

IN THE MATTER OF THE EXPORT CREDIT GUARANTEE DEPARTMENT'S
ANTI-CORRUPTION AND ANTI-BRIBERY PROVISIONS

JOINT OPINION

A. Introduction

1. We are asked to advise Corner House Research on whether the ECGD can 'blacklist' firms that have been involved in bribery and corruption.

2. On 15 December 2003, the ECGD disclosed to the Corner House a summary of its legal advice on the question of blacklisting:

ECGD is subject to general principles of administrative law. Pursuant to one of such principles, the Secretary of State may not fetter his future discretion; he must, in each case, evaluate all relevant facts before making decisions. If blacklisting means automating a refusal to grant cover to a company that has been convicted for corruption or debarred from the services of another institution, blacklisting would be contrary to the duties of the Secretary of State and could be successfully challenged by way of judicial review.

While ECGD cannot blacklist companies, a company's conviction for corruption or its inclusion in the World Bank's blacklist would be a *prima facie* reason for refusing it cover.

3. We consider that the emphasis of this summary is wrong. The assumption on which it is based is that 'blacklisting' means a rigid and immutable fettering or abdication of the ECGD's discretion. That is a mistaken assumption. It is entirely possible for the EDGD to exercise its public powers in a way which provides for a clear policy without exceeding its lawful powers. A blacklisting policy would

also give the public information on matters of legitimate public interest and concern.

4. The ECGD is, in our view, entitled to operate a stricter 'blacklisting' policy. It may do more than merely treat bribery and corruption as a "*prima facie*" reason for refusing cover. Bribery constitutes serious criminal misconduct and violates the generally recognised ethical principles of corporate governance. It offends the legal public policy of the United Kingdom. Given its public purposes and powers, it is proper for the ECGD to have a policy that proven wrongdoers should be denied public support for future transactions. However, before 'blacklisting', or the imposition of any lesser restriction, a firm must be given an opportunity to explain why its case is sufficiently exceptional to justify a departure from the general policy.

B. Legal principles

5. It is trite administrative law that a decision maker may not fetter his discretion. However, a policy is not a fetter on discretion, providing that:
 - a) the policy itself is rational and justifiable (*Wheeler v Leicester CC* [1985] AC 1054 (HL));
 - b) each case is considered individually under the policy; and
 - c) each case is considered in light of any representations that the person affected may wish to make (*British Oxygen Co Ltd v Board of Trade* [1971] AC 610 (HL) and *Fordham Judicial Review Handbook*, 4th Ed. para. 50.4).

C. Blacklisting

6. As the Court of Appeal put it in *R (Corner House Research) v SSTI* [2005] EWCA Civ 192 at [137] “*obtaining contracts by bribery is an evil which offends against the public policy of this country*”. There can be no doubt that the ‘blacklisting’ of firms shown to have been involved in bribery and corruption would be a legitimate and proper policy for the ECGD to implement. Such firms may be publicly identified and censured. In our view, public law does not restrict the power of the ECGD to ‘blacklist’ and to publish its decision so that the public may be properly informed.
7. A strict (but not blanket and inflexible) policy would be lawful. Such a policy could go beyond bribery and corruption being a mere “*prima facie*” reason for refusing cover. A ‘blacklisting’ policy for convicted firms has obvious general benefits, including general and individual deterrence. It would in our view be lawful to require a firm that had been found responsible for bribery and corruption to demonstrate exceptional circumstances when making its representations, if it wished to continue to enjoy the benefits of ECGD cover.
8. Indeed, we are instructed that the ECGD already operates a number of strict policies. For example:
 - a) Many countries (eg. Afghanistan, Zimbabwe, Somalia, Sierra Leone, Rwanda, Palestinian Authority, Niger, North Korea, Nepal, Liberia, Iraq, Cote D’Ivoire, DRC, Central African Republic, Burundi and Burma) are “off cover”. The ECGD has a strict policy that it is not prepared to cover exports to these countries. By way of example, the Secretary of State’s “policy” on Burma is that it “will not provide assistance that directly or indirectly benefits the current regime” (underlining added).

- b) The ECGD's policy on child labour was previously that "there must be exceptional circumstances for ECGD to provide cover to projects which involve child labour" (underlining added). It was presumably not thought that this strict policy was in breach of the ECGD's public law obligations. However, we understand that the policy has since been tightened up even further:

In common with most countries around the world, the UK has ratified the United Nations convention on the Rights of the Child and the International Labour Organisation conventions on the abolition of child labour. It is ECGD's policy not to provide support to projects that involve harmful child labour (underlining added).¹

- c) On slave labour, it was previously the ECGD's policy that "it is difficult to imagine circumstances in which the ECGD could provide cover to projects which involve forced labour". This already strict policy has since been further tightened:

It is ECGD's policy not to provide support to projects that involve bonded or forced labour (underlining added).²

¹ Compare http://www.ecgd.gov.uk/iq_may_2004.doc and <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmenvaud/689/68907.htm#n41>.

² See footnote 1.

LORD LESTER OF HERNE HILL QC

BEN JAFFEY

**Blackstone Chambers
Temple
London EC4Y 9BW**

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Leigh Day & Co
Priory House
25 St John's Lane
London EC1M 4LB

Tel: 020 7650 1200
Fax: 020 7605 1294