

SUBMISSION BY UNICORN TO THE ECGD CONSULTATION ON CHANGES TO ECGD'S ANTI-BRIBERY AND CORRUPTION PROCEDURES INTRODUCED IN DECEMBER 2004

THE CONSULTATION QUESTION

Do the changes made to ECGD's anti-bribery and corruption procedures in December 2004 have the effect of ensuring that, so far as practicable, 1) taxpayers' money is not used to support transactions tainted with bribery and/or corruption; and 2) an undue burden is not placed on exporters and/or banks?

If you consider that the changes do not possess this balance, please indicate what changes you think would do so?

1. Introduction

1. This submission is made by UNICORN, a Global Unions Anti-corruption Network. UNICORN undertakes empirical and policy research on a range of issues relevant to international bribery, including the anti-corruption policies and practices of OECD Export Credit Agencies (ECAs).

2. Obligations of the Export Credit Guarantee Department

1. The Export Credit Guarantee Department (ECGD) has legal and political obligations to introduce measures to deter and detect bribery under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1999) and its Revised Recommendations (1997).
2. The OECD Action Statement on Bribery and Officially Supported Export Credits (2000) was drawn up in recognition of these obligations and sets out actions to support the detection and deterrence of bribery, which all OECD ECA's are required to undertake.
3. It is widely recognised that this Action Statement is only a first step, falling short both of fully implementing the requirements of the Convention and the Revised Recommendations, and of incorporating existing best practice. The OECD Working Party on Export Credits and Credit Guarantees has already produced a paper "*Best Practices to Deter and Combat Bribery in Officially Supported Export Credits*", signalling the need, and political support, for further improvement. This 'best practice' paper will inform negotiations within the OECD Working Party on the content of an improved Action Statement.
4. According to the Action Statement (2000) "*if there is sufficient evidence such that bribery was involved in the award of the export contract, the official export credit or export credit insurance provided shall refuse to approve credit, cover or other support.*" However it does not require ECAs to exclude companies found to have engaged in corruption: i.e. to "*deny access to official support for all business.*" UNICORN considers this to be a key omission. This sanction is specifically provided for in the *Commentaries to Point 4 of Article 3* of the Convention, as well as in the 1997 Revised Recommendations. Furthermore, from January 31st 2006, all public authorities in the UK will be required to exclude companies found guilty of corruption from public tenders following the implementation the new EU Public Procurement Directive (Public Procurement Directive 2004/18/EC, Article 45). Whilst the Directive does not apply to the provision of export credits or insurance,

UNICORN
UNITED AGAINST CORRUPTION

Global Political Research Group, Cardiff University School of Social Sciences

UNICORN considers it imperative that the ECGD's anti-bribery and corruption procedures reflect developments in public procurement law in the UK. Failure to do so could give rise to the anomalous situation of a UK company that has been debarred from public procurement in the UK (or indeed across the EU) being in receipt of (public) export credits or insurance.

5. The Export Credit Guarantee Department (ECGD) also has a legal duty to protect whistleblowers from retaliation under the Public Interest Disclosure Act (PIDA). PIDA affords protection to employees in both the private and public sectors, who disclose information through the appropriate channels in good faith and in the public interest. Other government departments, such as the NHS, have developed sophisticated compliance procedures.

3. Obligations of the Clients of the ECGD

1. Clients of the ECGD are required to introduce comprehensive anti-bribery compliance programmes as a result of the OECD Anti-bribery Convention and specifically the enacting legislation in the UK, the Anti-terrorism Crime and Security Act 2001, Article 12, which entered into force on the 14th February December 2002 in England and Wales and the 27th June 2003 in Scotland. The effect of the new Act is that UK authorities have the right to prosecute UK registered companies and nationals for bribery and corruption offences committed abroad, even when no part of the act was committed in the UK. Previously part of the 'corrupt transaction' would have to have taken place in the UK. Clients of the ECGD that are listed on the New York Stock Exchange will already have been subject to the Foreign Corrupt Practices Act (FCPA) and should therefore already have in place corporate internal compliance programmes. According to the US Department of Justice, in its reply to the OECD Working Group on Bribery (n.d.a), this has been the main *internal* response of Multinational Companies to the FCPA and these "*generally require due diligence, investigation of foreign consultants and agents, foreign joint ventures, and foreign sales efforts by an independent committee; training of management, sales staff and foreign consultants and agents; and compliance officers charged with conducting or supervising investigations of alleged wrong-doing.*"
2. Clients of the ECGD are required to put in place policies and procedures for protecting whistleblowers under PIDA (see Point 2.5). The evidence to date suggests that private sector adoption of whistleblower policies is generally weak and that, where policies are in place, there is an absence of the necessary clearly defined management systems and lines of accountability.
3. Clients of the ECGD are also committed to complying with the requirements of the OECD Guidelines for Multinational Enterprises. Whilst the Guidelines are voluntary they are not optional - all OECD Multinational Enterprises are bound by the Guidelines and are required to comply with *all* the recommendations, which represent a shared view of what OECD governments consider to constitute "*good corporate behaviour*". As regards bribery, the Guidelines require companies to conduct due diligence and disclose full information on the use of agents : "*ensure that remuneration of agents is appropriate and for legitimate services only, and where appropriate, provide a list of agents employed on contracts with public or publicly-owned bodies to competent authorities*". As regards whistleblower protection, they require that enterprises "*refrain from discriminatory or disciplinary action against employees who make bona fide reports to management or as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise's policies.*"

4. Anti-bribery and Corruption Procedures: Assessment of Undue Burden

1. UNICORN believes that as bribing a foreign public official is now illegal for *all* ECGD clients and that the main business response is to put in place internal corporate compliance programmes, the tougher anti-bribery and corruption procedures of the ECGD introduced in May 2004 would serve to reinforce rather than increase this regulatory burden.
2. UNICORN also notes that Multinational Companies are involved in a growing number of voluntary private initiatives, which are developing and testing anti-bribery and corruption procedures that go beyond the requirements of the law. These include, most recently, the recent World Economic Forum's "Partnering Against Corruption Principles for Countering Bribery" (PACI), which are based on Transparency International's "*Business Principles for Countering Bribery*" and the UN Global Compact (10th anti-corruption principle). The fact that Multinational Companies themselves are voluntarily signing up to and participating in such initiatives suggests that, far from being the source of undue burden, these practices are supportive in the context of today's tougher regulatory environment.

5. Recommendations

1. UNICORN considers there to be high risks associated with a weak anti-bribery and corruption framework at the ECGD: to the ECGD's reputation; to its clients who may fall foul of the law as a result of inadequate due diligence; and to the UK Government's high profile international development agenda currently being pursued through the Commission for Africa, the G8 and the EU Presidency.
2. UNICORN considers that government departments generally have a key role to play in exerting the necessary leverage to raise private sector standards in line with both law and existing voluntary codes. The problem remains that those companies which raise their standards risk losing out to competitors which do not. Specifically the ECGD has a potentially vital role to play in creating a level playing field in international trade and stimulating the supply of new information that is vital to deterring and detecting bribery and corruption by applying strict anti-bribery and corruption procedures, including the threat of debarment and protection for whistleblowers.
3. UNICORN urges the ECGD re-adopt its May 2004 procedures, so as to once again place appropriate emphasis on strong preventative measures and:
 - a. require full disclosure on agents and agents' commissions and especially the name and the address of the agent (subject to appropriate confidentiality arrangements);
 - b. require the inclusion of affiliates in the no-bribery warranty so as to cover joint ventures, partners, parent and sister companies and subsidiaries;
 - c. include an audit clause which gives the ECGD the right to inspect key contract documentation at random.

4. UNICORN considers that the ECGD should introduce a formal debarment policy to bring it in line with the practices of other ECA's (Australia, Canada), and the Multilateral Development Banks and to reflect developments in public procurement law in the UK, following the implementation of Article 45 of the new EU Public Procurement Directive.
5. UNICORN considers that the ECGD should put in place, and actively promote, *internal* policies and procedures for protecting whistleblowers, as well as reporting mechanisms that are available to potential *internal* and *external* whistle blowers. The ECGD should also require its client companies to provide information on their whistleblower protection policies and procedures.