

# **Experience and Practice of Combating Bribery in Officially Supported Export Credits:**

## **The evidence so far from the OECD Working Group on Bribery Phase 2 reviews**

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## Executive Summary

### Introduction

- The OECD Working Group on Bribery's Phase 2 reviews are a vital source of information about what measures Export Credit Agencies (ECAs) have taken to combat bribery in officially supported export credits and the experience so far of putting these into practice.
- Phase 2 reviews also contain interesting insights and key recommendations from examiners and the Working Group on Bribery (WGB) on how ECAs should be improving their procedures and practices for combating bribery.
- Phase 2 reviews have repeatedly stressed the crucial role of ECAs in preventing, detecting and sanctioning bribery offences. In particular, the reviews have emphasised the role ECAs should be playing in:
  - Raising awareness of the OECD Anti-Bribery Convention with the private sector, and of the risks of bribery generally;
  - Detecting possible bribery in the operations of companies abroad which they support and reporting suspicions and credible evidence to the law enforcement authorities; and
  - Imposing administrative sanctions, in the form of exclusion from further ECA support, for companies convicted of bribery.
- Twenty-one reviews have been carried out so far. Sixteen of these reviews make specific reference to ECAs and their role in combating bribery. The level of scrutiny in each Phase 2 review has not always been consistent, making comparisons between ECAs somewhat difficult.

### Awareness-raising

- Phase 2 reviews have looked at:
  - Levels of awareness of foreign bribery and the OECD Anti-Bribery Convention in ECA staff themselves
  - How ECAs are raising awareness with their clients about the OECD Anti-Bribery Convention and the risks of foreign bribery in general
- In four of the sixteen reviews mentioning ECAs, levels of staff awareness were found to be good. In five of the sixteen reviews however, examiners and/or the WGB recommended that ECAs do more to raise awareness with their own staff. Japan's ECA staff, in particular, were found to have only "*superficial*" knowledge of foreign bribery offences.
- Phase 2 reviews have found that most ECAs are meeting their obligations under the OECD Working Group on Export Credits and Export Credit Guarantees (ECG) to inform clients of their legal obligations and requiring no-bribery declarations. Some ECAs have taken further measures to raise awareness of foreign bribery with clients, including seminars, circulars and website information. In four of the sixteen reviews mentioning ECAs, however, examiners and/or the WGB recommended that ECAs do more to raise awareness of the risks of foreign bribery with their private sector clients.
- Phase 2 reviews in general have found awareness of foreign bribery to be very poor among Small and Medium Sized Enterprises (SMEs). In eight of the twenty-one reviews published so far, examiners and/or the WGB have recommended that governments do more to raise awareness with SMEs. In two reviews, the

recommendation was that the government should promote corporate compliance programmes with SMEs.

#### Reporting suspicions/credible evidence to law enforcement authorities

- Phase 2 reviews have found, with few exceptions, reporting obligations among ECAs to be weak and highly discretionary. In some countries, ECA staff are not civil servants and therefore not subject to civil servant reporting requirements. In one country, Switzerland, ECA staff would be subject to secrecy obligations that would have to be lifted before they could report a suspicion of bribery.
- Phase 2 reviews have almost unanimously emphasised that ECAs are an important source of information on potential bribery. Seven of the sixteen reviews that mention ECAs have specifically and strongly recommended that reporting procedures for ECA staff be put in place, to enable them to report suspicions and credible evidence of bribery to law enforcement authorities.

#### Due Diligence Measures: preventing and detecting bribery

- Due diligence procedures are essential to enable ECAs to detect possible bribery. Such procedures include asking details of agents' commissions and for a country to provide details of previous convictions for corruption or debarment by a multilateral or bilateral aid agency. In looking at ECA anti-bribery procedures, several Phase 2 reviews have picked up on due diligence procedures operated by ECAs.
- Phase 2 reviews have found that some ECAs are doing background checks on companies for previous convictions or debarments and have some form of due diligence process in place. Others however have no procedures for checking previous convictions or debarments.
- Five of the sixteen reviews mentioning ECAs found no measures in place at all or inadequately resourced measures for detecting bribery. And five further reviews found that no training or guidelines had been provided to ECA staff to enable them to detect bribery.

#### Withholding Support for transactions where there is suspicion or credible evidence

- Under the current OECD ECG's Action Statement on Combating Bribery in Officially Supported Export Credits, ECAs are committed to withholding support for transactions where there is "sufficient evidence" of bribery. In practice, Phase 2 reviews have found that few ECAs are in practice committed to doing so on an automatic basis.
- Most ECAs maintain a considerable amount of discretion as to whether they would withhold support where there was a suspicion or not. Two countries, Japan and Sweden, categorically state that they would not withhold support unless there was a legal conviction. In Sweden's case, the ECA would not withhold support "*on the basis of evidence ... however cogent*". Other reviews threw up a lack of clarity about the definition of "sufficient evidence".
- A couple of ECAs say that they would suspend processing an application where there was a "*suspicion*" of bribery. One country said it would definitely withhold support where there was "*reasonable suspicion*". And two other ECAs say they might consider withholding support where there was a "*suspicion*".

### Agents' commissions

- Only four of the sixteen reviews that deal with ECAs make reference to agents' commissions. Two of these (Australia and France) referred to practices by the ECA to check the validity of agents' commissions, and two (Belgium and the Slovak Republic) stated that there were no checks on the validity of agents' commission. One review (Australia) stated that verification of agents' commission was an important tool for uncovering potential bribe payments. Another (the Slovak Republic) specifically recommended that the ECA require sufficient information about agents' commissions to enable it to verify if the client had engaged in bribery.

### Verification by audit

- Three of the sixteen reviews refer in passing to whether ECAs have the ability to audit their clients to ascertain whether bribery has occurred. One review (Korea) noted that the ECAs had not such right, but that another official body could do it on their behalf. Two other reviews (Greece and Sweden) noted that the ECAs had the right to audit in order to determine whether bribery had occurred but that it was not clear that when and how either ECA would do so, and that neither had done so in practice.

### Administrative Sanctions as Envisaged by the OECD Anti-Bribery Convention and Revised Recommendations: exclusion from export credits

- The OECD Anti-Bribery Convention and Revised Recommendations specifically envisage additional administrative sanctions for persons convicted of bribery of foreign officials (Article 3), including exclusion from entitlement to public benefits (Commentary) or denial of public advantages (Revised Recommendations). As official ECA support is usually subsidised in some form, and is in some cases administered by government departments, it falls within the category of public benefit or advantage.
- Phase 2 reviews have stated that exclusion from export credits would be a considerable “*deterrent*” against bribery. However, Phase 2 reviews have found that no ECA so far has adopted temporary or permanent exclusion from export credits as a sanction on an automatic, non-discretionary basis. Only three ECAs (Australia, Canada, and the UK) have adopted discretionary policies to enable them to exclude a company convicted of corruption. Some countries say that they are able to do so but do not in practice. Three countries (Hungary, Japan and Sweden) say they would not even consider doing so.
- In a full half (eight) of all reviews that mention ECAs (including Australia, Canada, and the UK), examiners and/or the WGB explicitly recommend that ECAs revisit or further develop their policies for dealing with companies convicted of bribery, with a view to imposing additional or administrative sanctions in the export credit context.

### Administrative Sanctions as Envisaged by the OECD ECG's Action Statement on Combating Bribery in Officially Supported Export Credits

- While not looking at the issue in detail, Phase 2 reviews have found that most ECAs have in place procedures for imposing one or more of the sanctions envisaged by the OECD ECG's Action Statement. These include: withdrawing support; denying indemnification; terminating the contract; recovering indemnity paid; seeking

indemnification for expenses incurred; interrupting loan disbursement and suspending payment of indemnity while proceedings are pending.

- The Phase 2 reviews have implied that there has been little experience of applying these sanctions in practice and that in some instances there is a lack of clarity as to how they would apply in practice. There is a further lack of consistency as to whether sanctions apply only on a conviction from a national court or on a conviction from any relevant or competent jurisdiction. Some countries would only apply sanctions in the former case, while others (Australia, Sweden and the UK), would take account of convictions from foreign jurisdictions.

### Conclusion

- Phase 2 reviews have shown that there is considerable room for improvement in Export Credit Agency practice in combating bribery. Thirteen of the sixteen reviews that mention ECAs have some form of recommendation for improvement from either the lead examiners or the OECD Working Group on Bribery.
- Phase 2 reviews reveal considerably different standards for implementation of the OECD ECG's Action Statement emerging, with some ECAs developing good practice well beyond the Action Statement, and a few barely meeting the current requirements.

## Introduction

1. Since 2002, the OECD Working Group on Bribery has been conducting peer review examinations of how OECD Member States are implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Convention requires Member States to criminalize the payment of bribes to foreign officials, and take various related measures to prevent, detect and sanction such bribery. In 1999, the first series of peer review examinations (Phase 1), explored national legislation that countries had established in order to implement the Convention. This phase is now complete.

2. Currently, the second series of peer review examinations (Phase 2), which started in 2002, is looking at *“the structures put in place to enforce the laws and rules implementing the OECD Anti-Bribery Convention and to assess their application in practice”*.<sup>1</sup> To date, the review reports of 21 of the 30 OECD member countries have been published. These are: Australia, Belgium, Bulgaria, Canada, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Japan, Korea, Luxembourg, Mexico, Norway, Slovak Republic, Sweden, Switzerland, the United Kingdom, the United States.<sup>2</sup>

3. The Phase 2 reviews are vital sources of information about the state of current Export Credit Agency practice when combating bribery.<sup>3</sup> They are also a critical indicator of the experience so far of how ECAs are implementing both the recommendations from the OECD Convention and Revised Recommendations and the OECD Working Group on Export Credit and Export Credit Guarantees (OECD ECG)’s Action Statement on Combating Bribery in Officially Supported Export Credits. Furthermore, they reveal interesting insights into what peer review examiners and the OECD Working Group on Bribery believe could and should be happening within Export Credit Agencies to enhance their role in combating bribery.

## Export Credit Agencies and the Phase 2 Reviews

*“Officially supported export credit and guarantee agencies deal with companies that participate in the international market and thus are able to play an important role in preventing transnational bribery, raising awareness of the Convention and in discovering foreign bribery cases” (Sweden, Phase 2, para 52).*

4. The OECD Working Group on Bribery’s Phase 2 reviews have repeatedly stressed the importance of Export Credit Agencies (ECAs) in combating bribery. The reviews have noted that ECAs are *“very much in contact with ... companies operating on*

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<sup>1</sup> OECD Anti-Bribery Convention: Procedure of Self and Mutual Evaluation, Phase 2; [http://www.oecd.org/document/27/0,2340,en\\_2649\\_34859\\_2022939\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/27/0,2340,en_2649_34859_2022939_1_1_1_1,00.html).

<sup>2</sup> One country has been reviewed but its report was not published prior to this analysis being completed (Austria). Three countries are currently being reviewed: Spain, Netherlands and Denmark. 11 countries are still to be reviewed: Czech Republic, New Zealand, Poland, Portugal, Ireland, Slovenia, Chile, Turkey, Brazil, Argentina and Estonia (See: <http://www.oecd.org/dataoecd/31/48/35395907.pdf>.)

<sup>3</sup> As part of the peer review examination, countries are required to complete a Phase 2 Evaluation Questionnaire. Export Credit Agencies are not specifically referred to in the Questionnaire. They are however implicitly referred to as “public subsidies, licences, or other public advantages”, in a section that asks: what steps the Member State has taken to deny public subsidies and advantages to companies as a sanction for bribery of foreign public officials and how does the Member State ensure that such subsidies and advantages are not “inadvertently granted in cases of bribery of foreign public officials”.

*foreign markets*” (Australia, para 103); that “*they enter into contractual business relationships with companies doing business abroad, including in countries particularly prone to corruption*” (Canada, para 36); and that “*in view of their particularly important interaction with ... enterprises involved abroad*” (Norway, Commentary, p 12; Japan, para 80) they have a key role to play in combating bribery.

5. In general, examiners in several reviews have highlighted the overall deterrent value of Export Credit Agency anti-bribery policies. They have recommended that the Member State consider revisiting the policies of their ECA to see if they are “*sufficiently effective for the purpose of deterring companies that deal with them from engaging in the bribery of foreign public officials*” (Canada, Commentary, p 37; see also United Kingdom, Commentary, p 79).

6. However, these reviews have further highlighted various specific ways in which ECAs are integral to preventing, detecting, reporting and sanctioning bribery at a national level. These include:

*i) Raising Awareness of the OECD convention and deterrence*

7. Various reviews have observed that through their policies and procedures, ECAs are crucial to raising private sector awareness of the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions and of national implementing legislation. In France, for instance, the examiners noted that “*the measures taken by public authorities to prevent corruption in the field of export credits and bilateral development aid are also likely to enhance the awareness of enterprises, and particularly of SMEs, as to the requirements of*” national anti-bribery legislation (France, para 21; Slovak Republic, para 42).

*ii) Detecting and reporting bribery allegations*

8. Several reviews have noted that ECAs “*comprise another potentially important source of information about companies engaging in foreign bribery*” (Canada para 36; Japan, para 80). In particular, examiners in various instances have observed that ECAs “*are in a good position to and could potentially play a useful role in detecting and reporting foreign bribery offences*” (Australia, para 103; Slovak Republic, para 42).

*iii) Sanctioning bribery offences*

9. The role that Export Credit Agencies play in imposing administrative sanctions against companies convicted of corruption is possibly the only role specifically referred to in the OECD Anti-Bribery Convention and Revised Recommendations. Article 3 of the Convention calls for parties to “*consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.*” The Commentary to article 3 states that this includes “*exclusion from entitlement to public benefits or aid.*” The Revised Recommendations state that Members should “*take concrete and meaningful steps*” to ensure that “*public advantages ... could be denied as a sanction for bribery in appropriate cases*” (II, v).

10. The role of ECAs in sanctioning bribery offences has been mentioned in numerous Phase 2 reviews. As one recent Phase 2 review emphasised, “*the threat of suspension or refusal of coverage, or the risk of seeing their names on a blacklist, would be powerful deterrents for companies dependent on exports*” (Belgium, para 6).

## General observations

11. The Phase 2 reviews have not always been consistent in the depth of scrutiny they have applied to ECAs (earlier Phase 2 reviews, such as the US and Germany, scarcely mentioned them), nor indeed in their recommendations. Of the 21 published reviews, only 16 explicitly mention Export Credit Agencies. Five reviews contained no information on export credit agencies at all: Bulgaria, Finland, Iceland, Mexico, and the United States. Germany's review has only limited information on its ECA.

12. In looking at ECA practice on bribery, some reviews have not gone much beyond restating the replies given by ECAs to the OECD ECG's 2002 *Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits*. Others have usefully probed the ECAs' responses to the OECD ECG's survey and compared it with real practice.

13. In two cases (the Slovak Republic and Sweden), ECAs actually admitted to filling out the Survey incorrectly (Slovak Republic, para 45), or that practice on the ground was not consistent with their responses to the Survey (Sweden, footnote 45). In two other cases, questions put forward by examiners revealed some disjuncture between policies and practice, and indeed some confusion as to what real practice was. Comments by ECA staff, on the on-site visit, were in one instance denied following the visit (Slovak Republic, para 45) and in the other, contradicted by the information and texts provided following the on-site visit (Italy, Commentary, p 14).

14. The following analysis goes through the main areas that examiners have focused on in the OECD Working Group on Bribery's Phase 2 reviews. Consequently, this gives an overview of the comments and analysis that comes out on each topic.

15. Two caveats need to be made in relation to the analysis below. Firstly, because of some lack of consistency in the level of scrutiny and thoroughness with regard to how Phase 2 reviews have dealt with ECAs, it is hard to come up with direct comparisons of ECA practice from the reviews. In some instances, Phase 2 reviews may not mention that an ECA is taking a particular action referred to in other Phase 2 reviews, but this does not mean that it is not in fact doing so.<sup>4</sup> Conversely, where a Phase 2 review implicitly criticises one ECA for not taking a certain measure or action, the fact that another Phase 2 review does not criticise an ECA for not doing so does not mean that that ECA is in fact taking this measure or action. The second caveat is that the practices of ECAs may have changed since the Phase 2 review came out because of the time period over which they have been and are being conducted.<sup>5</sup>

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<sup>4</sup> An example of this is that the Phase 2 review of the United Kingdom does not mention that the ECGD asks applicants whether they have been debarred from the World Bank or any multilateral or bilateral aid organisation and whether they have been convicted of corruption in a competent jurisdiction (see "Due Diligence" section), and does have a right to audit companies (see "Verification by Audit" section), despite the fact that other Phase 2 reviews have mentioned both these issues. In the United Kingdom's case, however, the fact that the ECGD's anti-corruption procedures had been subject to change and then to public consultation during the time of the Phase 2 review is likely to have affected how effectively the examiners could scrutinise its practices.

<sup>5</sup> The dates of publication for Phase 2 reviews referred to in this analysis are as follows: Australia, January 2006; Belgium, October 2005; Canada, March 2004; France, January 2004; Germany, June 2003; Greece, July 2005; Hungary, May 2005; Italy, December 2004; Japan, March 2005; Korea, November 2004; Luxembourg, June 2004; Norway, April 2004; Slovak Republic, December 2005; Sweden, September 2005; Switzerland, February 2005; United Kingdom, March 2005.

## **A. Awareness raising: public sector and private sector**

16. The reviews have focused on two areas of awareness-raising: first, awareness of Export Credit Agency personnel themselves about the bribery offence (usually discussed in the context of public sector awareness of bribery); and second, awareness raised in the private sector by Export Credit Agency policies.

### Export Credit Agency personnel awareness

17. Awareness of bribery offences by ECA staff was found to be patchy. Four of the 16 reviews mentioning ECAs, revealed that ECA staff had very good awareness and there were proper internal training and policies in place (Australia, Canada, Hungary, and Switzerland). Australia has an internal code of conduct, which includes reference to bribery of foreign officials (Australia, para 35) and Canada has a Code of Business Ethics for its staff, which likewise includes reference to bribery (Canada, para 85). In Hungary's case, the examiners specifically praised Hungary for the "*relatively high degree of awareness*" of its ECA staff due to "*significant internal training efforts*" (Hungary, para 24).

18. However, in five of the 16 reviews that mention ECAs, the examiners specifically recommended that the Member country raise awareness of the bribery offence with ECA staff (Belgium, Greece, Japan, Luxembourg, and Sweden). In Sweden's case, the examiners noted that despite some seminars provided to employees of EKN, Sweden could do more to raise awareness of EKN staff about bribery (Commentary, p 19 and Recommendations, para 220 (b)). In Japan's case, examiners found the knowledge of ECA staff of the bribery offence to be "*superficial*" (Japan, para 59).

### Private Sector awareness

19. In most instances, the reviews have noted the important awareness-raising effect of ECA procedures for informing companies of their legal obligations and requiring no-bribery declarations (both of which are obligations under the OECD ECG's Action Statement on Combating Bribery in Officially Supported Export Credits).

20. In some instances, the reviews have observed that Export Credit Agencies have taken further awareness-raising steps beyond the obligations in the Action Statement. These have included:

- sending out letters or circulars to clients (Canada, para 16; Greece, para 23; Norway, para 23 ; Sweden, para 58);
- developing an anti-corruption brochure for clients (Canada, para 16);
- holding meetings or a workshop for clients on foreign bribery (Canada, para 16; and Sweden, paras 57-60);
- placing information on the official ECA website (Slovak Republic, para 44; Sweden, paras 57-60 and United Kingdom, para 239); and
- providing additional information on the OECD Guidelines on Multinational Enterprises as an awareness raising tool (France, para 22; Sweden, para 57-60), or even in the case of France requiring customers to give a written declaration that they were aware of these guidelines.

21. In four of the 16 reviews where ECAs are mentioned (Greece, Norway, Slovak Republic, Sweden), however, examiners specifically recommended that ECAs take "*more proactive action to raise awareness with the corporate sector*" (Norway,

Commentary, p 12) beyond what they were already doing. Italy was criticised for not taking any actions beyond meeting its basic obligations under the OECD ECG Action Statement to raise awareness. The examiners noted: “*SACE had not informed applicants for support of the risks of corruption in foreign markets*” (Italy, para 34), with an implicit suggestion that it should. Other suggestions included:

- making greater efforts to promote the OECD’s anti-bribery instruments and “*the consequences of engaging in bribery to their clients and prospective clients*” (Greece, Commentary, page 11 and Recommendations, para 210 (d)); and
- “*sending information to clients and potential clients*” (Slovak Republic, para 44).

#### Awareness-raising among Small and Medium Sized Enterprises (SMEs)

22. The issue of Small and Medium Sized Enterprises (SMEs) in relation to Export Credit Agencies specifically has only been referred to briefly in 3 reviews (Australia, Canada, France). In Australia, examiners noted that EFIC generally provides “*specific help to Australian SMEs*” (Australia, para 103). In Canada, examiners were told that EDC’s cross-country seminars on corruption issues had been “*very poorly attended by SMEs due to, inter alia, insufficient resources*” (Canada, para 16). In France, as referred to above in the introduction, examiners observed that measures taken by public authorities in the export credits arena “*are also likely to enhance the awareness of enterprises, and particularly of SMEs, as to the requirements of*” national implementing legislation (France, para 21).

23. However, the vast majority of Phase 2 reviews have looked at awareness of bribery offences among SMEs in general, and have predominantly found an extremely low level of awareness of bribery among them (Australia, para 37; Belgium, para 33-5; Canada, para 17; France, para 19; Germany, Commentary, p 10; Greece, para 39; Italy, para 47; Japan, para 65; Korea, para 30; Luxembourg, para 15; Slovak Republic, para 31; Switzerland, Commentary, p 9; United Kingdom, para 35; United States, para 57). In some countries, SMEs had not even heard of the OECD Convention, or knew very little about it.

24. Some organisations representing SMEs during on-site visits told examiners that SMEs were unlikely to pay bribes, were not at particular risk of bribery or stated that bribery was not a problem for them (Australia, para 42; Belgium, para 33; Switzerland, para 21). In Canada, however, a lawyer representing SMEs told examiners, “*It is his impression that SMEs are often exposed to opportunities to bribe foreign public officials*” (Canada, para 17). In the US, a lawyer working with SMEs reported that few SMEs operating abroad had compliance programmes, and that this was “*an accident waiting to happen*” (United States, para 57). Examiners in the US review noted that “*SMEs are a particularly vulnerable business category*” and that the foreign operations of SMEs were “*the very environments in which bribery is most likely to occur and least likely to be detected*” (United States, para 58). Examiners in various other reviews have observed that SMEs were active players in the export market (in some countries making up the vast majority of exporters), often in high risk markets, with the implication that it was rather unlikely that SMEs would not be faced with risks of paying bribes.

25. In eight of the reviews published so far, examiners and/or the Working Group on Bribery have expressed considerable concern at the lack of awareness of SMEs and have specifically recommended that countries take more action to raise awareness among SMEs (Australia, Recommendations, para 176, iii); (Belgium, para 34; France,

Commentary p 13; Germany, Commentary, p 10; Italy, Recommendations, para 215 c); (Korea, Recommendations, para 142; Switzerland, Commentary, p 9; United Kingdom, Recommendations, para 251 b); and United States).

26. In two reviews (Germany and the United States), examiners recommended that the country actively promote corporate compliance programmes among SMEs (Germany, Commentary, p 10; United States, Recommendations, Article V C (i)) as part of this awareness-raising. Germany's Follow-Up report found that despite taking other awareness-raising measures, Germany had not implemented this recommendation in its campaigns to raise awareness (Germany, "Report on Progress since June 2003", January 2006, para 2). In the United States' Follow-Up report, this recommendation had been implemented satisfactorily. It is worth noting that in the review for Belgium, representatives for SMEs made the case that codes of ethics or compliance programmes were not appropriate for SMEs. The examiners in this review in response stated that while they "*acknowledge[d] that codes of conduct are not necessarily the appropriate solution in all cases, they believe that these codes can provide the opportunity to raise the subject in a more concrete manner, and progress beyond the level of general statements. They can also make it possible for detailed policies to be put in place that, provided they are implemented in practice, can reduce the risk that the company's employees will engage in bribery*" (Belgium, para 25).

27. Given the emphasis on awareness raising among SMEs in OECD Phase 2 reviews, it would seem clear that Export Credit Agencies should also make efforts to educate SMEs seeking export credits to the risks of bribery and the importance of compliance programmes. It would be entirely inappropriate, given the OECD Phase 2 recommendations and emphasis on this topic, if SMEs were to be excluded from anti-corruption requirements of ECAs.

## **B. Reporting suspicions of bribery to law enforcement agencies**

28. Most recent Phase 2 reviews have placed a special emphasis on the role that ECAs have in detecting and reporting suspicions and allegations of bribery to the law enforcement agencies.<sup>6</sup> In one recent review, examiners explicitly emphasized that "*a policy of legal requirement for reporting suspicions of [foreign bribery] violations [by export credit agency staff] would be an important tool for the detection of foreign bribery*" (Korea, Phase 2, para 44).

29. The reviews show that reporting obligations among ECAs are weak:

- Only the United Kingdom told examiners that it reported suspicions automatically to the law enforcement authorities (United Kingdom, para 242). Greece told examiners it would report only if "sufficient evidence" was available (Greece, footnote 50).
- In several instances, the reviews have picked up on the fact that ECA staff are not public servants and therefore not subject to normal civil service codes of conduct that may require reporting of crimes (Australia, para 105; Hungary, para 48; Japan,

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<sup>6</sup> This is in contrast to the OECD ECG Action Statement which only notes "referral of evidence of ... bribery to the appropriate national authorities" as one of the "appropriate actions" that Export Credit Agencies shall take if bribery is proved after credit, cover or support has been approved. The October 2003 OECD ECG's "Best Practices" paper on combating bribery in officially supported export credits however proposed that "Members should inform national investigative authorities when there is a "suspicion" or "sufficient evidence" of bribery.

para 81; and Luxembourg, para 39). However, Australia said that it would be “within [EFIC’s] internal policy to inform investigative authorities of suspicions of bribery” (Australia, para 105). In addition, Japan said that it would have “a moral obligation to report” and that it would report “on a case-by-case basis depending on the circumstances” (Japan, para 81).

- In other instances, ECA staff are only under an obligation to report suspicions to their superiors or the legal or human resources department (Canada, para 38; Hungary, para 48; Sweden, para 106-7) and it is then at the management’s discretion as to whether to refer these suspicions on to the law enforcement authorities. In Canada’s case, the examiners noted that whether the management passed on the suspicions might be circumscribed by their interpretation of their “duty of confidentiality” (Canada, para 38).<sup>7</sup>
- Some ECAs stated to examiners that they either had an internal policy to pass on information to the law enforcement authorities or would do so as a matter of practice (Italy, Korea, Slovak Republic). However, in Italy’s case, SACE told examiners that they would only do so but only “if appropriate” (Italy, para 36); in Korea’s case, one of the export credit agencies would only report “sufficient and credible evidence”<sup>8</sup> but nothing otherwise (Korea, para 45, 46); and in the Slovak Republic’s case, at the on-site visit, EXIMBANKA SR staff told examiners that they would only report to the law enforcement authorities “if there is a legal judgement that confirms that the subject transaction involved bribery; a suspicion of bribery will not suffice” (Slovak Republic, para 46). After the on-site visit to the Slovak Republic however changed its position and told examiners that EXIMBANKA SR would report “reasonable suspicions” of foreign bribery to law enforcement regardless of whether support has been provided (Slovak Republic, para 46).
- In Belgium’s case, where ECA staff are under a legal obligation to report suspicions of bribery, examiners noted that in practice Belgium’s export credit agencies “maintain a cautious approach to reporting suspicious facts to the prosecutor” (Belgium, para 60).
- In Switzerland’s case Export Credit Agency staff are subject to a general secrecy obligation on public officials, which can only be lifted by the relevant “hierarchically superior authority” who makes decisions on an entirely discretionary and subjective basis “after weighing the advantage of keeping the secret against that of revealing it in the interests of justice” (Switzerland, para 47). Examiners observed that in the context of export credits, “the mechanism for notifying the prosecuting authorities presupposes that the superior authorities of the ERG ... will have previously lifted the professional secrecy obligation” (Switzerland, para 48).

30. The lead examiners of the Phase 2 report have almost unanimously criticised the lack of reporting provisions or weak reporting provisions of Export Credit Agencies. Seven of the 16 reviews that refer to ECAs have specifically and strongly recommended that reporting provisions be instituted or strengthened (Australia, Commentary p 34; Belgium, Recommendations, para 177 (e); Canada, Commentary, p 17 and

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<sup>7</sup> EDC’s Anti-Corruption Policy Guidelines however explicitly state that EDC “will notify Canadian law enforcement authorities if in the context of transacting business with a company or individual EDC receives credible evidence (whether during its due diligence process or after support has been provided) that there has been a violation of [Canada’s anti-bribery laws]” (see [http://www.edc.ca/corpinfo/csr/anti\\_corrup/acpg\\_e.pdf](http://www.edc.ca/corpinfo/csr/anti_corrup/acpg_e.pdf))

<sup>8</sup> For a discussion of what OECD Phase 2 reviews have said about ‘credible evidence’ see Annex 1.

Recommendations, para 5 (d); France, Commentary, p 13 and Recommendations, para 159 (4); Japan (Recommendations, para 9), Luxembourg, Commentary, p 17; and Switzerland, Commentary, p 22 and Recommendations, para 146).

31. The Phase 2 reviews also revealed a lack of consistency in whether ECAs will pass on a suspicion of bribery or wait until they have ‘sufficient’ or ‘reasonable’ evidence. This lack of consistency is mirrored in recommendations made by examiners in the Phase 2 reviews to ECAs, as to whether they should report ‘suspicion’ or ‘credible’ evidence or signs. In Canada’s case, the examiners recommended that the Canadian authorities ensure “*that there is a consistent and reliable framework for disclosing suspicions forthwith where, in the course of transacting business with a company, credible evidence arises that a violation [of Canada’s anti-bribery laws] has occurred*” (Canada, Commentary, p 17 and Recommendations, para 5 (d)). In France’s case, the examiners recommended procedures for alerting the Public Prosecutor’s Office “*when there are credible signs, in [COFACE’s] business relations with an entity, that a violation [of the French anti-bribery laws] has occurred*” (France, Commentary, p 13, and Recommendations, para 159 (4)). In Japan’s case, examiners recommended a requirement on all export credit agency staff “*to report as a matter of course to the law enforcement authorities any payments suspected of being bribes to foreign public officials*” (Japan, Recommendations, para 9).

### **C. Due Diligence: Preventing and Detecting Bribery**

32. Due diligence procedures are essential for Export Credit Agencies to detect whether bribery might have or might occur on a project they will support and to prevent bribery in such projects. Indeed it is arguable that without some sort of due diligence or screening mechanisms ECAs would find it hard to meet the requirements of the current OECD ECG Action Statement, which states that “*if there is sufficient evidence that such bribery was involved in the award of the export contract, the official export credit or export credit insurance provider shall refuse to approve credit, cover and other support*”.

33. If Export Credit Agencies do not question the track record of a company or particular procedures relating to the award of the contract, such as an agent’s commission, it is arguable that they will not be able to pick up on instances where there might be “sufficient evidence” of bribery. Indeed the OECD ECG’s October 2003 ‘Best Practices to Deter and Combat Bribery in Officially Supported Export Credits’ paper, expressly proposed various due diligence measures that Members should adopt including:

- Asking details on agents’ commissions (including amounts paid, services rendered, purpose of commission and names of agents) on transactions above a certain threshold (paragraph 4)
- Requiring applicants to advise whether they have been debarred by the World Bank or other multilateral or bilateral financial institutions for bribery or been convicted in a ‘national court’ of bribery, and applying ‘enhanced due diligence’ where a positive response is received from the applicant (para 6)
- Applying ‘enhanced due diligence’ and suspending processing of an application when there is a ‘suspicion’ or ‘sufficient evidence’ of bribery (para 8).

34. The fact that ECAs are not investigatory bodies in no way impedes them from undertaking normal due diligence measures, which are common to and best practice in the private sector. Not to do so would leave the ECAs open to the accusation that they are wilfully refusing to ask the basic questions that might reveal whether a crime is being committed.

35. Although the Phase 2 reviews do not speak directly of ‘due diligence’ measures, their scrutiny of Export Credit Agencies has picked up various ways in which some ECAs are applying the ‘Best Practices’ approach proposed by the OECD ECG. More recent Phase 2 reviews have particularly explored under what circumstances ECAs would withhold cover for a project, including what level of evidence they require to do so (see ‘*Withholding cover*’ section below). A few reviews have also covered, in passing, the issue of whether ECAs scrutinise agent’s commissions (see ‘*Agent’s commissions*’ section below) and whether ECAs conduct audits when suspicions of bribery arise (see ‘*Verification by audit*’ section below).

#### Due Diligence measures

36. The Phase 2 reviews have picked up that a handful of ECAs are taking the ‘due diligence’ measures proposed as ‘Best Practices’ by the OECD ECG. This includes the following:

- A few ECAs check the background of applicants to determine if they are on the blacklist of the World Bank (Australia, para 166; Italy; para 34). Australia stated that if an applicant were on the list this “*would trigger particular scrutiny on the part of EFIC*” (Australia, para 166).
- A few ECAs check whether an applicant has been convicted of corruption (Italy, para 34; Luxembourg, para 40) or whether there are any legal proceedings against them (Hungary, para 47). Italy requires applicants to state that they are “*not aware of any criminal offence attributable to other third parties in relation to the subject transaction*” (Italy, para 34). Luxembourg requires applicants to provide an undertaking that they will “*advise the Luxembourg Ducroire of any prosecution or conviction against him*” (Luxembourg, para 40). Hungary requires applicants to report any legal proceedings subsequently initiated against them with regard to bribery (Hungary, para 47).
- One of Sweden’s export credit agencies, EKN, stated that “*prior to approving support, it conducts ‘due diligence’ whenever there are ‘indications’ of bribery*” (Sweden, para 103).
- Canada has an Action Statement on Bribery and Corruption for its ECA staff “*outlining the steps that must be carried out by EDC staff involved in processing applications for support.*” However, the measures mentioned in the Phase 2 review only relate to obligations under the current Action Statement, such as informing applicants of the legal consequences of bribery and obtaining anti-corruption declarations. It is not therefore clear what further due diligence EDC staff undertake.<sup>9</sup>

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<sup>9</sup> Again, EDC’s Anti-Corruption Policy Guidelines state only that EDC will “exercise reasonable due diligence and care” not to support a transaction tainted by bribery and that it takes due diligence measures to ensure that a company convicted of corruption has taken appropriate measures to deter further bribery (see [http://www.edc.ca/corpinfo/csr/anti\\_corrup/acpg\\_e.pdf](http://www.edc.ca/corpinfo/csr/anti_corrup/acpg_e.pdf)).

37. Examiners in several reviews have however picked up on areas where ECA practice is currently weak. This has included:

- Failure to have any measures in place at all or adequately resourced measures to detect bribery (Belgium, para 25-26; Germany, para 42; Luxembourg, para 41; Sweden (SEK), para 103; Switzerland, para 132). In Belgium’s case, examiners noted that *“very little is being done in practice to implement preventive measures”*, and that *“no prior analysis of the risks of bribery in the markets concerned or of the export contract covered by the guarantee”* was being done. Further the ECAs of Belgium had *“such limited means available that they are not in a position to make preliminary inquiries when they themselves receive allegations – sometimes explicit – that their clients are engaging in corrupt practices”* (Belgium, para 25-26). In Germany, Hermes officials told examiners that they would only consider withholding support for a transaction *“if proof of such bribery is presented to them”* and that they *“would examine allegations of corruption that are brought to their attention”* – both of which suggest a reactive approach rather than one based on due diligence procedures that proactively detect such allegations or proof (Germany, para 42). In Luxembourg’s case, examiners questioned *“the adequacy of the human and technical resources available ... to verify how the anti-corruption clause is applied in practice”* and the ability of ECA staff to check whether companies asking and receiving support were under investigation *“given the legal and practical obstacles to the exchange of information between government departments and public agencies”* (Luxembourg, para 41). In Sweden’s case, examiners remarked that one export credit agency (SEK) had *“no measures or policy to investigate whether its clients have or will engage in bribery”* (Sweden, para 103). In Switzerland, examiners questioned the ability of Swiss ECAs *“to detect whether a guarantee is linked to bribery”*. Switzerland’s representatives informed the examiners that ERG was thinking of setting up *“a screening mechanism that would enable its staff to be more vigilant with regard to applications relating to high-value projects in countries or sectors of activity ... that are particularly sensitive to bribery”* (Switzerland, para 132).
- Failure to provide training and guidelines to staff on how to detect bribery (Greece, para 199; Japan, para 59; Norway, para 23; Slovak Republic, para 45; and Sweden, para 103). In Norway’s case, staff from GIEK themselves noted that *“they felt they had very little power to find out whether the companies involved dealt in corrupt practices”*, and that *“additional information and training may be necessary within GIEK to raise their capacity to detect corruption cases”* (Norway, para 23). In Japan, examiners observed that *“training had not been provided ... on the role of officials involved in export credit ... in preventing and detecting foreign bribery transactions”* (Japan, para 59). In Greece’s case, examiners noted that ECIO had *“provided no training to detect ... ‘suspicions’ or to gather ‘sufficient evidence’”* (Greece, para 199). Likewise, with the Slovak Republic, examiners observed that, EXIMBANKA SR *“had not trained its staff to detect suspicions of bribery”* (Slovak Republic, para 45)<sup>10</sup>. While examiners found the Swedish based EKN’s stated policy to conduct ‘due diligence’ *“commendable”* (Sweden, para 105), they observed that the policy was not backed up by any *“guidelines ... on what amounts to sufficient ‘indications’ of bribery to trigger ‘due diligence,’”* nor any training in

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<sup>10</sup> Beyond providing a copy of the OECD Best Practices to Deter and Combat Bribery in Officially Supported Export Credits paper to its staff, that is.

how to conduct this practice. The examiners concluded: “*not surprisingly, there have been no cases in which ‘due diligence’ was conducted*” (Sweden, para 103).

- Failure to check for prior convictions or investigations (Belgium, para 26; Greece, para 199; Slovak Republic, para 45). In Belgium’s case, the examiners remarked that “*there are not even any procedures in place*” for checking previous convictions (Belgium, para 26). In Greece’s case, examiners stated that it was not clear “*whether the ECIO has instructed its staff to check for outstanding investigations or convictions against a client before or after approving support*” and explicitly recommended that the ECIO consider “*instructing their staff to verify whether an applicant is being investigated for or has been convicted of bribery before and after benefits are provided*” (Greece, para 199, 200). Examiners of the Slovak Republic, found that its ECA staff did not check for “*outstanding investigations or convictions against a client*” (Slovak Republic, para 45).

#### Withholding support on ‘suspicion’ or ‘sufficient evidence’ of bribery

38. As outlined above, the OECD ECG Action Statement obliges ECAs to refuse cover or support where there is “sufficient evidence” that bribery was involved in the award of the contract. Meanwhile, the OECD ECG “Best Practices” paper proposed that ECAs ‘suspend’ processing an application where there is ‘suspicion’ or ‘sufficient evidence’ of bribery, interrupt loan disbursement and deny access to official support for other applications from the same exporter (paragraph 10).

39. In 2005, the Commission for Africa suggested that whether support is being withheld on grounds of suspicions and evidence of bribery is a key test of whether the OECD’s Action Statement is working. It went so far as to recommend that the OECD ECG “*publish figures on the number of applications turned down on grounds of bribery so that the international community can determine whether these voluntary measures are working sufficiently well.*”<sup>11</sup>

40. So far, the Phase 2 reviews have revealed the following:

- Only Hungary and Italy state categorically that they “will” refuse cover where there is sufficient evidence of bribery (Hungary, para 48; Italy, para 36).
- With most ECAs, there is considerable discretion as to whether to refuse support on the basis of a suspicion or evidence (Australia; Germany; Greece; Switzerland; United Kingdom).<sup>12</sup> In Australia, “*EFIC retains discretion to accept or refuse support, and each request is examined on a case-by-case basis*” (Australia, para 166). In Germany, Hermes “*may deny cover ... if proof of ... bribery is presented to them*” (Germany, para 42). Greece used the term “*may deny support*” (Greece, para 196). In Switzerland, examiners noted “*some latitude in the [ECAs] assessment of facts that might justify withholding ... a guarantee*” and that the decision to do was based on “*discretionary not an automatic criterion*” (Switzerland, paras 131-2). The United Kingdom states that it “*will normally withhold support*” if there is a legal judgement or sufficient evidence of bribery, which again implies discretion as to whether to do so or not in some cases (United Kingdom, para 242).

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<sup>11</sup> Commission for Africa (2005), *Our Common Interest: Report of the Commission for Africa*, p.151.

<sup>12</sup> It is unclear where Korea stands since the Phase 2 report simply noted that Korea’s ECAs “meet the obligation under the Action Statement regarding the requirement to refuse the approval of credit, cover or other support if there is sufficient evidence that foreign bribery was involved in the award of the contract” (Korea, para 138). The examiners did not probe real practice by the Korean ECAs.

- A few countries state that they will or may suspend processing an application where there is suspicion of bribery (Hungary; Slovak Republic). Only one country, the Slovak Republic, claims that it would definitely refuse an application on the grounds of ‘reasonable suspicion’ – a commitment made after its on-site visit and contrary to what it had suggested during the on-site visit (Slovak Republic para 224). Australia and the U.K. said that they might consider refusing support where there was suspicion of bribery (Australia, para 166; United Kingdom, para 242). Hungarian representatives told examiners that procedures for approving credit would be “*temporarily stopped*” pending a review by the central committee once a suspicion had been referred to it (Hungary, para 48). The Slovak Republic said it would suspend an application “*pending clarification*” (Slovak Republic, para 224). The Slovak Republic also told examiners that it “*will decline an application for support if it has reasonable suspicions that a transaction involved bribery*” (Slovak Republic, para 224). Australia suggested that it “*may also withhold ... support for a contract where there is evidence or even a suspicion of bribery*” (Australia, para 166). In the United Kingdom, examiners were told that where it suspects bribery, ECGD “*will make enquiries with a view to determining whether it might withhold support for the transaction in question*” (United Kingdom, para 242). No other countries however, reported any procedures to act on suspicions of bribery.
- Several reviews threw up a lack of clarity about what level of evidence is implied by the term “sufficient” (Greece; Hungary). ECIO officials in Greece told examiners that “*these concepts are ‘very fluid’ and likely to require the commencement of a preliminary investigation by law enforcement authorities*” (Greece, para 196). Hungary told examiners that “*the sufficient evidence standard is always met if criminal proceedings have been commenced against the person participating in the transaction*” (Hungary, para 48).
- Two countries, Japan and Sweden, will only withhold support or take any action whatsoever if there is a ‘legal judgement of bribery’ (Japan, para 194; Sweden, para 61). Japan stated that in practice both JBIC and NEXI would only withhold support for a transaction where there is a legal judgement of bribery (Japan, paras 194-5). Although JBIC could in theory withhold support for a transaction where there is sufficient evidence, it is not required to do so (footnote 142). Sweden, meanwhile, told examiners that it would not withhold support “*on the basis of evidence ... however cogent*”, but would need a legal judgement to do so (Sweden, para 61). It is doubtful if these countries can be said to meeting their obligations under the current Action Statement with this approach.

### Agents’ commissions

41. The issue of scrutiny of agents’ commissions was only really put on the agenda of ECAs by the OECD ECG’s “Best Practices” paper in October 2003. It is perhaps not surprising, therefore, that few Phase 2 reviews have mentioned this important area. However, one recent Phase 2 review observed that “verification of agents’ commissions could potentially uncover attempts to pay bribes to foreign public officials through intermediaries” (Australia, Phase 2, para 104).

42. Four Phase 2 reviews have raised the issue of scrutiny of agents’ commissions (Australia; Belgium; France; Slovak Republic).

43. The reviews of Australia and France simply observed ECA procedures in this area. Australia’s review noted that “*EFIC exercises a control in order to support only*

*commissions that are at a level deemed reasonable ... Generally commissions of up to five per cent are acceptable, whereas amounts between five and ten per cent would trigger various checks to ensure that the level of work provided by the agent is proportionate to the fee paid. Commissions exceeding ten per cent receive even greater scrutiny, and could only be supported after a due diligence process involving EFIC's Managing Director"* (Australia, para 104). France's review noted that COFACE has procedures in place to ensure that *"remuneration paid to agents (included in the export contract) is only covered if it is in fact remuneration for services whose purpose, materiality and lawful character can be verified"* (France, para 22).

44. In Belgium's case, the examiners were critical that *"neither the Ducroire nor FINEXPO had any preliminary checks in place on the contracts covered by their guarantees, to satisfy themselves, for example, of the purpose, substance and legitimacy of some of the services falling within the contracts: only when a claim is notified do these bodies examine the contract on the basis of material evidence ... both these bodies allow commissions in the 5% range to be paid to intermediaries"* (para 60). In the Slovak Republic's case, both lead examiners and the OECD Working Group on Bribery recommended that *"EXIMBANKA SR require a client to disclose sufficient information, such as details on agents' commissions, which would enable EXIMBANKA SR to verify whether the client has engaged in foreign bribery"* (Commentary, p 13 and Recommendations, para 239).

#### Verification by audit

45. The ability of ECAs to audit their clients when there is a suspicion of bribery or to assess whether the anti-bribery declarations are being kept has come up in a handful of Phase 2 reviews (Greece; Korea; Sweden).<sup>13</sup> In Korea's case, the examiners simply observed that their ECAs did not have authority to perform such audits, but that the Board of Audit and Inspection of Korea (BAI) did, though it was not clear that it had ever done so in practice (Korea, para 76). In both Greece and Sweden's case, examiners noted that the ECAs did have the power to audit their clients, in Greece's case *"to determine whether funds obtained from the agency has been used for a bribe"* (Greece, para 197) and in Sweden's case *"if they uncover suspicions of bribery after support had been given"* (Sweden, para 104). However, in both cases, examiners stated that it was not clear as to when and how the ECAs would conduct such audits. In Sweden, they noted that *"there is ... no training on how to uncover suspicions"* nor any *"guidelines on when audits will be conducted"* (Sweden, para 104). And neither agency had in practice ever conducted such an audit.

#### **D. Sanctions for bribery convictions**

46. As outlined above in the introduction, the OECD Convention specifically envisages temporary or permanent exclusion from export credits as a possible administrative sanction for companies convicted of bribery of foreign officials. This has been restated in various forms in numerous Phase 2 reviews (Australia, Belgium, Canada, France, Greece, Hungary, Italy, Japan, and Switzerland).

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<sup>13</sup> In Germany's Phase 2 review it was noted of KfW that it *"regularly monitors the projects it finances and uses independent auditors as well as its own financial review teams who are instructed to include corruption checks as part of their work"* (para 43). KfW provides both export credit and development aid, but these comments were only made in the context of development aid and it is not clear if this also applies to export credits.

47. Several useful observations have been made by examiners about the importance of excluding companies from export credit support as a sanction for foreign bribery. In Australia's review, examiners noted that particularly where monetary sanctions for legal persons are low, "*complementary administrative penalties [in the context of export credits] may be useful and may act as a deterrent*" (Australia, para 162). In Japan's review, examiners stated that "*effective administrative sanctions, including disqualification from... export credit programmes, can represent an important tool to combat the bribery of foreign public officials*" (Japan, para 187).

48. The OECD ECG's Action Statement on bribery and officially supported export credits also envisages certain administrative sanctions for bribery, though not the administrative sanction recommended in the OECD Anti-Bribery Convention of excluding convicted companies from export credit support. The Action Statement requires that "*if, after credit, cover or other support has been approved, an involvement of a beneficiary in such bribery is proved, the official export credit or export credit insurance provider shall take appropriate action, such as denial of payment or indemnification, refund of sums provided and/or referral of evidence of such bribery to the appropriate national authorities*". The OECD ECG's October 2003 "Best Practices" paper also recommended sanctions where there is a legal judgement of bribery, which incorporates the OECD Convention's recommendation in the list of possible actions ECAs could take. These included: suspending indemnification of claims; interrupting loan disbursement; seeking recourse; and denying access to official support for other applications from the same exporter for a set (but unspecified) number of years (para 11).

#### Administrative sanctions envisaged by the OECD Anti-Bribery Convention

49. The Phase 2 reviews have revealed the following:

- No OECD Member State reviewed so far has taken the step, proposed under Article 3 of the OECD Anti-bribery Convention, of imposing administrative sanctions in the form of temporary or permanent exclusion from export credit support, on any sort of automatic basis.
- Some countries have a discretionary policy in practice allowing them to refuse support where a company has been convicted (Australia, para 166; Canada, para 85 and footnote 52; United Kingdom, para 243). The strongest of these policies is in Canada, which has a policy of debarring companies convicted of bribery "*until EDC considers that such party has taken appropriate measures to deter further bribery*".<sup>14</sup> At the time of the Phase 2 review, Canada stated that this policy was "*determined by factors including the deterrent effect of the sentence and subsequent actions demonstrating rehabilitation*" (Canada, para 85). However, the examiners noted in the context of EDC anti-bribery procedures that criteria such as "*rehabilitation of the applicant, are relatively subjective ... [and] could lead to an inconsistent decision-making policy framework*" (Canada, para, 38). In Australia, examiners were told that "*there is no formal requirement that support must automatically be refused or withdrawn where there has been a conviction for foreign bribery, whether in an Australian or a foreign jurisdiction. EFIC retains discretion to accept or refuse support, and each request is examined on a case-by-*

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<sup>14</sup> [http://www.edc.ca/corpinfo/csr/anti\\_corrup/acpg\\_e.pdf](http://www.edc.ca/corpinfo/csr/anti_corrup/acpg_e.pdf)

*case basis*” (Australia, para 166). And in the UK’s case, ECGD stated that “*blacklisting ... would be subject to legal challenge*” but that convictions “*would be taken into account when considering new applications for support*” (United Kingdom, para 243).

- Other countries say that the option of refusing support to convicted companies is open to them but not practiced (Greece, footnote 21; Japan (JBIC) para 194 and footnote 142; Korea, para 138). In Japan, JBIC ECA staff indicated that refusing support to convicted companies was “*available but not required*” (Japan, footnote 142). JBIC’s Overseas Development Assistance (ODA) branch stated that the Ministry of Foreign Affairs had the right to request companies not to bid for a set period of between 2-12 months (Japan, para 188-198). JBIC’s export credit staff told examiners that they had never disqualified a company blacklisted from the ODA branch despite extensive information sharing between the two branches (Japan, para 190). In Greece and Korea’s cases, their Phase 2 reviews simply reiterated the country’s responses to the OECD ECG’s 2002 Survey on Members’ practices.
- And others say that they would not refuse further support to convicted companies at all (Hungary, para 205; Japan (NEXI), para 194; Sweden (para 62)).<sup>15</sup> Hungary stated that beyond the administrative sanctions envisaged in the OECD ECG Action Statement “*there is no possibility of wider sanctions*” (Hungary, para 205). In Japan, NEXI officials maintained that they “*would continue to deal with a company if it were convicted of foreign bribery because officially they have no right to reject insurance. They added that they might request an internal compliance programme, but a concrete policy has not been established in this regard*” (Japan, paras 194-5). Sweden stated that “*a client who has engaged in foreign bribery in one transaction is not disentitled to support for other transactions*” (Sweden, para 62).
- In eight reviews, either the lead examiners and/or the OECD Working Group on Bribery has specifically recommended that in the absence of “*additional or administrative sanctions*” for legal or natural persons convicted of bribery, Member States should “*further develop*” or “*consider revisiting their policies*” on dealing with applicants convicted of foreign bribery either with a view to introducing such sanctions in the export credit context or ensuring that their policies in this area are a “*sufficient deterrence*” (Australia, Recommendations, para 181 (b); Belgium, Recommendations, 176 (c); Canada, Recommendations, para 6 (e); France, Recommendations, para 159 (4); Italy, Commentary, p 14; Japan, Recommendations, para 14 (e); Switzerland, Recommendations, para 147 (b); United Kingdom, Commentary, p 79). In Belgium, the Working Group did not specifically mention export credits, but directed Belgium to “*ensure that there is a fully efficient system of refusing ... [public] advantages to enterprises determined to have bribed foreign public officials*” (Belgium, Recommendations, 176 (c)). In France’s case, the lead examiners urged France to establish policies “*to evaluate the eligibility of enterprises that have been found guilty in the past of acts of foreign bribery*” (France, Recommendations, para 159 (4)). In Italy, the lead examiners encouraged SACE “*to further develop their internal guidelines to ... deal with client*

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<sup>15</sup> In Germany’s case, while no mention is made of Hermes’ policy on convicted companies, the Phase 2 review noted that while KfW may “*ban a particular entity from participating in a particular bid or project pursuant to which KfW has determined that the entity acted corruptly*” but that “*entities that have acted corruptly may participate in future projects run by the project executing agency*” (Germany, para 44). See footnote 8 above, however. It is not clear from the review whether this relates also to export credits supported by KfW.

*companies suspected of bribing foreign public officials, including ... refusal of future applications for credit*” (Italy, Commentary, p 14). In Switzerland, the examiners and Working Group recommended “*measures to temporarily or permanently ban any company convicted of bribery of foreign public officials ... be envisaged for access to export credits*” (Commentary, p 45 and Recommendations, para 147 9b).

- The examiners observed, in passing, in a few reviews that no blacklists were held by the ECA (Australia, Sweden). In Australia: EFIC confirmed that it does not “*maintain blacklists of firms convicted of criminal offences, including foreign bribery or any other corruption or fraud-related offences*” (Australia, para 164). In Sweden, examiners reported that: “*neither [export credit] agency maintains a blacklist of companies who are ineligible for support because of prior engagement in bribery*” (Sweden, para 62).

#### Administrative sanctions envisaged by the OECD ECG 2000 Action Statement and 2003 Best Practices paper

50. Not all Phase 2 reviews have looked into any detail at what sanctions ECAs are applying in line with the 2000 Action Statement or the 2003 “Best Practices” document. Therefore, it is hard to extract real comparative data from the reviews. However, the Phase 2 reviews that have looked at this issue have shown that most ECAs appear to have in place at least one or more of the administrative sanctions suggested under the 2000 Action Statement for foreign bribery offences.

51. In most cases, ECAs will only use these sanctions if there is a legal conviction (France, para 22; Hungary, para 205; Luxembourg, para 40; Sweden, footnote 44).<sup>16</sup> However, some countries claim that they would impose sanctions where there is “sufficient evidence” of bribery (Australia, para 166; Italy, paras 35-6;<sup>17</sup> United Kingdom, para 243) or even a suspicion of bribery (Australia, para 166; Slovak Republic, para 224).

52. The sanctions mentioned in Phase 2 reports and used by ECAs include:

- a. Withdrawing support (Australia, para 166; Germany, para 42, Greece, footnote 21; Luxembourg, para 40; Sweden, footnote 44; United Kingdom, para 243). Various terms are used for this in the Phase 2 reviews, including invalidating cover (Greece, footnote 21; United Kingdom, para 243); denying cover (Germany, para 42)<sup>18</sup>; forfeiting cover (Luxembourg, para 40); and responsibility for the guarantee lapsing (Sweden).

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<sup>16</sup> See Annex 1 for what Phase 2 reviews say about “credible evidence”

<sup>17</sup> There was some confusion in the case of Italy. Initially, SACE staff said that for a guarantee to be invalidated, a final judgement from an Italian court was necessary, and that evidence of corruption would not be sufficient to suspend guarantees (Italy, para 35). After the on-site visit, SACE said that if it became aware of “*pending proceedings*” under Italian bribery laws, it “*would be allowed to suspend payment of the indemnity until the proceedings are concluded*”. And that if there were sufficient evidence of bribery, SACE could ask the courts to terminate the contract and then “*deny further indemnity without having to wait for a final conviction*” (Italy, para 36).

<sup>18</sup> Germany also states that Hermes would “forfeit premiums paid” (Germany, para 42).

- b. Denying any indemnification<sup>19</sup> (France, para 22; Italy, para 36; Korea, para 138; Norway, para 23; Slovak Republic, footnote 123<sup>20</sup>; United Kingdom, para 243). Again various terms are used in the reviews including loss of “*entitlement to indemnity*” (France, para 22) and losing the ‘right to compensation’ (Norway, para 23)<sup>21</sup>.
- c. Terminating the contract (France, para 22; Hungary, para 205; Slovak Republic, para 224). In Italy, SACE officials stated, “*if sufficient evidence of bribery relating to the contract arises after support has been provided, SACE may ask the courts to invalidate the contract under article 1892 of the Civil Code*” (Italy, para 36). In the Australian context, both the lead examiners and the Working Group on Bribery recommended that EFIC include “*provisions for the termination of [export credit] contracts in appropriate cases where contractors are convicted of foreign bribery after entering the contract*” (Commentary, p 54 and Recommendations, para 181 (b)), implying that the Working Group on Bribery regards this as a desirable and appropriate sanction.
- d. Recovering any indemnity paid (France, para 22; Greece, footnote 21; Hungary, para 205; Italy, para 36; Norway, para 23; Slovak Republic, para 224; Sweden, footnote 44; United Kingdom, para 243). Again various terms are used in the reviews, including requiring the exporter to reimburse “*for compensation received in settlement of a claim*” (France, para 22<sup>22</sup>; Sweden, footnote 44) and seeking recourse (United Kingdom, para 243)
- e. Requiring the exporter to indemnify the ECA for all expenses incurred (Sweden, footnote 44). ‘Seeking recourse’ in the United Kingdom context would also appear to include reimbursing any expenses incurred.<sup>23</sup>
- f. Interrupt loan disbursement (United Kingdom, para 243).
- g. Suspending payment of indemnity where there are “pending proceedings” until the proceedings are concluded (Italy, para 36).

53. In practice, however, the reviews implied that no ECA had applied these sanctions and there was lack of certainty in some instances, whether or how they would be put into practice (Greece, para 199; Norway, para 23). In Greece, the Phase 2 review states that: “*although the ECIO may impose administrative sanctions against companies which engage in foreign bribery in theory, the lead examiners are concerned this may not occur in practice*” (Greece, para 199). Examiners noted that ECIO’s policy on sanctions “*could be made more effective if the ECIO considers providing guidelines to*

<sup>19</sup> It is not clear that this is entirely different from ‘withdrawing support’ since the latter would seem to presuppose denying indemnification, but they have been listed separately here because some countries list both, while others list only one or the other.

<sup>20</sup> The Slovak Republic states that no indemnification will be provided where there is a failure to observe the laws in the Slovak Republic or in the country of the debtor or transfer, or if “*payments of commissions exceed[ing] in value and in comparison to the insured export credit value the amount common for the given type of goods and country*” (footnote 123)

<sup>21</sup> Norway states, unusually, that the same sanctions apply “*to ‘assistants’ should they act in violation of the prohibition. The term ‘assistants’ was given “wide interpretation” according to the Norwegian authorities*” (Norway, para 23).

<sup>22</sup> France reports that “*this measure also covers sums paid to banks in settlement of a claim relating to the buyer credits involved in the contract*” (France, para 22).

<sup>23</sup> ECGD Premium and Recourse Agreement.

*their staff on what evidence is necessary to trigger administrative sanctions. It could also be useful to train ECIO staff on how to gather such evidence”* (Greece, para 200). Staff at GIEK in Norway admitted to examiners that they were unsure of “*how and when such sanctions should occur in practice*” (Norway, para 23); unsure of how to “*find out whether a company had been sanctioned for acts of bribery*”; and further admitted to a “*“lack of clarity” as to when the contract could be suspended depending on the trail process, or whether sentencing in the first instance, appeals or Supreme Court was necessary for suspension of the contract*”.

54. In Japan’s case, it was not clear from the Phase 2 review that either JBIC or NEXI were doing any of the actions suggested by the Action Statement. Both JBIC and NEXI said that they would ‘withhold support for a transaction’ if there was a legal judgement after support had been given but there is no indication of what this would mean in practice (Japan, paras 193-5). JBIC staff indicated “*certain actions are available but not required where there is sufficient evidence of bribery or a legal judgement of bribery*” (para 194). However, a footnote states that the only actions available are: withholding support for the transaction and denying access to official support for all business (Japan, footnote 142).

55. There was some lack of clarity and lack of consistency as to whether companies had to be convicted in a ‘national’ court in order to be sanctioned or if foreign convictions would be taken into account. Hungary stated categorically that it was only if a national level court judgement were passed down would their ECAs apply sanctions (Hungary, para 205). In Australia, convictions from either an Australian or a foreign jurisdiction are taken into account (Australia, para 166). In Sweden, EKN and SEK state that they will terminate support for a client if the client is convicted of the crime by a Swedish court or by “*a foreign court whose legitimacy they recognise*” (Sweden, para 61). In the United Kingdom, convictions from a “*competent jurisdiction*” are also taken into account.<sup>24</sup> In France, there is ambiguity because the Phase 2 review states that companies are sanctioned where they are “*convicted for an offence provided for in the OECD Convention*” (France, para 22). In Italy, sanctions are based on court convictions for breaches of Italian anti-bribery laws, but in the cases “*where SACE was alerted to proceedings in a foreign country against an Italian company, it would inform the Italian prosecuting authorities* (Italy, para 35). In Norway, sanctions are applied where exporters breach the anti-corruption declaration, which states that they will “*respect the relevant provisions of the Norwegian Penal Code against bribery of foreign officials*” (Norway, para 23). This suggests that only national convictions will be taken into account. In Luxembourg, exporters are only required to report convictions under national anti-bribery laws (Luxembourg, para 40).

## **Conclusion**

56. Phase 2 examiners have found considerable room for improvement in Export Credit Agency practice on combating bribery.

57. In no less than nine of the 16 reviews that mention export credit agencies, the OECD Working Group on Bribery made recommendations for improvement in Export Credit Agency practice (Australia, Canada, France, Greece, Japan, Norway, Slovak Republic, Sweden, and Switzerland). In Belgium, improvements to ECA practices are

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<sup>24</sup> ECGD application forms.

implied in the recommendations, though the actual recommendations are generic. In two reviews, Italy and the United Kingdom, reviewing ECA policies was listed under “follow-up” by the OECD Working Group on Bribery, while in Hungary,, lead examiners included a recommendation for ‘follow-up’ on export credit agency practice by the Working Group in their commentary. In Luxembourg’s review, lead examiners made specific recommendations for improvements in their commentary, which were not reflected in the Recommendations.

58. The reviews show that very different standards of implementation of the OECD ECG’s Action Statement are emerging, both on paper and in practice. Some countries appear to be considerably ahead of the Action Statement, implementing measures that go beyond the Action Statement including those proposed in the OECD ECG’s “Best Practices” paper. Other ECAs have good practice in some areas, but relatively poor practice in others. In some cases, the country has interpreted the Action Statement in a very narrow manner, and in others, it is not clear that the country is genuinely implementing the Action Statement in practice at all. In almost all cases, it is fairly difficult to assess how ECAs are implementing anti-bribery procedures in practice on a day-to-day basis.

59. Overall, an overview of the reviews indicates:

- Significant room for improvement in training and awareness-raising of ECA personnel, both of foreign bribery in general and of how to detect and prevent bribery in ECA supported transactions;
- Potential for greater awareness raising of the risks of foreign bribery with the private sector through ECA procedures and information provision;
- Particular weaknesses in standards and procedures at ECAs for reporting suspicions and evidence of bribery;
- Little evidence of proactive due diligence procedures applied by ECAs in a manner that would enable them to detect potential bribery on projects they are to support;
- Very little evidence that ECAs are actually withholding support for transactions where they have suspicions or evidence of bribery on any consistent basis (which is in part due to lack of due diligence procedures);
- No evidence that any ECA is implementing the recommendation implied within article 3 of the OECD Anti-Bribery Convention that export credit support be removed as a sanction for foreign bribery offences; and
- Some evidence that most ECAs have implemented at least one of the sanctions proposed in the OECD ECG Action Statement. However, there remain three concerns. First, there is a lack of clarity in some cases about how these would apply in practice. Second, there is a lack of consistency as to the level of evidence required for sanctions to be applied. Third, it is unsure whether only national convictions should be considered or if foreign convictions should be included in the factors to take action.

## **Annex 1: “Credible Evidence”**

1. The OECD Phase 2 reviews use the term “*credible*” with regard to allegations and evidence on a regular basis.
2. In six of the reviews published so far (Australia, Canada, France, Korea, Norway, Sweden), the OECD Working Group on Bribery and lead examiners have explicitly recommended that countries take certain measures with regard to “*credible evidence*” or “*credible allegations*”.
3. In the majority of cases, the recommendation has been that countries should ensure that public officials pass on “*credible evidence*” or “*credible allegations*” to law enforcement or “*competent*” authorities.
4. In some cases, this recommendation has been made with regard to public officials in general (Australia, Recommendations, para 179 b; Norway, Commentary, p 16). In two of the cases (Canada, Recommendations, para 5 d; and France, Recommendations, para 159 (4)), the recommendation was that procedures be established to allow the country’s Export Credit Agency and International Development Agency to report “*suspicious*” of bribery to the law enforcement authorities where “*credible evidence*” arises (Canada), or “*credible evidence*” itself (France). In another case (Korea, Recommendations, para 144 b), examiners and the Working Group recommended solely that the International Development Agency, KOICA, have a policy for reporting “*suspicious*” to the law enforcement authorities where “*credible evidence*” arose.
5. In three further cases (Canada, Recommendations, para 5 b); Korea, Recommendations, para 144 b; Sweden, Recommendations, para 222), the Working Group and examiners have recommended that specific instructions be issued to public officials based abroad, particularly foreign ministry personnel, about what steps to take when “*credible allegations*” arise. In these cases the recommendation has included the step of reporting to the competent authorities in their home country.
6. In one case (Australia), the Working Group and examiners recommended that the law enforcement authorities should undertake “*evaluations where appropriate of the veracity of allegations of foreign bribery ... contained in (i) media reports from credible sources*” (Australia, Recommendations, para 177 b)).
7. The Working Group and examiners have not spelled out in the reviews what constitutes “*credible*” evidence or allegations.



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