



House of Commons
Trade and Industry Committee

**Export Credits
Guarantee
Department's bribery
rules: the
Government's
response to the
Committee's Fifth
Report of Session
2005–06**

Eighth Report of Session 2005–06

Report, together with formal minutes

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The Trade and Industry Committee

The Trade and Industry Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Department of Trade and Industry.

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§ Chairman of the Sub-Committee on the Export Credits Guarantee Department's bribery rules

* Member of the Sub-Committee on the Export Credits Guarantee Department's bribery rules

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The Government's response to the Committee's Fifth Report of Session 2005-06

1. The Government's response to our report on the Export Credits Guarantee Department's (ECGD's) bribery rules is attached as an Appendix to this Report. The Committee is grateful to the Government for the detailed and thorough response which it has provided to our recommendations and conclusions. There are two matters in the response on which we comment in this Report: agents as conduits for bribes; and recourse.

Agents as conduits for bribes

2. In our Report we expressed the view that tightening the controls on agents might lead those soliciting and paying bribes to look for other conduits for their corrupt activities.¹ In its response the Government stated that "the ECGD has no basis upon which to form a view that agents have been used as a conduit to pass bribes on transactions in which it has been involved". In support of this view the Government pointed out that "there has never been a conviction or admission in respect of such behaviour on a transaction which ECGD has supported. Similarly, no such information is available to ECGD in regards to partners and contractors."²

3. We are concerned by the Government's comments and the conclusion that it draws from the absence of successful prosecutions or admissions. When he gave evidence John Weiss, at the time Deputy Chief Executive of ECGD, acknowledged that "it is possible that bribes might be paid via agents".³ In addition, Neil Stansbury, Project Director Construction and Engineering, Transparency International (UK), told us that "we work in many countries and we are coming across a lot of situations now where because agents are being closed down as an avenue for bribery because of the huge emphasis placed on agents, many corrupt clients in developing countries are now indicating to contractors or exporters to appoint a certain joint venture partner".⁴ On the activities of certain agents Transparency International (UK) stated in its written evidence:

At the other end of the spectrum [to reputable agents] are the murky intermediaries who 'assist in winning the contract', and are paid amounts vastly disproportionate to the actual work they undertake. Their commissions are often used wholly or partially to pay bribes. They are normally people of influence with government officials, and are often related to senior officials. Sometimes the agents are companies owned by the senior officials themselves.⁵

1 Trade and Industry Committee, Fifth Report of Session 2005-06, *Export Credits Guarantee Department's bribery rules*, HC 1124, 25 July 2006, para 95

2 See below p 12

3 HC (2005-06) 1124, Q121

4 HC (2005-06) 1124, Q61

5 HC (2005-06) 1124, Ev 41

4. The Corner House in its evidence to us cited a specific case where it was alleged that an agent used by a UK company was a member of an overseas president's Bridge Programme. The Corner House stated that bridge-building contracts had been the subject of allegations of corruption and over-pricing.⁶

5. On 9 October 2006 *the Financial Times* reported on a survey published by Control Risks and Simmons & Simmons, a law firm, of 350 companies from Britain, the US, Germany, France, the Netherlands, Brazil and Hong Kong, which “echoes the doubts many executives and anti-corruption campaigners have about the effectiveness of the international crackdown on bribery”. *The Financial Times* continued:

Nick Benwell, a Simmons & Simmons partner, said [...] ‘There still appears to be a fairly widely held belief that companies try to get round laws by using agents and intermediaries.’ The report says 43 per cent of the companies—ranging from a quarter in Britain to three-quarters in Hong Kong—claim to have lost out on business over the past five years because of bribery by competitors.

The number of countries that said bribery had cost them business in the past 12 months was higher in each of the five jurisdictions covered in a previous survey in 2002 —Hong Kong, the Netherlands, the US, Germany and Britain.

About three-quarters of the companies, including 94 per cent in Germany and 90 per cent in Britain, think businesses from their countries use agents to circumvent anti-corruption laws.⁷

6. Nor in our view is the absence of prosecutions a safe basis upon which to conclude that agents are not a conduit for corruption. Some foreign jurisdictions may not investigate or prosecute allegations. In the UK the absence of successful prosecutions may be a product of the difficulty of obtaining evidence to put before a court—for example, vital evidence both of a corrupt transaction and the concomitant financial transactions may be located abroad, the cooperation of foreign governments may vary, the provenance of evidence and its admissibility in the UK may be problematic and, where defendants are located outside the EU, extradition may be difficult.

7. We are concerned that the Government's response is out-of-touch with the experience of business and the non-governmental organisations, is unduly legalistic and will engender complacency in the ECGD that will blunt its policy objective to combat corrupt practices.

8. Furthermore, even if the Government were right that agents are not in fact being used to facilitate corruption (an assertion which we doubt), this still begs the question of whether “those soliciting and paying bribes are looking for conduits for their corrupt activities”⁸ (to repeat our own words). We are not convinced that the Government has considered that possibility sufficiently, a possibility to which our evidence (e.g. that cited above from Transparency International (UK)) led us; and we again urge the Government to do so.

6 HC (2005-06) 1124, Ev 35

7 “Third of companies think they have been hit by bribery”, *The Financial Times*, 9 October 2006,

8 HC (2005-06) 1124, para 95

Recourse

9. Our recommendation on recourse asserted a principle that where a contract fails because of bribery or corruption—irrespective of the complicity of the UK exporter seeking cover—neither ECGD nor the taxpayer should have to assume liability.⁹ We are concerned that the Government in its response has not endorsed this principle.¹⁰ We reiterate that unless this principle underpins ECGD’s approach it risks providing insurance cover for corruption and bribery. In our view it is unacceptable that a government department should provide such insurance in any circumstances.

10. In our Report we also expressed the expectation that ECGD would insist that English law be applied to all loan contracts and resist vigorously any attempts to enforce payments where a contract has been vitiated because of corruption.¹¹ The Government’s confirmation “that this has indeed been the case for the great majority of ECGD’s business”¹² does not meet the terms of our recommendation. We do not see why this matter—as the Government indicates in its response—has to wait until 2009 for further consideration. In our view it should be implemented now.

9 HC (2005-06) 1124, para 101

10 See below p 13]

11 HC (2005-06) 1124, para 101

12 See below p 13

Formal minutes

Monday 23 October 2006

Members present:

Mr Peter Luff, in the Chair

Mr Roger Berry
Mr Peter Bone

Mr Anthony Wright

The Committee considered this matter.

Draft Report (Export Credits Guarantee Department's bribery rules: the Government's response to the Committee's Fifth Report of Session 2005-06), proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 10 read and agreed to.

Resolved, That the Report be the Eighth Report of the Committee to the House.

Ordered, That the Chairman make the Report to the House.

The Government's Response to the Committee's Fifth Report of Session 2005-06 was ordered to be appended to the Report.

[Adjourned till Tuesday 23 October at 10.00am

Appendix

The Government's response to Recommendations made by the Trade and Industry Committee in its Fifth Report of the 2005-06 Session published on 25 July 2006—Export Credits Guarantee Department's bribery rules

The Government is grateful to the Trade and Industry Committee for the detailed analysis and comments in its report. It is pleased that the Committee has concluded that the public consultation held during 2005-06 was thorough, comprehensive and responsive, and that the July 2006 procedures should be workable.

The Government's responses to specific recommendations and invitations to comment in the report are detailed below. For the sake of convenience, responses have been grouped together by subject, at the expense of some duplication where relevant paragraphs in the report overlap.

Public Consultations

Page 11:

Para 24 **We recommend that all ECGD's future consultation exercises are carried out in accordance with the Cabinet Office's Code of Practice on Consultation.**

Page 15:

Para 36. We consider that the crucial error that ECGD made was to proceed with the May 2004 procedures without any consultation. It then compounded the problem by embarking on what turned into a one-sided dialogue with one interested party, the exporters, which excluded another, the non-governmental organisations. Without the efforts of the Corner House the less effective December 2004 procedures would have superseded the May 2004 procedures. We consider that both exporters and the non-governmental organisations have a clear interest in ECGD's bribery rules and **we recommend that all parties, including small and medium sized exporters, be consulted before future changes are made to the bribery rules, other than insubstantial amendments.**

Response

The Government accepts the recommendation and confirms that ECGD will follow Cabinet Office guidance on when consultation should occur and the procedures for conducting such consultations, save where ECGD's Statement of Business Principles imposes a more stringent obligation. ECGD will amend its other public statements regarding its consultation policy to reflect this; and bear in mind the Committee's comments in any future review of the Statement of Business Principles.

Not carrying out a public consultation in 2004

Page 15:

Para 34. In our view the changes made to the May 2004 procedures as a result of the work of the Solutions Group more than justified a full consultation on the anti-bribery procedures. We are concerned that the Government has still not conceded this point and **invite it to reconsider, particularly since it concedes that the ex post facto measures are an improvement.**

Response

The Government considers that there are two matters which must be distinguished: first, whether ECGD was obliged in law to hold a public consultation in relation to the changes made to the May 2004 procedures; and, second, whether, looking back in the light of what is now known, it would have been helpful to hold such a consultation.

With regard to the first matter, the Government expressly made no admission that ECGD was obliged to hold a public consultation when it settled the judicial review in January 2005. It did not, and does not, consider it had any obligation to do so. In regard to the second matter, the Government accepts that the public consultation did prove to be the most effective means of managing and considering the opposing views so forcibly expressed in the course of 2004 and 2005.

Export Guarantees Advisory Council

Page 20:

Para 52. In our view the Government made a serious error in failing to draw the Export Guarantees Advisory Council into the formulation of the May and December 2004 procedures. As well as having expertise on points of detail the Advisory Council was in a position to give a perspective on the broader issues such as the role of ECGD. **We invite the Government to set out the improvements that it proposes to make to the way it involves the Export Guarantees Advisory Council in any future consideration of changes to ECGD's policy and practices.** In line with our predecessors' Report in April 2005, **we recommend that the Secretary of State alter the terms of reference he has set for the Advisory Council, to include asking them to advise ECGD when proposed changes in ECGD's policies, products or practice should be subject to consultation.** This should not, in our view, remove the need for the Government itself to consider or initiate consultation exercises but we consider it would help to remind the Government of its responsibility.

Response

The Government accepts that the Export Guarantees Advisory Council (EGAC) should have been more proactively involved in the course of 2004. Recognising this, EGAC was actively involved in advising ECGD and the Secretary of State on the nature of the formal response to the public consultation. The Government intends that EGAC should have this same level of involvement for situations that appear of similar breadth in the future, consistent with its current terms of reference.

The Government does not accept that it is appropriate for EGAC to advise on decisions on whether and how public consultations should be undertaken by ECGD. This is a decision for ECGD management and Ministers based upon the Cabinet Office Code of Practice on Consultation.

Page 42:

Para 115. We found the discussion on the role of ECGD which took place at the Export Guarantees Advisory Council of 21 January 2004 illuminating. The discussion appears to have taken place when the May 2004 procedures were being developed. There is a suggestion that the procedures had been brought forward because:

[T]he Minister wanted ECGD to be protected from accusations. In the past, ECGD learned lessons and incorporated changes into policies to avoid the same situation arising again. By detecting and investigating, rather than being passive, ECGD could deflect criticism 175.

We are concerned by the inference in the Export Guarantees Advisory Council's minutes of 21 January 2004 that the impetus behind the May 2004 procedures was a desire to protect the reputation of, and to deflect criticism from, ECGD. If this is correct, it may explain why the Government failed to test the feasibility of the May 2004 procedures before announcing them. We have no doubt that a policy derived from a desire to protect ECGD is no basis from which to tackle bribery and corruption. **We invite the Government to comment on the minutes in its response to our Report.**

Response

The Government's view is that such an interpretation of the relevant minutes of the meeting of the Export Guarantees Advisory Council would not be appropriate given the overriding objective of Ministers at that time was to ensure that ECGD's procedures enabled it to do all it reasonably could to deter and detect bribery and corruption.

Page 50:

Para 134. **We recommend that the Government monitor the operation of the July 2006 procedures and at least once a year report publicly to the Export Guarantees Advisory Council the outcome of the monitoring.**

Response

ECGD will report to the EGAC annually the outcome of the monitoring. The minutes of the meeting will publicly record the views of the Council expressed at the relevant meeting.

Refusal of consent by applicants for ECGD to make investigations

Page 28:

Para 75. We invite the Government when it responds to this Report to state in more detail its policy in respect of applications for ECGD support where the applicant refuses consent for knowledge about an agent to be more widely shared where ECGD has concerns and needs to make further enquiries, and to indicate how likely it is that ECGD will allow an application where the applicant has refused consent.

Response

The Government set out its position in paragraphs 23 and 24 of the Concluding Response to the public consultation. The Government considers that a refusal of consent for wider enquiries is likely to mean that a case cannot be proceeded with. It is not possible to state in advance the circumstances in which an application might proceed where there was a refusal to furnish information, without prior knowledge of the specific situation.

Disclosure provisions

Page 35:

Para 92. In our view the disclosure provisions in the May 2004 procedures had the benefit of clarity and of fitting with best practice. We consider that the effective operation of the disclosure provisions in the July 2006 procedures will turn on, first, the construction put on the extent to which agents appointed by an applicant's joint venture partner are considered to be acting "on behalf of" the applicant. **We recommend that ECGD define the phrase unambiguously in guidance to exporters.** The second test will be the extent to which ECGD presses for further information on joint venture partners' agents and whether this information is supplied. If it turns out, as Transparency International (UK) fear, that in most cases exporters maintain that the agents are only acting on behalf of the joint venture partner and are not disclosed to ECGD, then the provision will, in our view, have failed. **We recommend that, when the anti-bribery procedures are reviewed, the operation of the disclosure provisions in respect of partners' agents be examined.**

Response

The Government does not accept the recommendation to define any further the meaning of 'on behalf of' in its applications. The Government considers that the current definition is applicable to a range of circumstances and it would be wrong to attempt to anticipate all those future circumstances in the definition. Refining the current definition is likely to result in the narrowing of its scope.

The Government accepts the recommendation to review the disclosure arrangements insofar as joint venture partners are concerned. ECGD's experience of applications from exporters who are in joint venture arrangements will be included in its review of its procedures in 2009.

Special handling arrangements

Page 27:

Para 70. **We recommend that ECGD review the operation of the Special Handling Arrangements in December 2006 and we invite the Minister to inform the Trade and Industry Select Committee of the outcome of the review.** Specifically, the review should include an evaluation of the extent to which ECGD's commitment to keep the identity of agents confidential has hampered its ability to undertake proper due diligence.

Response

The Government accepts the recommendation to review the Special Handling Arrangement but not the timetable recommended. The Government considers that the period from July to December 2006 is not sufficient for ECGD to gain the necessary experience of the operation of the Special Handling Arrangements for it to be able to provide a meaningful analysis. ECGD will undertake this analysis as part of the review of its anti-bribery and corruption procedures in 2009.

International considerations

Page 49:

Para 131. We share the Minister for Trade's aspiration that all export control agencies—irrespective of membership of the OECD—should meet the requirements of the OECD action statement on bribery. Otherwise those companies willing to condone, or turn a blind eye to, the payment of bribes and corruption to secure business will gravitate towards the least rigorous export control agencies. If, notwithstanding the effort of the OECD and the UK, this occurs and as a consequence ECGD loses business, we consider that ECGD will be well rid of such business. In these circumstances responsibility for investigating any breaches of the law would not fall to ECGD but to the police and the Serious Fraud Office. The Government will, however, need to monitor the market for credit and insurance for exports as well as the adequacy of the procedures that export control agencies outside the OECD apply to counter bribery and corruption. **We recommend that the Government review, and publish by 1 August 2007, its arrangements for monitoring the market for credit and insurance for exports and pass these analyses to those responsible for enforcing the law on bribery and corruption.**

Response

The Government does not accept the recommendation. The Government notes the Committee's view of the risk that business might gravitate to countries that apply less rigorous anti-bribery and corruption standards than the UK. However, the inevitable lack of transparency that would surround any such migration would render it virtually impossible, and outside ECGD's capacity, to conduct any meaningful analysis. The Government believes that this risk can only be reduced as a result of the adoption by other Export Credit Agencies of internationally recognised best practices in procedures aimed at avoiding support for business tainted by bribery and corruption. To that end, ECGD will continue its efforts, through its involvement with international bodies, including within the OECD and through other relevant institutions, to encourage all other Export Credit Agencies to implement rigorous anti-bribery and corruption measures to the standards applied by ECGD. In particular, it has been in contact with the Chinese and Indian Export Credit Agencies, who are outside of the ambit of the OECD, concerning their approach to combating bribery and corruption.

Independent due diligence

Page 29:

Para 77. We consider that there is much to commend a requirement for independent due diligence checks in high risk cases, irrespective of whether the applicant for ECGD's services has requested the Special Handling Arrangements. It would ensure that most scrutiny is directed to those areas of greatest risk of corruption and it would fit with best practice. We are not, however, recommending at this stage that ECGD require independent due diligence checks. Instead, **we recommend that, when the July 2006 procedures are reviewed in three years, the possibility of such a requirement should be examined.** In our view the crucial issue is the effectiveness of the checks which ECGD carries out on agents. If these are not effective, the case for introducing independent due diligence checks may well become compelling.

Response

The Government accepts the recommendation that consideration should be given to examining such a requirement.

Other conduits through which to make bribes and engage in corrupt activity

Page 36:

Para 95. In our view, if those soliciting and paying bribes are looking for conduits for their corrupt activities, one avenue will be partners and contractors. We are concerned whether the July 2006 procedures are strong enough to block this possible new conduit. **We recommend that the review in three years examine whether the conduit for bribery and corruption has extended from agents to partners and sub-contractors.**

Response

The Government notes the recommendation. However, ECGD has no basis upon which to form a view that agents have been used as a conduit to pass bribes on transactions in which it has been involved. There has never been a conviction or admission in respect of such behaviour on a transaction which ECGD has supported. Similarly, no such information is available to ECGD in regards to partners and contractors. No such review as recommended will enable reliable or useful comparisons to be made in order to judge whether any such extension referred to by the Committee has taken place. However, the Committee will note that an examination of ECGD's experience of applying the July 2006 procedures to applications involving joint venture partners will form part of the proposed 2009 Review.

Recourse

Page 38:

Para 101. The debate on recourse is complex but we start from the principle that where a contract fails because of bribery or corruption—irrespective of the complicity of the UK

exporter seeking cover—neither ECGD nor the taxpayer should have to assume liability. To do otherwise will mean that ECGD is providing insurance cover for corruption and bribery. We take reassurance from ECGD’s advice that the buyer credit documentation specifically provides that failure to perform the export contract on the part of the applicant for its services is no reason whatsoever for the loan not to be repaid. In the light of ECGD’s supplementary memorandum we expect ECGD to insist that English law be applied to all loan contracts and to resist vigorously any attempts to enforce payments where a contract has been vitiated because of corruption. On this basis we find the recourse procedures acceptable at this stage and **recommend that the review in three years examine the operation of the provisions.**

Response

While, for the reasons set out in ECGD’s Memorandum to the Committee on this subject, it does not accept the Committee’s analysis and conclusions leading up to its Recommendation, the Government is, nevertheless, content to include a review of the operation of the recourse provisions in the proposed 2009 review of the July 2006 procedures.

As regards the Committee’s expectations on the requirement for English law to apply, the Government can confirm that this has indeed been the case for the great majority of ECGD’s business. ECGD will, however, in 2009 undertake a review to consider whether there is scope for further application of this requirement and report on the outcome alongside its report on the review of the operation of the recourse provisions.

Whether ECGD should assume a regulatory role with investigatory powers

Page 4:

Summary: The Government has said that it will review the procedures in three years, which we welcome. We consider that that review should include a thorough examination of two areas. First, the operation and effectiveness of the anti-bribery procedures which came into operation on 1 July 2006. Second, whether the role of ECGD needs to change to take on regulatory and investigatory powers to tackle bribery and corruption committed by exporters.

Page 43:

Para 117. We express no view in this Report whether ECGD should become a regulatory or investigatory body with a remit to tackle bribery and corruption. There may be good reasons why it should; for example, it may need greater powers to keep in step with export credit agencies in the OECD (see chapter 5). We are, however, clear about three points. First, such a change would be substantial and must be subject to full consultation with all interested parties. Secondly, when the operation of the provisions is reviewed in three years, **we recommend that the Government invite views on the need to make ECGD a regulatory or investigatory body.** We consider that by then it will be time to address the issue squarely. In the meantime **we invite the Government to describe what expertise ECGD has, and does not have, to investigate bribery and corruption.** Third, the Government’s strategy for tackling bribery and corruption needs to encompass other government departments.

Page 50:

Para 135. There is a wider question which we consider will continue to surface: whether ECGD should have regulatory and investigatory powers to tackle bribery and corruption committed by exporters. We would be concerned if the need for these powers emerged in the charged aftermath of the publicity surrounding a high profile corruption case. There is a risk that such powers would be hastily formulated, draconian and grafted onto ECGD's current operations. In our view it would be much more satisfactory if the Government were to consider the need for such powers, including the role of ECGD, over the next three years and, if necessary, to bring forward proposals.

Response

The Government does not accept the recommendation. The Government maintains its view of the role of ECGD as set out in the Final Response to the public Consultation. Responsibility for the detection, prevention and suppression of criminal offences properly resides with the law enforcement bodies. The investigation and prosecution of criminal offences has always been a matter for those bodies specifically set up for that purpose, namely the Police Forces and Serious Fraud Office. In addition, the Government has announced that a new Overseas Corruption Unit will be established by November this year. This will be staffed by the Metropolitan Police and the City of London Police, which will enable the UK to increase its capacity to investigate and, if appropriate, prosecute those suspected of these offences.' For ECGD to have grafted on to it, by statute, a role in the detection, prevention and suppression of criminal offences equivalent to the Police bodies that currently undertake that role, would duplicate existing arrangements, muddy boundaries and unnecessarily increase costs, against a background that ECGD supports a small proportion of total UK exports.

*Review of 2006 procedures in 3 years**Page 4:*

Summary. The Government has said that it will review the procedures in three years, which we welcome. We consider that that review should include a thorough examination of two areas. First, the operation and effectiveness of the anti-bribery procedures which came into operation on 1 July 2006. Second, whether the role of ECGD needs to change to take on regulatory and investigatory powers to tackle bribery and corruption committed by exporters.

Response

As previously stated, the review will not include consideration of possible changes to ECGD's statute to enable it to assume regulatory and investigatory powers as the Government does not accept the relevant recommendation. The review, to be carried out during 2009, will :

- i. benchmark ECGD against the then current OECD Export Credits Group position on bribery and corruption and against the then current anti-bribery and corruption procedures of similar official Export Credit Agencies;

- ii. consider ECGD's experience during the three years relating to workability, resource and/or other difficulties in the implementation of the July 2006 procedures, including the operation of the Special Handling Arrangements;
- iii. consider the case for the use of independent third parties in conducting enquiries about joint venture participant's agents;
- iv. consider ECGD's experience of applying the July 2006 procedures to applications that involve joint venture partnerships; and
- v. review experience of the operation of ECGD's recourse provisions in the context of bribery and corruption and the application of English law to loan contracts.