

Submission by the Corner House 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.

Summary

1. The Corner House believes that the changes made in December 2004 to the ECGD's anti-bribery and corruption procedures substantially weaken the ECGD's ability to detect and deter bribery, and thus significantly increase the possibility that taxpayers' money will be used to support transactions tainted with bribery and corruption.
2. The ECGD has various duties and responsibilities to prevent corruption and bribery in projects it supports and to promote good business practice with regard to bribery. These duties and responsibilities derive from the Export and Investment Act 1991, the OECD Action Statement on Bribery in Officially Supported Export Credits, the OECD Guidelines on Multinational Enterprises, the UN Convention Against Corruption, and the ECGD's Mission Statement objective to ensure that its activities accord with the government's international commitments on corruption.
3. As a department that provides specific commercially related services to UK exporters (particularly those operating in high risk countries), the ECGD is in a strong position to influence the behaviour of UK companies with regard to bribery in a positive and constructive way. The ECGD is also in a powerful position during 2005 to help deliver an enhanced OECD Action Statement on Combating Bribery in Officially Supported Export Credits that would lead to higher standards being implemented by Export Credit Agencies on a multilateral basis. It will be more able to do this if it shows strong leadership on combating and deterring corruption in projects it supports.
4. In essence, the Corner House believes that in order to meet its duties and responsibilities with regard to combating corruption, to use its influence in the most constructive manner to help prevent bribery by UK exporters, and to help ensure that an enhanced OECD Action Statement sets high standards for Export Credit Agencies on combating bribery, the ECGD should largely re-adopt the May 2004 anti-corruption procedures with some minor amendments.
5. The Corner House does not believe that the May 2004 procedures place an undue administrative or bureaucratic burden on exporters in proportion to the risks posed by corruption, to the ECGD, to developing countries and to companies

themselves. Corruption is a serious criminal offence in the UK and poses enormous risks to business as well as having serious impacts upon development. Furthermore, compliance with the May procedures should not incur any additional costs on those companies that already have appropriate compliance regimes in place to comply with UK anti-corruption laws, and in the case of those companies listed on the US Stock Exchange, with the Foreign Corrupt Practices Act.

6. On specific changes made in December 2004, the Corner House believes that:
 - a. the reduced disclosure requirements on agent's commission introduced in December 2004 substantially increase the risk of bribery occurring in ECGD supported projects. It is important that ECGD procedures on disclosure of agent's commission represent best practice. The ECGD should re-adopt the disclosure requirements introduced in May 2004 in their entirety and introduce a requirement for companies to provide copies of all agency agreements when applying for cover.
 - b. the December 2004 definition of the phrase 'to the best of our knowledge and belief' is seriously flawed and must be replaced with a definition that requires "all reasonable enquiries" to have been made. It is entirely consistent with the ECGD's duties and responsibilities on corruption that it promote good practice on due diligence by its customers.
 - c. the ECGD should be promoting good practice on due diligence of joint venture partners and subsidiaries. The ECGD should re-adopt the May 2004 warranties, disclosure representations, Premium and Recourse agreement clauses and Letter of Undertaking clauses regarding affiliates. The warranties should however be amended to ensure they are realistic, by removing the phrase 'and any of its employees' with reference to affiliates. The warranties however need to be framed so as to ensure that the UK taxpayer does not assume liability for corrupt activity engaged in by the affiliates of the applicant where there was negligence or wilful blindness on the part of the applicant. The Corner House believes that the term negligence needs to be incorporated both into the warranty and the Premium and Recourse agreement with a suitable definition included in the application form. The Corner House also believes that the ECGD should issue guidance to customers, based on international good practice, about what levels of reasonable due diligence it expects.
 - d. the December 2004 procedures have reduced the scope of disclosure requirements on the track record of relevant company, bank or subsidiary executives too far by limiting it to directors. The disclosure requirements should not be extended to 'all employees' as before but should include relevant senior management and senior project personnel.
 - e. the ECGD should re-adopt the May 2004 audit clause. It will be virtually impossible for the ECGD to monitor compliance with its warranties if it does not do so. The Corner House believes that the ECGD should also take heed of the Trade and Industry Select Committee's recommendation that the audit clause should not include five days' notice, but be conducted on a spot check basis.

7. In addition, the Corner House believes that the ECGD must adopt more effective sanctions against bribery and breach of warranty by customers. The ECGD should reconsider proposals put forward by the Export Credits Advisory Council for an automatic financial penalty for a conviction for corrupt activity. Alternatively, the ECGD should take action against and impose sanctions upon customers for breach of warranty. In addition, the Corner House believes that the ECGD should introduce a proper debarment policy, particularly in light of Article 45 of the EU Procurement Directive coming into force in January 2006 and that it should revisit its legal advice in order to do this. This would assist the UK government in meeting the recommendations made by the OECD Working Group on Bribery in its Phase 2 Evaluation of the UK, with regard to bilateral aid and export credits.
 8. The Corner House considers the current Regulatory Impact Assessment to be seriously flawed. It does not take into account the full range of potential impacts, including beneficial impacts for developing countries of effective anti-corruption procedures. Furthermore, the RIA focuses heavily on costs to business of the ECGD's anti-corruption procedures rather than on the potential long-term benefits to business of such procedures.
 9. The Corner House believes that the heightened ability of the May 2004 anti-corruption procedures to detect and prevent bribery compared to the December 2004 procedures is clearly illustrated by recent corruption allegations on an LNG project in Nigeria currently under investigation in three countries and supported by the ECGD. The Corner House have included in its submission a case study of this project as Annex 1.
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I. Introduction

1. The Corner House is a not-for-profit research and advocacy group, focusing on human rights, environment and development. The Corner House has worked on the issue of corruption and export credits for some years now and has produced several reports on this topic. The Corner House is not a membership organisation, but works closely with NGOs and community groups in developing countries, including with those who are directly affected by ECGD-backed projects.

2. The Corner House believes that the changes made in December 2004 to the ECGD's anti-bribery and corruption procedures substantially weaken the ECGD's ability to detect and deter bribery, and thus significantly increase the possibility that taxpayers' money will be used to support transactions tainted with bribery and corruption. The Corner House believes that this situation is at odds with the ECGD's duties and responsibilities on ensuring proper financial management of its portfolio and on combating bribery in accordance with the government's international commitments. These duties and responsibilities are outlined below. The Corner House also notes that the Court of Appeal, in its judgement of 1st March 2005 in *Corner House v Secretary of State for Trade and Industry*, found that "obtaining contracts by bribery is an evil which offends against the public policy of this country". This ruling underlines the responsibility that

ECGD has to ensure that its anti-corruption procedures adequately reflect public policy on bribery and corruption.

3. In this submission, the Corner House will show why each of the main changes made in December 2004 is likely to increase the risk that taxpayers' money is used to support transactions tainted by bribery and/or corruption. In essence, the Corner House believes that if the ECGD is to ensure that taxpayers' money is not used to support projects tainted by bribery and/or corruption, the ECGD should largely re-adopt the May 2004 procedures with some minor amendments.

4. The Corner House does not believe that the May 2004 procedures, if minor amendments are made, place an excessive burden on exporters and banks in proportion to the risks posed by corruption. The fact that five companies were prepared to proceed with 10 transactions between them under the May procedures¹ shows that certainly not all of ECGD's customers felt that the May procedures were 'unworkable' or posed an undue administrative burden. Indeed, the evidence in the public domain from negotiations with the CBI and customers suggests that only a handful of the ECGD's customers did feel they were 'unworkable'. Furthermore, significant parts of the business community are increasingly taking anti-corruption compliance very seriously in recognition of the risks corruption poses. It is important that government departments like the ECGD should not undermine the efforts made by those companies that have implemented full anti-corruption compliance regimes by failing to adopt high standards for what it expects of its customers.

5. Corruption poses risks to:

- a. *The ECGD itself.* Corruption in projects supported by ECGD poses serious material and reputational risks for the ECGD. Corruption can increase the risk of default.
- b. *Developing countries.* Corruption has been identified as a major factor impeding development, and increasing poverty and inequality. The recent Commission for Africa report noted that "*corruption undermines all efforts to improve governance and foster development*". Corruption in export-credit backed projects poses particular risks to developing countries because it can lead to increased project costs paid by developing country governments and to increased debt burdens in the event of default.
- c. *Exporters.* Corruption poses real risks to companies. Corruption is a serious criminal offence in the UK and all OECD countries. Companies found guilty of corruption are liable to pay large fines, face considerable reputational damage, and their directors may face imprisonment. In the long term, corruption seriously increases business risk for companies, who may find themselves unable to enforce contracts because of the bribes paid, may have their contracts questioned in the event of regime change, may open themselves up to blackmail, and face spiralling demands for further bribes.

¹ *Hansard*, 7th April 2005, Column 1610W, Parliamentary answer from Douglas Alexander to Malcolm Bruce MP

6. These risks can be substantially reduced by careful due diligence and good business practice both on the part of customers and of the ECGD itself. It is therefore in the interests of the ECGD, the UK taxpayers, developing countries, individual companies and the UK business community as a whole that the ECGD promote good business practice on combating bribery.

7. Because of the risks posed by corruption, any assessment of the potential costs to customers of anti-corruption measures designed to promote good business practice by ECGD must be clearly offset against the long-term benefits that such measures will bring to the ECGD (and hence the taxpayer), to developing countries, and ultimately to companies themselves. The current partial Regulatory Impact Assessment does not reflect this fact. The final part of this submission will address this issue.

II. The ECGD's responsibilities on bribery and corruption

A. The ECGD's Statutory Powers: Duty to Proper Financial Management under Part 1, Section 3 of the Export and Investment Guarantees Act 1991

8. The ECGD suggests in the consultation document that its statutory functions and duties do not include deterring or investigating bribery. However, under the Export and Investment Guarantees Act 1991, the Secretary of State for Trade and Industry and, as a result, the ECGD itself do have a statutory responsibility for proper financial management of the ECGD portfolio. Part 1, Section 3 of the Act states:

“the Secretary of State may make any arrangements which, in his [sic] opinion, are in the interests of the proper financial management of the ECGD portfolio, or any part of it.”

9. Deterring, detecting and preventing bribery and corruption are crucial for the proper financial management of the ECGD's portfolio:

- a. Bribery leads to increased project costs and to poor project design and implementation, with a consequent increased risk of default;
- b. Bribery can also, where uncovered, lead to cancellation of contracts and/or arbitration, again leading to default.

10. Under its anti-corruption procedures, the ECGD can require companies proven guilty of bribery to repay any sums they have paid out in the event of default. However, the reality is that in some circumstances they may be unable to do so, because:

- a. the bribery may go unpunished due to the general lack of enforcement of overseas bribery offences in the UK context and elsewhere. Without a conviction, the ECGD is powerless to seek redress from the company in such circumstances; or
- b. the bribes may have been paid by a non-UK company involved in the project, such as a joint venture partner, or parent or sister company.

In such instances, were a contract to be voided by a host government, the ECGD may find itself in the position of being unable to seek redress either from the host government or from the company concerned. The former instance shows how important it is that the ECGD has strong procedures for preventing corruption rather than waiting for

convictions of corruption to occur. In the latter instance, where corrupt activity has been carried out by parties other than ECGD customers, such as joint venture partners or parent or sister companies, the ECGD, and therefore the UK taxpayer, is required to assume the liability for that corrupt activity in the event of contract cancellation. This raises serious questions about whether the burden of the risks posed by corrupt activity on an ECGD backed project is being appropriately shared between the customer and the taxpayer. It also underlines how important it is that:

- a) these parties be included in the ECGD's anti-corruption warranties;
- b) ECGD customers are required to undertake pro-active due diligence to ensure that no corrupt activity has been engaged in by such parties; and
- c) the ECGD is able to impose adequate sanctions where corrupt activity occurs due to lack of such due diligence.

11. Even where the ECGD is able to seek redress from a UK company, it may have to spend considerable staff time, resources and legal fees in doing so. It is therefore important that rather than having procedures in place to take action once corruption has occurred, the ECGD has robust procedures to detect, deter and prevent bribery on projects to be supported by ECGD. This is essential to enable the ECGD to fulfil its statutory duty to ensure proper financial management of its portfolio.

B. The OECD Action Statement on Bribery and Officially Supported Export Credits

12. Under the OECD Action Statement agreed in December 2000, members of the OECD Working Party on Export Credits and Credit Guarantees agreed to “take appropriate measures to deter bribery” and to “take appropriate action” where bribery was involved in an export contract supported by an export credit agency. The ECGD has now, to its credit, included various of the ‘appropriate measures’ agreed to under the Action Statement into its application forms, as have many of the OECD’s Export Credit Agencies.

13. One of the most significant and important measures agreed to under the OECD Action Statement in terms of preventing bribery on ECA-backed projects is as follows:

“If there is sufficient evidence that such bribery was involved in the award of the export contract, the official export credit or export credit insurance provider shall refuse to approve credit, cover or other support”

14. The ECGD states in the consultation document that it is its policy to decline support where there is sufficient evidence of bribery. However, in order to be able to implement this policy meaningfully, and in a way that would comply with the OECD Action Statement, it is imperative that the ECGD has access to the relevant information that would enable it to assess whether bribery has taken place on the contract to be supported. This necessitates the ECGD:

- a. asking the right questions at application stage and undertaking appropriate due diligence;

- b. having the ability to review and evaluate the appropriate project documents, particularly with regard to agent's commission and agency contracts and using its powers of inspection.

Crucially, the Action Statement makes no distinction between bribery carried out by customers of the Export Credit Agency or other parties. The fundamental principle behind the Action Statement is that Export Credit support should not be extended to contracts where bribery has occurred. This makes it essential that the ECGD (and other Export Credit Agencies) ask sufficient questions of customers as to potential corrupt activity by other parties involved in obtaining the contract, such as joint venture partners, parent and sister companies and agents.

15. During 2005, the OECD Action Statement on Combating Bribery in Officially Supported Export Credits is due to be renegotiated and enhanced. This is a major opportunity for multilateral consensus on how Export Credit Agencies can be more effective and combating and preventing corruption in export credit backed projects. The ECGD has rightly been a leader in developing best practice on how to combat bribery and its leadership has encouraged other Export Credit Agencies to make significant changes to their procedures. SACE for instance requires applicants to make almost identical declarations on its application forms as those of the ECGD² and Atradius has disclosure requirements on agents similar in scope to the ECGD's May 2004 requirements. The leadership shown by ECGD and other Export Credit Agencies such as Atradius were influential in the formation of the "Best Practices to Deter and Combat Bribery in Officially Supported Export Credits" paper produced by the OECD Working Party on Export Credits and Credit Guarantees, which has been the basis for negotiations on an enhanced Action Statement. If the ECGD were to show strong leadership by re-adopting its robust anti-corruption procedures from May 2004, this would significantly increase the chances of higher standards being agreed on a multilateral basis at the OECD. Indeed, arguably, if the ECGD does not do so, multilateral consensus on improving standards will be considerably harder to achieve.

C. The OECD Guidelines on Multinational Enterprises

16. With regard to bribery, the OECD Guidelines on Multinational Enterprises state that enterprises should:

- a. not offer to pay public officials or employees of business partners any portion of a contract payment, or use subcontracts, purchase order or consulting agreements to channel payments to public officials;
- b. 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;
- c. be transparent in its activities to combat bribery;
- d. promote employee awareness;
- e. adopt appropriate management control systems to discourage bribery;
- f. not make illegal political contributions.

² OECD Working Group on Bribery, "Italy: Phase 2", 29/11/04. p 13

17. In the official UK report for the 2004 Annual Report on the OECD Guidelines on Multinational Enterprises, the UK government stated that it “encourages all companies to adopt the recommendations on responsible business conduct contained in the “OECD Guidelines for Multinational Enterprises”.” The UK report went on to say that “ECGD’s internal procedures will check on the consistency of the operations of its customers (both in the UK and overseas) with these recommendations and in particular those relating to the environment, employment, combating bribery and transparency.”³ The ECGD has an important role to play in encouraging UK companies to comply with the OECD Guidelines’ recommendations, including on bribery – as is done by other Export Credit Agencies.

18. In order to play this role, the ECGD needs to ensure that it has access to the relevant information to ensure that companies are not paying bribes, that they are paying agents appropriate fees for legitimate services, that they are transparent in their activities to combat bribery (which should include making codes of conduct public) and that they have appropriate management control systems in place to discourage bribery.

D. UN Convention against Corruption

19. Article 12 of the UN Convention Against Corruption (which was signed by the UK in December 2003 and is due for ratification by the UK during 2005), deals with parties’ obligations on preventing corruption in the private sector. Article 12 states:

“Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector.”

Clause 2 (d) of this article states that this includes:

“preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licences granted by public authorities for commercial activities”.

20. Clearly, as a government department directly involved with providing services to UK exporters – the segment of the UK’s private sector that is most at risk of engaging in corruption – the ECGD has a special role to play in preventing corruption in the private sector. Furthermore, it is now recognised that ECGD provides a service to exporters that is an economic cost to the government of £150 million annually. In so far as it is a public authority providing a service for commercial activities that has a significant cost to government, the ECGD therefore needs to ensure that its procedures for providing that support are not misused, under the terms of the UN Convention against Corruption.

21. As noted in previous sections, in order to comply with its international responsibilities on combating corruption, the ECGD needs to introduce its own robust preventative procedures so that its guarantee and investment insurance procedures cannot be misused. However, the ECGD also has a role to play in promoting best practice by its customers as a preventative measure. It has long been recognised that encouraging good

³ This text is also contained in the ECGD’s Case Impact Analysis Process, ECGD Business Principles Unit, May 2004, para 10.3.

corporate practice and compliance programmes in the private sector is a crucial element to the fight against corruption.

22. There are various international initiatives, besides the OECD Guidelines on Multinational Enterprises mentioned above, which aim to involve the private sector in the fight against corruption. In order to fulfil its responsibility as a government department to help prevent corruption in the private sector, the ECGD could draw on and promote these initiatives as examples of best practice that they expect customers to be implementing.

These initiatives include:

- a. The 2005 World Economic Forum's "Partnering Against Corruption Principles for Countering Bribery" (PACI);
- b. The International Federation of Consulting Engineers (FIDIC) Business Integrity Management System, including its model representative agreement;
- c. The International Chambers of Commerce (ICC) Rules of Conduct – revised in 1998;
- d. The UN Global Compact, whose 10th principle is that "businesses should work against all forms of corruption, including extortion and bribery";
- e. Transparency International's "Business Principles for Countering Bribery".

E. The ECGD's Mission Statement objective "to ensure that its activities accord with other Government objectives, including those on sustainable development, human rights, good governance and trade".

23. The UK Government has stated its commitment to encouraging good governance and combating corruption in developing countries on various occasions. These commitments have been particularly brought to the fore during 2005 because the government has made poverty in Africa a priority for its presidency of the G7/8 this year. The Commission for Africa that was set up to assist this process highlighted governance and corruption as key issues that need to be addressed if Africa is to overcome poverty. The Commission's report, published in March 2005, noted that:

"Developed nations can help in [combating corruption] too. ... Those who give bribes should be dealt with... Firms who bribe should be refused export credits".⁴

The report specifically identified Export Credit Agencies as having a key role in combating corruption. The report stated that Export Credit Agencies are "in a strong position to demand high standards of governance from projects in which they become involved". The Commission recommended that:

"developed countries should encourage their ECAs to be more transparent and to require higher standards of transparency in their support for projects in developing countries. Developed countries should also fully implement the Action Statement on Bribery and Officially Supported Export Credits agreed by the OECD".

The Commission went on to say that OECD members need to implement and adopt the higher standards laid out in the OECD's subsequent Best Practices Paper, and that the OECD should publish figures on the number of applications turned down on grounds of bribery to assess whether the anti-corruption measures of ECAs are working.

⁴ Commission for Africa, March 2005, "Executive Summary", p 12.

24. The UK government's international objectives on corruption and good governance also derive from earlier G7/8 commitments on the issue. In the 2002 G8 Africa Plan, G8 countries committed to *"intensifying support for the adopting and implementation of effective measures to combat corruption, bribery and embezzlement, including by ... supporting voluntary anti-corruption initiatives, such as ... the OECD Guidelines for Multinational Enterprises and the UN Global Compact."* In 2004, the G8 once again affirmed that they would *"do still more to help cut away the burden of corruption on economic growth"*. This included *"encourag[ing] efforts of our private sectors to develop and implement corporate compliance programs to promote adherence to laws against foreign bribery"*.

25. The ECGD therefore needs to ensure that its activities accord with UK government policy on corruption and good governance by promoting good business practice by its customers and by having strong procedures to prevent and detect corruption on projects it supports.

III. The Principal Changes

A. Reduced Disclosure on Agents and Agent's Commission

26. The December 2004 changes to the disclosure required by ECGD on agents and agent's commission considerably reduce the ability of the ECGD to assess and detect whether bribery has taken place on a transaction for which it is considering support. As a result, these changes substantially increase the risk that taxpayers' money will be used to support a transaction tainted by bribery and/or corruption.

27. The December 2004 changes reduced the disclosure requirements in the following ways:

- d) applicants are now only required to make disclosure on commission payments that are not to be covered by ECGD where the payments exceed 5% of the contract price;
- e) applicants are now allowed not to give the name and address of an agent if they can provide written justification for not doing so;
- f) applicants are no longer required to state whether an agent has been employed by an 'affiliate' such as a joint venture partner; they need state only whether an agent has been employed by the applicant itself or a 'controlled company' (i.e. a subsidiary);
- g) applicants no longer have to explain why a commission payment has been made outside of the Purchaser's country;
- h) applicants are now required only to state that there is no relationship between the agent and the Purchaser 'to the best of their knowledge and belief' – a phrase that coupled with the ECGD's new definition of it (see below) means that applicants do not need to make any enquiries as to whether there is such a relationship;

- i) applicants are now required to provide details on agent's commission only with respect to the contract to be underwritten by ECGD, whereas previously the company had to provide details of agent's commission with respect to the contract and "any related agreement, undertaking, consent, authorisation or arrangement of any kind";
- j) applicants are no longer required to give details of the value of *any* payments not included in the contract price nor an explanation of these payments.

28. It is well-known that agent's commission is a high-risk area, and that bribes are often paid through or by agents as a means of evading criminal liability on the part of the exporting company. This risk was acknowledged by the ECGD when it introduced its May 2004 procedures. The ECGD stated at the time that "*agents can act as a conduit for improper payments*". Because of this, the ECGD told customers:

"it is important that ECGD has detailed information about any agent involved with a contract for which cover is sought".

The fact that 78% of respondents to Control Risks Groups' 2002 survey said that they believed that companies from OECD countries including the UK (but excluding the US) used middlemen to circumvent direct payment of bribes either occasionally or regularly shows that the risk is real.⁵

29. The disclosure requirements on agent's commission introduced by the ECGD in May 2004 did not impose an undue administrative burden on exporters. Most of the information requested was easily accessible by applicants. Possible exceptions were the requirements to state whether an 'affiliate' had employed an agent, and whether there was a relationship between the agent and the Purchaser. However, this is information that a responsible company would seek to find out in the course of ordinary due diligence checks. If an applicant had not made such checks, the ECGD disclosure requirements would prompt them to do so, thus promoting good business practice.

30. Promoting good business practice on the use of agents and commission payments is entirely consistent with, if not required by the ECGD's duties and responsibilities on combating corruption, as noted above. It is particularly consistent with its stated aim of promoting the 'combating bribery' section of the OECD Guidelines on Multinational Enterprises. Furthermore, several of ECGD's largest and most frequent customers are listed on the US Stock Exchange. They are thus strongly advised, in order to be compliant with the USA's Foreign Corrupt Practices Act (FCPA) and avoid liability, to implement a compliance regime, which includes well-documented, searching due diligence procedures on all business relationships including agents. An FCPA compliance regime would also require that a company establish business relationships only with reputable and qualified business partners.⁶ Likewise, under UK anti-corruption laws, a

⁵ Control Risks Group, *Facing Up To Corruption: Survey Results 2002*, p 10. 56.6% thought that companies from other OECD countries aside from the US used agents to circumvent direct payments of bribes occasionally (compared to 47.2% for US companies), and 21.6% thought they did so regularly (compared to 20% for US companies).

⁶ Wilmer Cutler Pickering Hale and Dorr, "Foreign Corrupt Practices Act Update", 5/1/05; Business Laws Inc, "Transnational Joint Ventures", September 2003. In the US, the Department of Justice takes into consideration whether

company is liable for prosecution if it authorises a bribe to be paid by an agent, or is complicit in the payment of the bribe by a third party. UK companies should therefore also have in place compliance regimes involving extensive due diligence on business partners such as agents in order to comply with UK law. If companies have such compliance regimes in place, they should have no difficulty in answering the ECGD's questions on agents, as this is information they would have gathered ordinarily in the course of their due diligence searches.

31. The questions asked by ECGD under the May 2004 disclosure requirements on agents in fact reflect only to a limited degree international standards for best practice on due diligence of agents, as laid out by the International Chambers of Commerce, the International Federation of Consulting Engineers, Transparency International and Transparent Agents and Contracting Entities (TRACE). Indeed, if ECGD were to ask the full range of questions that would more clearly reflect these international standards,⁷ it would need to include further questions on agents as follows:

- a. At what stage of the contract process is the commission payment to be paid?⁸
- b. Is any of the commission payment being made in cash?
- c. Is commission to be paid to the agent directly or to a different entity or a numbered bank account?
- d. Does the agent have a family member in a government position?
- e. Has the agent been specifically requested by the purchaser?
- f. Does the agent have a track record in the particular industry sector in which it will be employed?
- g. Has the company conducted a due diligence review of its agent, particularly of its business record?
- h. Has the agent ever been involved, to the knowledge of the applicant, in illegal or unethical practices in the past?
- i. Has the agency or representative agreement received prior approval from the senior management of the applicant?
- j. Are all the agent's expenses accurately documented, accounted for and audited?

32. The caveat introduced in December 2004 allowing companies not to give the name and address of an agent if they give a written justification is a particular concern.⁹ It potentially deprives the ECGD of crucial information for undertaking its own due diligence on agent's commission and for ensuring that agent's commission is legitimate. It is also directly at odds with international best practice on combating bribery. Both the OECD Guidelines on Multinational Enterprises and the International Chamber of

a company has such a regime in place when seeking to establish liability. Because of the lack of case law in the UK, it is not clear to what extent the same will be true in the UK, but clearly having a compliance regime in place will be a strong defence.

⁷ See in particular the FIDIC Model Representative Agreement, TRACE's "Red Flags" for dealing with intermediaries, and the ICC's "Red Flags" for dealing with sales representatives. All the questions in this list come from one or other or all of these sources.

⁸ This is a question asked by Atradius, the Dutch Export Credit Agency, on its application forms. Of particular concern would be if any of the commission payment was to be paid up front or in advance.

⁹ Correspondence between ECGD and the CBI on this specific issue shows that the ECGD accepted that commercial confidentiality would be a legitimate reason for not providing this information.

Commerce Rules of Conduct make recommendations to enterprises on disclosure of agent's details. The OECD Guidelines state that:

“where relevant, a list of agents employed in connection with transactions with public bodies and state-owned enterprises should be kept and made available to competent authorities”.

The ICC Rules of Conduct state that a record of the names and terms of employment of all agents employed by a company in connection with public bodies or State enterprises:

“should be available for inspection ... upon specific request by appropriate, duly authorized governmental authorities under conditions of confidentiality”.

33. During negotiations with industry groups in 2004, the exporters' primary concern with the May 2004 disclosure requirements on agents appeared to be that they did not want to be required to provide “commercially sensitive detail” to ECGD, and that they were concerned that such detail could get into the hands of competitors.¹⁰ The ECGD rightly offered to provide special confidentiality arrangements for details of agents provided to it. This should certainly have been enough to allay the customer's principal concern about the ECGD's disclosure requirements. The ECGD must be able to ensure that agent's commission has not been used to conceal bribery in a transaction it is to support. If exporters do not provide the relevant information, under appropriate confidentiality arrangements, the ECGD will be unable to ensure that bribery does not occur in projects it supports. Given the ECGD's duties and responsibilities on combating corruption, this is unacceptable.

34. In order to ensure that taxpayers' money is not used to underwrite transactions tainted by bribery, the ECGD needs to change its December 2004 procedures in the following ways:

- a. require details on agent's commission on *ALL* contracts, whether supported by ECGD or not, and regardless of the percentage of commission, as the Dutch Export Credit Agency Atradius currently does;
- b. require applicants to state whether an agent has been employed by an affiliate, such as a joint venture partner;
- c. require applicants to provide the name and address of agents in all circumstances, subject to special confidentiality arrangements if required;
- d. require applicants to provide explanations if the commission is paid outside of the Purchaser's country or if it is paid to a third party rather than the agent itself;
- e. require applicants to state whether agency commission has been paid with regard to the supply contract *AND* any related agreement, undertaking, consent, authorisation or arrangement;
- f. require companies to give details of any other payments and incentives (including party political donations) made in connection with obtaining or performing the Supply contract or any related agreement, as is done by the Australian Export Credit Agency, EFIC;
- g. require companies to provide a copy of all agencies contracts and agreements when applying for cover, and particularly when a company makes a claim or the commission is in excess of 5% of the contract, as is done by Atradius.

¹⁰ Note of meeting between ECGD and CBI, 7/10/04

B. Definition of “to the best of our knowledge and belief”

35. In December 2004, the ECGD introduced into its application forms a definition of the phrase ‘to the best of our knowledge and belief’ at the request of a few customers. This phrase qualifies several important parts of the ECGD’s anti-corruption procedures, including parts of the no-bribery warranty that customers must sign. A definition of what the ECGD expects of customers in relation to this phrase may therefore be useful, particularly where there is lack of clarity about what the phrase requires legally of customers. However, the definition introduced by ECGD in December 2004 is seriously flawed.

36. The ECGD’s December 2004 definition states, with regard to ‘knowledge’, that the phrase:

“does not require the person [signing the form] to make any enquiries or in any other way to seek to improve or augment his or her state of knowledge before making the statement”.

With regard to ‘belief’, the ECGD states that the phrase does not require the person signing the form:

“to seek to verify or bolster a belief by enquiry, other than by a diligent search of the person’s own conscience”.

This definition essentially allows companies to make important statements with regard to corruption without requiring them to undertake any checks as to whether those statements are true. Such a definition encourages companies to neglect their duties in relation to the proper management of their business and potentially to practice ‘wilful blindness’.

37. As noted above, undertaking well-documented and careful anti-corruption due diligence on business partners, including agents, subcontractors, joint venture partners, and subsidiaries is:

- a. good business practice recommended by several international initiatives on the role of the private sector in combating bribery; and
- b. a necessity for those companies listed on the US Stock Exchange, with the US Foreign Corrupt Practices Act, and highly desirable for all UK companies in order to be compliant with the UK’s Anti-Terrorism, Crime and Security Act.

38. It is thus entirely consistent with the ECGD’s responsibilities on preventing corruption and bribery in the private sector and promoting responsible business practice for the ECGD to require proper and reasonable anti-corruption due diligence to have been carried out by its customers. If customers are not required by the phrase to carry out any due diligence (i.e. reasonable enquiry), it makes it harder for the ECGD to evaluate whether their warranties and answers to questions on the application form are accurate. It also encourages bad business practice as well as increasing the likelihood that taxpayers’ money will be used to underwrite corrupt transactions.

39. The definition used by ECGD in the December 2004 forms represents the weakest of UK legal interpretations of this phrase. In June 2004, during negotiations with the CBI

and certain customers, the ECGD put forward an alternative definition of the phrase as follows:

*“a state of actual knowledge and belief held by the signatory at the time of signature which he either has never had any cause to consider inaccurate nor should have had, or has resolved any such cause by sufficient enquiry”.*¹¹

This definition is much more in keeping with the contract law concept of “honest belief”. A person, according to this concept, enters a contract without ‘honest belief’ where he/she does so “*with a suspicion that something was wrong but refraining from making further enquiry*”.¹² This definition is therefore the absolute bottom-line that the ECGD should employ as its understanding of the phrase. It was rejected, however, by the industry side during negotiations in 2004 particularly by one exporter who did “not like the concept that the applicant might be liable if he should have had cause to consider the warranty inaccurate”.¹³ Clearly, this argument is unacceptable. Exporters must be liable if they give warranties on taxpayer-supported transactions that they have cause to consider inaccurate, otherwise the exercise is inherently meaningless.¹⁴

40. However, even the ECGD definition proposed during negotiations and rejected does not reflect best practice on anti-corruption due diligence. It requires companies only to make enquiries where they have suspicions. The nature of corruption is that it will often remain hidden unless the right enquiries are made. Given the ECGD’s duties and responsibilities on preventing and deterring corruption in transactions that it supports and the risks that corruption poses, the ECGD’s definition of this phrase needs to reflect a higher standard of due diligence. The ECGD therefore needs to amend the December 2004 definition of ‘to the best of our knowledge and belief’ to read:

“to the best of our knowledge and belief” means that all reasonable enquiries have been made and appropriate due diligence checks undertaken by the applicant to ascertain that the knowledge and belief are correct at the time of signing”.

C. Replacement of the Concept of Affiliate

41. The December 2004 procedures replace the concept of ‘affiliate’ (which denoted joint venture partners and companies from the same group as the applicant, whether parent, sister or subsidiary) with the concepts of ‘controlled company’ (a controlled subsidiary) and of ‘associate’ (a joint venture, consortium or similar business partner). The effect of this change was that:

¹¹ Letter from ECGD to BEXA, 11/6/04

¹² Halsbury’s Laws of England and Wales, Contract, 612, 1 (2), Fn (2)

¹³ ECGD Document, “Customer Complaint Summary”, 24/6/04

¹⁴ In agreeing the December 2004 definition, ECGD told the industry side that they should be aware that the definition “does not allow the representation to be accurately made where doubts are entertained” (Letter from ECGD to CBI, 5/8/04). However, this is not spelt out in the December 2004 definition, nor is it reflected anywhere else in publicised form. Moreover, proving whether a company entertained doubts or not would be exceptionally difficult to do and therefore, such a ‘gentleman’s agreement’ can never be a substitute for a proper definition that lays out expectations of due diligence that companies are required to do.

- a. applicants are no longer required to declare that ‘to the best of their knowledge and belief’ their affiliates, such as joint venture partners, have not previously been convicted of or freely admitted to corrupt activity, or have not been blacklisted by a multilateral bank or aid donor. They only have to do this now in respect of themselves and their controlled subsidiaries;
- b. applicants are no longer required to warrant that ‘to the best of their knowledge and belief’ their affiliates, such as joint venture partners, have not or will not engage in corrupt activity on the contract to be supported. They now only have to do this with respect to their controlled subsidiaries;¹⁵
- c. applicants are now only required, with regard to joint venture and other similar business partners (associates), to notify the ECGD if they “become aware” that such a partner has engaged in corrupt activity (subject to the caveat that by doing so they would not be engaging in “tipping off” under section 333 of the Proceeds of Crime Act 2002).

42. Due diligence on joint venture partners is an important part of good business practice when operating abroad. When companies establish a joint venture, they are entering a legally binding agreement. Given the risks involved in entering such an agreement, it would therefore be unusual for a company not to engage in some examination of the joint venture partner’s business record, solvency and accounting practices. Legal experts in the UK, the US and elsewhere recommend extensive due diligence checks as well as warranties that partners have made full and frank disclosure, and disclosure letters detailing what has been disclosed.¹⁶ In the words of one expert: *“Money expended at pre-contract stage [on due diligence] may lead to considerable savings further down the track”*.¹⁷

43. Increasingly, it is being accepted that anti-corruption due diligence on joint venture partners is an important part of this process. The 2005 World Economic Forum’s Partnering Against Corruption Principles for Countering Bribery (PACI), for instance, specifically include the recommendation that:

“Due diligence should be conducted before entering a joint venture, and on an on-going basis as circumstances warrant.”

44. Best practice on anti-corruption due diligence of joint venture partners is most advanced in the US context. Under the Foreign Corrupt Practices Act, US companies and foreign companies listed on the US Stock Exchange (issuers) can be subject to vicarious liability for bribes paid by a joint venture partner because of ‘wilful ignorance’ or conscious disregard of ‘red flags’ on their part.¹⁸ Issuers can also be liable for ‘implicit authorization’ of bribes by a joint venture if they discover bribes are being paid but fail to

¹⁵ With respect to applicants themselves, they are still required, as under the May 2004 procedures, to declare without the qualifying phrase ‘to the best of our knowledge and belief’ that they have not engaged in corrupt activity.

¹⁶ Stephen Sayer, “Negotiating and Structuring International Joint Venture Agreements”, 14/5/99, Journal of the Centre for Energy, Petroleum and Mining Law and Policy, Dundee University

¹⁷ *ibid.*

¹⁸ This includes where companies consciously disregard the probability of a bribe being paid.

disengage. This is so even where it has only a minority position in the joint venture.¹⁹ In order to avoid liability, such companies are strongly advised²⁰ to:

- a. have clear company procedures “*to assure that all necessary and prudent precautions are taken ... to form business relationships with reputable and qualified Business Partners*”;²¹
- b. have thorough and clearly documented due diligence procedures on joint venture partners, which involve investigating in detail the experience and reputation of such partners;
- c. have a clearly articulated corporate policy on combating bribery, with compliance standards and procedures that are to be followed by joint venture partners;
- d. require joint venture partners to sign no-bribery or FCPA compliance warranties and representations with clauses in these agreements that allow for termination, the right to be bought out or for indemnification where anti-corruption representations and warranties are broken or prove to be untrue;
- e. include in all agreements and contracts the right to audit expenses and invoices of the joint venture and the right to review third-party payments;
- f. adopt corporate procedures to ensure that the company does not delegate substantial discretionary authority to individuals who are likely to engage in illegal activities (which could include a joint venture partner);
- g. have procedures for ongoing monitoring and oversight over joint venture partners.

45. Several of the recent corruption scandals that have emerged in relation to projects for which the ECGD gave support have involved joint ventures.²² These scandals have raised considerable reputational issues for the ECGD, and are likely to continue to do so during 2005 given that both of these projects were in Africa. It would therefore seem wise for the ECGD to adopt high standards with regard to what they require of their customers in relation to joint venture partners.

46. The ECGD’s May 2004 procedures required applicants to state that their ‘affiliates’ including joint venture partners and other companies from the same group as itself:

¹⁹ See Business Laws, Inc, “Transnational Joint Ventures”, <http://www.businesslaws.com/tjvch1.pdf>

²⁰ See Business Laws, Inc, “Transnational Joint Ventures”, <http://www.businesslaws.com/tjvch1.pdf>; US Department of Justice, “Foreign Corrupt Practices Act Review: Opinion Procedure Release”, No 04-02, 12/7/04; Lucinda A. Low, “Coping with the Foreign Corrupt Practices Act: A Primer for Energy and Natural Resource Sectors”, Journal of the Centre for Energy, Petroleum and Mining Law and Policy, Dundee University, 1997; Lucinda A. Low, “Sarbanes-Oxley: Consequences for FCPA Compliance”, 8/1/03, <http://www.millerchevalier.com/db30/cgi-bin/pubs/S-O%20L.%20Low%20Article.pdf>

²¹ US Department of Justice, “Foreign Corrupt Practices Act Review: Opinion Procedure Release”, No 04-02, 12/7/04

²² The two that have had received the most publicity are the Lesotho Highlands Water Project and the Nigerian Liquefied Natural Gas (LNG) plant at Bonny Island. The Lesotho Highlands Water Project has already resulted in the conviction of the lead company of a joint venture in which one UK company was a partner. The lead company of another joint venture in which two UK companies were partners is about to stand trial in Lesotho. The UK companies concerned also face possible prosecution in Lesotho. In the Nigerian case, the allegations of bribery by the joint venture involved in constructing the LNG Plant are under investigation in France, the US and Nigeria. Evidence has emerged in the press suggesting that the UK subsidiary of one of the joint venture partners is implicated in the allegations. In both cases, the UK companies concerned received ECGD support.

- had not been convicted of or freely admitted to corruption;
- had not been blacklisted by a multilateral development bank or aid donor; and
- had not engaged in corrupt activity on the transaction to be supported.

All of these statements were qualified by the phrase ‘to the best of their knowledge and belief’. Coupled with the more robust interpretation of the phrase suggested above, at most this would require applicants to conduct reasonable and appropriate due diligence on its joint venture partners. Such due diligence is, as we have shown, highly recommended for businesses operating in high risk markets as a means of mitigating future risks and avoiding possible future liabilities. It is therefore entirely consistent with the ECGD’s duties to help prevent corruption in the private sector that it promote good business practice in this regard.

47. The ECGD has a wider obligation to ensure as far as it can, not just that the UK company it supports does not engage in corruption, but that there is no corruption in the project as a whole. The ECGD needs to ensure that (as is one of its stated objectives) its activities accord with Government objectives on sustainable development and good governance. Corruption in an ECGD-backed project has the potential to seriously undermine these objectives, regardless of whether it is carried out by the UK company supported by ECGD or another entity. Requiring applicants to conduct appropriate anti-corruption due diligence on joint venture partners and other affiliates and to make warranties and declarations to that effect means that ECGD is more likely to be able to ensure that taxpayers’ money is not being used to support a project tainted by corruption or bribery. Furthermore, corrupt activity by an ‘affiliate’ of an ECGD customer that leads to the contract being voided has serious financial implications for the ECGD and thence the taxpayer, as the ECGD will be unable to seek recourse from a customer in this situation even though it will be required to compensate banks for ensuing losses. This means that the ECGD and thence the UK taxpayer is ultimately liable in such circumstances. Under the December 2004 procedures the taxpayer would be liable even where the corrupt activity by an affiliate took place as a result of negligence or wilful blindness by ECGD customers. This is clearly an unacceptable shifting of the risk posed by corrupt activity away from the customer to the taxpayer.

48. Under the May 2004 procedures, liability for corrupt activity by an affiliate was limited to where an affiliate had engaged in corrupt activity “with the Supplier’s prior consent or subsequent acquiescence”. It is extremely important that Suppliers are required to accept liability for wilful blindness or negligence on their part with regard to corrupt acts carried out by affiliates for the reasons outlined in the paragraph above. The phrase ‘prior consent or subsequent acquiescence’ is thus too limited. The Corner House believes that the ECGD must reintroduce the standard of liability for corrupt acts carried out by affiliates set in May 2004 Premium and Recourse Agreement subject to the inclusion of the phrase “or as a result of Negligence on our part”. Negligence should be defined in the application form as follows:

“Negligence” means the failure to take all reasonable steps to prevent corrupt activity occurring.

The Corner House also recommends that the ECGD issue guidance to applicants with on the appropriate level of due diligence and anti-corruption safeguards the ECGD expects

with regard to affiliates, and other business partners in order to avoid liability for negligence.

49. The December 2004 introduction of a duty on applicants to inform ECGD if they “become aware” of corrupt activity by associates, namely joint venture partners, is inadequate because:

- a. it does not require any effort or due diligence on the part of the company to find out whether such partners are engaging in corruption;
- b. it carries no sanction, and with the reduced audit rights of the ECGD and the wide discretion given to companies to interpret whether to inform would constitute ‘tipping off’ under the Proceeds of Crime Act, this gives companies little encouragement to disclose, and the ECGD no recourse if they fail to do so.

Furthermore, the duty only relates to corrupt activity once it has occurred and not allegations or suspicions of corrupt activity, which it is equally important for the ECGD to know about.

50. The ECGD has, meanwhile, stated in the consultation document that if an applicant company were to use a joint venture partner or other affiliate to pass on a bribe then they would be in breach of their warranty, because the joint venture partner would be acting on their behalf. This is insufficient because

- a) the warranty would then only cover a situation where an applicant proactively asks an affiliate to act on its behalf in paying a bribe, and would not cover situations where the applicant was complicit in or acquiesced in bribes paid by an affiliate; and
- b) it depends on the ECGD being able to prove that the affiliate did indeed act on the behalf of the applicant, which would in many instances, be a difficult task to do.

51. There are several issues that need to be addressed should the May 2004 warranties and representations be reintroduced as we propose. These are:

a. whether reasonable due diligence extends to all employees of an affiliate

Reasonable due diligence checks would not normally include every employee of a business partner, but would include the most relevant employees, including senior management, directors and those directly involved in senior positions in the project concerned. The May 2004 warranty referred to ‘all employees’. This could legitimately be seen as going beyond the bounds of what is ‘reasonable’. The phrase ‘and any of its employees’ should thus be removed with reference to affiliates.

b. whether the May 2004 warranty accurately reflected the liability for corrupt activity by an affiliate laid out in the Premium and Recourse Agreement;

There is a lack of clarity in the May 2004 warranty that applicants were required to sign on application, as to whether corrupt activity by an affiliate only referred to corrupt activity which was engaged in with the applicant’s ‘prior consent or subsequent acquiescence’. As such, the warranty does not appear to have reflected the

wording used and the test set for liability in the Premium and Recourse Agreement. This lack of clarity and consistency means that it would be more difficult for the ECGD to hold an applicant to account or take legal action against it with regard to a breach of warranty. The Corner House believes that the ECGD should include taking legal action against applicants for breach of warranty as part of the range of sanctions open to them, as is done by EXIM in the US. It may therefore be appropriate to ensure that a revised warranty that includes ‘affiliates’, as we recommend, does reflect better the liability companies will face for corrupt activity by affiliates. However, the liability laid out in the May 2004 Premium and Recourse Agreement still leaves the UK taxpayer open to liabilities arising from negligence on the part of ECGD customers with regard to corrupt activity by affiliates. The Corner House therefore believes that the phrase “or as a result of Negligence on our part” needs to be included in both the ECGD’s anti-corruption warranty and the Premium and Recourse Agreement subject to a definition of negligence as proposed in para 48 above. Other Export Credit Agencies have such a standard of liability. Norway’s GIEK, for instance, requires companies to compensate GIEK if they break the Norwegian Penal Code section against bribery of public officials, or if any of their “assistants” do so and the company *“knew or should have known this”*.²³

c. whether the term ‘affiliate’ should include group companies and non-controlled subsidiaries as under the May 2004 warranty

The term ‘associate’ in the December 2004 procedures relates only to joint venture or consortium partners. In the May 2004 forms, the term ‘affiliate’ was broader and included “*any company which is a member of the same group of companies or any other party to any joint venture or consortium or other similar arrangement with our company in connection with the Supply Contract*”. It thus included parent and sister companies and subsidiaries, whether controlled or not. UK subsidiaries of foreign companies routinely apply for ECGD support. It is therefore appropriate to ensure that the warranty covers parent and sister companies. This is particularly so given that the ECGD usually requires parent companies to join in recourse arrangements, and states that it can bring “any of the group companies” that have a “share of group assets” into the recourse arrangements.²⁴ It makes little sense that such companies should be excluded from the no-bribery warranty when they are included in the recourse arrangements. It is also clearly appropriate to include controlled subsidiaries. The question really arises as to whether non-controlled subsidiaries should be included. If they are not included, this creates an obvious loophole and an incentive for UK companies to use non-controlled subsidiaries for bribe payments. Under the US Foreign Corrupt Practices Act, companies may be liable for, and therefore need to undertake due diligence with regard to, payments made by subsidiaries whether they

²³ See OECD Working Party on Export Credits and Credit Guarantees, “Export Credits and Bribery: Review of Responses to the 2004 Revised Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits – Situation as of 21 January 2005”, p 22.

²⁴ www.ecgd.gov.uk/index/ps_home/recourse_mi.htm

are controlled or not.²⁵ It is therefore appropriate for ECGD to ensure that non-controlled subsidiaries are included in due diligence requirements, and for the ECGD to revert to the May 2004 use of the term ‘affiliate’.

52. If ECGD is to promote good practice with regard to corporate procedures relating to joint venture and other business partners, including subsidiaries, and if it is to prevent and detect corruption in projects it supports regardless of whether it is committed by UK companies or other actors in order to avoid unnecessary liability for the UK taxpayer, the ECGD needs to:

- a. reintroduce the May 2004 warranties and disclosure representations so that they include the term ‘affiliate’ (as defined in the May 2004 application forms) subject to the phrase ‘to the best of our knowledge and belief’;
- b. reword the warranty at paragraph 9.2.1 of the December 2004 procedures to read: *“neither we (nor any of our employees), nor anyone acting on our behalf with our consent or acquiescence or as a result of Negligence on our part, nor to the Best of our Knowledge and Belief, any of our Affiliates or anyone acting on their behalf with our consent or acquiescence or as a result of Negligence on our part has engaged or will engage in any Corrupt Activity in connection with the Supply Contract or any related agreement, undertaking, consent, authorisation or arrangement of any kind”*;
- c. reintroduce the May 2004 Premium and Recourse Agreement phrasing with regard to company liability for corrupt activity, including liability for corrupt activity by ‘affiliates’ (as defined in the May 2004 application forms), where the corrupt activity was engaged in with the consent or acquiescence or as a result of negligence on the applicant’s behalf, subject to a definition for ‘negligence’ (see para 48);
- d. issue guidelines to companies as to what the ECGD will expect with regard to due diligence on affiliates, agents and other business partners and adequate safeguards to prevent corrupt activity, with particular reference to international best practice developed in the US.

D. Reduced Disclosure on Employees/Directors

53. The December 2004 procedures have reduced the number of people that companies and banks are now required to make representations about with regard to convictions for, admissions of and blacklisting for corrupt activity. While, as noted above, it is reasonable to reduce the scope of these representations from ‘all employees’, the ECGD has gone too far by restricting it solely to directors. Due diligence on the backgrounds of relevant personnel would normally include senior management and other relevant personnel involved directly in the project to be underwritten. We suggest that ECGD rephrase the representations to read:

²⁵ Under the FCPA’s books and record keeping requirements, parent companies are directly responsible for ensuring that subsidiaries in which they have 50% or more of voting power have proper internal accounting controls, and are liable if they do not. However, with subsidiaries in which they have less than 50% of voting power, they are only required to show “good faith” in using their influence to ensure that these companies do maintain a system of internal accounting controls (See O’Melveny and Myers, “Foreign Corrupt Practices Act Handbook - 2003”, Fourth Edition).

“we or any affiliate or any board director or member of senior management or relevant project personnel of ours or of any affiliate company”.

The Corner House believes that with this minor amendment, the May 2004 representations should be reintroduced, in all of the ECGD’s product documents including the Letters of Understanding. As we have stated above (para 47), these representations are important as they provide ECGD with crucial information on business partners involved in the project and on whether applicants have conducted appropriate due diligence with regard to these partners.

E. Audit Provisions

54. The ECGD introduced its audit clause in May 2004 specifically in order to enable the ECGD to “monitor compliance” particularly with its anti-bribery warranties. The May 2004 audit clause allowed ECGD to inspect relevant contract documentation including on agency commission and measures taken to deter corrupt activity by a company as long as it gave five days notice.

55. The changes introduced to the ECGD’s audit clause in December 2004 dramatically limit the scope of the audits that ECGD can undertake. These limitations are as follows:

- a. the ECGD can conduct an audit only if it confirms in writing first to the company that it has reasonable grounds for suspecting wrong-doing;
- b. the ECGD must agree an independent third party acceptable to the company who will conduct the audit;
- c. the ECGD can only inspect those documents up to the time of the award of the contract, and only to verify statements made on the application form;
- d. the ECGD can only inspect documents in the UK premises where “records relating to the obtaining and performance of the Supply Contract and the making of Disbursement Claims under the Loan Agreement are kept”, not in any of the company’s premises as under the May 2004 clause;
- e. the ECGD no longer has the right to inspect documents relating to measures taken by the company ‘to prevent, detect and deal with Corrupt Activity’, nor of those relating to ‘the placing of any sub-contracts’.

56. These changes mean that ECGD is now unable to do random audits, and that it is now limited as to what it may audit. The deterrent effect of random audits is clear and would have provided a powerful incentive for companies not to give false warranties or representations. Random audits may throw up evidence or suspicions of bribery that the ECGD may not discover otherwise. Furthermore, the ECGD has stated that it passes on all suspicions of bribery and corruption to the law enforcement agencies. It would be impossible for the ECGD, having forwarded a suspicion to law enforcement agencies, to then write to the company citing those suspicions as grounds for audit without potentially undermining a police investigation. It is therefore highly unlikely that ECGD will use the revised audit provisions at all. This means that ECGD is unable to monitor compliance with its warranties effectively.

57. During the negotiations in 2004 between the ECGD and certain exporters, exporters complained that the May 2004 audit clause might lead to ECGD auditors becoming “aware of information that the supplier considers commercially sensitive.”²⁶ This is not a legitimate argument for reducing the ECGD’s audit scope. In order to ensure that bribery does not occur in projects it supports, ECGD may well need to see information that the supplier considers commercially sensitive, under suitable conditions of confidentiality. While the ECGD is not, as it says, an investigative body, it clearly has powers of inspection that the May 2004 audit clause laid out. The ECGD’s duty to prevent serious crime occurring in a taxpayer-supported transaction clearly outweighs the preference a company may have to keep commercially sensitive information on such a transaction secret from the government department providing it with financial support.

58. We believe that the ECGD should re-introduce the May 2004 audit clause outlined in the Premium and Recourse Agreement. However, we believe that in so doing they should take note of the Trade and Industry Select Committee’s view that the ECGD should not allow five business days notice before conducting such audits. In the words of the Trade and Industry Select Committee, “such voluntary constraints undermine confidence that ECGD will be rigorous in exercising its ... powers”.²⁷ Of course, such audits should not be oppressive, but a random system with little prior notice would be a very effective deterrent against bribery. Given that such audits essentially involve giving access to the relevant files for the person conducting the audit, they are unlikely to involve any serious administrative burden on businesses.

F. Appropriate Sanctions

59. Currently, the main sanction that the ECGD can apply against a company convicted of corrupt activity on a project it supports, as laid out in the Premium and Recourse Agreement, is to require it to pay ECGD any amounts the ECGD has paid the Bank with respect to any losses incurred by the Bank, and any related costs incurred by ECGD. In effect, this means that companies only incur a financial penalty if a default occurs on the project in question – a event that is by no means inevitable. One exception to this is in one of ECGD’s products, the Supplier Credit Finance Facility. In the Standard Terms and Conditions for this product, where an applicant gives a warranty that is “incorrect or untrue in any respect”, or where the warranties with regard to corrupt activity “have not been complied with”, the ECGD may at its “absolute discretion” require the company to

- a) repurchase for cash any bills of exchange or promissory notes purchased by the Bank with respect to ECGD support to the Bank for financing a particular export contract;
- b) repay the Bank any amounts advanced by the Bank under the loan contract.

60. In October 2004, the Export Credit Guarantee Advisory Council advised ECGD that it provide a provision in its contracts with customers that the ECGD will require a

²⁶ Aerospace Industry Note, “Bribery and Corruption Wording”, 30/7/04

²⁷ Trade and Industry Select Committee, “The Work of the ECGD”, Sixth Report of Session 2003-4, 15/6/04

financial penalty to be paid to it if a conviction for bribery takes place.²⁸ ECGD said it would consider this proposal when it was next considering its anti-corruption procedures. As these procedures are now currently under consideration, the ECGD should examine what financial penalties it has in place for breach of warranty and conviction for bribery. It is clearly illogical that companies should only face a financial penalty if a default occurs, as this makes the penalties for bribery or breach of warranty dependent upon arbitrary country specific circumstances and whether the buyer decides to cancel a contract due to bribery or not.

61. Additionally, the ECGD should reconsider its position on debarment. Currently, the ECGD does not have a formal debarment policy. This is despite the fact that the OECD Revised Recommendations on Combating Bribery in International Business Transactions call on countries to take “concrete and meaningful steps” towards deterring, preventing and combating bribery in the area of “public subsidies, licences ... or other public advantages” with a specific recommendation that “*advantages could be denied as a sanction for bribery in appropriate cases*”. The OECD Working Group on Bribery has recommended to various countries during the peer review process for monitoring implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions that their export credit agencies should introduce measures to debar companies convicted of corruption.²⁹ As noted in Para 23 above, the Commission for Africa also stated in its report that “*firms who bribe should be refused export credits*”.³⁰ Debarment or blacklisting is used by the Multilateral Development Banks, some bilateral aid agencies and several countries (including the US, South Africa, Germany and Singapore) as an effective deterrent against bribery in publicly-funded procurement.

62. The ECGD states that blacklisting by a multilateral development bank or aid agency, a conviction for or admission of corrupt activity is a prima facie grounds for refusing cover to an applicant. However, the ECGD has also said that it is unable to introduce a formal policy on debarment because to do so would fetter the Secretary of State for Trade and Industry’s discretion and expose the Department to claims for judicial review. The Corner House has received clear legal advice (which it is submitting for this consultation) that it is perfectly acceptable for ECGD, under public law, to have a firm policy to refuse cover to companies that have previously engaged in bribery or corruption whilst also considering the exceptional circumstances of any particular case on its merits. The ECGD already operates several clear exclusion policies with respect to other issues.

63. Furthermore, in January 2006 a new EU Public Procurement Directive (2004/18/EC) will come into force. Article 45 of this Directive requires ‘contracting authorities’ to operate mandatory exclusion from bidding for public contracts of companies convicted of corruption, fraud, money laundering or criminal organisation. The ECGD would appear to be covered by this Directive only with regard to purchases the Department makes as a contracting authority but not with regard to the main bulk of its business: providing

²⁸ EGAC Minutes, 21/10/04

²⁹ See in particular the OECD Phase 2 reports for Switzerland, Italy and France.

³⁰ Commission for Africa, March 2005, “Executive Summary”, p 12.

guarantees and insurance. If the ECGD, however, does not introduce mandatory exclusion for convictions of corruption in its main business operations, it will be at odds not just with the practice of other government departments in the UK but with UK government policy in this area as shaped by the Directive. Furthermore, it is not inconceivable that situations would arise whereby a company that is unable to bid for government contracts throughout the European Union because of a conviction for corruption may continue to receive ECGD support. Additionally, a company might be excluded from bidding for contracts to provide ECGD goods, but would not be excluded from receiving ECGD guarantees or insurance to provide goods to other governmental bodies outside the EU. This could incur considerable reputational damage for the ECGD. The Corner House believes that as part of this consultation and in light of the legal opinion we have received, the ECGD should revisit its own legal advice and policy on this issue.

64. During its Phase 2 Evaluation of the UK's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the OECD Working Group on Bribery specifically recommended that with regard to sanctions for bribery of foreign public officials, the UK government should consider:

“revisiting the policies of agencies such as Department for International Development and Export Credit and Guarantees Department on dealing with applicants convicted of foreign bribery, to determine whether these policies are a sufficient deterrence.”³¹

The OECD stated that this was particularly important in light of the “absence of additional administrative penalties upon persons and entities convicted of the bribery of a foreign public official” in the UK.³² Adopting the sanctions proposed above would assist the ECGD and the UK government as a whole in meeting the Working Group on Bribery's recommendation and in bolstering the UK's implementation of the OECD Convention and the Revised Recommendation.

G. Banks Letters of Undertaking (LOUs) and Money Laundering

65. It may be appropriate for the ECGD not to ‘double regulate’ the UK's money laundering regulations with regard to Banks. However, there is no reason why Banks should not be able to make the same anti-corruption declarations as exporters are required to do. The Corner House believes that the changes to the anti-corruption warranties and declarations outlined in this submission should be applied equally to the Banks in the LOUs.

H. Partial Regulatory Impact Assessment

66. As stated above, corruption poses considerable risks to the ECGD itself, developing countries and exporting companies. Because of this, assessment of the potential costs to exporters of anti-corruption measures by ECGD must be clearly offset against the long-

³¹ OECD Working Group on Bribery in International Business Transactions, “United Kingdom: Phase 2”, 17th March 2005, para 257 (a).

³² *ibid.* p 79, Commentary

term benefits that such measures will bring. It is much more difficult to put a monetary value on the long-term benefits of such measures than on short-term compliance with them.

67. Cabinet Office guidance on Regulatory Impact Assessments states that these assessments should consider “the full range of potential impacts – economic, social and environmental” and that they should include consideration of all groups affected, “those that benefit as well as those that bear costs” and “those affected directly and indirectly”. The current partial Regulatory Impact Assessment by the ECGD does not cover the full range of potential impacts, nor does it cover the full range of groups likely to be affected by the ECGD’s anti-corruption procedures. It does not, for instance, examine the costs and benefits to the ECGD itself of not supporting projects tainted by bribery. Meanwhile, a Regulatory Impact Assessment that does not take into account the impact on, and costs and benefits to developing countries of anti-corruption measures operated by the ECGD, particularly in the light of the Commission for Africa report, is fundamentally flawed.

68. Although properly complying with ECGD anti-corruption procedures is likely to have cost implications for companies, the economic costs to a company of a conviction for corruption or the reputational costs of being embroiled in a corruption scandal are likely far to outweigh the costs of compliance with any due diligence and anti-corruption measures proposed in this paper.³³ By setting high standards for compliance, in the long-term ECGD will help companies mitigate the risks of larger costs further down the line.

69. It is important that the ECGD gets an accurate estimate of the monetary cost that reverting to the May 2004 procedures would impose on exporters. However, the ECGD should make sure that it consults independently and preferably commissions an independent survey of the possible monetary costs. In estimating these costs the ECGD must take into account, and offset against them, the fact that companies should adopt internal procedures to comply with the UK anti-corruption laws in any case and, if they are US issuers, with the Foreign Corrupt Practices Act. It would distort the outcome of the RIA if the ordinary costs of complying with the law were included as costs of complying with ECGD procedures.

70. There is a danger that the argument of ‘undue burden’ may be used by exporters to conceal a deeper fear that abiding by more robust anti-corruption procedures would put UK businesses at a competitive disadvantage to companies from other parts of the world. The Corner House believes that the ECGD will need to do considerably more work to ensure that exporters are aware of the business benefits of strong anti-corruption procedures and of the benefits of ECGD’s leadership in bringing higher standards at a multilateral level (see para 15).

³³ It is worth noting that in the US, aside from multi-million dollar fines that companies have been required to pay when found guilty of bribery, companies face considerable investigation fees ranging from \$1-4 million when they have been required to undertake internal investigations as a result of bribery allegations.

Conclusion

71. The Corner House believes that the changes made to the ECGD's anti-corruption procedures in December 2004 do not have the effect of ensuring that as far as practicable, taxpayer's money is not used to support projects tainted by bribery or corruption. Indeed the December 2004 procedures considerably weaken the ability of the ECGD to prevent, detect and combat bribery and corruption in projects it supports. The Corner House believes that the ECGD must reintroduce the May 2004 procedures with some minor changes, and introduce a formal debarment policy. If the ECGD fails to do so, it will miss a historic opportunity during 2005 firstly, to support the Government's efforts to combat bribery and corruption, not least in order to help find real solutions to poverty in Africa, and secondly, to increase substantially the chances of achieving a multilateral consensus at the OECD on how Export Credit Agencies should deter and prevent bribery. The Corner House believes that robust anti-corruption procedures at the ECGD, such as the slightly amended May 2004 procedures proposed here, would be in the long term interests of the UK taxpayer, developing countries and ultimately ECGD customers themselves. Such procedures represent good and effective regulation targeted at real risks and do not represent an undue burden on ECGD customers.

Annex 1

Case Study: Bribery allegations at LNG Plant at Bonny Island, Nigeria

1. The following case study illustrates the different applications and outcomes of the ECGD's pre-May, May and December 2004 anti-corruption procedures.
2. In October 2003, French authorities announced publicly that they were beginning a major investigation into allegations of bribery by a major energy consortium, TSKJ. TSKJ is a joint venture of companies from France (Technip), Italy (Snamprogetti), the US (Kellogg Brown and Root, a subsidiary of US energy and logistics contractor Halliburton) and Japan (JGC), acting through three offshore companies based in Madeira, Portugal. The allegations were that one of the TSKJ Madeira companies, LNG Servicos e Gestao de Projectos had paid \$175 million to an agent, and that the agent had used this money to pay bribes to Nigerian officials, and to expatriate managers of Kellogg Brown and Root. These bribes were alleged to have been paid to enable the TSKJ to win contracts for a liquefied natural gas (LNG) plant at Bonny Island in Nigeria. In January 2004, US authorities also opened an investigation into the allegations.
3. One of the contracts on the LNG plant at Bonny Island, now under investigation in France and the US, was awarded to TSKJ to build the second extension (trains 4 & 5) to the plant. This contract was awarded on a negotiated basis to TSKJ in March 2002. The ECGD was one of a number of export credit agencies that helped finance the project in December 2002. ECGD gave support worth £127 million on the project to a UK subsidiary of the US energy company, Halliburton, MW Kellogg, for goods and services including project management.
4. Evidence now in the public domain from the ongoing investigations reveals that:
 - The agent involved was a UK based lawyer, Jeffrey Tesler, acting through his Gibraltar based company, Tri-Star.
 - Tesler signed an agreement with LNG Servicos e Gestao de Projectos, one of the TSKJ Madeira companies, on 24th December 2001 for "consulting and commercial promotion services for the Nigeria LNG Plus Project". According to this agreement, Tesler was to receive a fee of \$51 million to be paid into a bank in Monaco, if he obtained the EPC (Engineering, Procurement and Construction) contract for trains 4&5 on behalf of TSKJ. Tesler's fee represented roughly 3% of the \$1.6 billion contract price.
 - Tesler has admitted that he has only ever been to Nigeria for half a day in the 1980s.³⁴ However, some of the services he agreed to provide under his agreement with TSKJ would have required to be performed in Nigeria. Others services were exceptionally vague, such as "maintaining favourable relationships with the Client" and advising on an "appropriate sales strategy".
 - Tesler had been engaged as the consultant on the advice of MW Kellogg (which is controlled by Kellogg Brown and Root) and Kellogg Brown and Root, with

³⁴ Wall Street Journal, "In Halliburton Nigeria probe, search for bribes to a dictator", 29/9/04

- whom Tesler had a long standing relationship.³⁵ A decision to keep Tesler as the consortium's agent was taken at a consortium meeting in 1999 in the UK, at the insistence of Kellogg Brown and Root.³⁶ The contracts with Tesler were signed by UK officials working with or for MW Kellogg, as authorised signatories of LNG Servicos. The payments were made by LNG Servicos e Gestao, which is 50% owned by MW Kellogg.
- In September 2004, Halliburton revealed that an internal probe had uncovered notes written between 1993 and 1998 showing that consortium executives discussed bribes to Nigerian officials in order to win the contract.³⁷ Halliburton has also reported in its filings to the US Securities and Exchange Commission that it understands from the ongoing investigations that payments were actually made to Nigerian officials. The former Nigerian chairman of Nigeria LNG Ltd has admitted to a Nigerian House Committee that he received 'loans' from Tesler some of which he did not pay back, although he denies that these were bribes.³⁸
 - The agreement with Tesler included a no-bribery declaration. The fact that it did so shows the limitations of requiring agents and other parties to make such declarations, and that on their own, they are not a panacea for preventing bribery.

5. In March 2003, shortly after it gave support to MW Kellogg, ECGD gave a presentation to its advisory council, EGAC on the Bonny Island project. EGAC members asked ECGD about the possibility of corruption on the project. ECGD told them that "this had been dealt with in the underwriting process in the normal way".³⁹ MW Kellogg had signed a no-bribery warranty for the ECGD on the project stating that neither it nor anyone acting on its behalf had engaged in bribery on the contract to be supported. The ECGD did not underwrite agent's commission on the project, as this involved TSKJ rather than MW Kellogg. In a reply to an NGO letter of March 2004 about the bribery allegations, ECGD stated that "ECGD undertook its usual due diligence checks, which revealed nothing adverse in relation to the parties involved in the transaction".⁴⁰

6. The case is a very good illustration of how differently the ECGD's anti-corruption procedures apply under the respective pre-May 2004, May 2004 and December 2004 versions:

A. The fact that ECGD's due diligence checks revealed nothing abnormal in the contract suggests that prior to May 2004, the ECGD's anti-corruption procedures were inadequate to detect and deter corruption. Large offshore payments to a UK-based agent for vague services should have raised a multitude of red flags particularly when that agent was not based in Nigeria, and had only ever visited Nigeria once two decades previously. Shortly after giving its support

³⁵ Financial Times, "Halliburton 'backed' bribes probe agent", 16/9/04; Wall Street Journal, "In Halliburton Nigeria probe, search for bribes to a dictator", 29/9/04

³⁶ *ibid.*

³⁷ Wall Street Journal, "Halliburton uncovers talk of bribes", 2/9/04. These notes are likely to be have been found in the London offices of Kellogg, Brown and Root or MW Kellogg.

³⁸ This Day (Nigeria), "Halliburton's \$180 Million Bribe Scandal: A Can of Worms...", 4/11/04

³⁹ EGAC Minutes 19/3/03

⁴⁰ Letter from Mike O'Brien to the Corner House and others, 5/5/04

to MW Kellogg, ECGD changed its procedures to require companies to provide the name of their agents to the ECGD. However, because agent's commission was not being covered by ECGD on this contract, MW Kellogg would not have been asked to provide details of the agent.

B. The pre-May 2004 anti-bribery warranty was too narrow, and would not have covered this particular case, therefore potentially allowing MW Kellogg to avoid liability if bribery were proved. The pre-May warranty only required the company to state that neither itself nor anyone acting on its behalf had engaged in corrupt activity on the contract to be covered by ECGD. MW Kellogg could (and presumably will if the allegations are proved) argue that the bribes were agreed and paid by the consortium and on behalf of the consortium, not on its own behalf. Furthermore, despite the fact that MW Kellogg officials are deeply implicated in the allegations, and appear to have run the contract with Tesler, MW Kellogg could argue that any payments made by Tesler to Nigerian officials were for the main Engineering Procurement and Construction contract won by the consortium and not for MW Kellogg's sub-contract with TSKJ Madeira, which alone was directly supported by ECGD. Therefore, MW Kellogg may not be liable under the pre-May warranty and related provisions in the pre-May premium and recourse agreement, and the ECGD may not be able to void its cover.

C. Under the May 2004 procedures red flags would have been raised for the ECGD in its due diligence procedures on the project. Under the May procedures, despite the fact that ECGD was not supporting agent's commission, MW Kellogg would have had to declare that an agent had been employed on the project by its 'affiliates' (i.e. a related company or consortium partner). The company would have had to state that Tristar, based in Gibraltar, was the agent. It would have had to state what services Tristar was providing. It would also have had to inform ECGD that the commission was being paid in Monaco and give an explanation as to why it was being paid outside of Nigeria. At this stage, the ECGD would have had enough information to ask some serious questions about the propriety of the company's arrangements.

D. The May 2004 anti-bribery warranty and the related provisions in the premium and recourse agreement would have covered this particular case, thus making MW Kellogg liable if bribery were proved. The May anti-bribery warranty would have required MW Kellogg to state that 'to the best of its knowledge and belief', none of its affiliates had engaged in corrupt practices. Under the May warranty, this included corrupt activity not just on the contract to be underwritten by ECGD but on "any related agreement, undertaking, consent, authorisation or arrangement of any kind". It would have been difficult for MW Kellogg truthfully to have signed this warranty, given that it had a 50% share in the consortium subsidiary that was making payments to Tesler and Tristar, and given that it must therefore have known that payments were being made on the main Engineering Procurement and Construction contract. If bribery was proved, MW Kellogg would have been liable under the May warranty, would have had its cover terminated, and would have been required to pay back any sums that the ECGD had paid out.

E. Under the December 2004 procedures, ECGD would not have had access to the necessary information that would in this particular case have enabled it to assess whether bribes were being paid on the project. Tesler's fee represented only 3% of the contract price. Given that ECGD was not supporting agent's commission, MW Kellogg would not be required even to state whether an agent was being used on the project, and could have put 'not applicable' on all the disclosure questions asked on the ECGD's application form. Furthermore, under the December 2004 procedures, ECGD asks companies only whether they or a controlled company have used an agent and whether or not the commission is above 5%. While MW Kellogg owned 50% of the consortium's offshore subsidiary that paid Tristar, it did not control the subsidiary, either through contractual arrangements or through ownership of the majority (above 50%) of voting share capital.⁴¹ Therefore, even if Tesler's fee had been above 5%, MW Kellogg would not need to have declared any details of the agency arrangements on the project.

F. Under the December 2004 anti-bribery warranty and the related premium and recourse agreement provisions, this case would not be covered and MW Kellogg would be able to avoid liability if bribery were proved. The December 2004 anti-bribery warranty requires a company to state that neither it, nor any controlled companies, nor anyone acting on its own or their behalf have paid bribes. Given that, as previously stated, MW Kellogg did not control the consortium subsidiary that paid the agent, MW Kellogg could have signed the warranty truthfully. Furthermore, the December warranty now applies only to corrupt activity in relation to the contract to be supported by ECGD and not to 'any related agreement' as the May warranty did. Again, given that payments were made to Tesler, not for the sub-contract to be supported by ECGD, but for the main Engineering Procurement and Construction contract, the warranty would not cover this case, despite the fact that MW Kellogg officials may themselves have been involved in helping to arrange payments to be made for the main contract. MW Kellogg may therefore not be liable under the December 2004 provisions. The only action that MW Kellogg may have had to take under the December revisions would be to inform ECGD that they had become aware that their joint venture partners had engaged in corrupt activity. Given that this requirement carries no penalty, and that MW Kellogg could have considered that informing the ECGD would reasonably constitute a 'tipping off' offence under the Proceeds of Crime Act, it is an open question whether MW Kellogg would have done so.

⁴¹ MW Kellogg Ltd and Subsidiary Companies, Annual Report and Financial Statements, 31/12/03