

THE
CORNER
HOUSE

Station Road
Sturminster Newton
Dorset DT10 1BB
UK
Tel: +44 (0)1258 473795
Email <enquiries@thecornerhouse.org.uk >
Website: [http:// www.thecornerhouse.org.uk](http://www.thecornerhouse.org.uk)
Company No: 3892837

Patrick Crawford
Chief Executive
Export Credits Guarantee Department
2 Exchange Towers
Harbour Exchange Square
London E14 9GS

15 September 2009

Dear Mr Crawford,

ECGD's Letter of Credit Guarantee Scheme

We write in respect of the Government's response to the ECGD's consultation on its proposed Letter of Credit Guarantee Scheme (LCGS).¹ In particular, we seek further clarification on the proposed contractual rights and obligations under the Master Guarantee Agreement as set out in the Consultation Response published on 8 August 2009.

Legal and Policy Obligations, Safeguards, Master Guarantee Agreement and Contractual Relations

We note the Government's conclusion that it is "impractical" to apply its current environmental, social, human rights and anti-corruption procedures to the LCGS in the way in which they have been applied to ECGD's other products.² That is said to be

-
1. ECGD, "Government Response to the Public Consultation on the Introduction of a Product Guaranteeing Reimbursement of UK Confirming Banks under Letter Of Credit Arrangements", 7 August 2009, http://www.ecgd.gov.uk/index/public-information/public-consultation/government_response_to_letter_of_credit_arrangements.htm.
 2. ECGD, "Government Response to the Public Consultation on the Introduction of a Product Guaranteeing Reimbursement of UK Confirming Banks under Letter Of Credit Arrangements", 7 August 2009, sections 14, 15, 17 & 19 http://www.ecgd.gov.uk/index/public-information/public-consultation/government_response_to_letter_of_credit_arrangements.htm.

because of the limited time available to screen applications given the short timescales that apply when banks are requested to add their confirmation to letters of credit.³

Whilst we disagree with the conclusion that the ECGD's full Business Principles should not apply to the LCGS, we can see that the need for a quick decision on short-term letters of credit provides at least some justification for it.

The need for a quick decision does not, however, suggest that it is impossible to require the provision of information **after** the decision to back the letter of credit has been given. In particular, the Government's Response to the ECGD Consultation gives no reason why it is impossible to require that:

1. Within a certain number of days after a letter of credit guarantee has been entered into, basic details of a transaction should be provided by the exporter to the ECGD to enable ECGD to check whether or not the warranty that the exporter has given to the confirming bank has been or is being breached. The information required need be no more complex than the nature and destination of the export, the names of the contracting parties, the names of any agent, the value of the export and the value of any commission.
2. The contract between the exporter and confirming bank contain an express right in favour of ECGD to carry out monitoring and audits (in line with its rights under the current Business Principles) where it has reason to believe that further scrutiny of a transaction is required in accordance with the Government's obligations and policy objectives in respect of environmental and social impact and/or corruption and bribery.
3. The contract between the exporter and confirming bank contain an express right in favour of ECGD, either directly or through the contracting bank, to revoke a contract under the LCGS where there is evidence that the warranty relating to corruption and bribery has been breached or where there are breaches of the ECGD's required standards on environmental or social impact.

There is nothing in the Government's Consultation Response to indicate that the implementation of these safeguards would in any way affect the speed with which individual letters of credit transactions can be concluded. In the vast majority of transactions, the impact of these safeguards would be likely to be *de minimis*. These safeguards are in line with the Government's obligations and policy objectives.

We hope, therefore, that these recommendations will be adopted when the Master Guarantee is finalised.⁴ They will enable the ECGD to undertake its usual case impact analysis procedures, albeit after the letter of credit guarantee had been agreed. In the event that serious issues or irregularities are unearthed, the ECGD will be able to take enforcement action and/or refer the matter to the appropriate authorities.

3. Exporters typically expect their banks to be able to respond to confirmation requests within 1 to 2 business days. On occasions, however, the turnaround time is limited to a matter of hours. For the LCGS to be effective, banks need to know that they can bring letters of credit within the scope of ECGD's guarantee within similarly short timescales.

⁴ In this understanding we are guided by the Government's assurance that "Through the proposed contract between the participating bank and the exporter, those requirements of the OECD Recommendation which it practicable to apply to the LCGS will be followed" (section 17, page 12). We assume that the same principle applies to the Government's other international obligations and policy objectives.

A second issue arises for clarification in this respect. There appears to be some confusion as to the issue of contractual rights and obligations between the ECGD, the participating bank and the exporter. We along with other consultees have raised the issue of ensuring that a contractual relationship exists between the ECGD and the exporter.

Our recommendations in this regard were two-fold:

1. That the ECGD's Business Principles and normal procedures should apply in full to the LCGS and as such there should be a primary contract between the exporter and the ECGD in the usual way (paragraph 59); or
2. In the alternative, the recommended powers and obligations as between the exporter and ECGD (as above) should be governed by a contractual relationship between the ECGD and the exporter (paragraph 60).

The Government appears to rule out a contractual relationship on the basis of impracticality by dint of delays caused to the letter of credit guarantee transaction (section 17, page 12). Although we may disagree with the reasoning, it at least makes sense insofar as it relates to our primary recommendation. But the Government goes on to infer that it is not possible to create a contractual relationship between the ECGD and the exporter if the ECGD is not a direct party to the application process and the letter of credit guarantee contract (section 17, page 18).

If this is the Government's position, it seems to us to be wrong as a matter of law. The necessary contractual rights and obligations as between the exporter and ECGD can be established indirectly by requiring the confirming bank to include among the warranties that it is already obliged to extract from the exporter a further provision granting rights in favour of the ECGD pursuant to the Contracts (Third Party Rights) Act 1999.

It may be that there is simply a misunderstanding between us on this point and that it is the ECGD's intention to create such a contractual relationship.

Either way, we would kindly request that you provide us with a copy of the draft Master Guarantee Agreement (MGA). As the LCGS is being offered to a number of competing banks, the MGA will no doubt be in a standard format.

This will enable us to fully understand the Government's consultation response and proposals. It will enable us to consider and make any further suggestions as to the appropriate safeguards, rights, obligations and enforcement procedures. We are making this request as a stakeholder in this process and as such trust that it will be dealt with expeditiously.

Please could you therefore provide us with your response and a copy of the draft MGA within 14 days, or such shorter period as would sensibly enable us to feed into this process.

In this regard, please could you also inform us:

- a) When you expect to conclude the process of finalising the provisions of the LCGS and MGA.

b) When you expect to enter into the MGA with the participating banks? and for the LCGS to be up and running?

We are very willing to explore these proposals in more detail with ECGD and look forward to hearing from you soon.

With best wishes

Nicholas Hildyard
The Corner House

Sarah Edwards
Jubilee Debt