

**Strengthening the Implementation of the ECG's Action Statement of
December 2000 on Bribery and Officially Supported Export Credits
Approaches to key terms, working definitions and practical applications**

**Presentation to the OECD - ECG
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First, I would like to thank the Working Party on Export Credits and Credit Guarantees of the OECD for once again inviting Transparency International to present its comments and suggestions to this Group. We also welcome the efforts that the Group and its members undertake to improve the standards and practices of Export Credit Agencies that aim at hindering corruption.

We have been invited on this occasion to provide to the ECG our views on the definition of three key terms included in the Action Statement of 2000: "sufficient evidence", "due diligence" and "enhanced due diligence" which we present in the paragraphs below.

A. STANDARD OF PROOF: SUFFICIENT EVIDENCE

1. The Action Statement requires the presence of "**sufficient evidence**" of bribery in the award of the export contract, in order to refuse credit, cover or other support. According also to the Action Statement, if "**proof**" of the existence of bribery in awarding the export contract emerges after the credit, cover or other support has been approved, this should trigger appropriate action. It would appear reasonable to apply the same standard of proof irrespective of whether it is applied before or after the credit or support has been granted.
2. One then needs to define what constitutes **sufficient evidence**. A legal judgment on the presence of corruption, especially a final judgment ("res iudicata"), of course is the best evidence possible; but in view of the low number of cases reaching court, and the long periods experienced before judgments emerge requires that something less "perfect" be generally accepted. Many jurisdictions have dealt successfully with this issue. The most common definitions that have emerged, and with which legal practitioners are quite familiar, are "more likely than not", "balance of probabilities" or "beyond a reasonable doubt", depending partly on the circumstances in which they are used, i.e. civil or criminal cases.
3. The standard of common use in the US and the UK for civil cases is "more likely than not" or "balance of probabilities". The more demanding standard of "beyond a reasonable doubt" is used only in criminal cases and reflects the very high hurdles set in most jurisdictions before a criminal sanction can be imposed. The principle behind this criterion is similar in all legal systems, that is, that the compensatory nature of civil sanctions does not require the same high standard of proof as does the imposition of criminal sanctions. The denial of coverage

¹ This document has been prepared together with Michael Wiehen and received input from various experts from the TI movement.

and the denial of payment are not criminal sanctions but precautionary or prudential administrative/contractual measures. In the circumstances then we would propose that a standard of “more likely than not” or “balance of probabilities” be applied by the ECAs.

4. There is no unique prescription of what constitutes “more likely than not” or “balance of probabilities”. The application should be performed case by case and be the result of common sense and logic proper to common business and banking practices.
5. The World Bank, within its procurement processes, uses “reasonably sufficient” as criterion to impose sanctions (debarment and alike):

According to the Section 13, (b) of the Procedures of the Sanctions Committee²:

*“1) Insufficient Evidence: If the Committee finds that the evidence is not **reasonably sufficient** to support a finding that the Respondent engaged in a fraudulent or corrupt practice in connection with a Bank Project, the Committee shall direct the Secretary to so notify the INT and the Respondent in writing, and the matter shall be closed.*

*(2) Recommendation of Sanctions: If the Committee finds that the evidence is **reasonably sufficient** to support a finding that the Respondent engaged in a fraudulent or corrupt practice in connection with a Bank Project, the Committee shall determine an appropriate sanction from the range of possible sanctions, and shall recommend that sanction to the President of the Bank.”*

This standard is not common in civil or criminal law. It was interpreted by the 2001 World Bank Procurement Guidelines to mean “more likely than not” and has been retained through the recent reforms of the Bank’s procedure.

6. According to the ECA Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits” (as of January 2005), in most cases mere “suspicion” already instigates some type of action. It should certainly instigate enhanced due diligence and the duty to report to the authorities. However, a mere “suspicion” or “unsubstantiated accusations” can never be considered as sufficient evidence to trigger sanctions.
7. A good standard of proof and a good evidence management mechanism allows ECAs to avoid sponsoring unproductive activities, compensation under the cover and even liability. In fact, inaction by the ECA in cases where evidence of corruption was sufficient could lay the ground for liability. The use of the “balance of probabilities” or “more likely than not” rule offers a good safe ground.
8. A good approach to managing “sufficient evidence” would be for ECAs to determine and disclose to the clients clearly from the outset the consequences of encountering “sufficient evidence” of corruption at the moment of coverage application or project implementation. It is equally important that cases where “sufficient evidence” is found are actually enforced. This will create a dissuasive effect that may in turn reduce the burden of due diligence by discouraging companies from wrong doing in the first place. In any case, it should be required for all ECAs that upon encountering “sufficient evidence” the appropriate authorities are informed. According to the Survey, currently in most cases that option is available but not mandatory, and only a handful of cases have actually been reported to the authorities.

² Underscored not in original text.

B. DUE DILIGENCE and ENHANCED DUE DILIGENCE

9. **“Due diligence”** and **“enhanced due diligence”** are part of a risk management strategy. Their implementation therefore should not be seen only from an anti-corruption perspective but from a wider prudential perspective as well, similar to other due diligence standards now common in daily banking practice. ECAs that do not perform adequate due diligence can become subject to financial, reputational, legal and operational risks related to corrupt activities. In defining what due diligence should be, it is important to remember what its purpose is. Due diligence should serve: (and include everything required for these purposes)
- To reduce the likelihood of ECAs becoming a victim of a criminal activity (corruption) or of becoming the vehicle to perform it
 - To limit risk exposure
 - To help prevent corruption in international transactions by detecting and reporting suspicious activities
10. General due diligence relates to a particular project. Therefore, it should be performed as to both new and existing customers despite familiarity with their general corporate ethics or operations. It should comprise not only the client, but also the partners and the downstream operators (subcontractors, branches, subsidiaries and affiliates etc.) and among other aspects, comprise applicants’ codes of ethics, anti-bribery compliance programs and agents’ commissions and tasks. Due diligence should be performed at the moment of application for cover. For high risk projects, it should be maintained during project execution (project monitoring).
11. According to the ECA Survey (as of Jan 2005) many ECAs already have enhanced due diligence procedures for specific cases, others have no enhanced due diligence process at all, and there may be substantial differences in the application of the concept among the ECAs. It would appear highly desirable for ECAs to have consistent due diligence procedures, as many of the projects at risk involve joint ventures between companies of various countries and because of this, often parallel coverage as well. The weakest due diligence procedure increases the risk to the others by creating a “weakest link” through which corrupt practices could be concealed. It is advisable in these cases to use a common high standard of due diligence. If harmonising was not possible and there was a discrepancy, the highest standard should be applied. This is also applicable in regards to commercial banks.
12. What should trigger enhanced due diligence? Enhanced due diligence should be applied to those cases that under average scrutiny (due diligence) show red flags that indicate they are high corruption risk projects. Among the red flags are the following:
- Excessive agent’s commissions (beyond a pre determined threshold, depending on the contract’s total value).**
 - Excessive agents’ commissions vis à vis the local market. **
 - Unexplained, vague or open-ended agent’s tasks.
 - Public allegations, suspicions or credible information that indicates the potential presence of corruption.
 - The company has been debarred by the World Bank or other Development Banks, or the European Commission.
 - The project has a high market value or represents a high market stake (in terms of the company’s total earnings, or market share for example).
 - Use of subsidiaries, intermediaries or other third parties under conditions which do not assure full disclosure of relevant facts.
 - The project is located in a country known for its high prevalence of corruption.

**This determination requires of course that agent's commissions are listed separately from the other costs.

13. Enhanced due diligence includes the proactive search of information and further consideration of specific aspects of the proposal, among them:
 - Companies' previous involvement in corruption cases, their responses to them and the actual performance of internal ethics management systems (controls, audits, codes of ethics and compliance systems).
 - Agents' and other intermediaries' payments and specific tasks, including subcontractors, subsidiaries and other third parties.
 - Apparent existence of conflict of interests of the company's executives or owners in regard to host country or home country's government.
14. If enhanced due diligence cannot be performed because of customer's non-willingness to provide the required information, it should result in denial of coverage.
15. Even ECAs that do not offer coverage of agents' commissions should review the level of commission since a high level of commission suggests that bribery may have been used in pursuing the project.
16. ECAs can make good use of publicly available information from regulatory and surveillance agencies. Cooperation among ECAs in this field is encouraged and particularly in cases of parallel coverage.
17. High risk projects (identified by the red flags) should be subject to enhanced due diligence and project monitoring (continuous due diligence during the implementation/execution phase).
18. Monitoring project execution:
 - Could be performed by an independent monitor whose costs could be shared among participant project financial institutions and ECAs.
 - Should include the opening up of communication channels to encourage whistleblowers to provide information, even anonymously.
 - Should include on-site inspections.

Monitoring schemes involving Civil Society Organisations have proved successful in TI's experience. CSOs can play a number of important roles in preventing corruption.

19. It appears highly desirable that ECAs adopt and require from their applicants for cover, higher standards of information disclosure, such as described above. This will increase the likelihood that ECAs will receive adequate information or evidence to spot corruption risks in a timely manner.
20. Finally, TI is currently preparing detailed guidelines for due diligence, and expects to publish these during the middle of this year.

C. CONCLUSIONS AND RECOMMENDATIONS

1. Adopt “more likely than not” or “balance of probabilities” as the “sufficient evidence” standard of proof in order to determine whether to provide, reject or withdraw coverage in corruption related cases.
2. Introduce a two-tier approach, applying due diligence to all cases and enhanced due diligence to high corruption risk cases.
3. Adopt and harmonize “due diligence” and “enhanced due diligence” standards as high and similar as possible among ECAs in order to avoid special corruption risk gaps.
4. Develop an “intelligent” red flags’ system to assess whether a project represents high corruption risk. Allow it to evolve through time and change practices as events evolve.
5. High corruption risk projects should be subject to due diligence during project execution.
6. In parallel to adopting shared definitions of standard of proof, due diligence and enhanced due diligence, it appears highly desirable that ECAs adopt and require from their applicants for cover, higher standards of information disclosure, such as described above. This will increase the likelihood that ECAs will receive adequate information or evidence to spot corruption risks in a timely manner.

We remain available to provide our views and support for the Group in developing these ideas.

Thank you.

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