



EXPORT CREDITS GUARANTEE DEPARTMENT

**CONSULTATION ON CHANGES TO ECGD'S
ANTI-BRIBERY AND CORRUPTION PROCEDURES
INTRODUCED IN DECEMBER 2004**

Issued 18 March 2005
Respond by 18 June 2005

Contents

1	Introduction.....	3
2	Regulatory Impact assessment.....	4
3	Participating in the consultation	4
4	How ECGD provides support for exports and overseas investments.	5
5	The International and Legal Background	6
6	The broad effect of ECGD's Anti-Bribery & Corruption Provisions	7
7	The May 2004 Provisions, the December 2004 Provisions & this Consultation.....	7
8	The details of the changes.....	8
9	The principal changes.....	8
10	What happens next?.....	12
11	Annexes.....	12

1 Introduction

- 1.1 The Export Credits Guarantee Department (ECGD) is the UK's Export Credit Agency (ECA). It is a Department of State whose existence and powers are governed by the Export and Investment Guarantees Act 1991. Its core statutory powers are to facilitate the export of goods from the United Kingdom and to insure overseas investment made by United Kingdom entities. The principal ways that it fulfils that role are described in section 4 below.
- 1.2 ECGD also takes into account wider Government policies relating, amongst other things, to the deterrence of bribery and corruption; although such policies are not expressed to be part of its statutory functions. Bribery and corruption now constitute crimes in the UK even when the acts in question are committed abroad, provided that the acts would constitute a corruption offence if done in the United Kingdom and provided that the acts are committed either by UK nationals or bodies incorporated under the law of any part of the United Kingdom. The enforcement of the criminal law is a matter for agencies charged with the investigation and prosecution of offences and equipped with the powers which enable them to carry out those duties. ECGD has no such statutory duty and has no statutory investigatory power. It is, however, HMG policy that ECGD should play what part it can in deterring the commission of such offences. It is also in the interests of ECGD and the taxpayer that ECGD should not support transactions which are tainted with corrupt practices.
- 1.3 The procedures that ECGD uses in pursuit of the objective described above will be described in greater detail in section 6 below. Broadly the measures involve the following three stages:
 - 1.3.1 Information is sought upon application for ECGD support together with written assurances regarding the applicant's behaviour;
 - 1.3.2 The information is assessed and further enquiries made or additional details requested where considered necessary;
 - 1.3.3 ECGD's contracts of support are worded in ways which allow recourse action to be taken where problems or misrepresentations are subsequently discovered.
- 1.4 The basis of the current provisions, designed to minimise the chances of ECGD supporting corrupt activity with taxpayers' money, was created in arrangements introduced in September 2000. There have been a number of revisions since that time which are described further below. One such revision took effect in May 2004 (the May 2004 provisions). After the introduction of those provisions ECGD received representations from some exporters and banks to the effect that they could not comply with some aspects of the May 2004 provisions. There followed a period of discussion between ECGD, exporters, their trade associations and the banks. In November 2004, ECGD revised the May 2004 provisions by introducing further provisions taking effect in December (the December 2004 provisions). Both the May 2004 and December 2004 provisions consisted of alterations to questions asked in Applications or Proposal Forms and the terms of Standard Contracts of support.

1.5 ECGD wishes to receive representations on the changes to its provisions which it introduced in December 2004.

1.6 The question on which it invites representations is:

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.

2 Regulatory Impact Assessment

Attached to this consultation document is a partial Regulatory Impact Assessment (RIA). The final RIA, having taken account of the responses received from consultees, will analyse the impact of the changes made to ECGD's anti-bribery and corruption procedures. ECGD thus seeks consultees' comments on its partial RIA. We would also welcome your comments on any unintended consequences or other implications not currently contained in the partial RIA which you may identify.

3 Participating in the consultation

3.1 Opportunity to meet ECGD

3.1.1 ECGD is offering interested parties the opportunity to meet officials during the consultation period, to present their views. If requested meeting(s) will take place at ECGD's offices at time(s) and date(s) to be arranged. Records of the meetings will be made publicly available. Please contact Consultation Co-ordinator Ben Llewellyn if you would like to convey your views in person.

3.2 How to respond

3.2.1 When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

3.2.2 According to the requirements of the Freedom of Information Act (2000), all information contained in your response, including personal information, may be subject to publication or disclosure. Moreover ECGD intends to publish all representations it receives unless: (a) confidentiality is requested and (b) it would be consistent with the Freedom of Information obligations to keep such representations confidential.

3.2.3 A response can be submitted by letter, fax or email to:

Ben Llewellyn
Export Credits Guarantee Department
PO Box 2200
2 Exchange Tower
Harbour Exchange Square

London E14 9GS
Tel: 020 7512 7733
Fax: 020 7512 7271
Email: consultation@ecgd.gsi.gov.uk

3.2.4 A list of organisations and individuals being consulted can be found at Annex A.

3.3 Additional copies and feedback

3.3.1 You may make copies of this document without seeking permission. Further printed copies of the consultation document can be obtained from Ben Llewellyn using the contact details above.

3.3.2 An electronic version can be found at www.ecgd.gov.uk. Other versions of the document may be made available in Braille, some other languages or audio cassette on request.

3.3.3 Questions about this consultation may also be addressed to Ben Llewellyn whose details are above.

3.3.4 A copy of the Code of Practice on Consultation can be found at Annex B.

4 How ECGD provides support for exports and overseas investments

4.1 ECGD provides a mixture of financial guarantees to banks and export insurance policies to exporters. It has a number of types of product in each category. The main products constituting financial guarantees to banks are the Buyer Credit and Supplier Credit financing facilities. The main products under the heading of insurance policies are the insurance policy (EXIP), the Bond Insurance Policy (BIP) and the Overseas Investment Insurance Policy (OII).

4.2 Under a Buyer Credit, ECGD gives a guarantee to a bank (or a syndicate of banks) in respect of the financial obligations of an overseas borrower under a loan which has been made to finance a UK export. ECGD guarantees to pay the bank any principal and interest not received from the borrower under the loan agreement. Under the terms of the ECGD guarantee, the bank agrees to exercise its rights under the relevant loan agreement, and any related guarantee given by the Government of the borrower's country, in accordance with ECGD's directions.

4.3 Under the Supplier Credit Financing Facility (SCF) ECGD and a bank which wishes to finance UK exports enter into a Master Guarantee Agreement (an MGA). The MGA is a master global agreement. In order to bring a particular transaction within its scope, ECGD issues to the relevant bank a Certificate of Approval. Under the MGA, ECGD guarantees to pay the bank any principal and interest not received from the borrower in respect of any export contract that ECGD has approved for financing under the bank's MGA.

4.4 The EXIP is an insurance policy under which ECGD insures an exporter under an export contract against the risk of non-payment by the buyer under that contract arising as a result of certain specified causes of loss.

Under the BIP, ECGD insures the UK exporter which is required to provide a bond to an overseas buyer in relation to an export contract against the improper calling of that bond. The BIP is only available to an exporter who has taken out another form of ECGD cover (either a Buyer Credit Facility, an SCF Facility or an EXIP) in relation to the relevant Export Contract. Under an OII Policy, ECGD insures an investor carrying on business in the UK against risks of loss arising from war expropriation restriction on remittances or other similar events in relation to an investment of resources made by that investor on an enterprise carried on outside the United Kingdom.

- 4.5 ECGD's method, broadly, of underwriting such contracts is as follows. For each of these products, it will require an initial Application or Proposal from the customer. The customer, for these purposes, is the exporter or investor, although in a broader sense ECGD's customers include the banks which lend money in order to facilitate exports. There are different forms which ECGD require to be completed by the customer in order to initiate the consideration of different sorts of support.
- 4.6 ECGD has standard forms of contract for all its products. These were developed for operational reasons to assist ECGD in providing its support for individual transactions. The standard terms are for internal guidance. The standard terms are not, nor could they be, the only terms on which ECGD does business in respect of the products to which they relate. ECGD would not, however, depart from the standard terms relating to anti-bribery and corruption issues without ensuring that their overall effectiveness would not be compromised.

5 The International and Legal Background

ECGD's position on bribery, corruption and money laundering is intended to work together with the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, the Prevention of Corruption Act 1916, and the Anti-Terrorism, Crime and Security Act 2001. It also takes full account of the following provisions:

- 5.1 The relevant law in the UK (see UK Trade & Investment's website – <http://www.uktradeinvestment.gov.uk/>)
- 5.2 The following international agreements and guidelines:
 - 5.2.1 The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
 - 5.2.2 OECD Action Statement on Bribery and Officially Supported Export Credits
 - 5.2.3 OECD Guidelines for Multinational Enterprises
 - 5.2.4 United Nations agreements
 - 5.2.5 UN Declaration against Corruption and Bribery in International Commercial Transactions 1996
 - 5.2.6 UN Convention against Corruption 2003
 - 5.2.7 Council of Europe Conventions on Corruption

6 The broad effect of ECGD's Anti-Bribery & Corruption Provisions

- 6.1 If there is sufficient evidence that a transaction for which ECGD's support is sought involves bribery or other corrupt practices, ECGD will decline its support.
- 6.2 ECGD reports all allegations of criminal behaviour of which it becomes aware to the National Criminal Intelligence Service and warns all applicants on its application forms that it will do so.
- 6.3 If any representation of fact made in an application or proposal form (such as the representation that the Supply Contract has not been obtained by corrupt practices) is proved to be inaccurate, the ECGD forms and insurance policy contracts are designed to give ECGD the right to rescind an insurance policy from its inception. This power is intended to act as a deterrent, but the absence of ECGD investigatory powers needs to be kept in mind.
- 6.4 In Buyer Credit transactions, as ECGD has guaranteed a bank, it is not possible to rescind the guarantee to the bank on the basis of a misrepresentation by the exporter where the bank is innocent. To meet that issue, since September 2000, ECGD standard forms provide that if the exporter is proved to have engaged in corrupt activity, there is an obligation upon the exporter to repay to ECGD anything which it has had to pay the bank. This is designed to enable ECGD to recoup taxpayers' money where corruption has been proved.

7 The May 2004 Provisions, the December 2004 Provisions and this Consultation

- 7.1 The introduction of the May 2004 provisions was welcomed by some NGOs, but drew complaint from exporters and banks, which felt that a number of the new proposals were impractical and in some respects could not be complied with for contractual or legal reasons. They were also said to place unnecessary regulatory difficulties on exporters and the banks.
- 7.2 On receipt of these complaints, which were supported and amplified by various representative bodies, ECGD held discussions with the complainants and their representatives. ECGD took the view, having heard and read the representations made to it by the complainants that, in all the circumstances, the December 2004 provisions were the appropriate provisions to introduce and on the 5 November 2004 it announced those revised provisions would take effect as from 1 December 2004.
- 7.3 On 19 November 2004, The Corner House, an NGO, applied for a judicial review of ECGD's decision to promulgate the December 2004 provisions on the basis that no sufficient public consultation had taken place for their promulgation.
- 7.4 On 13 January 2005 a settlement was agreed with The Corner House, terms of which included an agreement by ECGD, without admission of any obligation so to do, to undertake this consultation.

8 The details of the changes

8.1 It is inevitable that the details of the changes can only be understood by a close study of the changes to the wording in ECGD application and proposal forms and standard contracts. For this reason, there are attached to this consultation document the following, all in a form marking up the changes made between the May 2004 and the December 2004 provisions;

- (c) an EXIP proposal form;
- (d) an EXIP policy;
- (e) a Buyer Credit Application Form;
- (f) a Schedule to a Buyer Credit Application Form;
- (g) a Buyer Credit Dollar Premium Agreement;
- (h) an LOU for British banks; and
- (i) an LOU for UK branches of overseas banks.

8.2 These forms serve as examples of, in the case of the EXIP documentation, how an ECGD insurance transaction works and, in the case of the Buyer Credit documentation, how a Finance Facility Guarantee will work. Other Finance Facility transactions and insurance transaction follow similar lines. The Buyer Credit Forms were used in discussions with complainants referred to above as a proxy for all ECGD forms. Equally, in order not to over-burden this consultation document, “clean” copies of the documentation either in their May or December forms have not been included; but ECGD is very willing to supply these to consultees on request.

8.3 The principal changes

8.4 The following issues are, in ECGD’s view, the principal areas where there has been a change in the rights and obligations created by ECGD’s documentation. The following section is an overview and necessarily sacrifices some precision in order to provide a broad understanding. Reference should be made to the attached ECGD documentation both for the full details of the changes referred to in this section and for other changes. References will be given in this section to the detailed documentation attached in order to assist that process. No significance should be attributed to the order in which these changes appear. In each case reference should also be made to the Regulatory Impact Assessment.

8.5 Replacement of the concept of Affiliate

8.5.1 The May provisions made use of the concept of an Affiliate which was, broadly, a related company or a joint venture party of the applicant. The December provisions replaced that concept with two different concepts; Associate and Controlled Company. The term Controlled Company was used to amend the applicant’s obligations in certain respects; and the term Associate was used

to impose a new obligation. Consideration is therefore given separately to those changes.

8.5.2 Affiliate and Controlled Company

8.5.2.1 The May provisions require applicants to declare, prior to contract, that to the best of their knowledge and belief, amongst other things, none of their Affiliates appeared on a World Bank blacklist or had been convicted of or admitted to previous Corrupt Activity or had engaged in Corrupt Activity in relation to the Supply Contract. The May provisions also obliged an applicant for Buyer Credit Support contractually to promise (see clause 5.11 of the Buyer Credit Standard Premium Agreement (Premium Agreement)) that if an Affiliate, with the Supplier's prior consent or subsequent acquiescence, engages in Corrupt Activity, the applicant for Buyer Credit Support will pay to ECGD amounts which ECGD has paid, on default, to the bank advancing the loan in the Buyer Credit transaction as well as any amounts ECGD certifies it has incurred in respect of costs, expenses and legal fees. See also section 9.2.1 of the Buyer Credit Application Form.

8.5.2.2 In the December provisions the applicant is obliged instead to make those declarations and enter into those obligations in respect of any Controlled Company. A Controlled Company is defined (see sections 4.4 and 4.5 of the Buyer Credit Application Form and clauses 2.5 and 2.6 of the Premium Agreement) as a company controlled by the applicant either by virtue of contractual arrangements including those in Controlled Company's Memorandum and Articles of Association or direct or indirect share ownership.

8.5.2.3 Two points should be borne in mind. First, if an applicant company had used a joint venture partner as a means of passing a bribe at the time the Application Form was signed, this would constitute Corrupt Activity on the part of the applicant and would be a breach of the representation that it has made. Equally, future conduct is caught by clause 5.11 of the Premium Agreement and if such events were to happen after completion of the Application Form, the applicant would be obliged to repay to ECGD anything that ECGD has had to pay the lending bank. This is because the joint venture partner would be likely to be a person acting on behalf of the applicant.

8.5.2.4 The same is likely to be true if the Applicant uses any other person to engage in Corrupt Activity.

8.5.3 Affiliate and Associate

8.5.3.1 The December provisions introduced a new concept of an obligation on the Applicant to notify ECGD if the Applicant becomes aware that any Associate or anyone acting on the Associate's behalf with authority or subsequent acquiescence has engaged in any Corrupt Activity (save where such notification would or might reasonably be argued to constitute the offence of tipping-off under section 333 of The Proceeds of Crime Act 2002).

8.5.3.2 See section 9.2.2 of the Buyer Credit Application Form, clause 5.12 of the Premium Agreement and section G7 of the EXIP Proposal Form. An Associate for these purposes is a company, other than the Applicant and the Controlled Company, which is a party to a joint venture or consortium or other similar arrangement involved in the transaction in respect of which ECGD's support is requested.

8.6 Details of Agents

8.6.1 The May provisions required applicants for ECGD support to state whether an agent or other intermediary has been used in the process leading to the supply contract being awarded or on any related matters. If so, the May provisions required the name and address of the agent, confirmation of whether the agent was also acting for the purchaser and, if so, details of relationship between the purchaser and agent as well as details of the services which the agent was providing and the amount the agent was being paid.

8.6.2 The December provisions provided instead that details were only required if either the agent's commission was included in the price charged by the Applicant to the overseas purchaser and thereby part of the latter's obligation covered by ECGD ; or was above 5% of the contract price. Under the December provisions the name and address of the agent continued to be requested in those circumstances but an applicant who felt unable to provide such details was allowed to explain why. A further question was asked in the December provisions whereby the applicant was asked to confirm that, to the best of its knowledge and belief, no improper relationship existed between the agent and the buyer.

8.7 Audit Provisions

8.7.1 ECGD's contractual rights to inspect records of those to whom it has given its support were altered between the May and December provisions. For full details, see clause 5.9 et seq of the attached Premium Agreement. The chief difference in the December, as opposed to the May provisions, is that in relation to auditing documentation relating to the obtaining of the Supply Contract (but not its performance), ECGD's rights to inspect are restricted to those occasions where it has confirmed in writing that

it has reasonable grounds for suspecting Corrupt Activity. ECGD's contractual rights in this regard do not of course limit in any way whatsoever the right of Criminal Law Enforcement Agencies to take such action as may seem appropriate to them upon report of suspected criminal activity whether by ECGD or otherwise.

8.8 Banks Letters of Undertaking (LOUs) and Money Laundering

8.8.1 In Buyer Credit transactions, ECGD guarantees banks which lend money to foreign borrowers to fund the acquisition of British exports. In these circumstances, ECGD takes an undertaking from the banks relating to the non-occurrence of Corrupt Activity on the part of the bank. The attached version of this showing the May provisions and the December provisions refers. Although the document has extensive amendments to its wording, the principal effect of those amendments is an alteration in the representation and warranty that the bank makes in relation to money laundering. This has changed from the May provision that the bank has not and will not engage in money laundering offences to a provision that the bank represents and undertakes that (a) it itself is regulated by the Financial Services Authority in relation to, amongst other things, the Money Laundering Regulations and (b) either it is not aware and has no reason to suspect that the Supply Contract would have been used for the purposes of money laundering or, if it has such awareness and suspicions, it has complied with its obligations under The Proceeds of Crime Act 2002. The latter formulation is intended to meet the case where a bank has reported a suspicion but has been instructed by the relevant Criminal Authorities to continue with the transaction without making any comment to any other party including ECGD.

8.9 Employees/Directors

8.9.1 The number of employees in respect of whose behaviour representations of fact are required in application forms and banks Letters of Undertaking has been reduced. In the May 2004 provisions it included Employees, - see section 2 of the banks Letter of Undertaking, section G5 of the EXIP Proposal Form and section 5 of the Buyer Credit Application Form. The corresponding provisions in the December 2004 provisions refer to Board Directors. The representations in question are those regarding appearance on World Bank blacklist, previous convictions for Corrupt Activity and admissions of previous Corrupt Activity. It should be noted that the representations and/or promises regarding the absence of Corrupt Activity in relation to the transaction in question still includes Employees (see section 9.2 of the Buyer Credit Application Form, sections G6 and G8 of the EXIP Application Form and clauses 1.3 and 1.4 of the bank's LOU).

9 What happens next?

- 9.1 When the consultation closes on 18 June 2005, ECGD will consider all the representations it has received.
- 9.2 The Government response to the consultation, containing a summary of views expressed, will be issued within three months of the close of consultation.
- 9.3 This document will be published on ECGD's website. Paper copies of the Government Response to the Consultation will be available upon request.

10 Annexes

- 10.1 Annex A: List of Individuals/Organisations consulted
- 10.2 Annex B: Code of Practice on Consultation
- 10.3 Annexes C – I: ECGD application and proposal forms and standard contracts (please see Para 8.1).

EXPORT CREDITS GUARANTEE DEPARTMENT, 18 March 2005