

Corner House Statement
29th March 2006

Export Credits Guarantee Department (ECGD) reintroduces improved anti-corruption procedures

On the 15th March 2006, the UK's export credit agency, the Export Credits Guarantee Department (ECGD), announced that it would reintroduce key anti-corruption measures that it had watered down in December 2004 following industry lobbying.

The changes made in December 2004 reversed strong, anti-corruption provisions that the ECGD had introduced in May 2004 as a result (in part) of The Corner House July 2003 report, *Turning a Blind Eye: Corruption and the Export Credits Guarantee Department*. This had exposed considerable loopholes in the Department's anti-corruption procedures.

The ECGD's March 2006 announcement follows its year-long consultation on its anti-corruption procedures, initiated after a successful court challenge by The Corner House.

The Corner House believes that the reintroduction of anti-corruption measures are a genuine and important step forward that will go some way towards restoring the ECGD's – and ultimately the UK government's – reputation on tackling corruption. The weakening in December 2004 of the improved May 2004 procedures considerably damaged the UK's reputation, particularly during 2005 when the UK-initiated Commission for Africa emphasised the importance of tackling corruption. The Commission's report specifically highlighted export credit agencies as a key factor in contributing to corruption and governance problems in Africa.

The re-introduction of several anti-corruption measures shows that good evidence-based, policy-making comes from hearing both sides of an argument before making important decisions. The grounds of The Corner House court case were that the ECGD had weakened its anti-corruption measures in December 2004 without proper consultation, and that stakeholders known by the ECGD to be interested in its anti-corruption measures (such as The Corner House) had been excluded from what were in essence secret negotiations with industry groups alone. The ECGD settled out of court with The Corner House in January 2005, agreeing to pay all costs and to carry out a full public consultation.

The content of the re-improved procedures

The ECGD now plans to adopt the following anti-corruption measures:

- **Agents:** The ECGD will require exporters requesting ECGD support to provide the ECGD with the name of any agent involved in the transaction that has been appointed by or on behalf of the exporter (subject to confidentiality procedures for companies concerned about the information getting into the hands of competitors or into the public domain).

Under the December 2004 weakened procedures, companies had been able to

cite commercial confidentiality as a reason not to disclose agents' identities; they also had to disclose details only of those agents that were engaged by the exporter or one of its controlled companies.

During the consultation, some exporters argued that they should not have to provide information about agents to ECGD as it was commercially sensitive information that represented part of the company's commercial assets and intellectual property. The ECGD noted in its consultation response, however, that:

“no compelling evidence of ‘unworkability’ or ‘inappropriateness’ ... has, in [the government’s] judgement been furnished in relation to the provision to ECGD by Applicants of the identity of Agents.”

- **Audit:** The ECGD's new audit clause will now permit the ECGD to audit the contract records of an exporter to verify declarations that the exporter has not engaged in corrupt activity on a random basis.

Under the December 2004 weakened procedures, the ECGD had first to confirm in writing to the exporter that it had reasonable grounds for suspecting wrong-doing by an employee, agent or partner of the exporter before it could conduct an audit.

Exporters argued during the consultation that, during such audits, ECGD staff might become aware of “commercially sensitive information.” They objected to the fact that, under the ECGD's May 2004 procedures, ECGD had been able “to investigate at will any aspects of the Supply Contract award and post-award administration” (CBI submission, June 2005).

In its final response to the consultation, the ECGD has accepted The Corner House's argument that audit rights were a normal part of both private and public sector insurance contracts and stated that it no longer considered it:

“appropriate that ECGD needs to have, or shall have, expressed a suspicion about bribery and corruption in order to trigger an audit”.

- **Anti-corruption declarations:** The ECGD will now require companies requesting ECGD support to declare that they have made reasonable enquiries of all other companies involved in the transaction in which there is an element of control (eg. parent companies that control the exporter; sister companies controlled by the parent company; and controlled subsidiaries of the exporter itself) and that, following these enquiries, they do not believe that any of these companies, their consortium partners or their agents have engaged in corruption. Companies will also be required to declare that they have made reasonable enquiries as to whether any of these parties has been debarred for, convicted of, or admitted to corrupt activity in the previous five years.

Under the December 2004 weakened measures, a company had to declare only that neither it nor its controlled subsidiaries had engaged in corruption, or been debarred for, convicted of, or admitted to corrupt activity in the previous five

years. If a joint venture partner engaged in corruption, ECGD required exporters only to notify it promptly once the exporter became “aware” of it. Furthermore, some parts of the required declarations were qualified with the phrase “to the best of our knowledge and belief”; the ECGD’s definition of this phrase did not require the exporter to make any enquiries whatsoever to ensure the truth of their declaration.

During the consultation, exporters argued that the undertakings required of them by the May 2004 procedures about bribery in respect of third parties were unworkable. They also argued strongly that the ECGD should keep the qualification “to the best of our knowledge and belief”. The Corner House, however, argued that, if the phrase “to the best of our knowledge and belief” was defined as “requiring reasonable enquiries”, the May 2004 declarations essentially required exporters only to have conducted appropriate due diligence on its business partners – something that any responsible exporter should carry out in any case.

In its final response to the consultation, the ECGD has drawn up declarations that are *not* qualified by the phrase “to the best of our knowledge and belief”, that require exporters to state that they have made reasonable enquiries of their business partners involved in the proposed transaction, and that they are satisfied that there has been no corruption. Exporters are still required to notify ECGD promptly if they uncover any corruption in relation to the transaction, including by any consortium partner.

Ongoing loopholes

These new procedures, which will operate from July 2006, are *not* a return to the May 2004 procedures, however. The Corner House believes that some loopholes for bribery and corruption to take place remain. The most significant are as follows:

- *The ECGD will give exporters five days’ notice before conducting an audit.* This provides ample time for a company to destroy or hide any incriminating documents, and runs counter to recommendations made by Parliament’s Trade and Industry Select Committee in March 2005 that the ECGD remove this clause.
- *The audit clause allows ECGD to audit documents “only to the period up to the date of the award of the Contract” and does not allow ECGD to inspect documents relating to measures taken by exporters to prevent, detect and deal with corruption or relating to the placing of subcontracts.* As The Corner House and others pointed out to ECGD, commission payments are often made *after* the award of a contract, and ECGD will not therefore be able to audit any documents relating to such payments, or to any administration of the agency agreement after that date. Furthermore, the fact that ECGD cannot inspect documents relating to how exporters prevent, detect and deal with corruption means that it cannot verify statements made in the application forms and repeated in the contract documentation that companies are requiring anyone acting on their behalf not to engage in corrupt activity, that they are monitoring that requirement and have taken appropriate action against anyone

involved in corrupt activity. The placing of subcontracts, meanwhile, is an area open to considerable corruption. The fact that the ECGD can still not audit this area of a transaction, as it could under the May 2004 procedures, is a considerable weakness.

- *Exporters have to provide information only about those agents who are instructed by them or appointed on their behalf.* This provides a clear loophole whereby an exporter can encourage a joint venture partner, subsidiary, parent or sister company to appoint an agent without the exporter's explicit authorisation – and therefore not on its behalf – and thus avoid having to provide any details of the agent to ECGD. Under the May 2004 procedures, exporters had to provide details of any agent involved by either themselves or any of their “affiliates”, and affiliates included any group company, whether controlled or not, and any joint venture, consortium or business partner. ECGD has said that where an agent is appointed by a consortium of which the exporter is a member, the agent will be deemed to have been appointed on the exporter's behalf and will therefore need to be declared under the new procedures. This is not clearly stated on the application forms, however.
- *Exporters are no longer required to state whether there is a relationship between the agent and the buyer of the exporter's goods or services nor to provide any details of such a relationship.* Given that the agent might be a public official, or a relative of a public official, this is important information that the exporter should be required to declare.
- *Companies do not have to make any declarations about non-controlled subsidiaries, parent companies that do not control them, or sister companies that are not controlled by the parent companies.* Ideally, the ECGD should have required exporters to declare that they had made reasonable enquiries of *all* parties involved in the transaction. Furthermore, the required declarations specifically exclude subcontracts. Subcontractors and non-controlled parties may therefore become an obvious conduit for bribes to be paid on ECGD-backed transactions.

The future

While the new procedures are not perfect and do not go as far as the May 2004 procedures, they are a considerable improvement on the weakened December 2004 procedures. They also represent a balanced and fair response to the consultation, given the demands that exporters themselves were making.

The Corner House believes that the key to ensuring that the ECGD prevents bribery occurring on projects it supports now lies in effective and consistent implementation of its new procedures.

One way of ensuring this is full transparency. The Corner House believes that ECGD should publish results of how its new policy is working in practice, including information about how many audits it has conducted to verify anti-bribery declarations, how many transactions it has refused because of suspicions or evidence

of bribery, and how many suspicions of bribery it has passed on to the law enforcement authorities. The ECGD should also report how many companies request the confidentiality arrangements for their agents on an annual basis.

Finally, The Corner House believes that the UK must now, on the basis of this March 2006 announcement, play a strong role in pushing for improved export credit agency procedures multilaterally through the Organisation for Economic Cooperation and Development (OECD). Negotiations are currently underway at the OECD to improve an agreement on how export credit agencies tackle corruption. Prior to issuing its response to the consultation, the ECGD had stated that it was unable to take a position at these negotiations.

Despite a G8 commitment made at Gleneagles in July 2005 to strengthen the anti-bribery requirements of export credit agencies, several G8 countries have been blocking progress at these OECD negotiations. As the country that presided over the G8 in Gleneagles, the UK has a special responsibility to seek to ensure that its G8 partners meet the commitments made in 2005. The ECGD's new procedures represent emerging best practice for how export credit agencies deal with corruption, and the UK should be encouraging both its G8 and EU partners to adopt similar procedures.

*Susan Hawley
The Corner House
29 March 2006*