that Meeting, Members agreed that the Secretariat should prepare a proposal on “Best Practices” for consideration at their November 2003 Meeting which would draw upon, *inter alia*, the ideas raised by TI (see attached at Annex ).

2. Currently, the obligations contained in the ECG’s Action Statement on Bribery represent the “least common denominator” for Members’ policies and practices in relation to deterring and combating bribery. These obligations can be summarised as follows:

- Members shall inform applicants requesting official export credit support about the legal consequences of bribery in international business transactions.
- Members shall invite applicants for official export credit support to provide a “no bribery” undertaking/declaration.
- If there is sufficient evidence that bribery was involved in the award of an export contract, Members shall refuse to provide official export credit support.
- If, after official export credit support has been granted, the involvement by the recipient of the support is proven, Members shall take “appropriate actions” such as the denial of payment or indemnification, requiring support provided by members to be refunded and/or referral of the evidence of such bribery to the appropriate national authorities.

3. A review of Members’ current policies and practices shows that several Members’ systems are still in the process of being modified to meet the basic commitments of the Action Statement. However, the vast majority of Members have adopted policies and practices which exceed the commitments of the Action Statement in terms of scope of measures taken and/or the rigour applied to these measures.

4. Against the above background, the approach taken in drawing up the following list of potential Best Practices was, in the first instance, to identify those practices exceeding the minimum requirements of the Action Statement that have already been adopted by a majority of Members. Consideration was also given to measures advocated by TI that: (1) fall within the mandate of institutions providing officially supported export credits; (2) do not impose an unreasonable administrative burden and (3) have already been adopted by some Members. Finally, with respect to “appropriate actions”, a number of Members’ responses indicated the *ability* to take a certain action that was not necessarily adopted as an official practice; in general, the Best Practices proposed below imply that these actions should be made official practice.

## II. Proposed Best Practice

5. The following list is presented for Members' consideration:

- With respect to the requirement **to inform applicants** requesting support about the legal consequences of bribery in international business transactions:

### *Proposed Best Practice*

- (1) Members should inform applicants requesting support about the national legal consequences of bribery in international business transactions **in writing** and **at the time of the application** for official export credit support.

Comment: *This is the current practice of almost all Members.*

- With respect to the invitation to provide a “**no bribery**” declaration:

### *Proposed Best Practice*

- (2) Members should **require, as a pre-requisite for obtaining official support**, the applicant and/or the exporter to provide an undertaking/declaration that neither they, nor anyone acting on their behalf, have been engaged or will engage in bribery in the transaction.

Comment: *This is the current practice of almost all Members.*

- (3) The undertaking/declaration should be required for applications for any type of official support **including short-term support**.

Comment: *This area of official support may be as susceptible to bribery as others and could include goods that are paid on terms of less than two years but which typically attract longer than two years repayment terms.*

- With respect to other actions **to deter** bribery:

### *Proposed Best Practice*

- (4) Members should require that details on agents' commissions be provided for all transactions exceeding a threshold of [5%] before the decision to provide support is made. The details should include amounts paid, services rendered, the purpose of the commission and names of the agents.

Comment: *Almost all Members already require such details under certain circumstances or on an ad-hoc basis (e.g. when the level of a commission seems to be high), and there would seem to be no institutional pattern (i.e. insurers don't ask for such whilst lenders do). TI proposes that such details be provided in the application, but this may not be practical since many important details related to a transaction are not known at the time of application.*

***Proposed Best Practice***

- (5) Members should (i) consider introducing a cap on commissions and (ii) apply enhanced due diligence for any reported commissions exceeding [5%] of the contract value.

*Comment: Some Members apply a cap to commissions whilst others further scrutinise commissions exceeding a certain threshold. TI recommends a threshold of 5%.*

***Proposed Best Practice***

- (6) Members should require applicants to advise whether they have ever been (i) debarred by the World Bank or any other multilateral or bilateral financial institutions as a result of having been involved in bribery or (ii) found guilty in a national court of having engaged in bribery. Members should apply enhanced due diligence to any applications with a positive response and consider withholding support. Members should consult any publicly available debarment list, such as that of the World Bank, before the decision to provide support is made.

*Comment: TI recommends that applicants advise that they have not ever been debarred or found guilty of bribery as a pre-requisite for obtaining support; however, Members may not be allowed to deny official export credit support only on this basis.*

- With respect to “appropriate actions” that should be taken **before** the decision to provide support has been taken:

***Proposed Best Practice***

- (7) Members should inform national investigative authorities when there is a “suspicion” or “sufficient evidence” of bribery.

*Comment: Many Members already take this action which is proposed by TI.*

***Proposed Best Practice***

- (8) Members should apply enhanced due diligence and suspend processing of an application for official support when there is a “suspicion” or “sufficient evidence” of bribery.

*Comment: Based on Members’ responses, there would seem to be no legal or administrative impediments to adopting this action which is proposed by TI.*

- With respect to “appropriate actions” that should be taken **after** the decision to provide support has been taken:

***Proposed Best Practice***

- (9) Members should inform national investigative authorities when there is a “suspicion” or “sufficient evidence” of bribery.

*Comment: Again, many Members already take this action which is proposed by TI.*

***Proposed Best Practice***

- (10) In the event that “sufficient evidence” of bribery exists, Members should, pending the outcome of any official investigation: (i) suspend the indemnification of claims; (ii) interrupt loan disbursement; and (iii) deny access to official support for other application from the same exporter.

*Comment: A number of Members report that they may take such measures (advocated by TI) in the event of “sufficient evidence” of bribery, although the definition of sufficient evidence could vary significantly amongst Members. However, it is likely that some Members are unable to take these actions absent a legal decision.*

***Proposed Best Practice***

- (11) In the case of a final legal judgement of bribery, Members should: (i) suspend the indemnification of claims; (ii) interrupt loan disbursement; (iii) seek recourse; and (iv) deny access to official support for other application from the same exporter for [X] years.

*Comment: In the extreme case whereby bribery is proven legally, it is proposed that all possible measures should be adopted as “best practice”, including debarment of the exporter involved in the bribery for a period of time.*

**Other Measures**

6. ECG Members may recall that it was decided at their April 2003 Meeting to make available to applicants for official support information about the OECD Guidelines for Multinational Enterprises (MNEs) which, after the latest revision, have a section on Bribery. Members may also consider whether to make adherence to the MNEs a prerequisite for official support. Also, Members may wish to consider additional measures such as asking their export credit agencies to require/encourage applicants to apply codes of conduct and require/encourage that transactions for which official support are sought, are subject to transparent procurement in competition.

**II. Next Steps**

7. ECG Members are invited to consider the above proposals for best practices with a view towards adopting an agreement on “**Best Practices to Deter and Combat Bribery in Officially Supported Export Credits**” - also for public dissemination. Members may also wish to consider whether it would be appropriate to strengthen the ECG’s Action Statement on Bribery by e.g. modifying the text to reflect the first three proposals in paragraph 5 above. Members may also wish to exchange views on their internal guidance for handling applications for cover in the context of the OECD Convention in order to assess best practice and to make appropriate recommendations.

ANNEX

**Paper Tabled by Transparency International at the 98<sup>th</sup> Meeting of the Working Party on Export Credits and Credit Guarantees Held on 23 April 2003**

**Presentation to the ECG  
By Michael H. Wiehen  
Member of the Board, Transparency International  
23 April 2003**

First of all, I would like to thank the Working Party on Export Credits and Credit Guarantees of the OECD for once again inviting Transparency International to present its comments and suggestions to this Group. We feel quite strongly that raising the corruption prevention barriers in the administration of official export support is a critical component in the broader international effort to assure full implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. That's why we very much welcomed the Action Statement adopted by this Group in December 2000.

Secondly, I would like to congratulate this Group for having carried out the 2002 Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits. The Survey was well structured and the responses contain very interesting and useful information. Having made the Survey public sets an important example of transparency and will surely contribute to fulfilling the purposes set forth in the Action Statement.

Transparency International has also canvassed its National Chapters in OECD countries, and the feedback we have received very largely confirms the Survey responses.

The responses show that most ECAs (with some notable exceptions) adequately inform applicants about the legal consequences of bribery, and nearly all require a no-bribery undertaking of the applicant. This is very commendable.

Some ECAs restrict the undertaking to medium- and long-term support (which we would not recommend), others require the undertaking to be repeated at each drawdown, which is good practice that should be adopted by all.

Some refer in the undertaking to the OECD Guidelines for Multinational Enterprises, and the Netherlands asks for a best effort clause to "apply them in the enterprise". This we welcome very much and commend to others.

It would send another strong signal if the ECAs would, in the application, require the applicants to state whether they have a code of conduct that is publicly available, reflects full compliance with the laws regarding the bribery of foreign officials, includes guidance on all areas of corruption including facilitation payments, commissions, gifts and donations, and provides for proper management systems and training programs to ensure the effective implementation of the code.

So far so good. The Results of the Survey become troublesome in the very varied manner in which agents' commissions are treated: Nearly all ECAs allow commissions to be included in the amount to be supported. But quite a few ECAs do not require a separate identification of the agents' commission

amount, and this, we believe firmly, needs to be changed. The responses of several ECAs indicate very clearly that the level of the commission is a fairly good indicator of impropriety. Canada considers “up to 10%” acceptable, Italy and others indicate that up to 5% is acceptable (Italy bases this on statistical evidence), and the Netherlands and others raise the due diligence and appraisal requirements when the commission amount exceeds the 5% level.

Traditionally the employment of a middleman or an agent is one of the most common vehicles for passing not just the bribe, but the sordid bribery action itself to a third party for whose action the exporter often believes he cannot be held responsible. And the commission very often contains the legitimate fee (“for legitimate services actually rendered”) as well as the amounts to be used by the agent for “unspecified contract acquisition purposes” or whatever, meaning bribery. A threshold of 5% makes a lot of sense. Any amount above that level should raise a red flag and require the ECA to apply enhanced due diligence. And of course this requires also that the amount of the commission be shown separately in the first place, together with the name and address of the agent. If the commission is not listed separately, it is too easy for the ECA to declare that there was no reason to be suspicious.

The Survey Results are even more troubling when one looks at the action and the use of sanctions by ECAs before and after the decision to provide support has been made: It is not entirely surprising that mere “suspicion of bribery” does not normally result in denial of access or other sanctions. As a minimum it should lead to a closer look, increased due diligence and in certain circumstances to the involvement of official investigators.

But even the existence of “sufficient evidence of bribery” does not necessarily lead to preventive action by many of the ECAs. This is very hard to understand. By definition, if there is “sufficient evidence of bribery”, the ECA must not do business as usual but invoke its sanctions including, one would think, informing the judicial authorities. What about suspending administrative processing by the ECA (granting the support, disbursement, indemnification) if there is “sufficient evidence”? What if the criminal prosecution has been opened or there is an admission of bribery by one of the main actors? Anything else is condoning a violation of the law. Quite apart from supporting a contract that may well be null and void. Simply sitting still, doing business as usual and waiting for a legal judgement of bribery means that the sanction comes much too late to have any impact or relevance.

According to the Survey, except for France and the US, there are no cases at all in which ECAs have withheld support for a specific transaction, denied indemnification or even interrupted the disbursement of a loan while they investigated a case. Apparently there are very few cases anywhere in which ECAs had considered it necessary to notify the investigative authorities. This record is deeply disappointing and disturbing.

Perhaps the time has been too short to really introduce the new rules in ECA practice, perhaps the staffs of the ECAs have been overburdened and not adequately trained in implementing these rules, perhaps – yes, even that is theoretically possible – exporters in OECD countries have given up bribery or at least do not submit corrupt deals to the ECAs. But neither of these explanations is truly convincing.

We call on the ECAs very seriously to make sure that the introduction of good rules for the ECAs is followed forthwith by strict, systematic and consistent application of those rules. To make this possible, ECAs must be sure to have adequate internal procedures and controls in place.

None of the ECAs seem to seriously consider or even allow the possibility of denying access to export support to a company that has previously been shown to use bribery (either by “sufficient evidence” or even “legal judgement of bribery”), the so-called blacklisting or debarment. We find this also quite disappointing. We know through the feedback from our National Chapters that some ECAs are at least

debating internally how to react to bribery judgements by courts of other countries, such as the recent cases in Lesotho. We believe cases like this should invoke ECA sanctions anywhere. Furthermore, the fact that an applicant company is blacklisted publicly by the World Bank in regard to a different project should at least invoke a higher degree of due diligence by each ECA, as we hear happens in the Canadian EDC and in several other ECAs. If an applicant is debarred by the World Bank with regard to the same project the ECA is considering, this of course would be more than “sufficient evidence” with all the consequences previously described.

We are pleased to note that the UK ECGD requires its applicants to declare that “to the best of our knowledge or belief, neither we nor any of our directors appears on any list of contractors or individuals debarred from tendering for or participating in any project funded by the World Bank or any other multilateral or bilateral aid agency, or has at any time been found by a court to have engaged in any corrupt activity.” Should this not be adopted by all the ECAs?

Debarment of corrupt companies for an appropriate period of time remains the most effective instrument of corruption prevention and should be adopted by all ECAs.

Two other related matters, not covered explicitly in the Survey, deserve our comment:

**Information Disclosure:** Several ECAs (i.a. Finland, Germany and the UK,) are experimenting with the publication of the list of their customers, and apparently with good results. The German experience, for example, shows that asking customer consent for this disclosure leads to very few refusals and fully protects the right for privacy. We welcome especially that for selected cases with high public interest and visibility the information is disclosed before the export support is contracted, and hope that in time this practice will be extended to all larger cases. We strongly encourage other ECAs to follow this example and implement a straightforward disclosure policy: All applications above a reasonable threshold should be disclosed at the time of application, giving the name of the applicant, the amount, the country of destination and the project name.

**Investment Insurance and Guarantees:** Some countries (i.a. Germany and the United Kingdom) have already extended the corruption prevention mechanisms to investment insurance and guarantees. We welcome this development and encourage other OECD member states to take the appropriate measures to that effect as well.

Summing up our recommendations, Transparency International would urge the Working Party to adopt a second Action Statement that includes the following measures:

- Ask ECA’s who still have not done so, to adequately inform applicants about the legal consequences of bribery;
- Strengthen the no-bribery undertaking by (i) adding the best-efforts clause regarding compliance with the OECD Guidelines for MNEs, (ii) adding a declaration that the applicant is not barred from tendering for any project funded by the World Bank or any other multilateral or bilateral aid agency or has at any time been found by any court to have engaged in any corrupt activity, (iii) requiring a statement whether the applicant has a code of conduct which meets minimum standards, and (iv) requiring this undertaking to be submitted with each drawdown and for short, medium and long-term cover cases;
- Require the separate listing of the amount of agents’ commissions in the application and set a threshold (preferably 5%) beyond which increased due diligence will take place;
- Invoke appropriate action (increased due diligence, suspension of administrative processing) and when pertinent, inform investigative authorities, if there is “suspicion of bribery”;

- Invoke appropriate sanctions (invalidation of cover, denial of indemnification, interruption of loan disbursements, seeking recourse, suspension of administrative processing) and inform investigative authorities if there is “sufficient evidence of bribery”;
- Introduce adequate disclosure and transparency of applications under consideration and approved; and
- Extend the ECA corruption prevention mechanisms to investment insurance and guarantee schemes.

In addition, we would of course also urge the ECAs in general to adopt a tougher and stricter stance and an increased degree of due diligence toward any and all indications of corrupt practices among their customers.

The Export Credit Agencies can and must play an active part in the global effort to combat corruption. The first Action Statement of December 2000 was a courageous first step. We urge you to further strengthen your efforts by adopting a Second Action Statement in line with our recommendations.

Thank you.