

TRANSPARENCY INTERNATIONAL

OECD Working Party on Export Credits and Credit Guarantees Informal Consultation in Paris on 16 November 2000

Presentation by Transparency International represented by Michael H. Wiehen Member of the Board, TI

On behalf of Transparency International, I would like to express our appreciation for TI being invited to present its proposals for changes in the laws, rules or regulations of the national export credit and export credit insurance agencies (ECAs). The aim of our proposals is to prevent the support of corruption-tainted export contracts by official agencies.

[Brief introductory statement on TI – at the request of the Chair.]

I assume that you have all received copy of TI's Position Paper dated September 1999. For ease of reference, copies are available in this room.

I will not dwell on the issue of the severe financial, social and political damage resulting from corruption, both in the countries which receive corruption-tainted exports and in the exporting countries themselves. That by now is a matter of record.

Bribery of foreign officials to obtain export sales or service contracts or licenses to invest has certainly been part of many deals in the past; after all, except for the United States, bribery of foreign officials has before February 1999 not been illegal in the exporting countries, it has in many countries been tax deductible, and it is safe to assume that many contracts financed, insured or guaranteed by ECAs in the past have been tainted by corruption.

Even before the "OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" came into effect, export or investment contracts obtained by corruption were, in many jurisdictions, invalid or subject to invalidation on the ground that they

were unethical. Since February 15, 1999 such bribery is a criminal act in all signatory states that have ratified the Convention, and contracts obtained through bribery are invalid or subject to invalidation in all those jurisdictions.

Even if this concept of invalidity due to being unethical would not apply in a signatory state, each state has undertaken, under the Convention (e.g. Article 3 § 4 in connection with § 24 of the Commentaries) and the Revised Recommendation of the Council adopted on May 23, 1997 (Articles I and II), to take effective measures to deter, prevent and combat such bribery and to deny any subsidies or other public advantages to those who commit such bribery. Among the appropriate sanctions recommended by the Council are inter alia exclusion from entitlement to public benefits and disqualification from participation in public procurement.

In our view this means that at least contracts which were obtained with the aid of bribery since February 1999 must not receive cover through official export credit or export credit insurance, and if covered anyway, perhaps because the bribery had not been known, the legal obligation under the cover must be invalid or subject to invalidation.

We believe this situation calls for action by the signatory states in several ways:

First, every exporter applying for cover should be required to submit a no-bribery affidavit.

Second, if there is a bona-fide charge of bribery or any suspicion, the ECA should investigate and, while doing so, suspend all claims under this cover until the suspicion has been removed.

Third, the ECAs should introduce effective sanctions against applicants who have violated the no-bribery policy, including

- denial of indemnification on the ground of invalidity of the bribe-tainted contract,
- disqualification from access to ECA support for an appropriate period of time, and
- forfeiture of any fees already paid.

A violation should be assumed not only, when a criminal conviction has occurred, but also when an explicit confession has been made or when

convincing evidence for the violation exists and the violation is not convincingly contested.

This judgment would have to be made by the ECA, possibly with the involvement of the judicial authorities.

Fourth, whenever an indemnification case arises, the company covered should be required to disclose all commission, fee or other payments made by it or on its behalf to anybody in connection with the contract.

Fifth, each ECA should develop effective information and guidelines for its customers and its staff so as to assure full knowledge of its policies and practices among its customers and staff. This includes clear information to all applicants about the consequences of bribery.

Sixth, each ECA should assure transparency of cases of confirmed violations and denials of cover or indemnification, through the Internet and its Annual Report.

In fact, we would strongly urge that ECAs make publicly available the names of major projects they have been asked to cover, and the names of the firms that have applied for cover.

We understand that the proposed no-bribery affidavit may be thought to be difficult to introduce in some OECD signatory states. We consider such an affidavit a very important and effective part of the instruments against bribery under ECA cover, and we are pleased that Germany has introduced such a requirement. The requirement of such an affidavit avoids any misunderstanding or argument at a later stage, such as the argument of the exporter that he did not know the consequences. It is highly effective in establishing that a customer has actually violated its obligations including its obligation to provide all relevant information to the ECA, including any and all information which might increase the commercial risk of the contract.

It is also highly likely that responsible exporters who in the past, as a matter of routine, have used bribery to obtain contracts “just like everybody else”, would think twice before they sign a wrong affidavit.

While it is easy for ECAs to impose new rules and regulations on exporters who deal directly with the ECA, we recognize that the situation is more complicated when exporters or importers obtain credit from commercial financial institutions, and the financial institution in turn seeks insurance coverage from the ECA. Our proposal of September 1999

suggests that in this case, the respective no-bribery affidavit of the exporter be attached to the financial institution's application for insurance, and that the financial institution should declare that it has taken note of the affidavit. We further suggested, and still suggest, that the financial institution should

- carry out, at the time of the application for cover by the exporter, a detailed investigation whenever the exporter or the country of destination has been known to have been involved in acts of bribery or other forms of corruption before, and
- explore any suspicion of bribery by the exporter, whenever it arises.

We consider it legitimate that financial institutions are held to apply the usual due diligence procedures in order to minimize the likelihood of an indemnification case arising.

When financial institutions are involved, it is also acceptable for the ECA to require from the exporter a Commitment/Release Statement, under which the exporter commits to release the ECA of its obligations vis-à-vis the financial institution if the export contract has been obtained by bribery or other criminal act, and to assume the obligation to indemnify the financial institution himself. That may for the financial institution be a lesser security, but it reflects the risk which the financial institution should minimize through due diligence procedures.

We understand that financial institutions are reluctant to become involved in such due diligence checks. However, some of the destination countries with the highest levels of ECA coverage are also well known to have necessitated, at least in the past, significant bribery as part of any export deal. While we have some sympathy with the argument that financial institutions cannot be expected to do routine bribery checks in all cases, we believe that financial institutions should not be able to disclaim responsibility, even in the most egregious cases. Due diligence must be expected of the financial institutions.

What happened and indeed may have been customary in the past must no longer continue. Since February 1999, bribery of foreign officials to obtain a contract is illegal. Contracts obtained through illegal means must not be supported by ECAs and indeed not by commercial financial institutions. This is a matter of legality as well as of commercial risk.

Of course this is a matter not only of having the right laws, rules and regulations in place, but of their actual implementation by the ECAs. There are strong indications that the ECAs in the past have not been forceful or consistent in enforcing even their rather limited rules against

covering corruption-tainted contracts. In that sense we share the concerns expressed in the letters sent by several NGOs in early November to Mr. Johnston. For a number of ECAs, even the pre-Convention rules were clear:

Corruption-tainted contracts could and should not have been covered. When indemnification cases arise under those contracts, we urge the ECAs to take a hard look, especially if the recipient country, through a successor government, charges corruption and challenges the validity of the obligations. And then – if bribery is proven – coverage should be denied.

In conclusion:

After the OECD Convention there can no longer be business as usual, and that applies to the ECAs as well. We know that a number of ECAs are working toward better rules. We have heard some good news from Australia, Belgium, Germany, Japan and the UK (and this list may not be exhaustive). But no single country can be expected to charge ahead all the way. We challenge the OECD and its member states to come forward with harmonized strengthening of their ECA rules so that corruption is no longer disregarded, tolerated or even tacitly supported by official export support agencies.

When you prepare a recommendation for the next Ministerial, we urge you not to be satisfied with the lowest common denominator, but instead to go through a rigorous process and seek an agreement that will have practical impact in reducing corruption.

Finally, we would very much welcome an opportunity to comment on your draft recommendation.

Thank you.

16 November 2000