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17 June 2005

Attention Mr. Ben Llewellyn

By Fax 020 7512 7271,  
and by email ([consultation@ecgd.gsi.gov.uk](mailto:consultation@ecgd.gsi.gov.uk)) and post

Our ref Alan Perry

Dear Sirs

### **Consultation on changes to ECGD's anti-bribery and corruption procedures introduced in December 2004**

This letter constitutes our response to the ECGD's consultation paper on the above subject, and in particular to the letter from John Weiss of 18 March 2005. For convenient cross-reference we will use numbered paragraphs.

#### **Support for the Transparency International (UK) submission**

1. As you know, we at Kendall Freeman are one of the London-based law firms that are most active in the field of cross-border anti-bribery and corruption issues and the litigation that results. We are active members of Transparency International (UK), and are familiar with TI (UK)'s Submission of June 2005. The principal observation we have to make is that we support and agree with TI's submission.

2. There would be no particular value in our repeating particular points TI have already made. However there are some matters not covered in the TI submission that we would particularly like to comment on, and our remarks on these matters are set out below.

#### **Provision for recourse**

3. The ECGD provides various types of assistance to businesses trading overseas, particularly in developing countries. It provides insurance to protect exporters who do not receive the contractual payments due to them. Where the ECGD has to pay out to the exporter, it normally seeks to recover the money from the defaulting organisation in the importing country overseas.

4. The ECGD also provides guarantees to banks, in particular to secure finance provided to exporting businesses in connection with overseas projects. The ECGD normally guarantees the loan from the bank to the exporting business, so that, where the business defaults, ECGD pays the bank. In such cases, ECGD's exposure is not confined to cases where it is the purchasing organisation that is in default. It is therefore essential for the ECGD to have appropriate rights of recourse against the exporter where it is the exporter which is itself in default.

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5. Once the ECGD has decided to provide a guarantee, its right of recourse against the exporter is written into the relevant Premium and Recourse Agreement. The ECGD always sets a limit to the amount of the recourse for which the exporting business is to be liable. The ECGD website indicates as follows: *"The minimum recourse limit is a figure representing ten per cent of the DML [Departmental Maximum Liability]. Recourse can be set at any amount up to a maximum of 100 per cent of DML. However, most cases attract the minimum limit."* The fact that most cases attract only the minimum level of 10 per cent leaves the potential for very large deficits in cases where the ECGD provides guarantees to banks and the exporting businesses breach their contractual obligations or fall into dispute with the overseas purchaser.

## **Recourse in connection with bribery and corruption**

6. The Consultation document recognises, at p.3, para.1.2, that ECGD is under an obligation, derived from the UK Government policy, to deter bribery and other forms of corruption, even in the absence of powers to investigate or prosecute such offences.

7. The statements on the website referred to in paragraph 5 above do not identify any exceptional circumstances in which the ECGD would be entitled to recover more from an exporting business than the predetermined limit, which, as noted, is normally 10 per cent. of the ECGD's own maximum liability.

8. It appears to follow that, even where allegations of corruption or bribery lead to a dispute or ultimately cause a default under the terms of a bank loan, situations could arise in which the ECGD would find it impossible, or at least difficult, to establish any valid legal basis on which to recover from the exporter more than 10 per cent. of the amount which it has paid out or is potentially liable to pay out.

## **The ECGD's duty**

9. It is notoriously difficult, laborious and expensive to prove bribery or other forms of corruption. This in our view makes it particularly important that the ECGD should take, and be seen to take, a tough stance against these offences. It would not be sufficient, for example, for ECGD merely to threaten to pass relevant evidence that comes into its hands to the relevant prosecuting authority. The ECGD has a public duty to ensure that public money is not used in such a way as, in effect, tacitly to underwrite acts of bribery or other forms of corruption. In our view, this necessarily implies that ECGD ought to be stipulating for stronger rights of recourse where the situation calls for them.

10. Quite apart from anti-corruption issues of public policy, there are sound practical and commercial reasons for the ECGD to reserve to itself stronger rights of recourse against the exporter. Although the ECGD exists to encourage exports, it is publicly funded, and is under an obligation to do all it reasonably can, consistent with the nature of its mission, to avoid losses. In effect this implies that it should generally be applying the principles of normal commercial prudence. If corresponding cover were supplied by a private insurer, it cannot even be supposed that such an insurer would habitually limit the level of recourse to ten per cent. Far less can it be supposed that a private sector insurer would be willing to exclude higher recourse where criminal offences had been committed by officers of the insured company. If ECGD is to behave differently, it has to have a compelling reason of public policy and to be prepared to defend that reason publicly. We do not believe that any valid reason in fact exists.

## **Effects of the changes introduced in December 2004**

11. The changes made in December 2004 do nothing to ensure that such stronger rights of recourse are available. If anything, the reverse is the case. One of the effects of the changes is to

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eliminate the requirement that a company must disclose details of agents' addresses and the services which they provide. Another is to eliminate the requirement that a company disclose any commissions amounting to less than five per cent of the contract value.

12. In our view, the overall balance between the convenience of the exporter and the requirements of public policy, as resulting from the December changes, is thoroughly unsatisfactory. The changes reinforce the view that the ECGD has adopted practices which make it weak at identifying and preventing corrupt practices, showing inadequate concern to prevent public money and public credit being, in effect, used tacitly to underwrite acts of bribery or other forms of corruption.

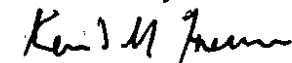
**Conclusion**

13. The December 2004 changes have significantly weakened the ECGD's position on bribery and corruption. By enabling companies to resist full disclosure of commissions and agency arrangements, ECGD is in effect providing opportunities for bribery and corruption to go undetected, and failing in its role to deter these offences.

14. A requirement of fuller disclosure would not of itself eliminate corruption, but it will provide ECGD with additional information and give it better opportunities to detect signs of corruption. That, however, would still not be enough. In our view the ECGD must be prepared to take real action against any exporter involved in corrupt activities. The minimum requirement has to be that, where there are indicators of possible corruption that are not satisfactorily explained by the exporter, ECGD should invariably decline to provide cover.

15. We see no objective reason to believe that more detailed reporting requirements as to agency and commission payments would impose significant additional burdens on exporters doing legitimate business. In any event, such additional burdens as would result would be amply justified by the objective of deterring corrupt practices, which constitute a major and extremely dangerous contagion in the global market place and a serious threat to its future.

Yours faithfully



Kendall Freeman