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Response to ECGD's letter of 17 May 2010 and Interim Government Response to the Public Consultation on proposed revisions to ECGD's Business Principles and ancillary policies

1. This submission constitutes The Corner House's response to:
 - (a) ECGD's Letter of 17 March 2010 to Companies and Organisations that have responded on proposed revisions to ECGD's Business Principles and ancillary policies; and
 - (b) The Interim Government Response to the Public Consultation on proposed revisions to ECGD's Business Principles and ancillary policies.

Failure to Conduct an Impact Assessment

2. Notwithstanding the contents of ECGD's letter of 17 March 2010, it remains The Corner House's view that it would be unlawful for ECGD to make a final decision on any of the matters that were addressed in the Consultation on ECGD's Proposed Revisions to its Business Principles and Ancillary Policies without first undertaking an impact assessment. This applies equally to the issues addressed in the interim response (*see* below at para 5).
3. ECGD argues that no Impact Assessment could be drawn up.¹ It bases this claim on the grounds that:

¹ ECGD, "Letter to Companies and Organisations that have responded on proposed revisions to ECGD's Business Principles and ancillary policies", 17 March 2010 [hereafter "ECGD Letter"], p.1. "No Impact Assessment was appended because it was felt that no such Impact Assessment could be drawn up".

- a) “ECGD does not know, and cannot estimate, the level of future demands for support for exports [that fall below the Common Approaches threshold for screening and assessment]”.²
 - b) past levels of applications – that is, the *number* of applications – are of no value in assessing likely future impacts.³
 - c) the impacts of past contracts that have been approved cannot be taken as a guide to the likely future impacts of similar projects, since “details of past individual cases are completely case specific” and “nothing whatever can be deduced . . . about the likelihood of exactly similar facts recurring”.⁴
4. Without prejudice to the arguments that The Corner House might advance in any future litigation that might arise from ECGD’s failure to conduct such an impact assessment, The Corner House replies as follows:
- a) We note that ECGD has conducted Impact Assessments for consultations in the past without raising any of the above difficulties. Most recently, it assessed the impact of its proposal to introduce a Letter of Credit Guarantee Scheme (LCGS).⁵ The ECGD should give reasons why the current consultation differs from previous consultations where Impact Assessments have been undertaken and why, in its view, those differences make an Impact Assessment impossible to conduct in the current instance. The Corner House deems it highly implausible that if ECGD was in a position to conduct an Impact Assessment for the LCGS scheme, for which ECGD had no experience, it is not in a position to do so for the current consultation that deals with schemes for which the ECGD has several years of experience.
 - b) The Corner House notes that, contrary to the position ECGD is now adopting, ECGD has in the past confidently predicted future demand for products, even where those products are entirely new and ECGD has no historical basis on which to make predictions, which is not the case in this instance. In the Impact Assessment for its LCGS Consultation, for example, ECGD affirmed that the scheme “*would* enhance the availability of letters of credit confirmations as well as help contain their costs, and therefore, to *sustain and potentially increase* export order for UK companies”(emphasis added).⁶ At a minimum, the ECGD’s final response should state whether it is of the view that requests for support for contracts under SDR 10 million or with a repayment period under two years will continue. If the answer is in the affirmative, it is bound by the Code of Practice to assess the likely impact of the proposed changes with regard to such contracts.

2 ECGD Letter, p.1

3 Letter from S. Dodgson to Leigh Day, 24 March 2010. “We note you’re your client accepts that the past level of applications is, by itself, of no value in judging the likely ESHR impacts of ECGD’s proposed changes to its screening and assessment policies. On this position, we are in agreement.”

4 Letter from S. Dodgson to Leigh Day, 24 March 2010.

5 ECGD, “Final Impact Assessment of Letter of Credit Guarantee Scheme”, 20 July 2010.

6 ECGD, “Final Impact Assessment of Letter of Credit Guarantee Scheme”, 20 July 2010.

- c) If ECGD is indeed unable to estimate future demand for the products that would be exempted from scrutiny under the proposed new rules, it follows that it is clearly not in a position to claim, as it does, that the proposed changes constitute a proportionate means of “levelling the playing field” for exporters. That claim rests on an assumption that the demand from exporters for the products that would be exempted is likely to continue at a level that would justify the abandonment of key safeguard policies. Given the doubts that the ECGD has now cast on its ability to assess future demand for its products, the need for an Impact Assessment that clearly weighs the costs and benefits of the proposals is all the more urgent.
- d) The information supplied by ECGD in its letter of 17 March on past numbers of applications under SDR 10 million or with a repayment period of less than two years is entirely insufficient to assess the likely future ESHR and other impacts of excluding such contracts from screening and assessment in the future. The ECGD has accepted this. Nonetheless, it has refused to disclose data (principally the assessments undertaken for past projects that fall within the categories that would be excluded from screening and assessment under the proposed changes) that would be pertinent to making an impact assessment, claiming that such disclosure would be not “necessary, appropriate or helpful” since “details of past individual cases are completely case specific” and “nothing whatever can be deduced . . . about the likelihood of exactly similar facts recurring”.⁷

Whilst The Corner House accepts that the impacts of all cases are case specific, it does not accept that generic conclusions as to environmental, social and human right (ESHR) and other impacts of the proposed changes cannot therefore be drawn. On the contrary, it notes that ECGD has done precisely this in its Interim Response, deeming the generic risk that companies will use the proposed new arrangements to circumvent having to disclose the names of agents to be “remote”.⁸ The fact that ECGD felt able to make such a generic assessment clearly demonstrates that, regardless of the specificity of cases, the ECGD is in a position to make broad brush judgements as to the future impacts of its proposals.

- e) The Corner House does not accept that the specifics of past cases would be unhelpful in assessing the likely impacts of ECGD’s proposals. As a result of past Freedom of Information requests, The Corner House has obtained copies of the assessments and impact questionnaires for 3 contracts with a value under SDR 10 million that were approved in 2005. The released documents clearly show that none of the contracts involved a project that was at or near a sensitive site, as defined under the Common Approaches, and would (the ECGD now accepts)⁹ thus be exempted from screening and assessment under the proposed changes to ECGD’s policies and

7 Letter from S. Dodgson to Leigh Day, 24 March 2010

8 ECGD, Interim Response to the Public Consultation on Proposed Revisions to ECGD’s Business Principles and Ancillary Policies, 19 March 2010, para 20.

9 Letter from S. Dodgson to Leigh Day, 24 March 2010. “It would be ECGD’s policy to apply the Common Approaches. They state, among other things, that, in effect, projects where there is a loan contract having a repayment term of two years or more (sic) and the value of the export is less than ten million SDR, but *where the project is in or near a sensitive area*, will still be classified and, potentially, reviewed” (emphasis added).

procedures. Yet two of the contracts involved exports to a nuclear plant and the third to a country (India) that has not signed the ILO Convention on Child Labour and where the risk of harmful child labour being employed is thus high.

On the basis of this information alone, the ECGD should properly conclude that the impact of its proposed changes is likely to be an increased risk that contracts that involve projects in high impact sectors (such as nuclear and steel production) or that are located in countries which are not signatories to key ILO agreements will be approved without screening or assessment.

- f) ECGD only publicly discloses limited information on past export guarantees that have been approved. Moreover, it would appear that many past guarantees for contracts under SDR10 million or with repayment periods of less than two years have not been disclosed for reasons of claimed commercial confidentiality. In addition, it is not possible from the publicly available records to separate out the contracts that have a repayment period of less than two years from the other contracts listed in ECGD's annual reports. It is possible, however, to identify contracts that have a value of less than SDR10 million.

Since 2004-2005, the impact categorisation of 25 such contracts has been publicly disclosed. Of these, 3 were deemed to be of medium impact and 3 of high impact. Without access to the completed impact assessments, which ECGD has denied, it is not possible to judge whether the contracts in question would have been exempted from screening and assessment under the new rules (since it is not possible to state whether they involved projects located at or near a sensitive site – the trigger for an assessment under the Common Approaches). It is possible, however, to state that, if the proposed changes are adopted, there is a risk that projects with a medium to high impact will be approved without any screening or assessment.

- g) The Code of Practice on Consultation states that consideration should be given to asking questions about which groups or sectors would be affected by the proposed changes to policy and that policy options that would exempt specific groups or sectors should be considered.¹⁰ ECGD has conspicuously failed to do this. The Corner House contends that ECGD should review past cases which, if they were to be considered in the future, would be exempt under the proposed changes in order to reach an informed judgement as to whether or not cases involving specific sectors (construction for example) had in the past proved more likely to involve

10 BIS, Code of Practice on Consultation, paras 3.3 and 3.4. "A "consultation stage Impact Assessment" should normally be published alongside a formal consultation, with questions on its contents included in the body of the consultation exercise" and "Consideration should also be given to asking questions about which groups or sectors would be affected by the policy in question, and about any groups or sectors (e.g. small businesses or third sector organisations) that may be disproportionately affected by the proposals as presented in the consultation document. Consultation exercises can be used to seek views on the coverage of new policies, *ideas of how specific groups or sectors might be exempted from new requirements*, or used to seek views on *approaches to specific groups or sectors that would ensure proportionate implementation*" (emphasis added).

adverse social and environmental impacts; whether cases involving specific country and/or sectors were more at risk to, say, child or forced labour concerns; and whether such sectors/country cases should therefore continue to be subject to mandatory screening and assessment, regardless of their value or repayment terms. Such analysis would assist ECGD in ensuring that the impact of any changes that are decided upon would be proportionate.

Interim Response

5. In their submission to the Consultation (para 76),¹¹ The Corner House and its joint Consultees clearly stated that their concerns about the failure of ECGD to carry out an impact assessment related to all the issues being considered in the Consultation. The joint submission is clearly headed as a response to the Consultation as a whole (“Response to Export Credits Guarantee Department’s (ECGD’s) ‘Public Consultation on Proposed Revisions to ECGD’s Business Principles and Ancillary Policies’”). Moreover, where specific points are made about specific aspects of the consultation, the sub-headings clearly reflect this specificity. The heading of the section on Impact Assessment, by contrast, refers only to the Consultation exercise itself: “Failure to Conduct Consultation in accordance with Code of Practice”).
6. In its response, ECGD limits this concern to a failure to conduct an impact assessment on the ESHR aspects of the Consultation. ECGD has now issued an Interim Response “in relation to matters unaffected by ESHR impacts and the Common Approaches”, which “will be final as to the matters with which it deals”. In effect, ECGD has made a final decision on a range of major policy changes, notably those relating to its anti-bribery policies and (depending on how one construes the wording of its circular letter) the Business Principles, without any impact assessment having been undertaken. The Corner House contend that this is unlawful and that the ECGD should undertake and consult on an Impact Assessment that encompasses the issues in the Interim Response as well as those being considered under the rubric of ESHR impacts.

Forced Labour and Child Labour

7. In its letter of 17 March, ECGD confirms that ECGD will no longer screen or assess contracts with a repayment period under two years or a value under SDR 10 million for forced or harmful child labour impacts. ECGD should explain how this intended change to its screening and assessment procedures is compatible with its current stated policy of refusing support for projects involving forced labour or harmful child labour. If the policy is being abandoned, ECGD should clearly state this and consider the impacts of such a policy change on the UK’s reputation and its international legal undertaking in an Impact Assessment.

¹¹ “The Consultees contend that the failure to conduct an impact assessment renders the consultation illegitimate and that the ECGD should not proceed with its proposed changes until such an impact assessment has been undertaken and the public has had an opportunity to comment on it.”

8. With respect to the UK's international obligations, The Corner House notes that it is uncontested in international law that states, including the UK, have a duty to "contribute to the universal repression of certain international crimes"¹² Slavery, which may be held to include forced labour, is under any circumstances, a breach of international law. It is also a crime under UK Law with regard to the Coroners and Justice Act. The UN Commission on Human Rights has stated:

"In addition to treaty law, the prohibition of slavery is a *jus cogens* norm in customary international law. The crime of slavery . . . constitutes an international crime whether committed by State actors or private individuals."¹³

9. In light of the above, the ECGD should consider whether a failure to assess whether or not the contracts it supports involve forced labour, might amount to complicity in an international crime, in so far as 'Knowledge and Foreseeability of Risk' with regard to gross human rights abuses can engage legal responsibility,¹⁴ or whether it might be construed as facilitating slavery.

12 De Schuter, O., "Extraterritorial Jurisdiction as a tool for improving the human rights accountability of transnational corporations", Faculte de Droit de l'Universite Catholique de Louvain, 22 December 2006, p.25.

13 UN Commission on Human Rights, Contemporary Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict, Final report submitted by Ms. Gay J. McDougall, Special Rapporteur, 1998, <http://www.unhcr.ch/huridocda/huridoca.nsf/7fba5363523b20cdc12565a800312a4b/3d25270b5fa3ea998025665f0032f220?OpenDocument#Bsl>.

14 International Commission of Jurists on Corporate Complicity and Legal Accountability for International Crimes, http://icj.org/IMG/Volume_1.pdf