

**TRADE DIRECTORATE
TRADE COMMITTEE**

**TD/ECG(2005)15
Confidential**

Working Party on Export Credits and Credit Guarantees

DRAFT 2005 ACTION STATEMENT ON MEASURES TO DETER BRIBERY

Paris, 14 and 15 (morning) November 2005

PURPOSE AND TIMING: This draft revised Action Statement is for consideration by ECG Members at their forthcoming 105th Meeting to be held on 14-15 November (morning) 2005.

ACTION: Members are encouraged to come prepared to conclude on the substance of a revised Action Statement and also to consider whether it should be converted to a formal OECD instrument, e.g. an OECD Recommendation.

LINK TO PROGRAMME OF WORK AND BUDGET: Output Group 3.1.1.: Advocacy of Freer Trade

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DRAFT 2005 ACTION STATEMENT ON MEASURES TO DETER BRIBERY

I. Introduction

1. The proposal at Annex 1 for a 2005 Action Statement has been prepared by the Secretariat on the basis of Members' discussions of the proposals submitted by Belgium/Czech Republic/Germany, Canada, Switzerland and the United States at the 104th ECG Meeting held on 10-11 October 2005, as well as the specific recommendations made to Members in respect of their official export credit systems in the Phase II reviews completed to date by the Working Group on Bribery. The proposal has also been drafted bearing in mind the views expressed by Civil Society Organisations, as illustrated in the submission from Transparency International.

2. The aim of this proposal is to provide a text to serve as a point of departure for Members' further deliberations in respect of an enhanced Action Statement. In order to assist Members in assessing the impact of the proposed wording *vis-à-vis* the current Action Statement and the proposals submitted by Members at the 104th ECG Meeting, the following explanations are provided in respect of the key aspects of the proposal (see Annex 1) along with the basic principles that guided the overall formulation of the draft 2005 Action Statement.

II. Basic Principles

3. The basic structure of the proposal is meant to be sequential, *i.e.* starting with:

- i) information provided by Members to applicants and exporters [2a], followed by
- ii) information and undertakings that are provided by applicants and exporters to Members at or before the time of application [2 b), 2 c), 2 d), 2 e)];
- iii) actions to be taken by Members in relation to, *inter alia*, the information provided [2f]; and
- iv) actions to be taken if there is credible evidence that bribery has been involved in the award of the export contract in questions [2 g) and 2 h)].
- v) Finally, the measure described in 2 i) relates to the development of ongoing procedures in relation to companies that have been convicted of bribery.

4. The term "Members" has been applied rather than *e.g.* "ECA", or "official export credit providers" in order to make it clear that the obligations are related to the official export credit programmes of governments¹. The use of the term "applicants **and** exporters" has also been applied consistently. The term "credible evidence" has also been adopted instead of "sufficient evidence" in order to place emphasis on the quality of evidence.

¹ Such a formulation avoids any problems with respect to what a particular institution or ECA is allowed to do under its statutes, such as the issue raised by Switzerland in respect of the inability of its ECA to directly inform law enforcement authorities.

5. In addition, consistency in the use of terms has been sought, *e.g.* “transactions benefiting from official export credit support” is used instead of *e.g.* “officially supported export credits” in order to avoid any confusion between the coverage of ECG undertakings in comparison with the scope of the Arrangement on Officially Supported Export Credits.

6. The proposal has also been drafted in a way which seeks to avoid making repetitive caveats (which distract the reader from appreciating the actual value of the measures that would be agreed) by placing them either in footnotes (see Footnote 1 of the proposal) or at the end of the Action Statement (see paragraph 3).

7. A differentiated approach in respect of some measures has been introduced to avoid: (1) imposing inappropriate requirements on *e.g.* smaller transactions involving SMEs or on short-term transactions where the likelihood of bribery is lower, or in any event less significant, and (2) not undertaking reasonable efforts to deter bribery in *e.g.* project-related deals for which greater efforts can be justified in terms of cost/benefit [see 2 e) of Annex 1].

III. Additional Explanation of Specific Aspects of the Proposal in Annex 1

Introductory Chapeau and Footnote 1

8. The proposed text is similar to that of all three proposals received from ECG Members. However, Footnote 1 has been limited to include only information describing the link between the ECG’s work and the Anti-Bribery Convention.

Paragraph 1

9. There is no change in the text *vis-à-vis* the current Action Statement.

Paragraph 2 – Chapeau and Footnotes 2 and 3

10. This chapeau has been streamlined in comparison with the text of the Action Statement proposed by Belgium/Czech Republic/Germany (paragraph 4) and is similar to the text proposed by Canada and the United States. As mentioned previously, however, the caveat sought by Canada (“*subject to the legal system of each ECG Member country*”) has been placed in Footnote 2 and is meant to apply to all common measures that follow. Footnote 3 has been added in response to the concern raised by Canada that the scope of the Action Statement should match that of the Anti-Bribery Convention.

Paragraph 2 a)

11. The proposed text represents no change *vis-à-vis* the current Action Statement and is consistent with all proposals tabled by Members.

Paragraph 2 b)

12. The proposed text has been strengthened in comparison with the current Action Statement, *i.e.* exporters and applicants would now be “required” instead of “invited” to provide a “no bribery” undertaking; this is reflected in all three proposals from Members. An additional required undertaking from the applicant and exporter in respect of appropriate anti-bribery controls has been added along the lines proposed by the United States; this requirement should be considered in concert with the fact that information on agents’ commissions would not be required on a systematic basis [see 2 d) and 2 e)] as was proposed during the 104th ECG Meeting by some Members. Footnote 4 represents an attempt to cater to the issue raised by some Members in relation to SMEs and anti-bribery controls (*i.e.* “appropriate” anti-bribery

controls for some SMEs need not entail formal, detailed systems that are comparable to those of larger multinational corporations).

Paragraph 2 c)

13. This text, which imposes a disclosure requirement on applicants and exporters in respect of debarment by a multilateral financial institution or of a conviction related to bribery (subject to a time limit to be determined by Members), is close to that which has been proposed by Canada and the United States. The text proposed by Belgium/Czech Republic/Germany does not specify that applicants and exporters should disclose this information, and specifies that only a conviction in a national court or debarment by a multilateral financial institution need be taken into consideration. Consistent with the general approach described previously, the caveat proposed by Canada has not been included in the text in view of Footnote 2. It is recognised that the scope of the concept of “affiliated entities” described in Footnote 5 is a difficult issue. Accordingly, the proposed text attempts to define this scope in terms of whether or not control can be exercised over the affiliate.

Paragraph 2 d)

14. This text is consistent with the proposal made by the United States and is not included in the other two proposals. However, as mentioned previously, some Members consider that information on agents’ commission should be provided on a systematic basis, e.g. in relation to the application of an approach that would employ “red flags” to determine when enhanced due diligence should be applied.

Paragraph 2 e)

15. This text is not found in any of the Members’ proposals, but reflects the comments made by some Members that one possible approach would be to concentrate efforts on “red flag” areas where the potential for bribery is relatively high. It also reflects the idea of applying a differentiated approach as described previously. As far as the critical value (in terms of transaction size) is concerned, this is left open for the decision of the Members.

Paragraph 2 f)

16. The idea of applying enhanced due diligence when an applicant or exporter has been debarred or convicted of bribery is addressed in all proposals from Members. However, the specific text proposed mirrors which has been provided by Canada, insofar as it proposes that enhanced due diligence also be applied “*if they have reason to believe that bribery may be involved in the transaction*”; this notion supports the collection of information on agents’ commissions in 2 e) without saying so directly (*i.e.* suspicious commissions could give rise to enhanced due diligence).

Paragraph 2 g)

17. This measure is also addressed in all three proposals from Members. Again, the specific text is similar to that provided by Canada, albeit without the wording which was meant to accommodate those ECAs who are required to transmit information through their guardian authorities; such wording is not necessary since all obligations in the document are directed at Members and not *e.g.* ECAs.

Paragraph 2 h)

18. Although the text of this paragraph has been reformulated to cover possible actions to be taken at any time during the life of a transaction, the substance remains unchanged in comparison with all three of the current proposals by tabled by Members.

Paragraph 2 i)

19. The addition of this measure is meant to reflect the concern raised by Switzerland as a result of its Phase II review and the proposal by Canada (it is not addressed in the other proposals tabled by Members). The wording seeks to avoid using the term “debarment” whilst maintaining a requirement that Members should, at a minimum, not provide support to companies who have not put their house in order after having been involved in bribery.

Paragraph 3

20. The caveats *vis-à-vis* the responsibility of applicants and exporters that appear as “appropriate actions” in the current Action Statement have been re-grouped here in order to improve the coherence of the document.

Paragraph 4

21. There is no change in this paragraph in comparison with the current Action Statement. All items related to monitoring and are now grouped at the end of the Action Statement.

Paragraph 5

22. The use of the ongoing exchange of information (Survey) has been strengthened as a counter-balance for what could be perceived as a lack of proscriptive common measures and clear definitions of key terms (*e.g.* enhanced due diligence, credible evidence) in Paragraph 2. In this vein, the idea of undertaking a peer review exercise seeking “functional equivalence” (as introduced by the Chairman of the Working Group on Bribery at the 104th ECG Meeting) on best practices has been introduced. Also, the reference to undertaking the exchange of information with a view to “*considering further steps to combat bribery*” provides a link to the idea of undertaking future work in this area. This represents no real change in terms of what is being asked of Members, but rather provides a more clear description of what is to be done with the information collected.

Paragraph 6

23. The text of this paragraph has been reformulated slightly, but remains consistent with the substance of all the proposals tabled by Members (*i.e.* to continue to share the Survey results and to consult with stakeholders).

ANNEX 1

DRAFT 2005 ACTION STATEMENT ON BRIBERY AND OFFICIALLY SUPPORTED EXPORT CREDITS

In recognition of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereafter the Anti-Bribery Convention) and the 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions (hereafter the 1997 Recommendation)², the Members of the OECD Working Party on Export Credits and Credit Guarantees (ECG) agree:

1. Combating bribery in international business transactions is a priority issue and the ECG is the appropriate forum to ensure the implementation of the Anti-Bribery Convention and the 1997 Recommendation in respect of international business transactions benefiting from official export credit support.
2. To take appropriate measures³ to deter bribery⁴ in international business transactions benefiting from official export credit support, including:
 - a) Informing 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) Requiring applicants and exporters to provide an undertaking/declaration that they maintain appropriate⁵ anti-bribery controls and that neither they, nor anyone acting on their behalf, (*e.g.* agents) have been engaged or will engage in bribery in the transaction.
 - c) Requiring applicants and exporters to disclose occurrences, within a [xx] year period preceding the application, of (i) any debarment of the exporter, or any subsidiary or affiliated entity⁶, by the World Bank or any other multilateral financial institution, or any

² Article 12 of the Anti-Bribery Convention provides for monitoring and follow-up to promote the full implementation of this Convention. The OECD Working Group on Bribery in International Business Transactions considers that insofar as officially supported export credits is concerned, the appropriate forum is the OECD Working Party on Export Credits and Credit Guarantees (ECG); the ECG reports progress to the Working Group on Bribery.

³ These measures would be realized in accordance with the legal system of each Member country taking into account its specific judicial instruments and institutions to implement its penal laws and are not prejudicial to the rights of any parties not responsible for the illegal payments.

⁴ As defined in the Anti-Bribery Convention.

⁵ Some small- and medium-sized enterprises may have less detailed anti-bribery controls in comparison to those maintained by *e.g.* large, multinational corporations.

⁶ For the purposes of this Statement, “affiliated entity” means (a) any company that holds, directly or indirectly, a majority of the voting stock of the company; and (b) any other company the majority ownership of whose stock is held by the company described in (a).

government entity, as a result of having been engaged in bribery, and (ii) any conviction, charge, or civil or administrative determination, penalty, order or settlement involving the exporter, or any subsidiary or affiliated entity, for violations of laws against bribery of foreign public officials of any country.

- d) Requiring that applicants and exporters agree to disclose, upon demand: (i) the identity of persons acting on their behalf in connection with the transaction, and (ii) the amount and purpose of commissions and fees paid to such persons.
 - e) Requiring, for medium and long-term transactions⁷ with a total contract value of SDR [xx] million or more with a public sector buyer in a country where risk of bribery and corruption is deemed to be relatively high⁸, that applicants and exporters disclose: (i) the identity of persons acting on their behalf in connection with the transaction, and (ii) the amount and purpose of commissions and fees paid to such persons.
 - f) Undertaking enhanced due diligence if the Member becomes aware that the applicant, exporter, or any subsidiary or affiliated entity of such exporter has, within a [xx] year period preceding the application, been: (i) debarred by the World Bank or any other multilateral financial institution or any government entity as a result of having been engaged in bribery, (ii) found guilty in a court, criminally charged, or the subject of a civil or an administrative determination, penalty, order or settlement, for violation of laws against bribery of foreign public officials of any country; or if they have reason to believe that bribery may be involved in the transaction.
 - g) Developing and implementing procedures to disclose to their law enforcement authorities instances of credible evidence of bribery in the case that such procedures do not already exist.
 - h) Taking preventative and corrective actions that are appropriate given the specific circumstances of the transaction if there is credible evidence that bribery was involved in the award of the export contract, including: refusing to approve credit, cover or other support and, where support has already been provided, denying payment or indemnification or seeking refund of sums provided.
 - i) Developing and implementing procedures to deal with companies that have been convicted of bribery in order to ensure that support is not provided to any company that has not taken appropriate internal corrective measures⁹ to deter further bribery.
3. The application by Members of the measures set out in Paragraph 2 in no way mitigates the responsibility of the exporter and other parties in transactions benefiting from official support to: (i) comply with all applicable laws and regulations, including national provisions for combating bribery of foreign public officials in international business transactions, or (ii) provide the proper description of the transaction for which support is sought, including all relevant payments.

⁷ For the purposes of this statement, any transaction with a repayment term of two years or longer.

⁸ For the purposes of this Statement, “countries where the risk of bribery and corruption is deemed to be high” are countries with a score of three or lower on Transparency International’s Corruption Perception Index.

⁹ Such measures could include: replacing individuals that have been involved in bribery, adopting an effective anti-bribery programme, submitting to an audit and making the results of such audit available.

4. To continue to exchange information on how the Anti-Bribery Convention, the 1997 Recommendation and the measures listed in Paragraph 2 above are being taken into account in Members' official export credit systems.
5. To continue to collate, map and review the information exchanged with a view to: (i) ensuring that functional equivalence exists in respect of the practical application by Members of the measures set out in Paragraph 2 above, and (ii) considering further steps to combat bribery in respect of transactions benefiting from official export credit support.
6. To continue to publish the results of the information exchange and to consult on a regular basis with appropriate stakeholders.