

## **Complaint under the OECD Guidelines for Multinational Enterprises**

**Brought by:**           **The Corner House**

**Against:**               **Airbus, BAE Systems and Rolls Royce**

**Date:**                   **4 April 2005**

**1.** This complaint is brought by The Corner House. The Corner House is a research and advocacy group that works among other things on the issue of bribery and corruption in international business transactions. The Corner House has worked in particular on the role of UK governmental institutions. In particular, it has undertaken extensive research on role of the Export Credits Guarantee Department (ECGD) in combating bribery and corruption on projects for which it offers support.

**2.** This complaint is brought against three companies: Rolls Royce and BAE Systems – both UK listed companies – and a third company, Airbus, which is a European consortium based in France, 20% owned by BAE Systems and with operations in the UK. All three companies are major recipients of buyer credit guarantees and investment insurance from the ECGD.

**3.** The Corner House's interest in making the complaint is as follows. In October 2004, it became public knowledge that the ECGD was in negotiation with industry groups following complaints by its major customers, namely Rolls Royce, BAE Systems and Airbus, about new anti-corruption procedures it had introduced. The purpose of the negotiations was to revise the procedures in such a way as to lessen the administrative burden on customers in complying with them. In early November 2004, the ECGD revised its anti-corruption procedures following these negotiations. In November 2004, The Corner House took legal action against the Secretary of State for Trade and Industry for failing to consult fairly with all interested parties and for engaging in a one-sided consultation with industry, in breach of its own consultation guidelines. Considerable documentation was disclosed to the Court about the negotiations between the ECGD and industry groups, which included the three companies named above. That documentation has been made public. It provides detailed information about the negotiating positions taken by the three companies and industry groups acting on their behalf. In particular, the documents show that the companies refused to provide information to the ECGD about the agents they employed in ECGD-backed transactions. The companies also refused to accept disclosure requirements on agents' commission that had been laid out in the ECGD's anti-corruption procedures. In an out of court settlement in January 2005, the Secretary of State for Trade and Industry agreed to open a full public consultation on the amendments made by the ECGD to its anti-corruption procedures. This consultation is due to begin in early March. The Corner House has developed considerable expertise on the topic of anti-corruption measures at the ECGD. Much of the evidence for making the

current complaint is from the court case taken by The Corner House against the Secretary of State for Trade and Industry.

4. The violation that The Corner House believes has occurred took place in the UK in the course of the three companies' commercial interactions with the ECGD and in the course of negotiations between the three companies and the ECGD.

5. The Corner House believes that the refusal of the three companies named above to provide details of their agents and about agents' commission to the ECGD represents a violation of Chapter VI, paragraph 2 of the OECD Guidelines on Multinationals which deals with bribery. Paragraph 2 states that enterprises should:

*“Ensure that remuneration of agents is appropriate and for legitimate services only. 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”.*

A good number of the contracts for which the three companies named above seek ECGD support are contracts with public bodies or state-owned enterprises in foreign countries. Under the Guidelines, companies should disclose a list of agents employed in such transactions “where relevant” and to “competent authorities”. Seeking support for a transaction from an export credit agency would appear to be just such a ‘relevant’ situation. The ECGD, as a government department, is clearly a ‘competent authority’ to whom such a list could and should be made available. Commercial confidentiality is not cited anywhere in the Guidelines as a legitimate reason for not disclosing such a list. The blanket refusal by the three companies to provide the name of agents employed on transactions for which they were seeking ECGD support therefore constitutes a breach of the Guidelines.

6. The specific actions by the three companies that constitute violations of the Guidelines are as follows:

- In March 2004, ECGD wrote to its customers advising them of new anti-corruption procedures to come into effect in May. These procedures included new enhanced disclosure requirements on agents and agents' commission. Some disclosure requirements, including the requirement to provide the name of the agent on a particular transaction, had been required by ECGD since April 2003.
- It would appear that one of the companies, BAE Systems, had already had some discussion with ECGD about their disclosure requirements on agents, since the ECGD introduced such requirements in April 2003. When BAE Systems wrote to ECGD on 24<sup>th</sup> May 2004 to express its concern about the new anti-corruption procedures introduced in May 2004, it referred to “earlier discussions” from which ECGD “will already be aware of our concerns about ECGD’s previous request for detailed information”. In November 2003, according to one press report, BAE Systems refused to provide ECGD with details about the agents they

were to use on the sale of defence equipment to Saudi Arabia for which they were seeking ECGD support.<sup>1</sup> This would appear to be the first and earliest breach of the Guidelines.

- Following the introduction of the new anti-corruption procedures in May 2004, the companies made a blanket refusal to provide any details about their agents, including their names, to the ECGD when seeking ECGD support for a transaction. During the negotiations, they reiterated this refusal on various occasions. Finally, as the negotiations concluded, they sought an assurance from ECGD that they would be able to use ‘commercial confidentiality’ as a reason for not giving the name of an agent to the ECGD during the application process. The chronology of their refusals to provide the names of their agents, which The Corner House believes are a breach of the Guidelines, is as follows:
  - On 7<sup>th</sup> April 2004, Airbus wrote to ECGD stating that “details of fees, if any, paid to consultants in connection with assistance or services they provide, constitute commercially sensitive information. We feel very strongly that our network of consultants is part of our competitive advantage and that it is therefore inappropriate, in our view, to disclose this information outside our organisation”. Shortly afterwards, on the 23<sup>rd</sup> April, Rolls Royce also wrote to ECGD stating that the new disclosure requirements on agents were not acceptable.
  - On 5<sup>th</sup> July 2004, at a meeting between customers, industry groups and ECGD, Airbus insisted that it would not provide any details to ECGD relating to its agents. According to the minutes of this meeting, Airbus said that it had “entered into confidentiality agreements with its agents and regarded these arrangements as strictly a matter between the company and the agent involved”. The minutes note that “it was supported in this by Rolls-Royce”.
  - On 30<sup>th</sup> July, the Aerospace Industry submitted a note on anti-bribery procedures to the ECGD for the negotiations, in which it stated (para 21.5) that “the identities of third party ‘agents or intermediaries’ appointed by applicants to assist with their marketing is commercially sensitive information and is part of the company’s commercial assets” and that (para 21.7) “contracts with third parties may contain confidentiality provisions which prevent disclosure to third parties”.
  - On 9<sup>th</sup> August, again at a meeting between ECGD and industry groups, ECGD asked the aerospace and defence companies to explain why they could not provide the ECGD with the name of their agents. The companies stated that this was commercially sensitive information, and that intermediaries themselves “may have valid and justifiable reasons for

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<sup>1</sup> Rob Evans and David Leigh, “Millions risked on BAE contract”, *The Guardian*, 27 November 2003

wanting to remain anonymous”.

- On 12<sup>th</sup> August, following that meeting, ECGD wrote to the industry side stating that from the explanation given them, they had concluded that “there can be no commercial disadvantage to you in ECGD’s being aware of an agent’s identity” but that the companies were concerned about “the heightened risk of inadvertent leakage”. In response, ECGD suggested that they would put additional and heightened procedures in place to ensure the security of this information. On 25<sup>th</sup> August, the CBI ECGD Solutions Group which was negotiating on behalf of BAE Systems, Airbus and Rolls Royce, stated that the industry side would accept a compromise whereby applicants would not have to provide the name of an agent if ECGD were not underwriting the agency commission but would provide the name of the agent where the ECGD was doing so “*except ...where there is justification for not disclosing it (eg competitive reasons)*” [italics added].
- On 31<sup>st</sup> August, Airbus again wrote to ECGD stating that contracts with agents “are concluded on a commercial basis and Airbus considers that such contracts are part of its commercial know-how and must therefore be kept confidential”.
- On 7<sup>th</sup> October, at a meeting between the industry side and ECGD, the minutes state that the companies sought “some assurance that if they were unwilling to disclose the identity of an agent on the grounds of commercial confidentiality then this would not be used by ECGD as a reason for not providing support”. They wanted, according to the minutes, “confirmation that commercial confidentiality would be accepted as a valid reason for not identifying an agent”. ECGD gave that assurance despite the fact that on 12<sup>th</sup> August it had told the industry side that “given that the requirement for providing this information to ECGD has been in place for over a year, there would be difficulty for Ministers in changing this part of our system”. On 29<sup>th</sup> October ECGD gave written confirmation to the three companies through a letter to the CBI that “where commercial confidentiality is given as the ground for non-disclosure of an agent’s name, this will not automatically be used by ECGD as a reason for not giving cover”.
- The fact that ECGD eventually accepted the three companies’ refusal to provide the name of agents on transactions does not detract from the fact that this refusal was a breach of the Guidelines. The Corner House submits that any request by a company to proceed with an application for ECGD support without providing the name of an agent where the transaction to be supported is with a public body or state-owned enterprise would constitute a further breach of the Guidelines. As noted above, the Guidelines do not allow for commercial confidentiality to be used as a reason why a list of agents on transactions with public bodies or state-owned enterprises should not be made available to a competent authority.

**7.** The relevant documents, including the newspaper article which first raised the suggest that BAE Systems had refuse to provide details of agents' commission in November 2003 and correspondence between the three companies and ECGD during 2004 are attached as evidence.

**8.** The Corner House would be grateful for written confirmation from the National Contact Point of how it intends to proceed with our complaint.