



**EXPORT CREDITS GUARANTEE
DEPARTMENT**

**THE GOVERNMENT'S FINAL RESPONSE TO ECGD'S
CONSULTATION ON CHANGES TO ITS
ANTI-BRIBERY AND CORRUPTION PROCEDURES
INTRODUCED IN DECEMBER 2004**

EXPORT CREDITS GUARANTEE DEPARTMENT
FINAL RESPONSE TO PUBLIC CONSULTATION

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EXPORT CREDITS GUARANTEE DEPARTMENT

REVISIONS IN STANDARD DOCUMENTS RELATING TO BRIBERY AND CORRUPTION:

FINAL RESPONSE TO PUBLIC CONSULTATION

I INTRODUCTION

- 1 This is HMG's Final Response to the public consultation which the Export Credits Guarantee Department ("ECGD") has been conducting since 18 March 2005. ECGD is a Government Department whose powers are granted by the Export and Investment Guarantees Act 1991 ("the 1991 Act"). It enters into contracts, principally insurance policies and guarantees, in order to facilitate UK exports or insure overseas investments. It uses these standard forms to assist in writing these contracts. It uses provisions in standard forms in an attempt to avoid taxpayer's money being used to support export transactions or investments that are tainted by bribery and corruption and to support wider efforts to deter these practices. The public consultation, to which this is the Final Response, concerned changes made by ECGD to those provisions and arose in the following way.

- 2 In 2000, as a result of the review of its Mission and Status, ECGD published a Statement of Business Principles, which indicated, amongst other things, that it would "combat corrupt practices". After the promulgation of the Statement in 2000, ECGD made a number of amendments in connection with bribery and corruption to its standard documentation, notably in 2002 and 2003. In May 2004, ECGD produced a further set of amendments to its standard documentation designed at further deterrence of corrupt practices. There had not been public consultation in relation to the 2002, 2003 or 2004 amendments.

3 A number of major users of ECGD's facilities objected to the terms of the May 2004 documentation and felt unable to apply for export support on that basis. As a result, ECGD held discussions with them. This then resulted in a further revised set of standard documentation in December 2004, which amended some of the requirements of May 2004 and which then enabled those users to resume their applications for export support. An NGO, The Corner House, objected to the process which had led to the production of the December 2004 documents, and launched a judicial review to examine their charge that the changes had been brought about with insufficient consultation. That judicial review was settled in January 2005 on the basis that the Government, without admission of The Corner House argument, agreed to launch a public consultation on the changes to its anti-bribery and corruption procedures made in December 2004.

4 The question on which the consultation invited representations was:

Do the changes made to ECGD's anti-bribery and corruption procedures in December 2004 have the effect of ensuring that, so far as practicable, (1) taxpayers' money is not used to support transactions tainted with bribery and/or corruption; and (2) an undue burden is not placed on exporters and/or Banks?

and further requested: "If you consider that the changes do not possess this balance, please indicate what changes you think would do so."

5 ECGD received 28 written responses to the original Consultation Document (the "Original Document") by the 18 June 2005 deadline. Copies of all the responses received can be found on ECGD's website or may be obtained by application to ECGD. A list of the entities and individuals who submitted responses can be found at Annex A.

6 ECGD held three meetings with consultees before the same deadline under the arrangements in paragraph 3.1.1 of the Original Document. A list of the consultees in question can be found at Annex A. Copies of

the minutes of the meetings can be found on ECGD's website or may be obtained by application to ECGD.

- 7 Following its consideration of the responses made up to 18 June, ECGD considered it would be helpful and appropriate to issue an interim response ("the Interim Response") which it did on 21 October 2005. The Interim Response set out the context in which ECGD operates and an explanation of the role of ECGD. Against that background and role, certain possible responses to the various issues related to the subject of this consultation were set out.
- 8 Following the Interim Response, ECGD has received 11 written submissions by the 18 November deadline. Copies of all the responses received can be found on ECGD's Website or may be obtained on application to ECGD. A list of the entities and individuals who submitted views following in the Interim Response can be found at Annex B.
- 9 ECGD held one meeting with a consultee during the further consultation period initiated by the Interim Response under the arrangements in paragraph 68.1 of the Interim Response. The name of the consultee in question can be found at Annex B. Copies of the minutes of that meeting can be found on ECGD's website and may be obtained by application to ECGD.
- 10 At that meeting and in BAE Systems' ("BAES") written representations, it was pointed out that the phrase "best of our knowledge and belief" had been removed in documentation which the Interim Response suggested should be provided by Exporters but that the Interim Response had also said, in the section dealing with Banks' Letters of Undertaking ("LoUs"), that: "in view of the difference in role played in an export transaction by Banks and Applicants, there seems to be no reason to change the December 2004 form of Letter of Undertaking"; and that form still included, at one point, the phrase "best of knowledge and belief". Although the comments in the Interim Response

immediately quoted above were directed towards the issue of representations that participating Banks make in relation to money laundering (see paragraph 8.8.1 of the Original Document and paragraph 10(iv) of the Interim Response), ECGD accepted that the comments could be read as a proposal that a Bank's obligations, in relation to its declaration about the absence of bribery and corruption on the part of entities other than itself, should continue to be qualified by the words "to the best of knowledge and belief". Such a reading of the Interim Response would not mean that HMG could not change its proposed response in the light of representations received by 18 November. However, it was thought fair and appropriate to indicate to all concerned that HMG would be inclined to apply whatever it thought was the correct content of similar representations equally to documentation submitted by an Exporter and that submitted by a Bank and to give a chance for comment upon that point.

- 11 To that end a clarifying letter was sent to all consultees on 5 December 2005. Written responses to that letter were received from 9 consultees; and a further letter was sent to all consultees by ECGD on 23 December 2005. Copies of those exchanges can be found on ECGD's website and may be obtained on application to ECGD.
- 12 Everything that has been received since publication of the Interim Response has been carefully considered in conjunction with everything which was received following publication of the Original Document. It is not possible, without making this Final Response unwieldy, to refer to every view that has been expressed or to set out every detail of the reasoning behind every individual decision. Nevertheless HMG has considered all views and given detailed attention to everything received.
- 13 It has been decided that it is not necessary or appropriate to deal with individual sectors or industries, as one consultee suggested. The decisions reached are intended to deal with the issue of bribery and corruption (within the limits referred to below) in general and to apply

across all of the sectors of business covered by ECGD, although differences in the methods of operation and role of Banks entail alterations to document wordings applying to them where this is necessary to reflect those differences.

- 14 This document seeks to set out, in a manageable form, a summary of the decisions reached and sufficient of the reasoning which led to those decisions to allow the reader to understand their broad basis. The exact nature of the obligations which the new standard documentation will impose can be understood by a study of the attached examples (Annex E) of a Buyer Credit Application Form, a Premium and Recourse Agreement (the “PRA”), an EXIP application form, an EXIP policy and the two Banks’ LoUs, for UK Banks and overseas Banks with a London branch respectively. These documents are given as examples of how the decisions will be carried into effect across the complete range of ECGD documentation.

II THE CHANGES WHICH WERE THE SUBJECT OF THE CONSULTATION

15 The details of the changes made in December 2004 can, as the Original Document said, only be understood by a close study of the changes to the wordings in the ECGD application and proposal forms and standard contracts. Examples of these were attached to the Original Document. The Original Document suggested that there were five principal areas where changes had been made to the rights and obligations created by ECGD's documentation.

16 This Final Response does not repeat the detailed explanation of those principal changes given in the Original Document (paragraphs 8.3 to 8.9 and the documentation thereto refer), but this Section gives an outline of the principal changes by way of reminder. They were:

- (i) the replacement of the concept of "Affiliate" and the reduction of an Applicant's obligations in respect of an "Affiliate";
- (ii) the reduction in the number of occasions upon which Applicants were requested to state whether an agent or an intermediary had been used and the introduction of a possibility for an Applicant to persuade ECGD that the circumstances of the application were such that they justified the Applicant not providing ECGD with the name of the agent;
- (iii) the restriction of ECGD's contractual right to inspect documents relating to the obtaining of a Supply Contract to circumstances where it had confirmed in writing that it has reasonable grounds for suspecting Corrupt Activity;
- (iv) a change in the LoU received from a Bank guaranteed by ECGD, so that the Bank ceased to represent and warrant that it had not engaged and would not engage in money laundering offences and instead represented and undertook that it was regulated by the Financial Services Authority in relation to,

amongst other things, Money Laundering Regulations and that either it was not aware or had no reason to suspect that the Supply Contract had been used for the purposes of money laundering or that it had complied with its obligations under the Proceeds of Crime Act 2002;

- (v) a reduction in the number of employees in respect of whose past behaviour in regard to acts of bribery and corruption representations of fact were required in application forms.

17 It has been stressed throughout this consultation process that these five principal changes are not intended to be a comprehensive description of the changes made between the May 2004 and the December 2004 documentation. The Original Document invited consultees to indicate what other changes might strike the right balance if they did not agree with those made by ECGD in December 2004. Moreover, in relation to changes made by ECGD in December 2004, where the submissions received have indicated a solution to the issue attempted to be addressed which is different to the terms of the May 2004 or December 2004 documentation, HMG has considered those suggested solutions.

III BACKGROUND

- 18 In the Interim Response, because several of the representations made had been expressly or impliedly based on respondents' views of ECGD's role it was felt helpful to set out HMG's view of that role. The representations made in respect of individual provisions in the documentation were then considered against the background of that view.
- 19 The importance of the context in which ECGD functions, and HMG's view of ECGD's role, are no less important in this Final Response. For that reason, and in order to enhance the degree to which this is a self-sufficient document, the following background facts are repeated and HMG's view of ECGD's role stated. The following are the background facts.
- 20 ECGD's statutory powers are to enter into commercial contracts such as guarantees and insurance policies with a view to facilitating exports and to insure overseas investments. It has express statutory powers under Section 3 of the 1991 Act to make arrangements in the interests of proper financial management of the portfolio created by the writing of such commercial contracts.
- 21 It has implied statutory duties to consider the making of such arrangements, whether in order to facilitate exports or insure overseas investments in the first place or to manage the portfolio thus created in the second place.
- 22 ECGD does not have statutory powers of search or arrest. Nor does it have the resources or expertise to undertake an investigatory role.
- 23 For the last year (Financial Year 2003/04) for which an estimate exists, ECGD supported only approximately 1.2 per cent of all UK exports.
- 24 It is ECGD's policy to "*combat corrupt practices*"; and ECGD aims to "*deter illegal payment, corrupt practices and money laundering by*

Applicants for ECGD support and ensure, as far as is practicable, that all transactions that ECGD supports are in compliance with all applicable laws, regulations and international agreements to which the UK is a party” (Quotation from ECGD website).

- 25 As part of the international context, HMG must bear in mind its international obligations and the declarations to which the UK is a party, including the UN Declaration against Corruption and Bribery in International Commercial Transactions (1996), the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the UN Convention against Corruption (2003).
- 26 The UK also adheres to the 2000 OECD Declaration on International Investment and Multinational Enterprises under which HMG recommends to multinational enterprises operating in or from the UK the observance of the OECD Guidelines for Multinational Enterprises providing voluntary principles and standards for responsible business conduct consistent with applicable laws.
- 27 The international instrument which is specifically aimed at Export Credit Agencies (ECAs) such as ECGD is the 2003 OECD Action Statement on Bribery and Officially Supported Export Credits. This requires OECD members to take appropriate measures to deter bribery in officially supported export credits and, where bribery is involved in the award of an export contract, to take appropriate action including:
- informing Applicants of the legal consequences of bribery;
 - inviting Applicants to provide undertakings or declarations that neither they, nor anyone acting on their behalf has engaged, or will engage, in bribery in relation to the relevant transaction;
 - ensuring that the Applicant and other parties receiving ECA support remain fully responsible for (1) the proper description of

the supported transaction; (2) the transparency of all payments; and (3) complying with all applicable laws;

- refusing to approve credit cover or other support in cases where there is sufficient evidence that bribery has been involved in the award of an export contract;
- if export credit cover or other support has been approved and bribery is subsequently proved to have occurred in relation to the supported contract, the relevant ECA taking appropriate action such as denial of payment under the export credit, refund to it of any funds provided and/or the referral of evidence to the appropriate national authorities.

28 HMG considers ECGD's role to be as follows:

- (i) ECGD is expected to take reasonable precautions, including making reasonable enquiries, to avoid financial loss by becoming involved in transactions tainted by bribery or corruption;
- (ii) judgements about those precautions have to be made within the timescale of the commercial transactions which ECGD has been asked to support and in the absence of statutory powers of investigation;
- (iii) whilst ECGD must make the best judgement it reasonably can on whether a transaction is likely to involve corrupt practices, ECGD cannot guarantee that a transaction with which it is involved may not subsequently prove to be tainted because it is working at arms length from those entering into export contracts and because of the timescale referred to and the absence of statutory investigative powers;
- (iv) it is appropriate, in consequence, that any investigations which ECGD is able to make before entering into arrangements should

be supplemented by contractual powers enabling ECGD to have financial recourse to Applicants in specified circumstances should transactions subsequently prove to have been tainted by corruption;

- (v) the responsibility for the detection, prevention and suppression of criminal offences resides with law enforcement bodies, who carry out investigations when appropriate;
- (vi) it is legitimate and appropriate nevertheless for ECGD, in view of both the moral and business cost of corruption, to play a wider part in that effort than one restricted solely to the protection of the Exchequer interest in transactions to which it makes a commitment;
- (vii) but that wider role does not extend to its conducting a more thorough-going pre-contract investigation of the potential existence of bribery and corruption. As a result, it cannot guarantee to expose every incident of bribery and corruption;
- (viii) the wider role, instead, involves the deterrence of bribery and corruption, for instance: by the reporting of all suspicious circumstances to the Serious Fraud Office, with the consequence that a decision will be made regarding investigation by criminal investigative bodies; by the imposing of appropriate contractual consequences should bribery and corruption transpire to have taken place in a supported transaction; and/or by applying the principles set out in Annex D to the Interim Response on the withholding of support in future transactions for those who have been found guilty of bribery and corruption.

29 In summary, whilst ECGD is not an investigatory body, and this imposes restrictions on what it can do, it should do all it reasonably can to avoid taxpayer's money being used to support transactions tainted

with bribery and corruption, and to support wider efforts to deter these practices.

IV SUBMISSIONS AND FINAL RESPONSES

(i) General

30 The question upon which submissions were invited in the Original Document was:

Do the changes made to ECGD's anti-bribery and corruption procedures in December 2004 have the effect of ensuring that, so far as practicable, (1) taxpayers' money is not used to support transactions tainted with bribery and/or corruption; and (2) an undue burden is not placed on exporters and/or banks?

If you consider that the changes do not possess this balance, please indicate what changes you think would do so.

31 Submissions received, both in response to the Original Document and the Interim Response, have commented on the changes that ECGD made and suggested, in some cases, alternative wordings in relation to those changes and in others, different changes altogether.

32 The task of HMG is to reach a decision on changes to ECGD's standard documentation having carefully and conscientiously considered the representations made to it. This function does not prevent HMG from adopting a final resolution which was not proposed by any consultee, in the form attached to the Original Document or suggested in the Interim Response. Moreover it is not obliged to act only with the assent of any or all of the consultees. In the light of the range of responses to this consultation, the latter course would in any event be impossible. HMG's aim, consistent with the question posed in the Original Document, has been to achieve an appropriate balance between the rigour and practicability of ECGD's anti-bribery and corruption procedures, taking account of the representations made by consultees.

- 33 The scheme of this document, insofar as it deals with the details of the final responses concerning the terms of ECGD's documentation, is as follows. The framework of the five principal changes set out in the Original Document, and repeated in the Interim Response is still the starting point. But as HMG's thinking on this topic has developed in the course of this consultation, and with the help of the representations made to it, a greater degree of interconnection between the five principal changes has been made in the responses finally adopted. As a result, it has been thought helpful to the reader of this document to change the framework against which the final responses are described and the order of issues.
- 34 The Headings under which final responses are given are, in this order, "Audit Provisions", "Details of Agents and Related Matters", "Representations in Application Forms and Warranties in Contracts" and "Banks' Letters of Undertaking". Where changes have been proposed by consultees which go beyond what was in either the May or December 2004 formulations, this Final Response will deal with those proposed changes, where they have been adopted in whole or in part or have prompted other changes, by reference to that part of the revised framework to which they most closely relate.
- 35 In the following sections, the final responses are set out in bold type. In considering all the representations made to it, and in formulating its Final Responses, the workability and administrative burden of the requirements in ECGD's standard documentation, in the context of a view on ECGD's role as set out in Section III above, have, amongst all other material factors, been borne in mind.
- 36 "Unworkability" is taken to mean in this document that obligations are either impossible or severely impracticable for Applicants or Banks to fulfil. "Inappropriate" means they impose a burden which is disproportionate either to the benefit to HMG of the obligations or to the benefit obtained by the Applicant or Bank from HMG support; or to both. The term "Group Company" is used in this Final Response to

mean: all companies the Applicant controls, all companies it is controlled by and all companies controlled by its controller. The full definition appears in the attached documentation.

- 37 It is worthwhile recalling that ECGD Application Forms are not contracts, and that the statements made in them have effect principally as representations of fact. Moreover, nothing in ECGD Application Forms prevents ECGD making further enquiries if something represented in these Forms causes it to consider it appropriate in all the circumstances to do so.

(ii) **The Changes**

(A) **Audit Provisions**

38 Paragraph 8.7 of the Original Document and paragraphs 29 – 35 of the Interim Response refer. The issues arising related to ECGD's audit rights in connection with the obtaining of the contract and concerned principally the need for a reason to conduct such an audit, the degree of notice to be given and the identity of the auditor.

39 A number of representations argued strongly that the powers of audit set out in the Interim Response in relation to how a contract had been obtained were inadequate in that they could only be exercised when ECGD has a reasonable suspicion that bribery might have occurred and on giving notice of such to the exporter. These representations suggested that ECGD should have rights to audit at random and without notice.

40 Some consultees suggested that, if ECGD were to stipulate by contract for greater and more random powers of audit than those proposed in the Interim Response, this would (a) have a deterrent effect on those contemplating corrupt activity and (b) constitute "entirely normal practice" in contracts between Government Departments and Private Sector Operators. It was suggested in one submission that it was "somewhat disingenuous" for HMG to suggest that ECGD was taking powers in excess of those enjoyed by Investigatory Agencies because the May 2004 inspection rights would be regarded as "perfectly normal" and were "consistent with audit rights contained in other contracts between Government Departments and Private Sector Operators".

41 One representation also suggested that HMG appeared to have confused the fact that ECGD is not an investigatory body with an absence of entitlement to assert contractual rights. It was asserted that "as a Government Department, the ECGD does have a regulatory.... role to play in ensuring that bribery does not occur on a project it

supports and that contracts of support comply with UK law". It was also asserted in some representations that ECGD should have access to the records and staff of the supplier, controlled companies, associates, agents, subcontractors and suppliers to the supplier. It was further suggested that the inspector or auditor need not to be acceptable to the supplier, provided that he is suitably qualified, subject to a duty of confidentiality and without a conflict of interest.

42 On the other hand, some representations, particularly those made on behalf of Applicants in response to the Original Document, objected to random powers of audit believing that ECGD might mount "fishing expeditions" to view commercially sensitive information (including documents other than Contract Records and Administration Records) with the consequent risk of unwarranted disclosure and unnecessary disruption.

43 **The Final Response is as follows.**

Identity of Auditor

44 **The Interim Response proposed that the auditor should either be a member of ECGD staff or a third party acceptable to those who were to be audited. Under this provision, ECGD will always have a right to audit, by using one of its own staff, without needing the consent of the audited party to the identity of the auditor. It is felt that there is some force in the point that the records to be inspected could be of a commercially confidential and sensitive nature with the result that the identity of the auditor is a legitimate matter of interest to the audited party if he is not to be a government official. For this reason it is proposed to retain the provision in the Interim Response relating to the identity of the auditor. In all cases of audit, whether in relation to the obtaining of a supply contract or its performance, the auditor will therefore either be a (ECGD) government official or a third party acceptable**

to the entity to be audited, such agreement not to be unreasonably withheld.

Powers of Audit

- 45 It is not correct that ECGD has a regulatory role in ensuring that bribery does not occur in a contract that it supports and that such contracts are compliant with UK law. ECGD is not a regulator any more than it is an investigatory agency (see Section III above). ECGD's powers of audit are a matter of private law contract between it and private sector bodies. This was set out in the Interim Response (paragraph 34). HMG must balance the powers for which ECGD may stipulate by contract in order to take reasonable precautions not to be involved with contracts tainted by corruption against the consideration of the need to avoid imposing inappropriate obligations.
- 46 In doing so, HMG bears in mind the representation received in relation to the Original Document from F&C Asset Management to the effect that a right for ECGD to audit contracts (HMG emphasis) on a random basis, irrespective of suspicion, is part of a framework which may discourage corruption. The decision of HMG on this point takes account of the points put to it regarding the normality of inspection rights in the insurance (perhaps particularly in the reinsurance) industry and the example appended to The Corner House submission of a draft Technology Supply Agreement drawn up by the Office of Government Commerce. Both of those examples relate to a situation where a party bearing financial risk resulting from the actions of another party takes steps to check that the second party is properly carrying out the contractual obligations owed to the risk-bearer. This analogy suggests that ECGD should stipulate for the contractual powers to check that the information given to it in Application Forms with regard to issues concerning bribery and

corruption and upon reliance on which ECGD has entered into support contracts is accurate.

47 Against this background, HMG intends that ECGD should continue to have powers to audit the performance of contracts in relation to matters other than bribery and corruption in the same way as currently; and the power also to audit the accuracy of representations relating to the issue of bribery and corruption made to it in Application Forms. However, HMG does not consider it appropriate that ECGD needs to have, or shall have, expressed a suspicion about bribery and corruption in order to trigger an audit. HMG considers it reasonable that notice of such audits should be given. They will therefore continue to be held upon five days notice. These powers will be consistent with ECGD's role as a party making a commercial contract, whilst taking reasonable precautions to avoid financial loss by becoming involved with transactions tainted by bribery and corruption and making reasonable efforts to support wider efforts to deter such. These powers are also consistent with the absence in ECGD's case of an investigatory or regulatory role. ECGD will continue to report suspicions in appropriate cases to the Serious Fraud Office.

48 Some submissions suggested that the definition of "Contract Records" and "Administration Records" should be amended so it is clear that they are not intended to include the Applicant's internal notes, Board minutes and the like. It follows from the powers that ECGD will seek, as set out above, that it will require to see all documentation which bears on the accuracy of the representations made to it on the issue of bribery and corruption. It may be the case that relevant parts of internal notes and Board minutes would fall into this category and they will therefore be within the definition of what ECGD has a right to inspect.

(B) **Details of Agents**

49 Section 8.6 of the Original Document and paragraphs 55 to 66 of the Interim Response refer to this issue.

50 Representations on this topic have continued to be polarised. The starting point for HMG's consideration of this issue is its view of ECGD's role as set out in Section III above.

51 In the Interim Response, provisional views were set out under two headings: "Exceptions" and "Identity of Agents". The same headings will be used in this document with the addition of a section on "Related Matters".

(B)(i) Exceptions

- 52 For the reasons given in the Interim Response it was not considered that the regulatory burden of extending requests regarding the details of agents to all applications for ECGD support was sufficient to justify the retention of exceptions to the obligation to respond to such requests in circumstances where the Agents' commission was below 5% of the contract price and was not included in the price charged by the Applicant to the overseas purchaser and thereby part of the latter's obligation covered by ECGD.
- 53 Little further was received pursuant to the Interim Response in relation to this issue, although one representation suggested that there should be a "de minimis" level of Agents' commission beneath which details of Agents should not be provided. It was asserted that this might assist small or medium-sized exporters (SMEs). Otherwise, submissions broadly either welcomed the provisional views set out in the Interim Response or did not refer to the issue.
- 54 **The Final Response on this topic is to affirm the view set out in paragraph 58 of the Interim Response: the exceptions referred to above will not be retained. It is not felt that the de minimis exception for SMEs is either logically defensible or worthwhile. The relationship of the size of monies paid to an Agent to the services rendered is more important than the size itself of the payment. It would be difficult to decide at what level such a de minimis exception should be set and ECGD has received no complaints from SME customers about providing such details. Doing so is not regarded as inappropriate or unworkable.**

(B)(ii) Identity of Agents

- 55 The starting point is the view of ECGD's role set out above at Section III.
- 56 The principal issue is whether it should be a requirement in an ECGD Application Form that an Agent is identified. The Interim Response suggested two alternatives in this respect: one being that of identification; with the other being an absolute contractual warranty which would oblige an Applicant to repay any monies which ECGD had been obliged to pay under its cover if an Agent, whether with or without the knowledge, consent or acquiescence of the Applicant, had committed corrupt activity within the meaning of the ECGD Forms.
- 57 Representations in relation to this issue were sharply polarised. Representations from Applicants in relation to the Interim Response said very little about the option of identifying Agents beyond referring to the representations they had made in response to the Original Document against that option and saying in one instance that the idea "remained unworkable". No specific rejoinder was made to the reasoning set out at paragraphs 60 to 63 inclusive of the Interim Response where ECGD responded to the original submissions of Applicants in this respect.
- 58 Representations from Applicants concentrated instead on the "warranty option", but indicated that in their view the warranty option should not act so as to put an exporter under an obligation where the Agent had "acted corruptly without the exporter's authority, particularly as the exporter would have provided ECGD with its procedures for the appointment and management of Agents" (the CBI representation), or that exporters "should not be penalised in instances where (a) Agents have acted corruptly without the exporter's authority, and (b) where the exporter has provided ECGD with its procedures for the appointment and management of Agents" (BAES representation).

- 59 The essential difficulty with such an alternative version of the warranty option is that there is already a warranty in the Premium and Recourse Agreement imposing liability where the Agent acts with the authority, prior consent or subsequent acquiescence of the supplier or any controlled company of the supplier. In consequence, a new warranty so circumscribed would be unlikely to add anything to the existing form in substitution for ECGD knowing the name of the agent.
- 60 The difficulty with the suggestion that the exporter should not be penalised by virtue of a warranty in circumstances where it has provided ECGD with its procedures for the appointment and management of Agents (which would be softening of the December 2004 provisions) is that the provision of such information is not, in itself, a sufficient substitute for knowing the identity of the Agent. Nor is it the case that all of ECGD's Applicants necessarily have such a code or system which they can supply to ECGD.
- 61 The CBI and BAES submissions both make reference to HMG's guidance in relation to PFI Contracts. It is not felt that this guidance is of particular assistance in relation to the set of circumstances under consideration in ECGD-supported contracts. As the solicitors for the CBI say in their advice, appended to the CBI submission: "The corrupt acts and fraud provisions included in PFI/PPP Contracts are aimed at all types of bribery and corruption and fraudulent acts....perpetrated against the authority...." (HMG emphasis). ECGD is concerned with what may or may not have happened in relation to (usually) the obtaining of an export contract. The issue of a fraud on ECGD would only arise in the case of a knowingly inaccurate representation made to it in order to obtain its support. Moreover, the remedies in the PFI/PPP Contracts relate broadly to the termination of the contract with the authority. It is unlikely in the extreme (see paragraph 6.4 of the Original Consultation Document) that ECGD will ever have a right at law to terminate its financial obligations to the supported Bank, as a

result of misrepresentation by an exporter, provided the Bank is not party to that misrepresentation.

62 Representations other than those from Applicants and their representative organisations tended strongly to advance the proposition that requiring the identity of the Agent was the only viable course of action.

63 Transparency International (“TI”) said that: “it is a fundamental part of good anti-corruption practice that the identity of the Agent should always be disclosed to ECGD”, and that the commercial logic of the “warranty option” is fundamentally flawed because, if the Applicant did disclose the identity of the Agent, “ECGD would assume responsibility for the corrupt acts of the Applicant’s Agent”. It is not clear what is meant by ECGD assuming responsibility for corrupt acts of the Agent. The position if an option of giving the warranty were offered but, instead, the Agent’s identity were disclosed to ECGD, would be that the Applicant would be responsible to pay ECGD sums which ECGD had had to disburse if the Agent had engaged in corrupt activity with the Applicant’s authority, consent or acquiescence, but not otherwise. In no case would ECGD “assume responsibility” for corrupt acts: the position would merely be that the Applicant would not have responsibility to ECGD for the acts of its Agent in which it had no complicity.

64 In other representations (including The Corner House) it is pointed out (inter alia) that the “warranty option” would mean that the Applicant would only face liability in the event that corrupt activity was uncovered and successfully prosecuted; that the warranty option would be solely directed to the role of protecting the Exchequer interest rather than the wider role of deterring bribery; and that the warranty option would prohibit ECGD from asking further questions. It is also said that it is “totally mistaken” that, as exporters argue, ECGD is able to conduct only limited due diligence because it is not an investigatory body.

- 65 Although the effect of the “warranty option” is somewhat greater than suggested by The Corner House (because the definition of “Corrupt Activity” includes more than a successful prosecution), there is force in the proposition that the warranty would bite, in many cases, only where corrupt activity was uncovered and successfully prosecuted and if there were a default leading to payment by ECGD.
- 66 It is not considered to be correct that, by adopting the “warranty option”, ECGD would solely be protecting the “Exchequer interest”. It is believed that the obligation to enter into an absolute obligation involving financial penalty without default would be a significant deterrent.
- 67 Whilst, as the Interim Response set out at paragraph 61, the knowledge of Agents’ identities has value to ECGD, it is also true that its value, as equally set out in that paragraph, is not unlimited. For the reasons given in Section III above, there are real limits on the use to which ECGD can put the knowledge of Agents’ identities.
- 68 **Having taken full account of all that has been said both in response to the Original Consultation Document and the Interim Response, including but not restricted to those representations selected for particular reference in this document, the Final Response on this topic is as follows.**
- 69 **Although limited, the knowledge by ECGD of Agents’ identities does have value, both in relation to protecting the Exchequer from financial loss and in relation to the deterrence of corruption.**
- 70 **No compelling evidence of “unworkability” or “inappropriateness”, as defined in this document, has, in HMG’s judgement been furnished in relation to the provision to ECGD by Applicants of the identity of Agents. However, fears have been expressed about the commercial confidence of Agents’ identities being lost either through the operation of the Freedom of Information Act or by error or as a result of ECGD making**

enquiries outside Government in respect of the named agent. ECGD will scrupulously operate the provisions of the Freedom of Information Act which provide exemptions, amongst others, for information protected by the law of Commercial Confidence. Information which is properly protected by the law of Commercial Confidence will not be liable to publication by virtue of that Act. ECGD will also offer those Applicants who choose to take advantage of it a system along the lines of that proposed in ECGD's letter to the CBI of 12 August 2004 in order to minimise any risk of inadvertent disclosure of the Agent's identity. The system which ECGD proposes for this purpose is appended at Annex C. Representations on the terms of this system, but only on the terms of this system, are invited, in order to finalise this Consultation, from any consultee initially consulted or anyone who has responded to the Original Document or Interim Response. Details of how to respond on this topic are set out in Annex D.

- 71 A significant number of Applicants for ECGD support found it possible to provide Agents' identities under the May 2004 arrangements. It is not therefore felt that it is impossible, or severely impracticable, subject to the safeguards referred to above, for Applicants to furnish the identity of their Agents.
- 72 The question therefore is: does the warranty option provide, in substitution for knowledge of that identity, a system of equal worth in preventing ECGD being involved with contracts tainted by corruption and in deterring bribery and corruption? Whilst it is believed that there is a strong deterrent effect in an absolute warranty, it is also felt that there is force in the proposition that the warranty would only bite in circumstances where there has been a successful prosecution and a default and that the warranty option is not equivalent to knowledge of the Agent's identity in the attempt to prevent entanglement in the first place with corrupt

transactions. Moreover, representations from Applicants for ECGD support have indicated in their view that the warranty option should only be adopted in a form which would render their obligations no greater than they have been for some time under the PRA.

- 73 It is therefore the decision of HMG that ECGD's Standard Forms will require the name and address of Agents of Applicants.**

(B)(iii) Related Matters

74 This Final Response also deals with two other issues raised by consultees relating to details of Agents.

75 One is a proposal that ECGD should require the names of Agents of Consortium Partners. The other is that ECGD should ask a number of additional questions about Agents including (i) those set out at paragraphs 39 and 40 of the TI submission and (ii) those set out at paragraph 7.4 of the submission made by Mr Burbidge-King responding to the Interim Response.

76 **HMG's responses to these submissions are as follows.**

77 **It would impose an unjustifiable burden on Applicants to oblige them to provide the names of the Agents of Consortium Partners or other Group Companies. Moreover, in the case of Consortium Partners, it is conceivable that it would be impossible for the Applicant to acquire the necessary information. It has been strenuously represented to HMG that the identity of Agents can be a matter of commercial confidence. It is possible that the identity of the Agent of a Consortium Partner would be something which a Consortium Partner, considering that he may wish to use that Agent in future in business where he is in competition with that ECGD Applicant, would be unwilling to provide to that Applicant. Consequently, to make the provision of the identity of such an Agent obligatory might prevent ECGD being able to carry out its function of facilitating UK exports by imposing a condition upon the Applicant incapable of fulfilment. Representations about the behaviour of Consortium Partners will however continue to be required.**

78 **With regard to the issue of expanding Application Forms with further questions about Agents, HMG recognises that in certain circumstances some of the questions suggested to it (including**

ones concerning the practice of how agents are appointed (Mr Burbidge-King's submission) as well as Codes for their behaviour) would be pertinent ones to ask. However, bearing in mind the second point made in paragraph 37 above, HMG considers it more appropriate that ECGD should bear these questions in mind and ask them, or others, in appropriate cases rather than imposing an obligatory and burdensome requirement in all cases.

(C) **Representations in Application Forms and Warranties in Contracts**

79 The submissions made both to the Original Document and the Interim Response have broadened the issues of what changes are desirable to the May 2004 Forms beyond the five principal changes set out in the Original Document and repeated in the Interim Response. In consequence, the distinctions between the issue of changes to the concept of Affiliate and the issue of representations about employees and directors have become blurred and mixed with issues about representations concerning Corrupt Activity. It has therefore been thought helpful to deal with all obligations imposed by representations and warranties together in this section. The issue of obligations under Banks' LoUs will still, however, be dealt with separately below.

80 The nature of the Final Response on this topic cannot be understood without an appreciation of the way in which ECGD documents work. This was touched on in paragraphs 6.3 and 6.4 of the Original Document and is referred to briefly in paragraph 37 above of this Final Response. The brief explanation in paragraph 4 of the Original Document of how ECGD provides support for exports and overseas investments is also pertinent. Nonetheless, the nature of some of the submissions made is such that some greater detail regarding terminology and legal effect of statements in differing documents is necessary.

- 81 ECGD Application Forms are not, in themselves, contracts: ECGD relies on the statements made in them in entering into contracts. The two principal examples of contracts appended to the Original Document were the EXIP Policy and the Premium and Recourse Agreement. The Banks' LoUs are also contracts, although not contracts of support.
- 82 The most important distinction between the legal effect of the Application Forms and of the contracts is that only in a contract can an enforceable promise as to future behaviour be taken. The act of completing an Application Form itself merely makes a party liable for misstatements of material facts upon which ECGD relies in entering into a subsequent contract. A number of consequences follow from this fundamental distinction. These are referred to below.
- 83 The considerable number of individual submissions which have been made in relation to this topic are considered for convenience under three headings: Issues of Definition, Issues of Principle and Miscellaneous.

(C)(i) Issues of Definition

84 There are five sub-issues under this heading. These are “control”, “Relevant Acts”, “Related Agreement”, “Directors”, and “Controlling Mind”.

“control”

85 Representations have been made that it is not feasible to regard as under “control” a company whose ownership is split 50/50 and over which the Applicant does not have any control by contract.

86 **These views are accepted and the definition of “control” where ownership is deadlocked will be restricted to circumstances where the Applicant has contractual control.**

“Relevant Acts”

87 It has been queried why the definition of Relevant Acts provides that there is a “carve out” in respect of acts committed which are only found to be offences under the Relevant Acts (or would have been so regarded) by virtue of an amendment to the Relevant Acts having retrospective effect. The implication of the submission is that if the UK legislature has, highly unusually, seen fit to amend criminal legislation with retrospective effect, Applicants should be expected to comply with that law.

88 **HMG considers that it is appropriate to remove the “carve out” but for a different reason to that advanced in the submission referred to above. A retrospective amendment of the Relevant Acts would be in contravention of Article 7 of the European Convention on Human Rights enacted into domestic United Kingdom law by the Human Rights Act 1998. As there is no prospect of HMG breaching Article 7 by the imposition of retrospective criminal legislation, the carve out serves no useful purpose and will be removed.**

“Related Agreement”

89 Representations were made that the definition of “Related Agreement” was such that it could refer to internal notes with a very tenuous link to the Supply Contract.

90 **HMG does not accept that this definition could include internal notes. Whilst the term is wider than a two-party agreement and includes undertakings, consents and authorisations, it is nevertheless requires one of the Applicant or a Consortium Partner to be a party, or a recipient or beneficiary. No amendment to it is felt necessary to meet the concerns referred to above; but the definition has been tightened in the way that appears from the attached documentation.**

“Directors”

91 It was requested in some submissions that representations should not be required about Non-Executive Directors and that there should be a definition of “Director” to this effect.

92 **This submission is not one that HMG finds compelling. If, for example, a Non-Executive Director of an Applicant were to appear on the World Bank list of Debarred Firms, it is something which ECGD would wish, and should be entitled, to know about. The administrative burden of furnishing this information is not considered to be sufficient reason for this representation not to be required.**

“Controlling Mind”

93 One consultee, The Corner House, submitted that knowledge of an Applicant has been defined by HMG in the Interim Response as knowledge held by “a Controlling Mind” of a company; but that HMG has adopted a much weaker and more limited concept of “Controlling Mind” than that suggested by the criminal law in the UK. It was

submitted that the criminal law definition in the UK includes the knowledge of anyone with “senior management capacity or with powers of representation, decision or control within the company”. It was further submitted that the knowledge possessed by anyone in those latter categories should constitute knowledge of an Applicant Company for ECGD support.

- 94 **The term “Controlling Mind” does not find any place in the documentation appended to the Interim Response. It is not accepted that the test in criminal law for rendering a company guilty of an offence, by virtue of an act committed by an officer or employee, is that implied at paragraph 18 of the submission of The Corner House. See Tesco v Nattrass (HL) [1971] 2 All ER 127 and R v Andrews Weatherfoil Ltd (CA) [1972] 1 All ER 65.**
- 95 **More importantly, HMG does not accept that the test for deciding whether the acts of an officer of a company constitute an offence by the company is the right test to apply in deciding what constitutes knowledge of an Applicant in making pre-contractual representations in relation to a commercial contract. Nor does it believe that it follows from the fact that representations are made about a wider circle of people than those whose knowledge constitutes that of the Applicant implies that the knowledge of such subjects of the representation should constitute knowledge of the Applicant in signing the Application Form. The definition of what constitutes knowledge in the case of a corporate Applicant will therefore remain as set out in the documentation appended to the Interim Response.**

(C)(ii) Issues of Principle: The Nature of Representations about the behaviour of Controlled Companies, Consortium Partners and Others

96 Representations are made about Corrupt Activity in two separate sections of Application Forms for ECGD support. In one case, representations concern convictions or admissions or presence on the World Bank List of Debarred Firms; and in the other, representations concern the absence of Corrupt Activity in connection with the transaction for which ECGD support is sought. The main issue in those sections is whether, and if so, how, those representations should be qualified; and about which entities, other than the Applicant itself, should those representations be made. This issue of principle will be dealt with first and other related matters of principle will be dealt with subsequently in this section.

Main Issue

97 The main issue subsumes a number of matters which have been debated during the course of this consultation such as the concepts of “Affiliate”, “Associate”, “Controlled Company” and “Consortium Partner”. Matters which are part of the main issue also include the question of about which employees (Directors, Senior Managers or all employees) of the corporate entities referred to above representations should be made.

98 It may be helpful briefly to summarise the history of the development of the recent use of these concepts in ECGD Application Forms. The May 2004 Forms required representations that neither the Applicant nor any of its Affiliates had (broadly) committed a corrupt act in the past and had not engaged in Corrupt Activity in relation to the transaction in question. The December 2004 Forms replaced the concept of “Affiliate”, which included both a joint venture partner and a related company, with that of Controlled Company. Both in May and December 2004 the phraseology concerning the absence of Corrupt Activity in relation to the transaction in question was unqualified in

relation to the Applicant and qualified by the phrase “to the best of our knowledge and belief” as far as other entities were concerned.

- 99 The documentation appended to the Interim Response made two main changes to the December wording. It removed the qualification of “to the best of our knowledge and belief” from representations made about Controlled Companies; and it reintroduced a part of what was previously covered within the concept of “Affiliate” in the shape of “Consortium Partner”. With regard to the latter, an Applicant had to represent that, if it had a Consortium Partner, it had made reasonable enquiries regarding that Partner’s conduct both historically and in relation to the transaction in question and that those reasonable enquiries did not give the Applicant cause to believe that the Consortium Partner had acted improperly.
- 100 The May 2004 documentation required representations about the previous history of all employees of the Applicant and its Affiliates. The December 2004 documentation required such representations in relation to employees only if they were Board Directors of the Applicant or any Controlled Company. The documentation appended to the Interim Response asked for representations about Directors and “Senior Managers”.
- 101 A number of submissions were received under this head. Many objected to giving absolute undertakings for any third party including Controlled Companies; BAES suggested that the removal of any qualification in the representations made about Controlled Companies would appear to be either a drafting error or an attempt to make a significant change without due process; on the other hand some suggested that representations should additionally be given about the past behaviour of the Applicant’s Agents; and about non-controlled Group Companies.
- 102 In greater detail, paragraph 65 of the BAES submission in relation to the Interim Response said that: “BAE Systems believes that while a

Senior Manager or Board Director should have visibility of the majority of activities in the organisation, it is not possible for such individuals to have complete knowledge of all activities of all parts of the organisation. It is not impossible for large enterprises to have to implement firewalls to prevent certain information from passing one part of the business to another – in such situations it is not possible for all Managers to have complete knowledge of the business activities”.

- 103 The representation went on to say that, in consequence, an absolute declaration about BAES, its Controlled Companies and Board Directors and Senior Managers of BAES “is not possible”. The BAES representation applies on its face to representations about Controlled Companies but would serve equally, if not more strongly, as an answer to submissions arguing that representations should be required in relation to the activities of non-controlled Group Companies.
- 104 The CBI said at paragraph 17 of its submission following the Interim Response (although paragraph 39 may contradict this) that: “CBI agrees with ECGD that representations about “Controlled Companies” should be as unqualified as representations about the Applicant itself....”. In its letter of 19 December, however, the CBI said: “It is not practical for business to make absolute undertakings, particularly where they are in respect of third parties where companies are relying upon the representations of others”.
- 105 ECGD’s letter of 5 December 2005 drew a number of other comments about the question of qualification of representations, particularly from the British Bankers Association (“BBA”) in a letter of 14 December 2005 referred to below in the Section on Banks’ LoUs. The burden of what is said by the BBA, by the British Exporters Association (“BExA”) and by Rolls Royce is that it is not practicable to make unqualified statements “particularly where they are in respect of third parties”, and that either the phrase “to the best of our knowledge and belief” or the phrase “as far as you are aware” should be inserted at all relevant points. SBAC makes similar points. Submissions were made that the

lack of practicality flowed from either the number of third party entities with whom enquiries would have to be conducted or from the inability to be certain about the information received from third parties. It was added by BExA and Rolls Royce in identical terms that it was impossible to state absolutely that all questions had been answered “fully”, as no Applicant could claim to have “full” knowledge of every aspect of every question.

106 Applicant consultees did not object to the nature of the representations required in relation to Consortium Partners, although subsidiary issues were raised as to how far the definition of Consortium Partners went. Indeed BAES states in its submission to the Interim Response that: “subject to confirmation of the scope of Consortium Partner, BAES accepts that it is appropriate to confirm to ECGD that an Applicant has made...enquiries about the Board Directors of a Consortium Partner and that the Applicant has no reason to believe its Consortium Partner has engaged in Corrupt Activity” (paragraph 55).

107 **HMG’s response on this main issue is as follows.**

Background

108 **It is necessary to bear in mind that what is being considered are representations made in Application Forms rather than the recourse provisions in, for example, the PRA in the case of a Buyer Credit or the termination provisions in the EXIP Policy itself.**

109 **These latter provide, in effect, that if anyone acting on behalf of the Supplier, or with the Supplier’s subsequent acquiescence, engages in Corrupt Activity in connection with the Supply Contract or Related Agreement, the Applicant’s liability will be engaged. In the case of a Buyer Credit, and similar arrangements, the liability takes the form of a recourse obligation; in the case of an EXIP and similar insurance policies, liability takes the form of**

potential termination of the insurance and repayment to ECGD of any amounts it may have paid out.

110 In the case of the Buyer Credit, these are certainly more significant provisions than the factual representations in the Application Form. By the time that a factual representation in the Application Form is shown to be a misrepresentation, it is overwhelmingly probable that the ECGD guarantee to a Bank will have been written. If the Bank has acted in good faith, without knowledge of the misrepresentation, it would generally not be possible for ECGD in law to terminate its obligations to the Bank. There will, be little point terminating the PRA, and the amount of damages that ECGD will have a right to for misrepresentation of a fact concerning Corrupt Activity in relation to the transaction in question will certainly be no greater, and will possibly be more circumscribed, than the recourse obligations ECGD would otherwise have in the PRA.

111 Whilst it is true that the recourse obligations apply only where there has been some degree of complicity of the Applicant, and liability for misrepresentation could be wider, it is also felt likely that an instance of Corrupt Activity from which the Applicant benefited would involve the Applicant's complicity. Therefore there would be little practical distinction between the conditions for liability in the Application Forms and in the PRA. Nonetheless it is felt right that there should be declarations in Application Forms about the absence of Corrupt Activity.

112 It is also useful to keep in mind the difference in function between representations about the absence of Corrupt Activity in relation to the transaction for which support is sought and representations relating to past behaviour, that is to say absence of appearance on the World Bank list of Debarred Firms or previous convictions for Corrupt Activity. The former is of more direct utility to ECGD for reasons that are plain. The function of

the latter is to provide some comfort to ECGD that the Applicant and/or its employees and others covered by the representation do not have a history, and perhaps therefore propensity, towards improper activity; or that the Applicant and others have had sufficiently strong internal controls or Codes of behaviour to prevent such activity; or both. The information it provides gives much more indirect assistance towards the objectives of not hazarding taxpayers money in transactions tainted by corruption and deterring the commission of those offences.

- 113 The principal objective of ECGD in taking representations about the absence of Corrupt Activity, whether past or present, is to avoid involvement with transactions in connection with which impropriety has taken place. The entities about whom it is most important to require representations are, by a large margin, those who are involved with the transactions in question.

Process

- 114 The suggestion that, either in the Interim Response or the Final Response, a decision to require unqualified representations would be one made without due process is misconceived for the reasons set out in paragraph 32 above.

Scope and Nature of Representations

- 115 The first issue is about which entities, in addition to the Applicant (see paragraph 122 below), should representations be required. The relevant possible categories are the Applicant's Controlled Companies, the Applicant's Group Companies, the Applicant's Consortium Partners and any other entity involved in the transaction.
- 116 HMG considers that the touchstone of the issue is not related to the Applicant's degree of control but whether there is involvement with the transaction in respect of which ECGD support is sought.

The test for “involvement” will be whether the entity in question has had, or is intended at the time of application to have, a material part in the negotiating or obtaining of the Supply Contract. Such a test encompasses those entities about whom HMG is most concerned: those who have played a material part in obtaining the Supply Contract whether or not they are controlled by the Applicant. Thus, the Applicant will be required to make reasonable enquiries as to which of its Group Companies, whether controlled or not, have been so involved and a representation (the nature of which is discussed below) will be required therefore about all those Group Companies which such enquiries show to have been involved.

117 This definition should not give rise to any issues of unworkability or inappropriateness by reason of the number of companies to which it is likely to refer. In any event, Group Companies who do have a material part in the obtaining or negotiation of the Supply Contract are companies about whom, however large their number, HMG considers Applicants should make representations.

118 The Agents of Applicants are also, of course, involved in the transaction in question. HMG therefore considers it appropriate that the Applicant should make representations about his Agents. Since, by definition, an Applicant has instructed an Agent or the Agent has been instructed on behalf of the Applicant, it is not appropriate to invite an Applicant to make reasonable enquiries as to what Agents are involved on his behalf in the transaction in question. Representations will therefore be required about all those who fall within the definition of “Agent”.

119 Representations will also continue to be required about Consortium Partners.

120 The second issue is the nature of the representation that will be required. There are four possible sorts of representation that

could be required. These are: (a) unqualified, as HMG suggested in the case of Controlled Companies in the Interim Response; (b) based upon reasonable enquiries about the behaviour of the company concerned (as was suggested in relation to Consortium Partners in the Interim Response and by The Corner House for all Group Companies in their submission); (c) representations to the best of the Applicant's knowledge and belief as suggested in the submissions to the Interim Response of BAES, the BBA, BExA, Rolls Royce, SBAC, Alstom and, at some points, the CBI; (d) representations purely based on actual knowledge as was also suggested at various points by BAES, BExA and Rolls Royce.

121 HMG believes that representations based purely on actual knowledge are not appropriate in any cases. The previous ECGD definition of the phrase "best of knowledge and belief" imposed a greater obligation than pure subjective knowledge. Although this has not been acknowledged in many of the submissions which have been critical of it, it had as a separate additional leg of the definition that the statement had to be made to the best of the maker's belief and the appended definition in ECGD documentation was explicit that a statement could not be made to the best of the maker's belief if the maker entertained any doubts which he had not laid to rest by enquiry. It would therefore be a diminution of the qualification "to the best of knowledge and belief" to adopt as a qualification of the representations under consideration a phrase such as "as far as the Applicant is aware"; and HMG will not do so.

122 As far as the Applicant itself is concerned, what is said about the absence of Corrupt Activity in relation to the transaction in question has always been unqualified in all of the May 2004, December 2004 and Interim Response Application Forms. That has never been objected to (save possibly by implication, which may not have been intended, in some submissions made in

reaction to the Interim Response). It seems entirely right that such representation should be unqualified as to the Applicant's own behaviour and HMG should not bear any risk in that regard. Representations will continue therefore to be unqualified in relation to the Applicant's behaviour connected with the nature of the transaction in question; and will also be unqualified as far as the past behaviour of the Applicant and its Directors is concerned.

123 As far as Group Companies and other entities not controlled by the Applicant are concerned, there is an element of common ground that representations should not be unqualified. Paragraph 14 of The Corner House submission to the Interim Response is in favour of this and many submissions to the Interim Response from Applicants and their representative organisations were adamant that representations made about any entities other than the Applicant could not be unqualified.

124 For this category of entity representations must take the form either of the reintroduction of the phrase "to the best of knowledge and belief" of the Applicant or be based upon reasonable enquiries. Although the use of the phrase "best of knowledge and belief" does not undermine the strength of a representation to the degree suggested by some consultees (see for example paragraphs 35 – 40 of The Corner House submission to the Original Document), it works best where the maker of the representation is likely to know a considerable amount about the subject matter of the representation. In those circumstances he is likely to be put upon enquiry if there exists any reason for him so to be. The phrase works less well where there is no likelihood that the maker of the representation will have knowledge, without specific enquiry, of the matters to which the representation relates. So, the phrase, if used in relation to a representation about past convictions or admissions of other entities or their

Directors or Senior Managers, leaves legitimate doubt about the value of that representation.

125 The Interim Response suggestion in relation to Consortium Partners that Applicants should make reasonable enquiries of such partners and base representations upon those enquiries, has not met with any objection. Indeed BAE Systems conditionally accepted the appropriateness of such an arrangement. HMG therefore believes that a similar obligation is appropriate in relation to a non-controlled Group Company, involved in the sense defined above, and the Agents of an Applicant.

126 The question therefore only remains as to whether the representation about a Controlled Company should be unqualified, like that of the Applicant itself, or based on “reasonable enquiries”. Whilst HMG is of the opinion that in many cases, the relationship of an Applicant and a Controlled Company will be so close that there is no reason not to require an unqualified representation, and whilst this position would appear to be borne out by paragraph 17 of the CBI submission to the Interim Response quoted above and by paragraph 48 of the BAES submission to the Interim Response, HMG accepts that it might be the case, especially if control is exercised only by virtue of a contract, that the assurance which an Applicant could have that such a representation was correct would not be quite sufficient for HMG in fairness to impose the requirement for an unqualified representation. HMG has therefore decided that the representations that it will require in respect of Controlled Companies will be framed in the same words as those in respect of non-controlled Group Companies and Agents and, in consequence, the concept of Controlled Company will not be used in ECGD Forms. What is reasonable will vary according to different circumstances.

127 **Finally, HMG has noted the representation made about the use of “fully” and “full” referred to in paragraph 105. Consultees will note the solution adopted in the attached Buyer Credit Application Form Schedule.**

Subsidiary Matters

128 Some Submissions pointed to the difficulties of making representations about Senior Managers; some suggested that representations should additionally be given about the past behaviour of the Applicant’s Agents; some suggested that representations should additionally be given about the Senior Managers of Consortium Partners; and it was suggested that there had been an oversight in not requiring a representation about the Consortium Partner itself as well as its Board Directors. It was also submitted that the declaration in the Buyer Credit Application Form, that no one with the Applicant’s or Controlled Company’s authority, consent or subsequent acquiescence should have engaged in Corrupt Activity should be amended, as should be the corresponding recourse provision in the Premium and Recourse Agreement, so as to increase the obligation upon the Applicant to include liability whether or not he had consented, authorised or acquiesced (see paragraphs 29 and 30 and, particularly, paragraph 46 of TI’s submission).

129 **HMG’s response to these subsidiary matters is as follows.**

130 **It is accepted that there could be difficulties with the definition given in the Interim Response of “Senior Managers” insofar as it relates to attempting to name those who will be given negotiating authority in future. The definition suggested by BAES is therefore very largely acceptable. The exact definition to be adopted appears in the attached documentation.**

131 **Representations about the past convictions, admissions and appearance on the World Bank list of Debarred Firms will remain unqualified as far as the Applicant and its Directors are**

concerned. The Applicant will be allowed to base such representations about its Senior Managers on reasonable enquiries.

132 It is not thought feasible to require Applicants to make declarations about Senior Managers of Consortium Partners. Applicants will be required to have made reasonable enquiries both about the past behaviour of Board Directors of any Consortium Partner and also about its conduct in relation to the contract. To require it to go further by demanding that it makes enquiries about senior staff of the Consortium Partner may be regarded by the latter as intrusive and may well also be refused on grounds of confidentiality or the preservation of the privacy of its staff. HMG does not believe that the value of this information justifies the possible adverse consequences of imposing this requirement on Applicants and does not intend, therefore, to do so.

133 It is accepted that it would be sensible to include a representation that the Applicant had made reasonable enquiry in relation to Consortium Partners and that as a result did not believe that the Consortium Partner itself as well the Board Directors of the Consortium Partner did not appear on the World Bank list of Debarred Firms or had been found guilty or admitted to corrupt activity; and this will be done.

134 It was suggested that the declaration in the Buyer Credit Application Form and the recourse provision in the PRA should apply irrespective of the Applicant's complicity. It is the view of HMG that it would be unreasonable to impose an absolute liability, irrespective of fault or complicity, upon the Applicant for what might be a very substantial sum of money unless, as was mooted in the Interim Response, in substitution for the provision of the Agent's identity. Should the circumstances occur where there was a conviction of anyone concerned with Corrupt Activity,

ECGD would consider those circumstances to see whether there had been any complicity. In any event, for the reasons given below in paragraph 140, it would not be possible to impose liability for future acts through the wording in the Application Forms.

- 135 The Declarations made in Application Forms annexed to the Interim Response, to the effect that no-one with the Applicant's authority, consent or subsequent acquiescence has engaged in Corrupt Activity, will be amended consequent upon the removal from the Application Form of the term "Controlled Company". The amendments will not alter the effect of the representation and may be seen in the attached documentation.**

(C)(iii) Miscellaneous Issues

- 136 There are a number of issues raised in the representations which merit comment but which do not easily fit under other headings in this Final Response. They are therefore dealt with in this section.
- 137 The first set of issues concerns certain terms in the PRA and its relationship with the Buyer Credit Application Form.
- 138 Both TI and The Corner House have submitted that, because the representations in the Buyer Credit Application Form appended to the Interim Response refer to Corrupt Activity which has already taken place, they are a diminution of the protection previously granted by statements in either or both of the Forms used in May 2004 and December 2004. The Corner House believes that ECGD must amend the proposed “warranties” given in paragraphs 9.1 and 9.3 of the Buyer Credit Application Form appended to the Interim Response; and TI states that “the “warranty” is deficient in that it relates only to past acts not to future acts” (paragraph 25(a)) and that “the link with future acts must be restored” (paragraph 30).
- 139 **There are a number of misconceptions in these submissions. The first is that paragraph 9.2 in the December 2004 form of the Buyer Credit Application Form is a warranty. The Buyer Credit Application Form is not a contract and nothing in it is a warranty, a legal description which only applies to a contractual term. A second is that a promisor can be held to a promise as to future behaviour contained in a document which does not evidence a contract.**
- 140 **The way that the Buyer Credit set of documents works is that the Applicant makes pre-contractual statements of fact in the Buyer Credit Application Form. Such representations can only relate to statements of fact existing at the time the representation is made. Even if they purport to do otherwise, they are of no effect or value**

as contractual terms. The only possible way in which an Applicant's responsibility can be engaged by the Application Form for behaviour which lies in the future at the time of submission of the Application Form is that it may be put under an obligation of disclosure if the state of facts represented by it in the Application Form should alter between the time of the representation and the date of the contract to which they relate. The Buyer Credit Application Form goes as far as it can to do this in its paragraph 12.

141 The PRA imposes its recourse obligations upon exporters in relation to Corrupt Activity which has occurred before the entering into the effect of that contract as well as in the future. For the avoidance of any doubt, the PRA will be amplified to include a contractual obligation on the part of the Applicant not to engage in Corrupt Activity in the first instance.

142 In consequence, HMG's Final Response on this issue is that the concerns which underlie the representations referred to above are met by the form of documentation appended to the Interim Response which will be that which is put into effect.

143 TI has submitted that the PRA is defective in its terms in that there is doubt whether recourse in relation to Corrupt Activity will always be as to 100%; and that recourse does not include anyone other than the Applicant or supplier.

144 There can, in HMG's view, be no reasonable doubt that the recourse provisions relating to Corrupt Activity will apply to 100% of the monies certified by ECGD that it has paid to the Banker. Any possible doubt was avoided by the inclusion of clause 9.7 of the PRA appended to the Interim Response which stated that for the avoidance of doubt the obligations of the supplier under clause 9 (the general recourse clause) are separate and independent from its obligations under clause 7.3 (the bribery and

corruption recourse clause). The recourse provisions under clause 9 (which do not concern Corrupt Activity) are not intended to include acts by Controlled Companies, associates, agents or others. In consequence, no alteration in this respect will be made to the forms appended to the Interim Response.

- 145 A further representation was received from TI that ECGD should impose an obligation on the Applicant to report to ECGD any corrupt activity undertaken by anyone in connection with the Supply Contract or a Related Agreement.
- 146 **The Buyer Credit Application Form imposes a duty of disclosure: see paragraph 140 above. The PRA also provides that: “If a supplier becomes aware that any Consortium Partner or anyone (including any of that Consortium Partner’s employees) has engaged in corrupt activity....the supplier should promptly notify ECGD accordingly and....”. Similar provisions to those of the PRA appear in the EXIP Policy and will appear in other ECGD standard forms. In consequence it is believed that this issue is amply covered in the documentation appended to the Interim Response which will therefore in this respect continue to appear in that form.**
- 147 The Corner House has renewed its request that ECGD should adopt a policy on debarment of companies convicted of corruption in accordance with their draft provided in its submissions, rather than the current ECGD promulgated policy set out in Annex D of the Interim Response.
- 148 **The Corner House has said that it recognises that the issue of whether ECGD should adopt such a strict debarment policy is outside the scope of the consultation. HMG does not find the difference between The Corner House draft and the ECGD stated policy to be significant and is content with the current statement**

of policy set out at Annex D to the Interim Response, both in legal and policy terms.

(D) **Banks' Letters of Undertaking**

149 In the Original Document (paragraph 8.8) one of the five principal changes between the May and December 2004 Forms was explained to be an alteration in the representation and warranty that the Bank makes in relation to money laundering in the LoUs. Forms of LoUs both for UK Banks and Overseas Banks with a London Branch were attached to the Original Document and comments invited. In comparison with the other four principal changes set out in the Original Document, the changes to the LoUs attracted little comment. The Interim Response suggested that, in view of the separate regulation of Banks in relation to money laundering matters and the difference in role played in an export transaction by Banks and Applicants, there seemed to be no reason to change the December 2004 Letter of Undertaking.

150 In a sub-clause of the LoUs not dealing with money laundering, the phrase "to the best of our knowledge and belief" was to be found. The nature of representations made in exporter documentation, which had in December 2004 documentation been qualified by that phrase, was changed in the Interim Response. Exporter submissions prompted by the Interim Response drew attention to the survival of the phrase in the LoUs in support of the proposition that it should be reinstated in the exporter documentation.

151 Any of the suggested responses set out in the Interim Response could be changed in this Final Response; and the Interim Response in relation to LoUs concentrated on the money laundering issue. Nonetheless, ECGD thought it proper to indicate in its letter of 5 December 2005 that it felt free to make changes to the LoUs in the Final Response including, in particular, changes relating to the phrase "to the best of our knowledge and belief". Thus, consultees would have an opportunity to make any comment on such potential changes before the publication of this Final Response. HMG is pleased that the opportunity to make such submissions was taken by consultees,

notably by the British Bankers Association (“BBA”) in its letter of 14 December 2005.

152 That letter made both substantive and procedural points. Substantive points included that the value of a representation to ECGD is dependent upon the integrity of the organisation providing it and the scope and breadth of the representation; and that, as members of the BBA took their responsibility seriously, the wider the representation is drafted, the more onerous will be the monitoring process and obligation imposed on the Banks. This will have bureaucratic and cost implications. Qualified undertakings rather than absolute ones should be retained because neither businesses nor Banks could comply with unqualified undertakings. The example was raised that legal opinions are rarely unqualified.

153 Procedural points were raised that these changes were “unilateral”; that the documentation implementing the changes had been “neither shown to the Banks nor agreed with them”; and that the imposition of such changes “without consultation and agreement” would not be acceptable to the Banks who were the members of the BBA.

154 **HMG’s Final Response relating to the Banks’ LoUs is as follows.**

155 **It is not felt that the procedural complaints made in the letter of 14 December are well founded. It is said that the changes contemplated have been neither shown to or agreed with the BBA. It is said that alteration without such agreement would not be acceptable. On 5 December 2005, ECGD confirmed that the type of changes which it was considering making to the Banks’ LoUs would be likely to be in similar terms to that contained in documentation relating to exporters. That documentation was sent to all consultees, including the BBA, attached to the Interim Response. The letter of 5 December was intended to, and did, alert consultees to the issue of whether they wished to make substantive representations on this point. The BBA has done so.**

- 156 The current consultation is being conducted according to the Cabinet Office Guidelines and pursuant to an agreed Order of the Administrative Court. (See paragraph 3 above). It is not the case that the agreement of any consultee or any set of consultees is necessary for HMG to make a decision.
- 157 With regard to substantive changes to the LoUs, the final view of HMG is as follows.
- 158 The position of Banks in an ECGD-supported transaction is materially different to that of exporters. The Corrupt Activity with which the LoUs are concerned is broadly that in connection with the obtaining of the mandate to finance the Supply Contract rather than the obtaining of the Supply Contract itself.
- 159 The first issue is that of representations and warranties required in a LoU to be given by a UK Bank in relation to behaviour in connection with the transactions in respect of which a guarantee is sought. Paragraphs 96 to 135 above deal with the representations that ECGD will require in exporter documentation from an Applicant relating to the behaviour of entities other than the Applicant. ECGD said in its letter of 5 December that it was inclined to apply to Banks' LoUs whatever the final response was in relation to exporters' duties to make absolute and qualified representations about Corrupt Activity of third parties. None of the substantive submissions made to it in the BBA letter of 14 December or otherwise has changed the view that that should be the basis of the Banks' obligations, although modifications suitable to the particular function and role of Banks will be made.
- 160 What that will mean for the LoU for a UK Bank is, therefore, that the UK Bank will be obliged to represent and warrant that it has made reasonable enquiries to determine which Group Companies of that Bank are involved; that it has made reasonable enquiries of those Group Companies; and that those latter enquiries do not

cause it to believe that any involved Group Company has engaged in relevant Corrupt Activity. The references to “Controlled Company” in paragraph 1.3 of the LoU will be removed. The test for whether a Group Company of the UK Bank is “involved” will be whether it has played any material part in the negotiation or obtaining of the mandate to finance the Supply Contract.

161 Once the reference to “Controlled Company” is removed, it would be a confusion to retain the phrase “to the best our knowledge and belief”. That phrase would then only qualify the behaviour of the Bank itself in authorising, consenting or acquiescing in certain actions. Representations and warranties about the behaviour of the Bank itself are, and always have been, unqualified. In consequence, the representations and warranties which the Bank gives about its own behaviour will be the subject of slight amendment, as shown in the attached documentation, in order better to reflect, in this regard, the intention behind the LoU attached to the Original Document.

162 The LoU to be given where a non-UK Bank is involved is in different terms. The concept of Controlled Company or Group Company is not and never has been used. The representation made in paragraph 1.3 of the non-UK Bank LoU annexed to the Original Document is, in effect, an unqualified representation that the London Branch of the non-UK Bank has not and will not itself engage in Relevant Corrupt Activity. Representations about Group Companies will not therefore be introduced.

163 The obligations of a non-UK Bank in relation to its own acts of authorising, consenting or acquiescing will be amended in a similar fashion to those of a London Bank for similar reasons. The forms used for non-UK Banks will be subject to such amendments as may be necessitated by the laws governing the jurisdiction of the lending Branch.

164 **The issue of representations about behaviour relating not to the transaction in question but to the past is differently dealt with in Banks' LoUs than in exporter documentation. It is dealt with by reference to the certification of a Compliance Officer. This system is unique to the Banks involved and variants of it are common both to the UK Banks LoUs and non-UK Banks' LoUs. The Final Response is that the terminology in the LoUs will not be changed in this respect save for amendments consequential upon the decisions set out above.**