

**Evaluation Finland NCP Statement on Finnvera Oyj Specific Instance**  
Center for Human Rights and Environment (CEDHA)  
January 2007

This paper analyses the Finnish National Contact Point (NCP) decision on the Specific Instance filed against Finnvera plc, stating that the Guidelines do not apply to Finnvera and their export guarantee activities.

**Timeline**

Finnvera's arguments against its responsibilities under the Guidelines relative to Botnia's Orion pulp mill were forwarded to CEDHA on 29 August 2006, less than 24 hours prior to the MONIKA Advisory Committee Meeting. CEDHA prepared arguments, presenting them at the MONIKA Advisory Committee Meeting and submitting them in written form to the National Contact Point in writing on 11 September 2006. The NCP gave no response when sent this submission. The NCP statement, dated 12 October 2006 was received by CEDHA by post on 11 November 2006. It was not sent by email.

CEDHA's arguments were entirely ignored in the NCP Statement.

**Special Nature of Finnvera Oyj**

The NCP states that Finnvera Oyj cannot be considered as a multinational enterprise 'when contemplating the special nature of Finnvera Oyj as a provider of state's export guarantees'. The Guidelines do not define what is a 'multinational enterprise' in order to encourage their implementation across a wide range of enterprise structures, and in parallel NCPs are obliged to promote the Guidelines. These issues were not addressed by the NCP.

The NCP does not state whether exclusion of Finnvera Oyj resulted from considerations of Finnvera's status as an enterprise or consideration of Finnvera's behaviour in a multinational context. Clear arguments were put forth by the complainants in this regard, referring to Finnvera's status as a public limited company, and that export guarantees are being provided to Botnia SA, a company registered in the Oriental Republic of Uruguay. Further, the Guidelines are to apply equally to domestic enterprises (Chapter 1, paragraph 4). The Finnish NCP failed to address these arguments, and it is submitted that the NCP has interpreted the Guidelines (Chapter 1, paragraph 3 and 4) incorrectly.

**Regulation by national legislation and OECD arrangements**

The NCP statement reveals '(t)he OECD Guidelines cannot be considered to refer to state's export guarantee activities, which are regulated nationally by special legislation and for which special arrangements exist within the OECD (such as the environmental principles approved for export credit agencies)'. The existence of national legislation governing the action of private limited companies such as Finnvera Oyj is not a valid reason to exclude Finnvera from the Guidelines. Throughout the world, OECD and non-OECD countries regulate enterprises with national law, including specific legislation for specific types of enterprise. This argument is absurd, leaving NCPs open can exclude all

enterprises from the ambit of the Guidelines simply because national law applies to them. The Guidelines incorporate national law which governs enterprises in their country of operation, the first paragraph of the Guidelines recognising the Guidelines are 'consistent with applicable law'. (Chapter I, paragraph 1)

That special arrangements exist within the OECD (such as environmental principles approved for export credit agencies) is no reason to exclude export credit agencies as supply chain entities under the Guidelines. Special OECD arrangements for export credit agencies are more general in scope, and are weaker than the Guidelines in the sense that no mechanism for compliance exists. Just as various national and international laws apply to the same enterprise, the reason for exclusion of export credit agencies due to an overlap of regulatory instruments is invalid. The Guidelines acknowledge that they will overlap with other instruments stating the Guidelines 'reflect common values that underlie a variety of international declarations and conventions as well as the laws and regulations of governments adhering to the Guidelines'.<sup>1</sup> If the drafters intent were to exclude enterprises subject to other OECD agreements, it would have explicitly stated this in the Guidelines. It is submitted that the NCP has incorrectly interpreted CIME position on the supply chain and investment nexus and Guidelines Chapter 1, paragraph 1.

#### **Investment activities and supply chain responsibility**

The NCP statement states that 'First and foremost, the Guidelines concern both investment activities and enterprises that have made investments (primary investors), in this case Botnia SA.' Commentary 10, Chapter 2 on the supply is interpreted to not include Finnvera Oyj as a business partner to Botnia SA. Export credit agencies can provide direct loans (investment) and export guarantees which have a mandate to facilitate and promote foreign direct investment by providing guarantees, which gives them a sufficient investment nexus and an investment like relationship.

The NCP provides no argument why Finnvera Oyj does not have a sufficient investment nexus in Botnia. With regard to the investment nexus, information on Finnvera's proposed activities with regard to Botnia has been sought by CEDHA through the Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental matters (mentioned in Guidelines, Commentary 30). Finnvera has failed to adequately respond to these requests. Due to the available information, the NCP cannot negate the absence of an investment nexus. Neither is the NCP in a position to state that the Guidelines cannot be applied directly to Finnvera, as they are indeed a business partner to Botnia with a direct and substantial business relationship. It is submitted that the NCP has incorrectly interpreted Commentary 10, Chapter 2 of the Guidelines.

#### **CIME Commentary on Investment Nexus**

The NCP concludes that the CIME commentary on the investment nexus of April 2003 'does not entail that the Guidelines should be applied to Finnvera's Oyj's special

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<sup>1</sup> Position of the CIME on Supply Chain Responsibility in the OECD Guidelines, From report of the annual meeting, September 2003

financing activities'. No reasoning is provided by the NCP as to how it arrived at this conclusion. To substantiate its decision, the NCP statement does not refer to any text in the CIME commentary. Neither does the NCP does not deal with key issues stated by the CIME such as the complementary nature of international declarations and conventions as well as the laws and regulations of governments adhering to the Guidelines. The NCP does not establish that Finnvera is not a business partner of Botnia. The NCP does not establish that Finnvera does not have an investment like relationship, nor that Finnvera does not possess a sufficient degree of influence over Botnia, one of which is required to rule out Finnvera's obligations under the Guidelines. The NCP provides no evidence of consulting the Investment Committee to clarify CIME intentions as provided by the Guidelines Procedural Guidance for CIME, paragraph 24. It is submitted that the NCP has incorrectly interpreted the CIME commentary.

### **Appropriateness of Guidelines applicability**

The NCP states '(w)ith respect to the investment viewpoint taken by the Guidelines, applying them to the activities of Finnvera Oyj could not, ever otherwise, be considered appropriate.' The NCP gives no reasons negating CEDHA's arguments that support provided by an export credit agency to multilateral enterprise is an investment like relationship. The NCP opinion that the application of the Guidelines to Finnvera is not appropriate remains unsubstantiated. It is troublesome that the NCP, under the auspices of Finland's Ministry of Trade and Industry, is arm of the Finnish Government which supports Botnia through its mandate to Finnvera, involvement in the Nordic Investment Bank, involvement in Kemira plc and having previously orchestrated bilateral investment treaties between Finland and Uruguay. The complainants wish to draw attention that it is inappropriate that the NCP address these questions relating to another Government owned institution.

The complainants are concerned by a lack of transparency in the NCP decision making process and request the NCP provide copies of all communication, formal or otherwise, between the NCP, MONIKA Advisory Committee, and Finnvera Oyj regarding the NCP process, in addition to all internal documents/information, such as the minutes of meetings etc, of these three bodies which deal with the Specific Instance Request.

Also of concern is that Finland has not published the details of the statement on its website, and did not send the statement to the complainants in digital format readily distributed. A press release can be found on Finland's Ministry for Trade and Industry Website, nothing more.<sup>2</sup>

### **Procedural failure of NCP**

The five issues that the NCP states 'should be taken into account' in consideration of the Guidelines' applicability to Finnvera erroneously interpret the Guidelines, erroneously interpret CIME commentary and ignore all arguments and evidence given by the complainants, in a manner which restricts the Guidelines, the NCP failing in its duty to promote adherence to the Guidelines. With respect to ECAs, this duty is all the more important considering the 2006 OECD Report which identifies widespread failure by

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<sup>2</sup> <http://www.ktm.fi/index.phtml?i=1914&l=en&s=666>

export credit agencies to promote the Guidelines. The remedy for this it seems, would be to include export credit agencies under the Guidelines. In this regard the Finnish NCP has failed to discharge its duty.

**Independence of NCP**

The NCP comes under the auspices of the Ministry for Trade and Industry in the Government, the same Government which supports Botnia through quasi-state enterprises Kemira and Metso Corporation, through multilateral bank the Nordic Investment Bank, and through Finnvera, the export credit agency 100% owned by the Finnish State. The Finnish government has also supported the Botnia project through a wide range of diplomatic actions such as the establishment of bilateral investment treaties, establishing Uruguay as responsible for costs or loss in earnings to Botnia, from any actions political or legislative acts to ensure positive social and environmental outcomes.