

From: [REDACTED]
To: [REDACTED]
Cc: [REDACTED]
Subject: SWL: reputational checks - current state of play
Date: 26 April 2019 13:24:18
Attachments: [REDACTED]

All

At this week's SWL meeting I took an action to set down where we currently are and what needs to happen next to finalise the reputational checking. Three points for consideration / discussion:

[REDACTED]

The initial point for the action was to let us work out who should take this on – having drafted this, I think it's pretty clear that [REDACTED] would be well placed to do most of it; however, we could do with an internal client to own it – so looking for volunteers to direct, rather than volunteers to do.

Thanks

[REDACTED]

Background

[REDACTED]

Reputation and investment were in the news in Scotland fairly recently:

<https://www.bbc.co.uk/news/uk-scotland-scotland-politics-35970893>
<https://www.gov.scot/binaries/content/documents/govscot/publications/foi-eir-release/2017/08/foi-16-01735/documents/8705b91b-4783-4d32-b9ac-fc946dfa2a64/8705b91b-4783-4d32-b9ac-fc946dfa2a64/govscot%3Adocument/?inline=true/>

This prompted some internal discussion within CES about possibly retro-fitting stronger reputational checking to our practices than were catered for in the original agreements. That retro-fitting has not been progressed to full implementation, although a few low-cost reputational reports have been commissioned from the company "Red Flag" and referred to in approval decisions for some transactions. Sample report attached – rates general "risk" as Red, Amber Green, accompanied by some commentary.

[REDACTED]

Policy position for ScotWind Leasing

The current CES Executive Team position is that [REDACTED] the ScotWind Leasing project should look into an approach which is appropriate for that activity. Whatever approach is decided upon can then be set out in the forthcoming Executive Team approval paper and signed off, and then disclosed to applicants as part of the Offer Document.

Objective for reputational checking for ScotWind Leasing

Come up with a balanced approach which is:

- compatible with the Scottish Crown Estate Act 2019 & associated docs
 - works from a competition and procurement law perspective
- [REDACTED]

Current draft approach for ScotWind Leasing

The basic idea, as far as it has been developed, is:

- Commission a Red Flag report on each applicant entity
- If any come up Red, and that is for reasons relevant to CES (eg Company A has human rights violations on record), invite applicant entity to comment on the finding (eg “we don’t do that any more” or “that report is inaccurate”) then if CES is satisfied, close the issue and continue; if CES sees potential problem then either decline the application and explain to applicant, or decide to accept it – and in either case, notify to our sponsor unit in SG for information (not for their decision*).

*This point needs checking against legislative framework – some CES decisions need to be escalated to Scottish Ministers, so need to analyse whether leasing counterparties with findings in a low-cost reputational report are caught by that

- [REDACTED] purpose of check for ScotWind Leasing is to pick up those cases where it is blatantly a terrible idea for CES to enter agreements, rather than to have a higher bar that catches more marginal cases (rationale is that low cost report not good basis for finely balanced decisions; OA / Lease should include “safety-net” term to allow CES to part company with disreputable organisations, so application-stage check should be consistent with that kind of test.)

In further detail, the current “Internal Process” description spreadsheet for this area currently says:

Activity	Detail
Procure reputational check on each applicant entity identified at registration stage	
Review red flag report and decide whether to seek clarification / response from any entities that cause	[Need rules / guidance about how to decide whether to seek clarification so we act consistently – working idea on this is (i) if green, no further investigation, (ii) If the report is “Amber” then assess whether that rating arises from matters which have a bearing on CES’s objectives relating to sustainable development and good management: if not, proceed as for a “Green” report, otherwise, proceed as for a “Red” report, (iii) if red for reasons which are important to CES, ask applicant to comment,

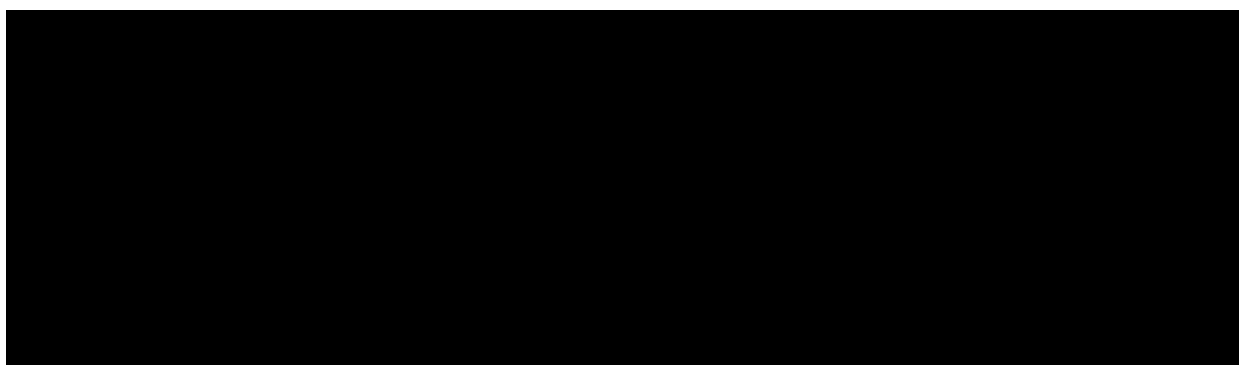
concern	otherwise proceed as for a green report]
Revert to applicant entity with red flag findings and invitation to comment	
Review applicant responses and either close matter or recommend rejection of application	[Need rules / guidance about how to decide whether to reject applicant so we act consistently]
If rejection is recommended, prepare briefing for Executive Team noting reputational risks and legal risks, making recommendation, and inviting decision	Recommendation may need legal advice (so allow lots of elapsed time)
Executive Team time to consider recommendation, then take decision	
Briefing to SG sponsor unit for information	
CES communication with applicant entities confirming position (either continue with application or decline)	

Next steps for ScotWind Leasing

1. Finalise what the approach should be (a couple of the points in the Annex (§) raise the possibility of an entirely different one to that sketched above, so keep open mind on this)
2. Get legal sense-check done on the principles
3. Define the guidance detail / rules for how to implement it (ie replace the [...] in the above table)
4. Write it up for the Executive Team paper
5. Write it up for the Offer Document (or applicant guidance)

ANNEX – additional material generated during internal CES discussion on reputational checking

Various points have emerged from discussions & internal correspondence which may be helpful in developing detailed guidance & rules; quoting from a range of internal emails...

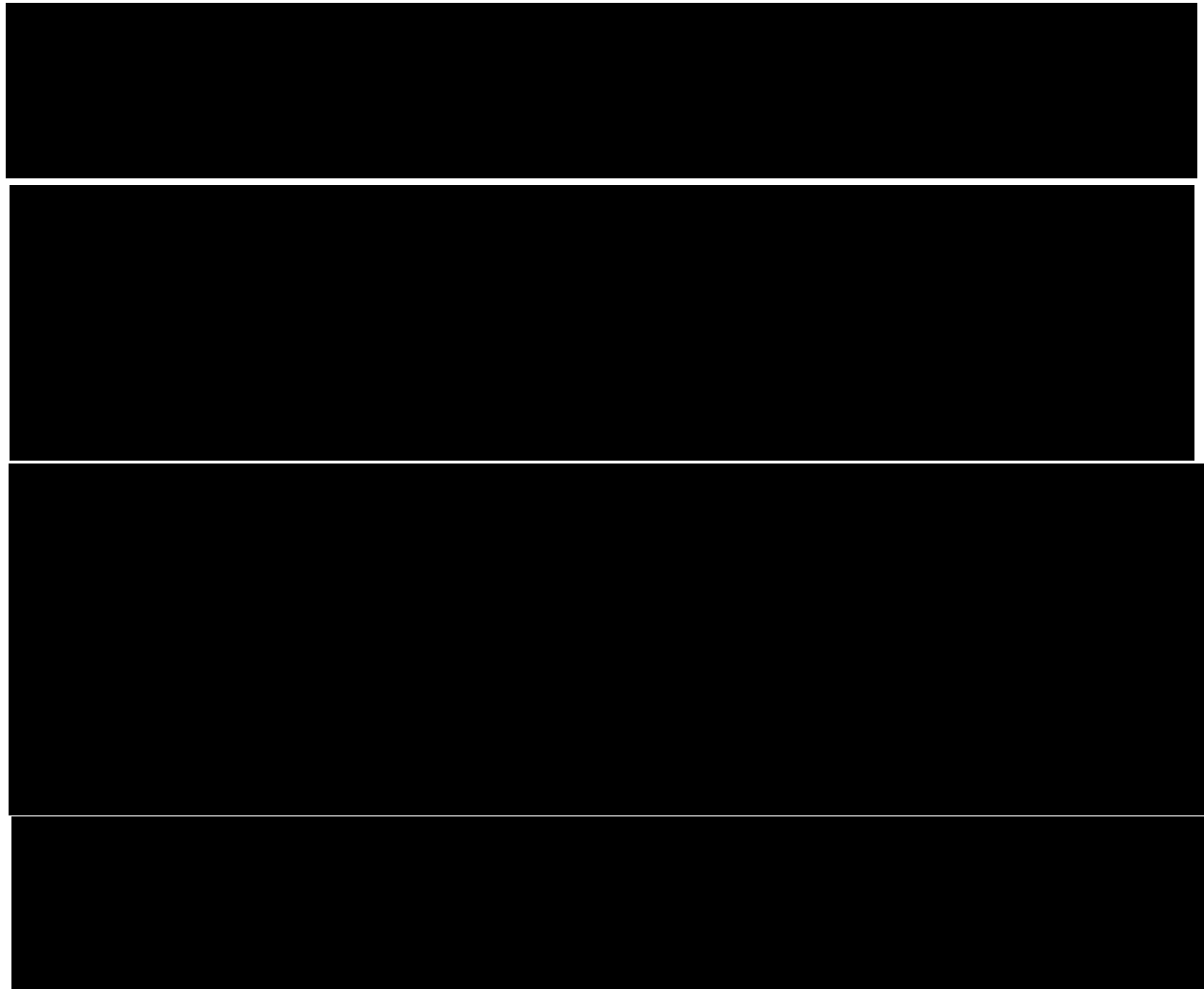


How far up the ownership chain do you go? (Red Flag methodology does look at parents, a bit) understand that the application of due diligence reports for any parent-co organisations beyond the counterparty under review would be a challenging, time consuming and expensive task; however, it may be worth reflecting on potential (i) non-compliance with the policy or (ii) reputational damage risk for a party who owns (or part-owns) the counterparty. I don't think the wider risk from ownership upwards means you should alter the approach here, but it may be worthy of some consideration or comment.

How small an interest in a project are we interested in investigating / how old an adverse reputational

finding before discounted?

how long in time ago is considered unreasonable or what %age ownership/equity becomes so diffuse that it ceases to be of significance.

**Avoiding inappropriate decisions based on superficial investigation**

From the sample check, companies could be in very lengthy court cases having been accused of something but they could ultimately be found not to be guilty – what do we do then? Hold up the whole project?

Self-certification as an alternative to CES investigations? §

I think a better solution to this rather than getting into this reporting would be to ask the prospective tenant/security provider a direct question; “are you involved in any businesses that” This puts the onus on them to be honest with us rather than developing a mediocre report that we have to make a decision on. It’s also more upfront and honest and will help build our reputation that we are doing our best.

[ends]