House of Commons

Trade and Industry Committee

Export Credits Guarantee Department's bribery rules

Fifth Report of Session 2005–06

HC 1124

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Footnotes

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Summary

The Export Credits Guarantee Department's (ECGD's) bribery and corruption rules which came into operation on 1 July 2006 had a long and difficult gestation. These are the third set of revised procedures since April 2004.

The first changes came into operation in May 2004. The regrettable failure of the Government to consult on the May 2004 procedures meant that assumptions behind the changes and the ability of exporters to operate them were not tested. In the face of opposition from exporters the Government embarked on consultation with industry—excluding anti-corruption non-governmental organisations—to "clarify" the May 2004 procedures without, it claimed, departing from the principles behind the procedures. The result was not clarification, but, as the Government gave ground to exporters' concerns during the second half of 2004, substantial revision in December 2004 which watered down the May 2004 procedures. Following complaints from the non-governmental organisations, including a challenge in the courts, the Government started belated consultation on the December 2004 procedures in March 2005 which concluded in June 2006. The procedures were revised again and the latest procedures came into operation on 1 July 2006.

We conclude that had the Government followed ECGD's own Business Principles to carry out a consultation exercise on the anti-bribery rules in the first half of 2004 it could have saved exporters, the non-governmental organisations and the taxpayer a great deal of wasted time and money. It appears that no one in a position of responsibility acknowledged that in proceeding to implement the May 2004 procedures without any consultation ECGD was in breach of its own business principles. It raises a question about the extent to which the business principles permeate the operations of ECGD. We conclude that had ECGD carried out a consultation in accordance with Cabinet Office Guidelines in 2003 or early 2004 a set of procedures broadly in line with those implemented in July 2006 would have been in place by the end of 2004 and saved all concerned a lot of time and money.

Views on what ECGD can and should be doing to tackle bribery and corruption are polarised between exporters and anti-corruption non-governmental organisations. We are clear that any future changes—other than the insubstantial—must be subject to consultation, to allow the interested parties to put their views and to comment on the approach of others.

The procedures that came into operation on 1 July 2006 strengthen the procedures back, although not completely, to the May 2004 procedures. Neither the exporters nor the non-governmental organisations are completely satisfied with the new procedures but accept that they have the potential at least to be workable. We endorse that view.

Given the tortuous history of the anti-bribery procedures we conclude that they go as far as could reasonably be expected to ensure that transactions supported by ECGD are not tainted with corruption. We consider that, after the turmoil of the past two years, the new procedures should be allowed to operate without further amendment.

The Government has said that it will review the procedures in three years, which we welcome. We consider that that review should include a thorough examination of two areas. First, the operation and effectiveness of the anti-bribery procedures which came into operation on 1 July 2006. Second, whether the role of ECGD needs to change to take on regulatory and investigatory powers to tackle bribery and corruption committed by exporters. In the meantime, we recommend that the Government monitor the operation of the July 2006 procedures and at least once a year publicly report to the Export Guarantees Advisory Council the outcome of the monitoring.

1 Introduction

1. The Export Credits Guarantee Department (ECGD) is the UK's official Export Credit Agency. It is a separate Government Department reporting to the Secretary of State for Trade and Industry and derives its powers from the 1991 Export and Investment Guarantees Act. Its objective is to assist UK exporters of goods and services to win business and UK firms to invest overseas, by providing guarantees, insurance and reinsurance against loss, taking into account the Government's wider international policies. It provides business with insurance or backing for finance to protect against non-payment, and it currently operates on a break-even basis, charging exporters premiums at levels that match ECGD's view of the risks and costs in each case. It now provides support for about £2 billion of UK exports a year and has a portfolio of about £16 billion exposure.[1]

2. In 2000 ECGD reviewed its objectives and business principles and introduced requirements on applicants for its services to give undertakings that support would not be used to support bribery or corrupt activities.[2] These anti-bribery procedures were revised and extended in 2002 and 2003.[3] In May 2004 ECGD announced further changes to the procedures ("the May 2004 procedures") but in the face of opposition from exporters it revised these procedures in December 2004 ("the December 2004 procedures"). In turn the non-governmental organisations were dissatisfied with the December 2004 procedures, and one sought judicial review. At the door of the court the Government undertook to put the December 2004 procedures to public consultation. Following consultation in 2005–06, revised procedures—set out in the Final Response to ECGD's Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004[4]—were published on 16 March 2006. They came into operation on 1 July 2006 ("the July 2006 procedures").

3. Our inquiry has focussed on the reasons why it has taken over two years from May 2004 to produce revised anti-bribery procedures and has considered whether the July 2006 procedures are workable and reduce to a minimum the risk of ECGD supporting contracts tainted by corruption.

4. Our predecessor Committee in the last Parliament examined ECGD's bribery procedures twice, and we have drawn on the evidence it received and on its Reports and conclusions. First, in 2003–04 it reviewed, among other matters, the effect of the revision and implementation of ECGD's objectives and business principles.[5] During the course of that inquiry the Committee received a significant body of evidence from non-

1 Export Credits Guarantee Department, *Annual Review and Resource Accounts 2004-05*, 13 July 2005, HC 158, pp 10, 12

2 From September 2000, ECGD standard forms provided that, if the exporter was proved to have engaged in corrupt activity, there was an obligation upon the exporter to repay to ECGD anything which it has had to pay the bank. See ECGD, *Consultation on Changes to ECGD's Anti-bribery and Corruption Procedures Introduced in December 2004*, 18 March 2005, para 6.4, http://www.dti.gov.uk/files/file15233.pdf .

3 Q 102

4 ECGD, *Final Response to ECGD's Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004*, ECGD, 16 March 2006, http://www.ecgd.gov.uk/final_consultation_main_doc.pdf

5 Trade and Industry Committee, Sixth Report of Session 2003-04, *The Work of the Export Credits Guarantee Department*, HC 506-I, 15 June 2004

governmental organisations and individuals that raised questions about ECGD's compliance with its own business principles. The Committee decided that this evidence required further consideration and consultation with the witnesses, and this was the subject of a further inquiry and Report in 2004–05.[6]

5. It was during the course of the second inquiry in November 2004 that ECGD announced it was amending the May 2004 procedures in response to representations made by exporters. As noted, this announcement attracted criticism from anti-corruption campaigners on the grounds that they represented a marked relaxation of the May 2004 procedures. In view of the apparently sweeping nature of the changes to anti-corruption procedures which had been in effect for less than six months, the Committee decided to inquire further into the background and to review the practical effect of the most recent changes. It invited the two organisations, the Corner House and Transparency International (UK), which had commented in detail on ECGD's anti-corruption procedures during its first inquiry, to submit comments on the effect of ECGD's revisions to the May 2004 procedures. It also invited the exporters' representative bodies and ECGD to provide an explanation of the need for the changes.[7]

6. The Committee concluded in its Report published in April 2005 that, although ECGD had described the December 2004 changes to its anti-corruption measures as clarifications of what it required from customers applying for support, it was not at all convinced that such "clarifications" would not seriously weaken ECGD's ability to contribute to the Government's policies against bribery. The Committee welcomed the May 2004 procedures, but noted that their effectiveness would depend on the rigour with which they were to be implemented. The Committee deeply regretted that their effectiveness had never been seriously tested.[8] Our work builds on the earlier inquiries and the Report published in April 2005.

7. In the course of the preparation of this Report, we held three evidence sessions with: (i) the Confederation of British Industry (CBI) and the British Exporters Association (BExA); (ii) the Corner House and Transparency International (UK)—referred to collectively in this Report as the "non-governmental organisations"; and (iii) the Minister for Trade, Rt Hon Ian McCartney MP, and officials from ECGD. We also received various written memoranda from the Government, those who gave oral evidence and other organisations. We put on record our thanks to all those who supplied evidence.

8. Finally, the Minister told us that he expected to review the operation of the July 2006 procedures in three years.[9] The procedures have been subject to 27 months of change and instability and we consider that there now needs to be a period of stability, but at the end of which there needs to be a review. **We recommend that the Trade and Industry Select Committee examine the operation of the procedures again in three years, or possibly earlier if they are revised in the meantime.**

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6 Trade and Industry Committee, Ninth Report of Session 2004-05, *Implementation of ECGD's Business Principles*, HC 374-I, 4 April 2005

7 HC (2004-05) 374-I, para 36

8 HC (2004-05) 374-I, p 3

9 Q 134

2 The process and consultation

ECGD's stated business principles

9. ECGD's 'Mission and Status Review 1999–2000', published in July 2000,[10] set out a new approach to the conduct of its business and the development of its relationship with its customers and others with an interest in its operations. Key elements of the new strategy included greater openness and transparency in ECGD's operations, more focus on the needs of small and medium-sized exporters and investors and ensuring ECGD's policies and activities were consistent with the Government's objectives of promoting sustainable development, human rights, good governance and trade.[11] In December 2000 ECGD published a statement of business principles, which included the following:

— the promotion of a responsible approach to business, ensuring that ECGD activities take into account the Government's international policies including those on sustainable development, environment, human rights, good governance and trade;

— the provision of a customer oriented, efficient and professional service and commitment to continuous review and improvement;

— openness and honesty in all business transactions and the expectation of the same standards from others; and

— wide consultation during the development of services, taking account of the legitimate requirements and expectations of ECGD's customers and other interested parties.[12]

10. These principles were developed in policies on business integrity and transparency.

Business integrity

11. On business integrity, ECGD's stated objectives commit it to be objective, consistent, fair and honest in all dealings; to combat corrupt practices; to ensure, as far as is practicable, that its support for projects is predicated on compliance with applicable laws and regulations by all parties benefiting from that support; and to promote the implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[13]

Transparency

12. On transparency, ECGD committed itself to consulting on major issues with all parties with a legitimate interest in its activities and being as open as possible in its operations, having regard to legitimate commercial and personal confidentiality. ECGD said that it would engage with all stakeholders to discuss ECGD's policies, products and practice, and

10 ECGD, *Review of ECGD's Mission and Status*, Cm 4790, July 2000

11 See also www.ecgd.gov.uk/index/pi_home/pi_bp.htm.

12 As set out at www.ecgd.gov.uk/index/pi_home/pi_bp.htm

13 As set out at http://www.ecgd.gov.uk/index/pi_home/pi_bp_bi.htm.

expand the information it published regarding its financial performance, business activities and the application of its business principles.[14]

ECGD's Public Consultation Guidelines

13. ECGD's Public Consultation Guidelines, published in January 2002, state:

> We are always looking to improve our standards of corporate governance and believe it is important that the UK taxpayer and other major stakeholders in ECGD should have the opportunity to comment on key issues/policies, as they arise, in order to inform our decision-making.
>
> One of the main conclusions of the recent Review of ECGD's Mission and Status […] was that *ECGD should undertake more consultation with customers and other parties who have an interest in what ECGD does*. In addition, one of the objectives in the Business Principles which ECGD adopted in January 2001 was that we should *consult, listen to and respond to relevant stakeholders on major issues* and, in aiming to do this, *engage with all stakeholders to discuss ECGD's policies, products and practice*.[15]

14. The Mission Statement, these policies and guidelines were current during 2004 and have not been superseded. They are currently displayed on ECGD's web-pages.[16]

The May 2004 procedures

15. On 4 March 2004, ECGD wrote to its customers telling them "that as from 1 May [2004] all applications to ECGD will need to be made on new forms that will incorporate enhanced provisions in respect of bribery and corruption [and] we shall also be amending our policy documentation to reflect the new provisions". The letter added that "for cases where documentation is finalised after 1 May, we will be expanding the scope of our audit provisions to cover the contract award process and arrangements for paying agent's commission as well as the steps taken to prevent corruption".[17]

Consultation on the May 2004 procedures

16. We established that no consultation took place on the May 2004 procedures before they were published. The CBI told us:

> In 2000, there was what we thought was a fairly significant consultation process over some significant amendments to ECGD's anti-bribery and corruption provisions. It is not clear whether that was a consultation with a capital C but it certainly was a consultative process which involved ECGD's customers and trade bodies. There were, as a consequence of that discussion, amendments to ECGD's original proposed

14 As set out at http://www.ecgd.gov.uk/index/pi_home/pi_bp/pi_bp_transparency.htm.

15 As set out at http://www.ecgd.gov.uk/index/pi_home/pi_pc.htm#PublicConsultation-Commitment

16 See preceding footnotes.

17 Letter from John Weiss, ECGD, to all customers, 4 March 2004, http://www.ecgd.gov.uk/index/lc_home.htm

> wording were made and were implemented in 2000. Between then and May 2004, we are not aware of any consultation, with or without a capital C, with ECGD's customers and trade bodies. So, when new provisions were announced, they did come, as far as we were concerned, as a complete surprise.[18]

The non-governmental organisations confirmed that they had not been consulted either about the May 2004 procedures.[19] Indeed, the Corner House told us that they had made unsuccessful "efforts to secure meetings and discussions, and also despite ECGD's position that the Corner House, together with Transparency International, are the two primary NGO stakeholders on anti-corruption, […] they brought those procedures in without consultation".[20]

17. The Government has advanced several reasons for not consulting interested parties on the May 2004 procedures. First, the Minister for Trade explained that "we had not envisaged [the] changes being introduced in May 2004 were of a nature to justify prior discussions with customers".[21] We note the main changes in the May 2004 procedures were that ECGD:

— extended the scope of the information it required from applicants to ensure that no improper agents' payments were being made to win contracts;

— took greater rights to inspect exporters' documents, particularly those relating to agents' payments; and

— required applicants to declare that they had not been involved in corrupt practices.[22]

18. In our view these were clearly significant changes affecting exporters and were of interest to the non-governmental organisations, one of whom, the Corner House, had already expressed an interest in the changes. **We do not accept the Government's contention that the changes set out in the May 2004 procedures did not need to be discussed, before implementation, with exporters or with other interested parties.**

19. Secondly, in response to our question about the lack of consultation on the May 2004 procedures John Weiss, at the time Deputy Chief Executive of ECGD, explained in his evidence to us that "in 2000, when we were first introducing anti-bribery procedures, we did act somewhat similarly to 2004 in that we gave notice of our intentions to introduce these new procedures" but "in 2000 we actually went out to the trade associations and asked for their feedback before we introduced them".[23] As far as we have established, the package, on which feedback was sought in 2000, did not foreshadow in detail the May 2004 procedures. Nor, would it appear, did the May 2000 exercise encompass the non-governmental organisations. **We do not consider that the apparently limited consultative exercise four years previously in 2000 could obviate the need to consult on**

18 Q 21

19 Q 96

20 Q 97

21 Q 102

22 ECGD Press release,1 April 2004, http://www.ecgd.gov.uk/news_home.htm?id=6095

23 Q 104 [Mr Weiss]

the package which was put forward by ECGD in 2004. Moreover, since 2000 ECGD had published its ECGD's Public Consultation Guidelines in January 2002 which contained a clear commitment to more consultation with customers and other parties.

20. Thirdly, the Minister pointed out that "ECGD had introduced some of the enhancements to its anti-bribery procedures in 2002 and 2003 without prior discussion with customers. This had not given rise to particular concerns and it was not thought at the time that the position would be different in 2004."[24] The Government conceded that with "hindsight" it was mistaken in its view,[25] and the Minister considered that this is "a complex difficult area with a range of conflicting opinions about the process here."[26]

21. **We consider that the fact that changes to the procedures on bribery had been introduced in 2002 and 2003 with no consultation but without adverse reaction does not justify ECGD's approach to the May 2004 procedures. In our view what it shows is that ECGD had on two earlier occasions introduced changes apparently oblivious to its Public Consultation Guidelines and its commitment to greater consultation with customers and other parties. Nor do we accept the Minister's suggestion that the correct course was only clear with the benefit of hindsight. In our view the problem was the absence of foresight. ECGD's Public Consultation Guidelines set up an expectation, commendable in our view, that ECGD will consult on substantial changes to its policies, products and practices. There must be a presumption that ECGD will consult on changes. In our view the Government should have considered the cumulative effect of the changes since 2000 and, if it had, it would have concluded in the light of the Guidelines that a full prior consultation exercise was necessary.**

22. We go further than the Minister when he said this is a difficult area with a range of conflicting opinions. Having taken evidence from exporters and the non-governmental organisations we consider that positions of the main interested parties—the exporters and the non-governmental organisations—are not only polarised but each side also contains elements of inconsistencies within it. The exporters' representatives, for example, have repeatedly declared they are "against any form of bribery and corruption"[27] but, in our view, they are not prepared to follow this through to its logical conclusion as the effect of implementing their representations on the procedures would be to blunt ECGD's attempts to implement Government policy on bribery and corruption. On the non-governmental organisation side, we found a reluctance to face up to the fact that the consequence of meeting their proposals in full might require the transformation of ECGD into a regulatory and investigative authority.[28] **We consider that the common ground between the main interested parties is neither extensive nor firm. In these circumstances comprehensive consultation serves a clear purpose: it allows all concerned to put their views and to comment on each other's key arguments in public; and it enables the Government to take account of the representations and to set out a considered response.**

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24 Q 102 See also Q 104 [Mr Weiss].

25 Q 104 [Mr Weiss] See also Qq 102-03.

26 Q 103

27 Appendix 1, para 3, Appendix 2

28 Q 78 See also below, para 114 ff.

23. We make no criticism of the non-governmental organisations when they seek to influence government—just as we make no criticism of the bodies that represent exporters for doing the same—but we were concerned to be told by John Weiss from ECGD that "the May 2004 procedures were actually heavily grounded in a report that the non-governmental organisations had put in at the end of 2003".[29] It is hardly surprising that exporters did not react positively to the May 2004 procedures. We consider that ECGD made a serious error when it failed to seek the views of exporters before proceeding with the May 2004 procedures. **We conclude that it was inequitable for the Government to proceed with the May 2004 procedures without seeking the views of exporters and others through a consultation exercise.**

24. Finally, the Government appeared to imply that because ECGD "gave two months' notice of the intention to bring in the new regime"[30] this was a substitute for consultation. In our view a consultation exercise has to be clearly labelled as such, views have to be sought and the outcome has to be open. The publication of the May 2004 procedures did not fulfil any of these criteria. ECGD's letter of 4 March 2004 informed exporters of a *fait accompli* and told them "if you have questions, or would like further information on any of the new provisions" they should contact a named official.[31] It did not seek views on the merits or operation of the May 2004 procedures. More importantly, consultation should be carried out in accordance with the Cabinet Office's 'Code of Practice on Consultation', which sets out the basic principles for conducting effective consultations.[32] We do not consider that the publication of the May 2004 procedures two months before they were due to come into operation met the requirements of the Code, not least its requirement to allow "a minimum of 12 weeks for written consultation".[33] **We recommend that all ECGD's future consultation exercises are carried out in accordance with the Cabinet Office's Code of Practice on Consultation.**

25. Nor do we accept the contention ECGD made in its evidence to us that it "introduced procedures perhaps too quickly" and "should have given longer for […] discussions with industry before bringing the new measures into play and then we would not have had a need to think about interim arrangements".[34] In our view this misses the point. **Giving parties longer to acclimatise themselves to a decision of Government is not, in our view, the same as consultation. Nor are *ad hoc* discussions with interested parties about the workability of a proposal; they can be useful in the preparation of proposals for consultation, or can form part of a consultation exercise, but they are not an alternative to consultation. We consider that the package which culminated in the May 2004 procedures should have been subject to consultation meeting the terms of the Cabinet Office's guidance on consultation.**

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29 Q 104 [Mr Weiss] See also Minutes of Meeting of the Export Guarantees Advisory Council held on 21 January 2004,EGAC (2004) 1st meeting, minute 5.1, http://www.ecgd.gov.uk/index/pi_home/pi_ac/the_advisory_council_-_minutes/the_advisory_council_minutes_-_previous.htm.

30 Q 104 [Mr Weiss]

31 Letter from John Weiss, ECGD, to all customers, 4 March 2004, http://www.ecgd.gov.uk/index/lc_home.htm

32 Cabinet Office, *Code of practice on written consultation*, November 2000, http://www.cabinetoffice.gov.uk/regulation/consultation/

33 Criterion 1 of the Code of practice on written consultation

34 Q 118[Mr Weiss]

Reaction to the May 2004 procedures

26. ECGD's letter of 4 March 2004, informing exporters of the May 2004 procedures, explained that the new provisions were "in the main being introduced to reflect lessons learned by ECGD and to ensure that we continue to play our part in the Government's drive to root out wrongdoing in international business transactions".[35] According to ECGD, the May 2004 procedures were welcomed by some non-governmental organisations[36] but a number of major users of ECGD's facilities objected to the terms of the May 2004 documentation, on which, as we have noted, they had not been consulted.[37] ECGD were surprised by the difficulties exporters faced.[38] Although they did not carry out a full survey, the trade bodies estimated "that the majority, if not all, of the CBI's and BExA's members who were actively involved in major export campaigns were not content with the provisions".[39] The initial focus of the opposition came from aerospace and defence manufacturers, although other sectors were affected.[40] Their concerns were echoed by trade associations such as BExA, the CBI and the Society of British Aerospace Companies, and the British Bankers Association also raised concerns. At the time, the CBI did not see any need for ECGD's new rules, and told ECGD:

> All exporters are aware of the obligation in your policies that they should comply with all laws applicable to the insured transactions. We believe that emphasising this fact is all that is necessary for you to do in connection with this issue.[41]

27. In the face of these objections, ECGD initially indicated that the new measures would stand.[42] The CBI then lobbied the Secretary of State for Trade and Industry, Rt Hon Patricia Hewitt MP, and requested that the new procedures be suspended until ECGD and its customers had resolved their problems.[43] Andy Scott, Director, International and UK Operations, at the CBI pointed out:

> As far as representative business organisations are concerned, it is what we are here to do which is to lobby government or the bodies to say, 'Here are concerns which we have for which we feel the procedures introduced are impractical. Did you actually mean to have this impact when you were introducing these procedures?' Ultimately, it is for the Government and indeed in this case ECGD to decide if it feels that those submissions which we and others have made had substance.[44]

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35 Letter from John Weiss, ECGD, to all customers, 4 March 2004, http://www.ecgd.gov.uk/index/lc_home.htm

36 ECGD, *Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004*, ECGD, 18 March 2005, para 7.1

37 Qq 21, 34

38 Q 118 [Mr Weiss]

39 Q 28 [Mr Caldwell]

40 Q 29 [Ms Walton]

41 Letter from CBI to ECGD, 19 May 2004 (HC (2004-05) 374-I, para 38)

42 Letter from CBI to Chairman, Export Finance Committee, CBI (HC (2004-05) 374-I, para 40)

43 Letter from ECGD to Secretary of State for Trade and Industry, 23 June 2004 (HC (2004-05) 374-I, para 40)

44 Q 35

As we have already stated, we make no criticism of the exporters' associations for representing their members' views to Government. It is for government to consider those views and to decide how to react. In this case the CBI said that the then Secretary of State had acknowledged that "some aspects of wording and some legal definitions may be able to be clarified" and invited the CBI to take on a coordinating role to represent the various customers and the banks, and to work with ECGD to "get this right". The Secretary of State stated that the principles of ECGD's anti-corruption measures were not for discussion, but ECGD was willing to discuss specific issues where legal clarification was required.[45] In his evidence to us the Minister, Mr McCartney, took a different line. He said that the discussions with the CBI, whilst within the principle outlined, "were aimed at making the procedures workable",[46] and he identified "the requirement for applicants to make a no-corruption declaration in respect of all of their affiliates, whether or not they controlled them".[47] **We consider that, if the Government had concluded that the May 2004 procedures were unworkable, it should have withdrawn them, rather than wait until December 2004.**

28. The CBI convened an 'ECGD Solutions Group' comprising representatives of the main trade associations and ECGD's main customers to negotiate with ECGD.[48] Negotiations between ECGD and the CBI-led Solutions Group continued during the summer of 2004. Whilst initially ECGD rebutted criticism of the May 2004 procedures and refused to consider amending them, following the CBI's appeal to the Secretary of State ECGD gradually conceded ground on the main elements of its new anti-corruption measures.[49]

The December 2004 procedures

29. On 5 November 2004 ECGD published revised procedures which relaxed some of the new requirements with effect from 1 December 2004.[50] ECGD's letter of 5 November to exporters explained:

> Many of the changes to the procedures clarify definitions in order to make it clear what ECGD requires of you but there have been other amendments, most notably with reference to agent's commission and your responsibilities with regard to affiliates within the anti-bribery and corruption declaration.[51]

30. When the December 2004 procedures were published the non-governmental organisations were critical of what they saw as a watering down of ECGD's standards and the lack of public consultation prior to the revision. In their Report published in April 2005

45 Secretary of State letter to CBI, 9 July 2004 (HC (2004-05) 374-I, para 40)

46 Q 105 See also Q 107.

47 Q 110 "Affiliate" was defined as "any company which is a member of the same group of companies or any other party to any joint venture or consortium or other similar arrangement with the applicant". (ECGD, *Consultation on Changes To ECGD's Anti-Bribery and Corruption Procedures introduced in December 2004*, 18 March 2005, Annex E, para 4.1, http://www.ecgd.gov.uk/index/pi_home/pi_pc/changes_to_public_consultation_document_december_2004.htm).

48 HC (2004-05) 374-II, App 13, para 9

49 HC (2004-05) 374-I, para 41

50 Letter from John Weiss to ECGD customers, 5 November 2004 http://www.ecgd.gov.uk/letter_to_customers_revised_procedures.pdf

51 *Ibid*.

our predecessors' assessment of the December 2004 procedures concurred with that of the non-governmental organisations:

> The net result of the December changes to ECGD's procedures is that companies receiving support from the public purse need make no checks on their business partners to ensure, to the best of their ability, that UK taxpayers' money is not used by these partners to pay bribes. This is unacceptable, to say the least.[52]

31. In our view the Government's attempts to get the anti-bribery procedures back on track were probably flawed from the outset. When the Solutions Group was set up, ECGD may have expected that "clarifications" to the May 2004 procedures were all that was required but the changes that eventually emerged from the Group cannot in our view be described as clarifications, they were wholesale revisions. **We consider that, if it was the then Secretary of State's intention that the changes to the May 2004 procedures were "clarifications", she should have laid down parameters for the Solutions Group or, when the Group moved to consider revisions to the May 2004 procedures, halted its work and looked for an alternative route to a solution. Again ECGD ignored its own Public Consultation Guidelines, which, in our view, provided a way out that should have satisfied all parties: a full consultation on the May 2004 procedures with all interested parties.**

32. Instead, having produced the May 2004 procedures which could be perceived—and we give no view on whether this view was justified or not—as in tune with the non-governmental organisations' approach, the Government proceeded to work itself into a position that was the mirror image of its position in May 2004. By November 2004 with the assistance of, or led by, the Solutions Group, from which the non-governmental organisations had been excluded, the Government produced a revised set of procedures—the December 2004 procedures—that were acceptable to exporters but not to the non-governmental organisations. Transparency International (UK) told us that "we only had the consultation on these procedures as a result of a settlement [in January 2005] to an action for Judicial Review brought by the Corner House", which started in November 2004, and commented that it did not "say much for transparency".[53]

33. One other feature of the Solutions Group gives us concern. Large companies, particularly from the aerospace and defence sectors, appear to have predominated. Small and medium size exporters had little or no voice, which casts doubt on ECGD's commitment to its policy to put more focus on the needs of small and medium-sized exporters and investors (see paragraph 9 above). Their views should have been represented by the Export Guarantees Advisory Council, one of whose main areas of responsibility is to provide advice on "ECGD's marketing and product development policies and whether these adequately address the needs of small and medium sized firms as well as ECGD's existing customer base".[54] As we discuss at paragraph 48 below, the Advisory Council, however, played a diminishing role during 2004. **We are concerned that, as was the case with its policy on consultation with interested parties, ECGD's promise to focus on**

52 HC (2004-05) 374-I, para 58

53 Q 96

54 See http://www.ecgd.gov.uk/index/pi_home/pi_ac/terms_of_reference.htm.

needs of small and medium-sized exporters and investors was largely ignored during the formulation of both the May and December 2004 procedures.

34. In its evidence to us the Government accepted that the outcome of the subsequent consultation in 2005–06 "is now a better balanced package of measures than we had either in May 2004 or December [2004]. It is sort of positioned somewhere between the two, but it is actually better balanced and is a good outcome."[55] We are therefore surprised to find that the Government has continued to maintain that the changes made to the May 2004 procedures as a result of the work of the Solutions Group did not justify a full consultation.[56] **In our view the changes made to the May 2004 procedures as a result of the work of the Solutions Group more than justified a full consultation on the anti-bribery procedures. We are concerned that the Government has still not conceded this point and invite it to reconsider, particularly since it concedes that the *ex post facto* measures are an improvement.**

Judicial Review sought by the Corner House

35. On 19 November 2004 one non-governmental organisation, the Corner House, sought Judicial Review of ECGD's decision to proceed with the changes without undertaking public consultation on its proposals.[57] On 13 January 2005, the first day of the court hearing, ECGD agreed to carry out the consultation demanded by the Corner House, and to pay all costs associated with the proceedings. As a consequence of the agreement, ECGD published documents relating to its negotiations with the exporters' representatives which began after the intervention of the then Secretary of State for Trade and Industry. It also undertook to put its revised procedures to public consultation.[58]

Conclusions on consultation

36. We consider that ECGD's response to the legal action is clear evidence of the failure of ECGD to meet its business principles for greater openness and transparency and its own guidelines for consultation. **We consider that the crucial error that ECGD made was to proceed with the May 2004 procedures without any consultation. It then compounded the problem by embarking on what turned into a one-sided dialogue with one interested party, the exporters, which excluded another, the non-governmental organisations. Without the efforts of the Corner House the less effective December 2004 procedures would have superseded the May 2004 procedures. We consider that both exporters and the non-governmental organisations have a clear interest in ECGD's bribery rules and we recommend that all parties, including small and medium-sized exporters, be consulted before future changes are made to the bribery rules, other than insubstantial amendments.**

55 Q 112[Mr Weiss]

56 *Ibid*.

57 Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004, ECGD, 18 March 2005, para 7.3

58 HC (2004-05) 374-I, para 37

Cost

37. The CBI also made the point that the exercise in agreeing ECGD's revised anti-bribery and corruption procedures cost business many thousands of pounds and staff hours in a diversion away from core business activity.[59] We agree. The Solutions Group appears to us to have been a waste of money and effort for business—and for the taxpayer—and underlines our view that a full consultation carried out in the first half of 2004 was the best way to proceed.

The "interim arrangements"

38. The adverse reaction which ECGD faced to the May 2004 procedures was such that its major customers and all the banks "that do ECGD financing business had said they could not work with the May procedures".[60] ECGD did not withdraw the May 2004 procedures but offered a set of alternative arrangements to their customers, the "interim arrangements". There were not, however, a formal set of procedures that ECGD announced or published[61] and their legitimacy is open to question. John Weiss from ECGD explained what happened from May 2004:

> Some companies were able to work with [the May 2004 procedures] and apply for cover under them, but we did have some other customers who were finding them more difficult to live with, who had urgent business to transact, exports to make. Ministers accepted that we could not leave them to hang out to dry; we had to give them ECGD cover. So our aim was, on a case-by-case basis, to see whether we could give them some support which retained some of the May procedures if at all possible, just to get the cover given and support the exports while we were trying to bring the discussions with the CBI to a close.[62] […]
>
> We were not trying to prejudge the workability issues and we simply felt it was reasonable. In the end, if we could not have got any of the May enhancements, then we would have accepted that; we would have given the cover pre-May.[63]

Clive Jones, Chairman of the CBI's Export Finance Committee and a member of BExA's Council, took a different view of the arrangements after May 2004:

> I think the interim arrangements were really a continuation of the arrangements which had existed prior to the introduction of the May 2004 procedures. I do not think there were any fundamental differences. One was effectively working with a situation which we all knew and understood. We thought that was probably the most appropriate methodology to move forward on whilst a solution to the new procedures was put in place.[64]

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59 Appendix 1, para 9

60 Q 113

61 *Ibid*.

62 *Ibid*.

63 Q 116

64 Q 31

39. We consider it unacceptable for ECGD to run anti-bribery procedures from May 2004 which allowed customers to select whether they followed the old or new arrangements. We are not surprised that, with a choice on offer, of the £955 million cover that ECGD provided between May and December 2004, 95% (£900 million) of the business was under the so-called interim arrangements and only 5% (£55 million) was subject to the May 2004 procedures.[65] **We consider that for the public to have confidence in the anti-bribery rules it is essential that ECGD apply a consistent set of procedures uniformly to all their customers. To do otherwise undercuts the policy behind the procedures. Where the procedures offer applicants options—for example, to invoke the Special Handling Arrangements which we consider below—these must be published and set out clearly and they must not be so extensive as to undermine the principles underpinning the arrangements. This was not the case from May 2004. We consider it was unacceptable and unfair to allow applicants for ECGD services to decide for themselves whether they followed the pre- or post-May 2004 anti-bribery procedures. In our view, once it became clear that the bulk of cover was being provided under the pre-May 2004 procedures, the May 2004 procedures served little purpose and Government should have withdrawn the May 2004 procedures.**

The March 2005 and subsequent consultation exercises

40. On 18 March 2005 ECGD started consultation on the revised procedures and invited views on two questions:

> 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?[66]

Responses were sought by 18 June 2005. By the deadline ECGD had received 28 written responses to the consultation and had met with a number of respondents.[67]

October 2005: ECGD's Interim Response

41. On 21 October 2005 ECGD published an 'Interim Response to ECGD'S Consultation on Changes to ECGD'S Anti-Bribery and Corruption Procedures Introduced in December 2004'[68] and invited further representations by 18 November 2005. ECGD explained that:

> The representations received during the initial consultation period, which ended on 18 June 2005, showed clearly that interested parties had detailed and wide-ranging views. After carefully considering these, ECGD has reached a settled view on the appropriate underlying principles. On the key specific issues covered

65 Qq 29 [Mr Scott], 117

66 ECGD, *Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004*, 18 March 2005, para 1.6

67 ECGD, *Final Response to ECGD's Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004*, 16 March 2006, para 5, annex A

68 ECGD, *Interim Response to ECGD's Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004*, 21 October 2005, http://www.ecgd.gov.uk/ecgd_interim_response.pdf

by the consultation, ECGD has identified certain provisional conclusions on which it is inviting comment from interested parties during a further round of consultation.[69]

42. ECGD received a further 11 written submissions by the 18 November 2005 deadline and held a further meeting with the CBI. During this consultation BAE Systems pointed out an inconsistency in the proposed requirements on exporters to give undertakings to the "best of our knowledge and belief". The Government issued a letter on 5 December 2005 to all consultees to clarify the issue and inviting further comments.[70] Written responses to that letter were received from nine consultees; and a further letter explaining the Government's settled view on the issue was sent to all consultees by ECGD on 23 December 2005.[71]

March 2006: ECGD's Final Response

43. 'The Government's Final Response to ECGD's Consultation on Changes to its Anti-bribery and Corruption Procedures Introduced in December 2004' was published on 16 March 2006.[72] ECGD proposed that the revised procedures would come into operation on 1 July 2006.

Consultation on changes to the Special Handling Arrangements

44. The Government's conclusions on all the major issues which had arisen in the course of the Consultation were contained in the Final Response. It decided, however, to extend the consultation ending on 7 April 2006, in order to seek the views of consultees on its proposals for special arrangements for the handling of information about the identities of agents to be supplied to ECGD ("the Special Handling Arrangements"). These arrangements were intended to minimise the risk of inadvertent disclosure of this information.[73]

45. The deadline was extended by ECGD to 30 April 2006, following requests from a number of consultees to be given more time. ECGD received eight written representations by the revised deadline and "clarificatory meetings" were also held with two consultees—BAE Systems and Rolls-Royce—who subsequently submitted written representations.[74]

46. We examine the Special Handling Arrangements in more detail at chapter 3.

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69 Letter dated 21 October 2005 from the ECGD at http://www.ecgd.gov.uk/letter_to_consultees_web.pdf

70 Letter from Patrick Crawford, Chief Executive of ECGD to consultees, 5 December 2005, http://www.ecgd.gov.uk/consultee_letter.pdf

71 ECGD, *Final Response to ECGD's Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004*, 16 March 2006, para 11

72 ECGD, *Final Response to ECGD's Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004*, 16 March 2006

73 ECGD, *Final Response to ECGD's Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004*, 16 March 2006, para 70, annex C, and annex D and ECGD, *Revisions in Standard Documents Relating to Bribery and Corruption: Concluding Response To Public Consultation*, 12 June 2006, para 1, http://www.ecgd.gov.uk/news_home.htm?id=7247

74 ECGD, *Revisions in Standard Documents relating to bribery and corruption: Concluding response to public consultation*, 12 June 2006, para 2 and annex A

47. **We received no representations criticising the consultation exercises which ECGD undertook after March 2005. We consider them to have been thorough and comprehensive and also responsive—for example, in the consultation on the Special Handling Arrangements in March-April 2006 in response to the reasonable request of consultees for additional time. At the end of the process we concur with the assessment of Ms Drew from the Corner House:**

> **[A]s a result of the process that we have all gone through the procedures have been changed again and we now have stronger anti-bribery rules in place and it shows that the results are better when all stakeholders are consulted and not just one side of the argument is listened to. I hope that is the lesson that has been learned from all of this.**[75]

The Export Guarantees Advisory Council

48. Finally in this chapter, we examine the role of the Export Guarantees Advisory Council. Its statutory purpose is to give advice to the Secretary of State for Trade and Industry, at his request, in respect of any matter relating to the exercise of his functions under the Export and Investment Guarantees Act 1991.[76] The Advisory Council's role was radically changed in 2000 in line with the conclusions of the Mission and Status Review (see paragraph 9 above).[77] Since then the Advisory Council has had a broad remit from the Secretary of State to provide advice on the principles that should guide the pursuit by ECGD of the aims and objectives set out in its Mission Statement, and how these principles should inform its business policies.[78] The Council explained in its memorandum that it followed ECGD's consultation on its anti-bribery and corruption procedures "with interest", "was given proper opportunity to contribute" and was "able to provide advice on the relevant procedures as policy was being formulated".[79] The Council endorsed the procedures set out in the Final Response.[80]

49. We asked the Government what part the Advisory Council played in advising on earlier procedures. John Weiss from ECGD replied:

> In relation to the May 2004 procedures, ECGD did keep the Export Guarantees Advisory Council informed at its bi-monthly meetings throughout the process of the review of the policies which led to the May procedures and I recall that the Council was supportive of what we were proposing to put in place in May, so they were quite well involved in that process leading up to May 2004.[81]
>
> Similarly ECGD did keep the Council informed of the progress because then we were in a situation where we were having discussions with the CBI Solutions Group. We

75 Q 97

76 Appendix 11, para 1

77 Public information on the Advisory Council at http://www.ecgd.gov.uk/index/pi_home/pi_ac.htm

78 Appendix 11, para 1

79 Appendix 11, para 3

80 Appendix 11, para 4

81 Q 108

> did keep the Council informed of the progress of those discussions running up to December. However, we now accept that possibly was rather a passive process in that we were just reporting where we had got to rather than sign-posting where we wanted to end up. We perhaps did not give the Council the opportunity for active intervention and that is one of the other lessons learned from this process. We recognise the need to improve the way in which we involve the Council in future in this sort of matter. They did not really have an opportunity to sit down and sign-off where we got to in December in so many terms. They saw it build up and they were invited to play rather more of a passive than an active role.[82]

50. We have examined the minutes of the meetings of the Advisory Council in 2003 and 2004 and they bear out Mr Weiss's account. It is also consistent with the evidence and conclusions of our predecessors in their Report published in April 2005:

> We welcome ECGD's acknowledgement that the introduction of new procedures could have been handled better. In the light of this experience, we would expect the Export Guarantees Advisory Council to be consulted on any proposal to amend ECGD's procedures and that ECGD would seek its advice on the need for consultation with customers and other interested parties.[83]

51. From the minutes of their meetings the Advisory Council had a general discussion about bribery and corruption in January 2004[84] and were kept informed of developments at their meetings in 2004.[85] We note that at its meeting in October 2004 the Advisory Council commented that "the key lesson for ECGD was to avoid the problems encountered on this issue by consulting more widely before introducing new policies".[86] From Mr Weiss's response and the minutes it appears that during the summer of 2004 ECGD had sidelined the Advisory Council in favour of the Solutions Group. In contrast in 2005, we note that the Advisory Council reviewed and discussed submissions to ECGD's March 2005 consultation exercise at its meeting on 25 August 2005 and made a number of detailed points to the Government.[87] The Council's comments were taken into account by the Government in preparing its response to the consultation.[88]

52. **In our view the Government made a serious error in failing to draw the Export Guarantees Advisory Council into the formulation of the May and December 2004 procedures. As well as having expertise on points of detail the Advisory Council was in a position to give a perspective on the broader issues such as the role of ECGD. We invite the Government to set out the improvements that it proposes to make to the way it involves the Export Guarantees Advisory Council in any future consideration of**

82 Q 109

83 HC (2004-05) 374-I, para 80

84 Minutes of the Meeting of the Export Guarantees Advisory Council held on 21 January 2004,EGAC (2004) 1st meeting, minute 5, http://www.ecgd.gov.uk/index/pi_home/pi_ac/the_advisory_council_-_minutes/the_advisory_council_minutes_-_previous.htm. The contents of these minutes are considered further at paragraph 115 ff.

85 Minutes of the Meeting of the Export Guarantees Advisory Council held on 17 March 2004, minute 2.4, 19 May 2004, minute 2.3.1, 21 July 2004, minute 4 and 21 October 2004, minute 3

86 Minutes of the Meeting of the Export Guarantees Advisory Council held on 21 October 2004, minute 3.2.4

87 Minutes of the Meeting of the Export Guarantees Advisory Council held on 25 Aug 2005, minute 3

88 Minutes of the Meeting of the Export Guarantees Advisory Council held on 21 September 2005, minute 4.1

changes to ECGD's policy and practices. In line with our predecessors' Report in April 2005, we recommend that the Secretary of State alter the terms of reference he has set for the Advisory Council, to include asking them to advise ECGD when proposed changes in ECGD's policies, products or practice should be subject to consultation. This should not, in our view, remove the need for the Government itself to consider or initiate consultation exercises but we consider it would help to remind the Government of its responsibility.

3 Are the bribery procedures workable?

Overall assessment

53. In carrying out this inquiry we set ourselves two questions:

— Are ECGD's July 2006 anti-bribery procedures workable?

— Do the July 2006 procedures reduce as far as reasonably practicable the risk of ECGD supporting contracts tainted by corruption?

54. In this chapter we focus, though not exclusively, on the first question and we address the second question in chapter 4.

55. On the question of workability, the short answer from exporters appears to be "yes", with reservations. In its memorandum the CBI considered that "the procedures set out in the Final Response have the potential to be workable" but added a proviso, at the time of writing, on the arrangements for the safe handling of information on agents, consultation concerning which had not been completed.[89] When it gave evidence on 17 May 2006 the British Exporters Association made this assessment:

> Where we are today, we can work with ECGD's guidelines. It is more onerous. It will be more difficult particularly for some of our smaller members to comply with because they do not have the manpower and resources to deal with it, but certainly we are in a better position than we were back in the year 2004 when many of our members were simply unable to do these things. […] The proof of the pudding is going to be in the eating here. They appear to be more workable to us.[90]

The Corner House considered the July 2006 procedures to be workable.[91] But Transparency International (UK) considered that a number of the procedures were "fundamentally flawed"[92] and needed to be rectified to make the procedures acceptable—see paragraph 87 below and following.

56. The main focus of concern about the workability of the July 2006 procedures was on the treatment of agents and the operation of the Special Handling Arrangements.

Agents

57. The May 2004 procedures required exporters to disclose the identity and address of any agent or affiliate involved in the contract, their role(s), the amount of the commission and where it would be paid.[93] There was no percentage or financial limit to the disclosure. In

89 Appendix 1, para 7 See also Q 39.

90 Qq 4-5

91 Appendix 3, para 18

92 Appendix 5, para 6

93 HC (2004-05) 374-I, para 44 "Affiliate" was defined as "any company which is a member of the same group of companies or any other party to any joint venture or consortium or other similar arrangement with the applicant". (ECGD, *Consultation on Changes To ECGD's Anti-Bribery and Corruption Procedures introduced in December 2004*,

contrast, under the December 2004 procedures the exporter was no longer required to provide any details of an agent where the agent's commission was 5% or less of the contract price and where it was not to be covered by ECGD support. Exporters were no longer required to give the name and address of agents if they were able to give reasons for not being able to do so. ECGD confirmed to the CBI that "commercial confidentiality" would be an acceptable reason for withholding such information.[94]

ECGD's conclusions in the Final Response

58. In its Final Response ECGD confirmed the views it had set out in the Interim Response. It did not consider "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".[95] On disclosure of the identities of agents, ECGD concluded in its Final Response:

> 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.
>
> No compelling evidence of "unworkability" or "inappropriateness", as defined in this document, has, in [the Government]'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 [Special Handling Arrangements] in order to minimise any risk of inadvertent disclosure of the Agent's identity. […]
>
> 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.[96]

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18 March 2005, Annex E, para 4.1, http://www.ecgd.gov.uk/index/pi_home/pi_pc/changes_to_public_consultation_document_december_2004.htm).

94 Letter from ECGD to CBI, 29 October 2004 (HC (2004-05) 374-I, para 46)

95 ECGD, *Interim Response to ECGD'S Consultation on Changes to ECGD'S Anti-Bribery and Corruption Procedures Introduced in December 2004*, ECGD, 21 October 2005, para 58 and ECGD, *Final Response to ECGD's Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004*, 16 March 2006, para 52 ff

96 ECGD, *Final Response to ECGD's Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004*, ECGD, 16 March 2006, paras 69-71

59. ECGD concluded that :

a) there should be no exemptions from the requirements to disclose payments to agents; and

b) it should be a requirement in an ECGD application form that an agent is identified. Companies will not be able to cite reasons of commercial confidentiality for not disclosing agents' identities.[97]

60. On the disclosure of information about agents both the CBI and BExA expressed misgivings to us about requirements to disclose information about agents. Whilst stressing that "agents play a perfectly normal and legitimate role in our members' business day to day",[98] they questioned the purpose of the requirement and had concerns that the information supplied by exporters would be kept confidential.[99]

61. On the first point we start with the conclusions of our predecessors' Report in 2005 which, in our view, provide a concise justification for the requirement to disclose information. The Committee concluded:

> We are not persuaded by the arguments put forward by those ECGD customers that the Department had no right to information on the agents they use and the money to be paid to them. The payment of commission or fees to agents is generally recognised to be a common method of paying bribes, and in our view ECGD was right to attempt to get access to information on agents as part of the implementation of its anti-corruption policy. We have no doubt that its decision not to require such information in the future weakens that policy.[100]

62. Whilst pointing out that "there is no instance of an ECGD customer being convicted or admitting bribery in relation to an ECGD supported transaction", ECGD acknowledged that "it is possible that bribes might be paid via agents and therefore we should do what we can, within the terms of our role, […] as an insurer […] to deter such practices".[101] **During our inquiry we received no new evidence to shake the conclusion of our predecessor Committee expressed in its Report in 2005—and endorsed by the Government in the Final Response—that information about agents should be disclosed to ECGD. We add that, if agents are an integral part of legitimate business activities as the exporters' representatives told us, there should be little or no reason for withholding information about agents.**

Special Handling Arrangements

63. The main concern of exporters focused on the integrity of the arrangements for the safe handling of information on agents. To ensure that the procedures which came into

97 ECGD, *Final Response to ECGD's Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004*, ECGD, 16 March 2006, paras 54, 69-71

98 Q 9

99 Qq 11, 51 [Mr Scott]

100 HC (2004-05) 374-I, para 51

101 Q 121

operation on 1 July work satisfactorily, both the CBI and BExA attached importance to the Special Handling Arrangements for information about agents.[102] BExA explained:

> What our members were concerned about was the confidentiality of that information. I do not think there was a particular problem with sharing the information if our members could be confident that ECGD was going to keep what is very commercially sensitive information confidential and, as we were all working to understand, for example, the impact of the Freedom of Information Act—and there is no case law in that respect yet—it was difficult for our membership to say categorically that they were happy for ECGD simply to have this information on the face of an application form.[103]

The exporters wanted broad and comprehensive Special Handling Arrangements. In its memorandum the CBI pressed for:

a) the applicability of the Special Handling Arrangements to all information relating to overseas agents, and not just names and addresses;

b) precisely what steps ECGD will take when provided with the information on agents which they have requested. ECGD has acknowledged that it is not an investigatory body; and

c) the treatment by ECGD of information provided to it in confidence by exporters.[104]

64. Central to the CBI's concerns was the risk that some information about agents might be inadvertently released. The CBI cited the case of a:

> South African defence-related contract where information from an ECGD file did appear in the public domain and it is that sort of example where I think companies do have fears and concerns that unless there is a very careful arrangement put in place for the handling of this sensitive information, it could emerge in the public domain inadvertently and therefore to the detriment of the commercial confidentiality of the customer.[105]

65. We put this case to the Government which responded:

> [W]e are aware of it and indeed to the point where, because the journal was claiming to have ECGD papers, we conducted a thorough internal investigation into this alleged leak of what were claimed to be ECGD papers which concerned the South African defence package. The outcome of the investigation was that it simply was not possible to identify who might have leaked, whether from within ECGD or wherever else. Yes, we are aware of that instance and therefore understand the concerns of industry in this area.[106]

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102 Appendix 1, para 9, Q 51 [Mr Scott]

103 Q 11

104 Appendix 1, para 7

105 Q 51 [Mr Scott]

106 Q 137

66. In contrast to exporters, Transparency International (UK) had serious concerns about the need for the Special Handling Arrangements and the case for confidentiality. They pointed out:

> [W]hen we are doing corporate training we say if you are appointing an agent one of the questions you should find out initially is, is the agent willing to disclose to the client and to the banks involved who he is, what his commission is and what his scope of work is? A reputable agent will say no problem […] We say to companies if the agent says do not disclose to anyone who I am or what I am being paid, alarm bells should ring […] and our recommendation in that situation is do not appoint them, because the chances are very extreme that they could be corrupt agents […] [W]e do not accept for a second the argument that it is a competitive disadvantage to disclose the agent […] If you want to do an exclusive deal with a company you sign an exclusivity agreement.[107]

67. Following the consultation exercise the Government announced its conclusions on the Special Handling Arrangements on 12 June 2006. It concluded that substantial changes were not required to its proposals. The main features of the Arrangements are:

a) If an applicant chooses to invoke the Special Handling Arrangements, only the Head or Deputy Head of ECGD's Business Principles Unit, the relevant Business Director and the Chief Executive will be provided with the name and address of agents;

b) If, after its initial inquiries, ECGD decides that further enquiries are necessary, which would involve sharing the identity of any agent with any other person, whether an official of ECGD or not, the consent of the applicant will be requested;

c) If the applicant refuses to consent to this, the identity will not be shared. However, it is likely in such circumstances that ECGD would be unable to process the application further.[108]

68. The Minister for Trade added in his evidence to us that the Special Handling Arrangements were designed to minimise the risk of inadvertent disclosure of information about agents' identities[109] and that ECGD wanted "to assure our customer base that our investigations and our enquiries are as effective and exhaustive as they need to be to make a decision and at the same time recognising any instances of protecting confidentiality".[110] ECGD assured us that the Special Handling Arrangements would not give a company any additional protection from disclosure under the Freedom of Information Act 2000 or inquiries by Parliament.[111]

69. **We share Transparency International (UK)'s misgivings about the need for Special Handling Arrangements. In view, however, of the possibility that information about a defence contractor may have been released by ECGD on one occasion we accept that**

107 Q 63

108 ECGD press release, 12 June 2006, http://www.ecgd.gov.uk/news_home.htm?id=7247

109 Q 132

110 Q 133

111 Q 136 [Mr Weiss]

exporters' concerns are not unfounded. In these circumstances and given that supplying information about agents is a new departure and that use of the procedure is optional we consider that the Special Handling Arrangements, which the Government is now implementing, are an appropriate response to these concerns. At this stage we see no justification for a more broadly drawn scheme of the type proposed by exporters.

Likely demand for the Special Handling Arrangements

70. Neither the exporters[112] nor the Government[113] were able to give us an indication of the likely demand for the Special Handling Arrangements. Both the CBI's and BExA's main concern was that the option will be available to exporters; they will not be giving advice either to use, or refrain from, using the Special Handling Arrangements.[114] Transparency International (UK) asked how ECGD could "do enhanced due diligence if only three senior executives are allowed to know who the agent is".[115] We have concerns that, if a significant number of exporters request the Arrangements, ECGD may not be able deal adequately with the demand. Given that the Arrangements require senior officials to conduct the special handling there may be little scope to draft in extra staff; we are therefore concerned that there could be a delay in handling applications or inadequate scrutiny of agents. The Minister offered when "these arrangements are in place and up and running, I shall come back and advise the Committee".[116] We accept the Minister's offer. **We recommend that ECGD review the operation of the Special Handling Arrangements in December 2006 and we invite the Minister to inform the Trade and Industry Select Committee of the outcome of the review. Specifically, the review should include an evaluation of the extent to which ECGD's commitment to keep the identity of agents confidential has hampered its ability to undertake proper due diligence.**

Standards of due diligence

71. In its evidence the CBI stressed the need for ECGD to work closely with its customers[117] and it believed "that ECGD understanding its customers, having information about the due diligence processes which those customers operate and requiring them to produce codes of practice would be a very fair and legitimate way to approach this whole issue".[118] **We encourage ECGD to understand the needs of, and work with, its customers, particularly to set standards for due diligence, but we consider that the relationship must not preclude ECGD from checking and challenging the information that those applying for its services supply.**

112 Qq 19-20

113 Q 134

114 Q 20

115 Q 64

116 Q 134

117 Qq 6-7

118 Q 7

Treatment of a company withholding consent to disclose

72. The Corner House had concerns where an exporter having invoked the Special Handling Arrangements refused consent for knowledge about an agent to be more widely shared in response to ECGD's concerns and needs to make further enquiries. The Corner House drew attention to the terms of the Special Handling Arrangements which stated that "it is likely in those circumstances that ECGD would be unable to process the Application further" which appeared to leave open the possibility that ECGD might proceed with an application despite such an unsatisfactory situation.[119]

73. The CBI could envisage an application proceeding even where consent had been withheld:

> [A] customer/applicant for ECGD services has actually provided ECGD with a great deal of information about the agent already. They may have been through a review which has involved a third party. A number of our members use agencies to do very detailed scrutiny and analysis of their agents abroad. They may have provided ECGD with that information already and they may be in the middle of a very sensitive and very competitive campaign where they do not want further information potentially leaked into the market that might jeopardise their campaign. If ECGD is actually happy with the information that has been provided to them by the exporter, I think that in those circumstances the exporter might well be valid in its decision to say, 'No, we don't want you to do any further exploration in the country because we are at a very sensitive stage of this campaign and you have had every piece of information that we have diligently collected on our agent'.[120]

74. We do not find the example cited by the CBI persuasive. We also raised the guidance on the Special Handling Arrangements with ECGD which in response drew a distinction between policy and administrative law. Nicholas Ridley, General Counsel of ECGD, explained:

> You can have a policy not to do things, as indeed we have on, for example, black-listing. What you cannot say for once and for all, for all time, in advance is that we shall never ever in any circumstances whatsoever until eternity do that. The reason is that Parliament has actually given the Secretary of State an absolute discretion and it is not for anybody else, whether it be him or us on his behalf, to circumscribe it.[121]

75. We accept the point which Mr Ridley made that the Secretary of State's discretion to determine an application for support cannot be fettered. **We invite the Government when it responds to this Report to state in more detail its policy in respect of applications for ECGD support where the applicant refuses consent for knowledge about an agent to be more widely shared where ECGD has concerns and needs to make further enquiries, and to indicate how likely it is that ECGD will allow an application where the applicant has refused consent.**

119 Appendix 3, para 13(c)

120 Q 18

121 Q 141 See also Appendix 7.

Independent due diligence checks

76. In its evidence the Corner House said that the new procedures on agents could reasonably be improved by ECGD requiring applicants for its services to commission independent due diligence checks on their agents by an independent and reputable risk consultancy.[122] Where applicants requested the Special Handling Arrangements for high risk projects, such as a project in a country where the World Bank and Transparency International regard corruption as high, or a project in a high risk sector, the Corner House proposed that they would be required to provide ECGD with the full results of the checks. The Corner House pointed out that companies listed on the New York Stock Exchange regularly commissioned such checks on their agents in order to ensure and be able to document their compliance with the USA's Foreign Corrupt Practices Act. The Corner House believed "that the ECGD's due diligence on agents should be at least as strong as, if not stronger than, best industry practice, given that taxpayers' money is at risk".[123]

77. **We consider that there is much to commend a requirement for independent due diligence checks in high risk cases, irrespective of whether the applicant for ECGD's services has requested the Special Handling Arrangements. It would ensure that most scrutiny is directed to those areas of greatest risk of corruption and it would fit with best practice. We are not, however, recommending at this stage that ECGD require independent due diligence checks. Instead, we recommend that, when the July 2006 procedures are reviewed in three years, the possibility of such a requirement should be examined. In our view the crucial issue is the effectiveness of the checks which ECGD carries out on agents. If these are not effective, the case for introducing independent due diligence checks may well become compelling.**

Conclusions on the workability of the July 2006 procedures

78. **In our view the anti-bribery and corruption procedures, including the Special Handling Arrangements, that came into operation of 1 July 2006 should be workable.**

122 Q 72, Appendix 3, para 13(b)

123 Appendix 3, para 13(b)

4 Do the procedures reduce as far as is reasonably practicable the risk of supporting contracts tainted by corruption?

79. Having concluded that the procedures are workable we now consider whether they reduce as far as reasonably practicable the risk of ECGD supporting contracts tainted by corruption. Our examination focussed on three areas:

a) the declarations applicants for ECGD's services should be required to give about their controlled companies, consortium partners and others;

b) ECGD's contractual right to reimbursement ("recourse"); and

c) ECGD's right to audit.

Declarations in respect of controlled companies, consortium partners and others

80. All parties accept that applicants for credit should make declarations that the proposed contract is free from corruption and bribery. But two issues were in dispute:

— the extent to which the applicant is able to give assurances that companies or individuals, including agents, controlled or influenced by, or linked to, the applicant are free from bribery and corruption (in the terms used by ECGD, the "entities"); and

— and the nature of these assurances, in particular the diligence an applicant has to exercise before making a declaration on an application form about the absence of bribery or corruption (in ECGD terms, the "representations").

81. Between May 2004 and March 2006 the definition of entities changed as the procedures were revised. Four levels of representation of assurance about the absence of bribery or corruption by the applicant were identified, in descending order of stringency, as follows:

a) an unqualified representation;

b) a representation that reasonable enquiries had been made;

c) a representation made to the best of the applicant's knowledge and belief; and

d) a representation based exclusively on actual knowledge.

The May 2004 procedures

82. The May 2004 procedures made it a condition of support for a project that the applicant certified that:

> [N]either we nor to the best of our knowledge and belief any of our Affiliates nor anyone (including any of our or their employees) acting on our or their behalf with due authority or with our or their prior consent or subsequent acquiescence has engaged or will engage in any Corrupt Activity in connection with the Supply Contract or any related agreement, undertaking, consent, authorization or arrangement of any kind.[124]

83. The May 2004 procedures therefore required the provision of information about agents appointed by an applicant's affiliates in connection with the contract. For this purpose, "affiliate" was defined as "any company which is a member of the same group of companies or any other party to any joint venture or consortium or other similar arrangement with the applicant".[125]

The December 2004 procedures

84. Exporters objected to this requirement on the grounds that it involved the provision of information about the use of agents which was entirely beyond the applicant's control. ECGD reacted to their objections by revising its requirements and dropping the concept of affiliate. From December 2004 ECGD removed most of the applicant's obligations in relation to joint venture, consortium and similar partners. The anti-bribery undertaking applied only to the applicant and its controlled companies. The applicant's responsibilities in relation to joint venture and other partners were much reduced in scope. ECGD introduced a new definition of "associate", which was defined as "a party to any joint venture, consortium or other similar arrangement". ECGD now obliged an applicant to notify it of corrupt activity by an associate if the company "becomes aware" of such activity i.e. the lowest level of representation. However, there was no obligation on the applicant to attempt to find out whether such activity was being carried out or to try to prevent it.[126]

85. Our predecessors examined the nature of the declaration which exporters could reasonably be expected to provide. It their Report published in April 2005 they concluded:

> In our view, it should be possible to address the CBI's concern about the extent to which their members should be knowledgeable about the activities of their partners' employees by limiting the requirement to having knowledge of senior employees and defining that term to mean people with executive power in the company. This would cut down the extent of the information required considerably and maintain the need for some semblance of vigilance on the part of the applicant for ECGD's assistance.[127]

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124 ECGD Application form valid from 1 May to 30 November 2004, HC (2004-05) 374-I, para 55. See ECGD, *Consultation on Changes To ECGD's Anti-Bribery and Corruption Procedures introduced in December 2004*, 18 March 2005, Annex E, para 4.1, http://www.ecgd.gov.uk/index/pi_home/pi_pc/changes_to_public_consultation_document_december_2004.htm.

125 HC (2004-05) 374-II, App 10, para 65

126 HC (2004-05) 374-I, para 56

127 HC (2004-05) 374-I, para 70

The July 2006 procedures

86. In the Final Response published in March 2006 the Government concluded that in respect of the controlled companies, group companies, consortium partners or any other entity involved with the transaction the test was not the degree of control by the applicant but whether there was involvement with the transaction in respect of which ECGD support was sought. The Government concluded that 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 (i.e. declaration) will be required about all those Group Companies which the enquiries show to have been involved. On specific requirements the Government reached the following conclusions:

The applicant

> Representations will continue […] 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.
>
> 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.[128]

Group Companies, etc. not controlled by the applicant

> [ECGD found] there is an element of common ground that representations should not be unqualified. […] 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.
>
> 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. […] HMG therefore believes that a similar obligation is appropriate in relation to a non-controlled Group Company, involved in the sense defined.
>
> 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.[129]

Definition of involvement

> 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

128 ECGD, *Final Response to ECGD'S Consultation on Changes to ECGD'S Anti-Bribery and Corruption Procedures Introduced in December 2004*, 16 March 2006, paras 122, 131

129 ECGD, *Final Response to ECGD's Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004*, 16 March 2006, paras 123, 125, 132

> 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.[130]

Companies controlled by the applicant

> 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, […] 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.[131]

The applicant's agents

> Similar obligation […] to a con-controlled Group Company.[132]

87. In its memorandum Transparency International (UK) considered that the July 2006 Procedures did not reduce as far as reasonably practicable the risk of ECGD supporting contracts tainted by corruption and that the proposals were fundamentally flawed in each of the main areas we examine in this chapter.[133] Transparency International (UK) considered the disclosure requirements "to be materially inadequate". They were concerned whether the March 2006 procedures would require an agent appointed by a joint venture partner to be disclosed to ECGD.[134] Transparency International (UK) pressed for ECGD to reinstate the obligation on the applicant under the May 2004 procedures to disclose details of agents appointed by the applicant's group companies and by the applicant's joint venture, consortium or similar parties.[135] In their oral evidence Transparency International (UK) added that it was a "matter of commercial common sense and due diligence" for exporters to find out exactly what partners "are doing in relation to their agent, find out if the agents are reputable because that joint venture partner's agent can bring you down. Therefore, most companies are doing proper due

130 ECGD, *Final Response to ECGD's Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004*, 16 March 2006, para 116

131 ECGD, *Final Response to ECGD's Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004*, 16 March 2006, para 126

132 ECGD, *Final Response to ECGD's Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004*, 16 March 2006, para 125

133 Appendix 5, paras 5-6

134 Appendix 5, para 22(c)

135 Appendix 5, para 26

diligence in this respect, they will have all the details of the joint venture partner's agents *et cetera* and they will easily, therefore, be able to hand it over to the ECGD."[136]

88. We put Transparency International (UK)'s concerns to the Government. John Weiss from ECGD responded:

> We do require the name of the agents of consortium partners if they are also acting on behalf of the applicant, but where they are not acting on behalf of the applicant, they are acting solely for the consortium partner, our view is that it could be very difficult, indeed possibly impossible for our exporter and our applicant to get hold of that information. It has been represented to us by British industry during the consultation how sensitive it is for the names of agents to be disclosed and disclosed to the British Government in the shape of ECGD. This is postulating that a consortium partner, who may well be French or German or whatever, is to give the name of their agent to our applicant to be given to us and, given that the consortium partner and the applicant in another transaction may well be competing with each other—they come together in consortia for specific deals, but there may be another project in that country where they are actually competing—it seems to us that it may well be that the consortium partner would refuse to give this information to the applicant and we have effectively built in a condition to our cover that they would be incapable of fulfilling.[137]

Mr Weiss added a general point:

> The questions in our application form are meant to apply to the great majority of our business and consortium business is not the great majority of our business, so they are in a way starter questions. If we have a transaction coming along which has other features to it, and it could be a consortium partner, we have made it absolutely clear throughout the consultation that we have the right to ask more questions and we could well ask in a particular circumstance, if we felt there was reason to do it, for the name of the consortium partner. We have not put it in our standard application.[138]

89. BExA explained that exporters wanted to be sure that everything they set on the application forms was true and accurate. But, when they were asked to make representations about third parties over whom they have no control, they found that was impractical and something that they simply could not do. BExA explained that that had prompted the discussions with ECGD to find "what it needed in order to feel comfortable about its anti-bribery and corruption procedures and to find a way to make it practical for the exporters who were having to sign up to those representations and warranties in their application forms".[139]

90. We share Transparency International (UK)'s reservations about the force of the disclosure provisions in the July 2006 procedures on agents appointed by joint venture partners. As our predecessors noted in their Report in April 2005, "the payment of

136 Q 59

137 Q 122

138 *Ibid*.

139 Q 29 [Ms Walton]

commission or fees to agents is generally recognised to be a common method of paying bribes".[140] We are concerned that restricting the flow of corrupt payments via applicant's agents will not stop the flow but divert it through partners' agents. ECGD told us that if that "were to happen […] the applicant is obliged under the standard application forms to make reasonable inquiries about the absence of corruption on the part of his consortium partner and he is obliged to represent he has done that and he is obliged to represent that the results of those inquiries give him no cause to believe that the consortium partner has been corrupt".[141] ECGD also told us that on occasion it had asked UK diplomatic staff to make enquires about agents.[142]

91. ECGD said that initial questions posed by ECGD in its application forms did "not preclude it from asking more questions of any applicant if it considers this to be necessary in the circumstances of an individual application. In the interests of clarity and user-friendliness, ECGD has avoided overloading its application forms with questions that may apply only to a minority of cases."[143] The Minister for Trade gave us an assurance that "we shall try to make these arrangements work effectively and if occasions arise where the profile of the circumstances are such, then a range of inquiries will be made".[144] The Minister's and ECGD's statements give us some reassurance but we consider that for this malpractice to be halted ECGD will actively have to seek additional information from applicants where there is a risk of corruption via their partners' agents.

92. **In our view the disclosure provisions in the May 2004 procedures had the benefit of clarity and of fitting with best practice. We consider that the effective operation of the disclosure provisions in the July 2006 procedures will turn on, first, the construction put on the extent to which agents appointed by an applicant's joint venture partner are considered to be acting "on behalf of" the applicant. We recommend that ECGD define the phrase unambiguously in guidance to exporters. The second test will be the extent to which ECGD presses for further information on joint venture partners' agents and whether this information is supplied. If it turns out, as Transparency International (UK) fear, that in most cases exporters maintain that the agents are only acting on behalf of the joint venture partner and are not disclosed to ECGD, then the provision will, in our view, have failed. We recommend that, when the anti-bribery procedures are reviewed, the operation of the disclosure provisions in respect of partners' agents be examined.**

Sub-contractors

93. Neill Stansbury, Project Director Construction and Engineering Transparency International (UK), argued that as procedures tightened on agents corruption would find other channels:

140 HC (2004-05) 374-I, para 51

141 Q 123

142 Qq 127-30

143 Appendix 7

144 Q 131 [Mr McCartney]

> [W]e are coming across a lot of situations now where because agents are being closed down as an avenue for bribery because of the huge emphasis placed on agents, many corrupt clients in developing countries are now indicating to contractors or exporters to appoint a certain joint venture partner, they say you must appoint X as a 49 per cent joint venture partner, or you must appoint X as being a sub-contractor, particularly in the case of the construction sector where there is a lot of local work.[145]

He argued that:

> [T]he onus then is on the contractor to say why is this joint venture partner being imposed on me, why is the sub-contractor being imposed on me, what is their price, because that is now how the bribes are being filtered, because if the sub-contract price is higher than the market an element of the bribe can be in the sub-contract price.[146]

94. We put Transparency International (UK)'s concerns to ECGD. Nicholas Ridley, General Counsel of the ECGD, replied:

> [N]obody can actually force the British main contractor to agree to use a sub-contractor; in the end it has to be his decision. If what is happening […] is an enormous pressure is put on the main contractor to say 'You will use this guy to fulfil your contract with us' then this would be something of an oddity, because it would invert the usual arrangement where the main contractor chooses whom he is going to sub-contract […] Where, in relation to that matter, the main contractor knows this, then the current documentation works quite well because the main contractor will, if he is sensible, be well advised to make such inquiries as will make him happy. […T]he main contractor is obliged to represent absolutely that he has not authorised, consented or acquiesced in the corrupt activity on the part of any person—any person. So if he is coming under an extraordinary or unusual pressure to employ a sub-contractor that he himself would not have chosen, indeed he may not have thought about employing any sub-contractor at this stage of the process, and he knows that he is going to have to represent to us that he has not been complicit in any corrupt activity, even if he himself did not carry it out, then we think that it would be prudent on his part to make some further inquiry.[147]

95. **In our view, if those soliciting and paying bribes are looking for conduits for their corrupt activities, one avenue will be partners and contractors. We are concerned whether the July 2006 procedures are strong enough to block this possible new conduit. We recommend that the review in three years examine whether the conduit for bribery and corruption has extended from agents to partners and sub-contractors.**

145 Q 61

146 *Ibid*.

147 Q 144

Recourse provisions

96. Recourse is the contractual right to reimbursement. Recourse in respect of the bribery procedures means a liability owed to ECGD, as a result of a contract between ECGD and an applicant, to pay ECGD if certain specified events, including corrupt activity, occur.[148]

97. Transparency International (UK) were concerned that the March 2006 procedures on corruption prevented ECGD from having recourse against an exporter, unless it could be proved that the exporter was complicit in the corruption. Thus ECGD would bear the cost of corrupt acts of the applicant's employees, group companies, agents, joint venture partners, and sub-contractors, unless the applicant's complicity could be proved. Transparency International (UK) argued that ECGD would, in effect, be providing insurance against corruption by these parties and that the inability of ECGD to obtain recourse in these circumstances was contrary to normal contractual principles, to the UK's treaty obligations, and to the UK Government's and ECGD's express commitment to combat corruption.[149] In Transparency International (UK)'s view, any corruption—irrespective of whether the exporter was complicit or not—should be grounds for ECGD to recover its support.[150]

98. In its evidence BExA argued that a distinction could be drawn between corruption and other instances where ECGD had an absolute right to recourse. BExA said that in the case where a sub-contractor had failed to deliver goods the exporter had a remedy available under the contract. The supplier would be able to go to another sub-contractor. But this option was not available where a sub-contractor committed a corrupt act.[151] BExA said that, if ECGD explicitly required, through a sub-contract, that exporters expected the sub-contractor "to behave in a particular way, that any kind of corrupt activity is absolutely against the terms of the contract, and then that sub-contractor, without their knowledge, goes out and commits a corrupt act, then it does not seem equitable that the supplier should be held wholly responsible for the acts of a sub-contractor who has breached the terms of their sub-contract with the supplier."[152] BExA also pointed out that PFI contracts recognised that, if a sub-contractor committed a corrupt act, that should not terminate the terms of that PFI contract because the supplier could not be held responsible for the corrupt act of somebody further down the chain because it was not something that they could correct.[153]

99. We put Transparency International (UK)'s point to the Government and Nicholas Ridley, General Counsel of ECGD, replied:

> [T]here is a suggestion that we take recourse not in relation to bribery and corruption, but just where there is a circumstance where the British exporting contractor misperforms. The Transparency submission states that what will happen

148 Appendix 9

149 Appendix 5, para 6(a) and Qq 59, 65

150 Appendix 5, para 18, Q 65

151 Q 42

152 Q 41

153 Q 42

> there is that we shall be able to take recourse against him if the loan should not be repaid and we have to pay instead. The reason that the loan will not be repaid is in the submission of the defective performance of the main contractor. I have to say that that is not the case and the buyer credit documentation specifically says the contrary, that failure to perform the export contract on the part of the applicant for our services whom we have supported, is no reason whatsoever for the loan not to be repaid. So in those circumstances we should still be looking to the borrower through our ability to instruct the bank.[154]

100. In a supplementary memorandum Mr Ridley expanded on that reply.[155] He believed that Transparency International (UK)'s argument was flawed. He said that where a main contractor was in default under the main contract, ECGD's Buyer Credit loan documentation provided that this constituted no justification for non-repayment of the Borrower's loan. ECGD therefore would be able to enforce through its guaranteed Bank the repayment of that loan and did not need recourse from the main contractor. He argued that this procedure "by a considerable distance, is ECGD's most important right and remedy in those situations".[156] On Transparency International (UK)'s proposition that ECGD should take a recourse right against exporters which was independent of an exporter's personal fault for any sums which ECGD may have had to pay out, Mr Ridley argued:

> [T]here is […] no contractual principle which makes the main contractor liable to the [overseas buyer] for the criminal act of third parties in which he has no complicity or knowledge. Moreover, the situation which the expanded recourse right would exist to meet will not, in our view, arise, at least under English law, since our view of English law is that the [overseas buyer] will not be able to set aside either the main contract, still less the Loan Contract, for an act of corruption in which neither the main contractor or Bank had involvement or complicity.[157]

101. **The debate on recourse is complex but we start from the principle that where a contract fails because of bribery or corruption—irrespective of the complicity of the UK exporter seeking cover—neither ECGD nor the taxpayer should have to assume liability. To do otherwise will mean that ECGD is providing insurance cover for corruption and bribery. We take reassurance from ECGD's advice that the buyer credit documentation specifically provides that failure to perform the export contract on the part of the applicant for its services is no reason whatsoever for the loan not to be repaid. In the light of ECGD's supplementary memorandum we expect ECGD to insist that English law be applied to all loan contracts and to resist vigorously any attempts to enforce payments where a contract has been vitiated because of corruption. On this basis we find the recourse procedures acceptable at this stage and recommend that the review in three years examine the operation of the provisions.**

154 Q 155

155 Appendix 9

156 Appendix 9, para 6

157 Appendix 9, para 11

ECGD's rights of audit

The May 2004 procedures

102. When it introduced the May 2004 procedures, ECGD stated that it was expanding its rights of audit to enable it to monitor compliance with its new anti-corruption procedures.[158] The main point of the new procedures was to allow ECGD to conduct full audit checks, having given five days' notice of its intention to do so. Its customers objected to this extension of its audit rights, principally on the grounds that ECGD auditors might become "aware of information that the supplier considers commercially sensitive".[159] They were concerned that ECGD could use random audit powers to mount 'fishing expeditions'.

The December 2004 procedures

103. The procedures redrafted over the summer of 2004 produced an audit provision which was acceptable to exporters, but which limited ECGD's powers of independent audit. It provided that ECGD would be able to conduct a full audit of a company's records only if it first confirmed in writing to the company that it had reasonable grounds for suspecting that corrupt activity may have taken place; ECGD was allowed to audit those records only up to the date of the award of the contract; and ECGD was not able to conduct a full audit using its own staff, but had to use "an independent third party acceptable to the supplier and ECGD".[160]

104. In the earlier inquiry the Corner House was concerned that ECGD was no longer able to conduct random audits, which might uncover evidence or signs of corruption or of non-compliance with anti-bribery warranties. It felt that the new audit clause ran counter to ECGD's stated policy of referring suspicion of corruption to the police, on the grounds that it would be impossible for ECGD to write to customers informing them of their suspicions without jeopardising a potential police investigation. The Corner House doubted that such restricted audit powers could ever be used effectively.[161]

105. When he gave evidence to the Trade and Industry Select Committee on 23 February 2005 the then Minister of State for Trade and Investment, Mr Douglas Alexander MP, pointed out that ECGD had no statutory powers to seize documentation. ECGD's audit rights included in the May 2004 procedures the ability to audit documents relating to contractual award as well as performance. The rights regarding audit of contractual award remained, but were restricted in the December 2004 procedures to occasions when ECGD had reasonable grounds to suspect corrupt activity because ECGD had accepted it was not appropriate for it to have the right to audit papers without reason.[162] The Committee

158 Letter from John Weiss, ECGD, to all customers, 4 March 2004, http://www.ecgd.gov.uk/index/lc_home.htm

159 Aerospace Industry Note, "Bribery and Corruption Wording", 30 July 2004 (HC (2004-05) 374-I, para 71)

160 HC (2004-05) 374-I, para 72

161 HC (2004-05) 374-I, paras 73

162 HC (2004-05) 374-II, Q 85 [Mr Alexander]

questioned how ECGD could find grounds to suspect corrupt activity if it was not allowed to look for it.[163]

106. Our predecessors stated their concern:

> In conceding its right of independent audit, ECGD weakened its ability to detect fraud or other corrupt activity. The Department may not have statutory powers of investigation, but it does have the responsibility to ensure that public funds are used appropriately. We saw nothing wrong in requiring an applicant to agree to audit and inspection by ECGD as a condition of receiving support from the public purse and we regret ECGD's concession of the principle.[164]

ECGD's final conclusions

107. In its Final Response in March 2006 ECGD concluded it should 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 accepted 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. The Government concluded that "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".[165]

108. **We welcome the provision under the July 2006 procedures that ECGD has the power to audit at any time the accuracy of an applicant's representations, when considering possible bribery and corruption, rather than just when it suspects that bribery has taken place.**

109. The non-governmental organisations were not, however, satisfied with the audit provisions. Transparency International (UK) considered them "defective", and identified the following as unduly restrictive:

— The inspection rights are limited to the Supplier's UK premises.

— The inspector does not have access to the records of the Supplier's parent, associated and subsidiary companies, agents, joint venture and consortium partners, sub-contractors or suppliers.

— Records can only be inspected if they relate to the period up to the date of award of the Supply Contract.

— Records can be inspected for the sole purpose of verifying statements made and information given to ECGD by the Supplier in the Application.

163 HC (2004-05) 374-I, para 74

164 HC (2004-05) 374-I, para 75

165 ECGD, *Final Response to ECGD's Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004*, 16 March 2006, para 44

— Five business days' notice is required for inspection.[166]

110. The CBI reassured us that "customers have always fully accepted […] that ECGD can audit or sub-audit even now" but it was important to acknowledge that ECGD is "is not the SFO arriving on the doorstep, this is the ECGD quite legitimately wanting to have audit provisions and we believe that having five days is a legitimate way in order for both parties to be able to get the information that is required."[167] Mr Scott from the CBI explained that, if something untoward was uncovered by ECGD:

> [T]hen that is where the due force of the legal process will come into place and that is when you would have an inquiry or you would have a search and seize type of inquiry which you have through an SFO type of inquiry, but ECGD is not an investigatory body of that nature.[168]

He added:

> If, for whatever reason when ECGD does this audit, it feels uncomfortable with the outcome of the audit, it has the ultimate sanction to either withdraw some of that provision or not give it to the customer.[169]

111. The Government also pointed out that ECGD's primary function was not the enforcement of the criminal law and that it was in the position of a contracting party, whether the insured or insurer, who was trying to find that it has not received misrepresentations about corruption. Nicholas Ridley, General Counsel of ECGD, pointed out:

> When, for example, a reinsurance inspection takes place, that will take place on reasonable notice and it will take place at a place which will not disrupt the business because these are two parties to a civil contract who are checking their civil rights against each other. All that said, if in fact we had suspicions of criminal behaviour before we conducted an audit, not as a result of conducting it but beforehand, we should refer those to the appropriate bodies to take more drastic action if they saw fit. The overwhelming likelihood is that they would instruct us not to muddy the waters by going and conducting our own commercial audit on notice.[170]

112. The Minister for Trade added in his evidence to us:

> It is also true to say, we have a signed a memorandum of understanding with other departments requiring us to notify allegations of bribery and corruption to the Serious Fraud Office. Alongside that there are the Ministry of Defence police and a range of other law enforcement agencies where we would have no compunction,

166 Appendix 5, para 6(c)

167 Q 45

168 Q 46

169 Q 47 [Mr Scott]

170 Q 159

> where suspicions arose through audit or the receiving of information outside of the audit, about passing these on.[171]

113. We accept that, as it is currently constituted, ECGD is not a regulatory or investigatory body. It is an insurer.[172] But it does, in our view, have a clear duty to the taxpayer to ensure within all the powers available to it that bribery and corruption do not occur in a contract that it supports and that such contracts are compliant with UK law. **ECGD's powers of audit are currently governed by private law when it enters into contracts between itself and exporters. In the absence of investigatory or regulatory powers, we accept that it is therefore reasonable for ECGD to frame the audit and inspection provisions as it has done in the July 2006 procedures. That is not to say we are content with the provisions: we consider the provision allowing five days' notice before an audit is too generous. In our view two working days' notice would have been sufficient for an exporter using ECGD's services to assemble the paperwork for inspection.**

Should ECGD become a regulatory and investigatory body?

114. We have not considered in detail whether ECGD needs regulatory or investigatory powers. When we put the suggestion to Transparency International (UK), they replied that they were not saying ECGD should be investigatory.[173] They did, however, propose that ECGD should increase its resources to carry out more audits because it had "commitments to prevent corruption, and if the exporters do not believe there is a reasonable chance of being audited then the exporters may not take sufficient steps to prevent it."[174] We consider that such a change, if made in combination with some or all of the increases in ECGD's powers to audit proposed by Transparency International (UK) at paragraph 109 above, would take ECGD a considerable way towards becoming an investigatory body requiring additional resources to audit, for example, overseas subsidiaries of British companies.

115. We found the discussion on the role of ECGD which took place at the Export Guarantees Advisory Council of 21 January 2004 illuminating. The discussion appears to have taken place when the May 2004 procedures were being developed. There is a suggestion that the procedures had been brought forward because:

> [T]he Minister wanted ECGD to be protected from accusations. In the past, ECGD learned lessons and incorporated changes into policies to avoid the same situation arising again. By detecting and investigating, rather than being passive, ECGD could deflect criticism.[175]

We are concerned by the inference in the Export Guarantees Advisory Council's minutes of 21 January 2004 that the impetus behind the May 2004 procedures was a

171 Q 162 [Mr McCartney] See also Appendix 7.

172 Qq 121 and 159

173 Q 78

174 Q 80

175 Minutes of the Meeting of the Export Guarantees Advisory Council held on 21 January 2004,EGAC (2004) 1st meeting, minute 5.2.2, http://www.ecgd.gov.uk/index/pi_home/pi_ac/the_advisory_council_-_minutes/the_advisory_council_minutes_-_previous.htm

desire to protect the reputation of, and to deflect criticism from, ECGD. If this is correct, it may explain why the Government failed to test the feasibility of the May 2004 procedures before announcing them. We have no doubt that a policy derived from a desire to protect ECGD is no basis from which to tackle bribery and corruption. We invite the Government to comment on the minutes in its response to our Report.

116. The Advisory Council's minutes continue:

> There was general agreement that the issue of bribery and corruption was a concern, but that there was no way to fix this with changes only to ECGD. Other parts of government also dealt with exporting firms, and a joined-up solution was appropriate.
>
> The possibility of seconding an individual to an investigating authority to provide expertise and additional resource to help on relevant cases was discussed. It was agreed that this could be offered, and may have some effect, but would still not tackle the wider problem. […]
>
> It was agreed that a letter would be sent to the Minister for Trade outlining the Council's conclusions on this issue. This would accept that there was an issue, but argue that the most durable and effective solution would be to tackle the wider problem, rather than attempt to fix this within ECGD.[176]

117. We note that members of the Advisory Council considered that bribery and corruption was a concern and that it should be addressed comprehensively with the involvement of other government departments. As the CBI pointed out: "English law will apply to the exporter irrespective of which country they are exporting to and irrespective of which export credit agency they employ, or indeed if they employ no export credit agency at all and simply put in place a commercial bank finance structure. They are still subject to English law and its provisions against bribery and corruption".[177] We also note that the Advisory Council had identified a need for ECGD to acquire expertise to be able to investigate bribery and corruption. This chimes with ECGD's further memorandum which said that "it has neither the powers, resources, nor the expertise to undertake the role that would be required to investigate suspicions or allegations of criminal behaviour in relation to business it is supporting".[178] **We express no view in this Report whether ECGD should become a regulatory or investigatory body with a remit to tackle bribery and corruption. There may be good reasons why it should; for example, it may need greater powers to keep in step with export credit agencies in the OECD (see chapter 5). We are, however, clear about three points. First, such a change would be substantial and must be subject to full consultation with all interested parties. Secondly, when the operation of the provisions is reviewed in three years, we recommend that the Government invite views on the need to make ECGD a regulatory or investigatory body. We consider that by then it will be time to address the issue squarely. In the meantime we invite the Government to describe what expertise ECGD has, and does not have, to investigate**

176 Export Guarantees Advisory Council, 21 January 2004,, minute 5.2.3-5.2.6

177 Q 8[Mr Caldwell]

178 Appendix 7

bribery and corruption. Third, the Government's strategy for tackling bribery and corruption needs to encompass other government departments.

5 The international perspective

118. As well as taking account of the relevant law in the UK[179] ECGD also takes full account of OECD and UN conventions on combating bribery and corruption. The UK has ratified both the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[180] and the United Nations Convention against Corruption.[181]

119. Both the representatives of the exporters and the non-governmental organisations commented on the UK's position within the OECD and on the effect of the international conventions on the work of ECGD. Sue Walton, Chairman of the British Exporters Association, considered that ECGD was "at the forefront of applying anti-bribery and corruption procedures" and that "through some of ECGD's good efforts, the OECD working party on export credits is now promoting a multilateral approach which is much closer to that of ECGD although I would have to say that ECGD is still probably clearly ahead of what the OECD is proposing".[182] Ms Walton considered the new OECD guidelines (see paragraph 125 below and following) to be "a move in the right direction but there is also the issue of watching very closely what non-OECD countries are doing through their export credit agencies and we see more frequently that [the agencies] from India and China are very active in some of the markets that our members are competing in but they do not subscribe to the same OECD guidelines".[183]

120. The non-governmental organisations were also broadly favourable to the work, and impact, of the OECD. Graham Rodmell, Director Corporate and Regulatory Affairs, Transparency International (UK), considered that "you have international understandings to have objectives to improve matters".[184] He cautioned, however, in respect of international understandings "that you are likely to go for the lowest common denominator, the most laggard" and it was Transparency International (UK)'s position now "to encourage the UK to actually take a lead and having UK PLC known as being a country that does not tolerate bribery in international business […] in the medium to longer term, a much better position than trying to accommodate it in the short term".[185]

121. The Corner House took a more sanguine outlook: "the ECGD's new procedures represent emerging best practice for how export credit agencies deal with corruption, and the UK should be encouraging both its G8 and EU partners to adopt similar procedures".[186] But Ms Drew from the Corner House cited a comparative survey by

179 The Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, the Prevention of Corruption Act 1916, and the Anti-Terrorism, Crime and Security Act 2001; *see* Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004, ECGD, 18 March 2005, para 5

180 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 18 March 1999, DAFFE/IME/BR(97)20

181 United Nations Convention against Corruption, resolution 58/4, 31 October 2003

182 Q 2

183 *Ibid*.

184 Q 57

185 *Ibid*.

186 Appendix 3, para 22

UNICORN[187] which documented the practices the export credit agencies were implementing based on countries' returns to the OECD. On the basis of the practices each OECD country's procedures for combating bribery and corruption had been ranked. The UK is ranked ninth overall.[188]

122. We asked the Minister for Trade whether the UK, placed at ninth, could claim to be at the forefront of the countries within the OECD in tacking bribery and corruption. He disputed the methodology used in UNICORN's analysis. He explained:

> UNICORN gives credit to ECAs who claim to be able to withhold support or invalidate cover on the basis of suspicions of bribery. This appears to be contrary to the UK policy of innocent until proven guilty. Also, UNICORN analyses ECAs like ECGD that are prepared to consider providing cover for agents' commissions. ECGD considers that most agents are not corrupt, they provide a worthwhile service that forms part of the expenditure to secure a contract, so considers that agents' commissions are eligible for its support.[189]

He added:

> Despite the differences in methodology, I should point out that ECGD is second in the UNICORN league table for G7 countries, Italy being top and ninth place in the overall table compares well with France at 19th, the United States at 25th and Germany at 27th.[190]

123. In a supplementary memorandum ECGD pointed out that its methodology differed from that of UNICORN as:

> [I]t would appear that the countries ranked higher by UNICORN achieve a higher score by a combination of withholding support or invalidating cover on the basis of suspicions of bribery; not providing cover for agents' commissions and always requiring details of the agent(s) to whom commissions are paid. ECGD's July 2006 procedures will address this latter issue and the increase in ECGD's score due to this change would move it up from ninth to sixth place in the UNICORN table.[191]

124. **Whilst we note the concerns of the Government about the methodology, we found the comparative assessment produced by UNICORN useful. The conclusion we draw is that UK's procedures are in the vanguard of those countries tackling bribery and corruption, although not on the front line. We consider this position is acceptable but we would be concerned if it were to slip, both in a comparison against all countries in the OECD and within the G8.**

187 UNICORN is a Global Unions Anti-corruption Network. According to its website its overall mission is to mobilise workers to share information and coordinate action to combat international bribery, http://www.againstcorruption.org/default.asp.

188 Kirstine Drew, *The UNICORN ECA Anti-Bribery Index*, 30 September 2005, para 2.1

189 Q 147

190 *Ibid*.

191 Appendix 10, para 6

OECD's May 2006 Action Statement

125. On 11 May 2006 the OECD's Working Party on Export Credits and Credit Guarantees published an 'Action Statement on Bribery and Officially Supported Export Credits'. In their evidence Transparency International (UK) drew attention to paragraph 2(j) which advises OECD countries "to take, appropriate measures to deter bribery in international business transactions benefiting from official export credit support, in accordance with the legal system of each member country and the character of the export credit and not prejudicial to the rights of any parties not responsible for the illegal payments",[192] including the case where:

> (j) If, before credit, cover or other support has been approved, there is credible evidence that bribery was involved in the award or execution of the export contract, suspending approval of the application during the enhanced due diligence process. If the enhanced due diligence concludes that bribery was involved in the transaction, the Member shall refuse to approve credit, cover or other support.[193]

Transparency International (UK) saw the action statement as "very clearly saying that any corruption in the award or execution of that export contract would lead to indemnification" and Transparency International (UK) concluded that "under OECD guidelines now the ECGD must now revise its recourse provisions".[194]

126. We have considered recourse in detail at chapter 4. We return to the subject here as we are concerned that that the Action Statement might require the Government to revise the July 2006 procedures. We put Transparency International (UK)'s point to ECGD. Nicholas Ridley, General Counsel of ECGD, replied:

> I think Transparency suggest that paragraph 2(j) of the new action statement suggests that we shall have to change that policy on recourse to give ourselves the right to take recourse even where there is no complicity and no fault, no knowledge on the part of the applicant. I have to say that we are a bit puzzled by that. […] Briefly, article 2(j) deals with what an ECA should do if, before export credit is agreed to be given, there is credible evidence of corruption. It does not deal with what terms you have to put in the contract if you do decide, having obeyed what the action statement says in 2(j), to give support. It did occur to us that perhaps Transparency meant to refer to 2(k), which deals with what you put in the support agreement when you do give grant support, but in that case, our answer would still be no, we are not obliged to change the recourse provisions because of the action statement for two reasons really: one because the OECD action statement itself, and I can take you to this if you wish to see it, says that actions taken under any of 2(j), 2(k) or indeed 2(a) to wherever it runs to, are not to be prejudicial to the rights of parties not involved in the corruption. Secondly, 2(k) says that we shall take only appropriate action, leaving it to the ECAs to judge what is appropriate. Then there is

192 OECD, Trade Committee, Trade Directorate, *2006 Action Statement on Bribery and Officially Supported Export Credits*, TD/ECG(2006)11, 12 May 2006 and Q65

193 OECD, Trade Committee, Trade Directorate, *2006 Action Statement on Bribery and Officially Supported Export Credits*, TD/ECG(2006)11, 12 May 2006, para 2(j)

194 Q 65

an issue as to whether it is appropriate to take a right of recourse from an innocent party.[195]

127. In a supplementary memorandum Mr Ridley expanded on his reply:

> Paragraph 2(j) of the new Action Statement deals with whether Export Credit Agencies should give cover at all where there is 'credible evidence' of corruption which is discovered before support has been approved. Paragraph 2(j) thus has no bearing on the terms of recourse provisions to be included in a Support Contract which is approved, which provisions give future rights in circumstances where corrupt activity is subsequently discovered.
>
> Paragraph 2(k) deals with action to be taken if corruption is discovered in a transaction after support has been granted. But it remains HMG's position that the Action Statement does not oblige it to alter ECGD's standard recourse rights.
>
> HMG does not believe that imposing an absolute liability, irrespective of fault or complicity, for what could be a very substantial sum of money is an 'appropriate action' within the meaning of paragraph 2(k). This view is shared by the OECD since the Action Statement makes clear that any measures taken pursuant to it should not be 'prejudicial to the rights of any parties not responsible for the illegal payments'.[196]

128. **In the light of Mr Ridley's reply to our question about the need to amend the procedures to reflect paragraph 2(j) of the OECD's Action Statement published in May 2006 we do not consider that there are grounds to revise the July 2006 procedures.**

Alternative sources of finance from overseas export control agencies

129. Larger companies may have the option of 'shopping around' to obtain support from an overseas export credit agency. The CBI pointed out:

> [O]ne of the issues concerned throughout all of this where a company has an option is to look at whether it might get that finance from another ECA. Where some of the larger exporters certainly do have an option, then clearly what it will look at is the procedures and the bureaucracy and the burden of going through an ECGD route as opposed to going through another ECA. It has that option open to it and clearly the acid test will be how this will operate and how, when it operates, it will be implemented, relatively speaking, in other ECAs. If they find that another ECA presents a route which is less burdensome, then clearly that is an option which a company, if it can indeed go to those other ECAs, may choose to take.[197]

130. As noted, BExA told us that export control agencies from India and China were very active in some of the markets in which BExA members were competing in "but they do not subscribe to the same OECD guidelines".[198] The Minister was not clear whether "the anti-

195 Q 152

196 Appendix 8, paras 5-7

197 Q 8 [Mr Scott]

198 Q 2

bribery and corruption procedures of the export credit agencies of China and India met the requirements of the OECD action statement on bribery" but accepted that it was "very desirable for all ECAs to meet such levels and that includes India and China".[199] He said that he had asked his international officials to seek from their Indian and Chinese counterparts more information about their anti-bribery procedures and to supply a memorandum once they have received a response.

131. **We share the Minister for Trade's aspiration that all export control agencies—irrespective of membership of the OECD—should meet the requirements of the OECD action statement on bribery. Otherwise those companies willing to condone, or turn a blind eye to, the payment of bribes and corruption to secure business will gravitate towards the least rigorous export control agencies. If, notwithstanding the effort of the OECD and the UK, this occurs and as a consequence ECGD loses business, we consider that ECGD will be well rid of such business. In these circumstances responsibility for investigating any breaches of the law would not fall to ECGD but to the police and the Serious Fraud Office. The Government will, however, need to monitor the market for credit and insurance for exports as well as the adequacy of the procedures that export control agencies outside the OECD apply to counter bribery and corruption. We recommend that the Government review, and publish by 1 August 2007, its arrangements for monitoring the market for credit and insurance for exports and pass these analyses to those responsible for enforcing the law on bribery and corruption.**

199 Q 157

6 Conclusion

132. Support from the taxpayer via ECGD is not unqualified support for British exports. The UK public is more aware now than, say, thirty years ago of the ill-effects of corruption, particularly on developing countries and is not prepared to support business tainted with bribery and corruption. ECGD has a clear policy to combat corrupt practices, which we fully endorse. It is not acceptable to pay it lip service while carrying on business as before. The policy has to be implemented effectively to reduce as far as is reasonably practicable the risk of ECGD supporting contracts tainted by corruption. **We have concluded that ECGD's procedures, which came into operation on 1 July 2006, should be workable and will go a considerable way in reducing the risk of ECGD supporting contracts tainted by corruption. In some areas it may have been possible to have gone further, but given the tortuous development of the July 2006 procedures now in operation we are reluctant to recommend further changes.**

133. We consider that the July 2006 procedures give ECGD the powers and scope to seek out and challenge bribery and corruption by those seeking their services. ECGD will have the power to audit the accuracy of exporters' representations on bribery and corruption. Breaches of the new procedures will entitle ECGD to terminate the relevant insurance policy, or, in the case of other ECGD facilities, to seek financial redress from the exporter where the taxpayer has suffered loss. **We consider that ECGD now has to show that it has the expertise and the will to use the procedures. If it cannot, we conclude that the adequacy of a regime based on private law will be open to question.**

134. Tightening the procedures has a cost to exporters in terms of carrying out inquiries and submitting additional information to ECGD. Unlike most other areas covered by the Trade and Industry Committee, there are no comprehensive or reliable statistics on bribery and corruption to measure the effect of the changes. The Corner House said in its evidence that "the next steps are to monitor [the] procedures and to publish the results of the monitoring of those procedures periodically, openly, so that all stakeholders can have basic information on how they are being implemented, and that will provide the basis for on-going improvements to which everybody can contribute".[200] The Minister said that he would consider whether ECGD should report on its use of the July 2006 procedures in consultation with the Export Guarantees Advisory Council before coming to a final view on the need for monitoring.[201] We agree with the Corner House. **We recommend that the Government monitor the operation of the July 2006 procedures and at least once a year report publicly to the Export Guarantees Advisory Council the outcome of the monitoring.**

135. **There is a wider question which we consider will continue to surface: whether ECGD should have regulatory and investigatory powers to tackle bribery and corruption committed by exporters. We would be concerned if the need for these powers emerged in the charged aftermath of the publicity surrounding a high profile corruption case. There is a risk that such powers would be hastily formulated,**

200 Q 99

201 Appendix 7

draconian and grafted onto ECGD's current operations. In our view it would be much more satisfactory if the Government were to consider the need for such powers, including the role of ECGD, over the next three years and, if necessary, to bring forward proposals.

136. **Finally, the main lesson we draw from the saga of the development of the procedures is the gap between ECGD's policy statement committing it to consultation with interested parties and what has happened in practice since 2002, especially in the first half of 2004. We are concerned that it appears that no one in a position of responsibility acknowledged that in implementing the May 2004 procedures without any consultation ECGD was in breach of its own business principles. It raises a question about the extent to which the business principles permeate the operations of ECGD. We conclude that had ECGD carried out a consultation in accordance with Cabinet Office Guidelines in 2003 or early 2004 a set of procedures broadly in line with those implemented in July 2006 would have been in place by the end of 2004.**

Conclusions and recommendations

The process and consultation

1. We recommend that the Trade and Industry Select Committee examine the operation of the procedures again in three years, or possibly earlier if they are revised in the meantime. (Paragraph 8)

2. We consider that the fact that changes to the procedures on bribery had been introduced in 2002 and 2003 with no consultation but without adverse reaction does not justify ECGD's approach to the May 2004 procedures. In our view what it shows is that ECGD had on two earlier occasions introduced changes apparently oblivious to its Public Consultation Guidelines and its commitment to greater consultation with customers and other parties. Nor do we accept the Minister's suggestion that the correct course was only clear with the benefit of hindsight. In our view the problem was the absence of foresight. ECGD's Public Consultation Guidelines set up an expectation, commendable in our view, that ECGD will consult on substantial changes to its policies, products and practices. There must be a presumption that ECGD will consult on changes. In our view the Government should have considered the cumulative effect of the changes since 2000 and, if they had, they would have concluded in the light of the Guidelines that a full prior consultation exercise was necessary. (Paragraph 21)

3. We conclude that it was inequitable for the Government to proceed with the May 2004 procedures without seeking the views of exporters and others through a consultation exercise. (Paragraph 23)

4. We recommend that all ECGD's future consultation exercises are carried out in accordance with the Cabinet Office's Code of Practice on Consultation. (Paragraph 24)

5. We consider that, if the Government had concluded that the May 2004 procedures were unworkable, it should have withdrawn them, rather than wait until December 2004. (Paragraph 27)

6. We are concerned that, as was the case with its policy on consultation with interested parties, ECGD's promise to focus on needs of small and medium-sized exporters and investors was largely ignored during the formulation of both the May and December 2004 procedures. (Paragraph 33)

7. In our view the changes made to the May 2004 procedures as a result of the work of the Solutions Group more than justified a full consultation on the anti-bribery procedures. We are concerned that the Government has still not conceded this point and invite it to reconsider, particularly since it concedes that the ex post facto measures are an improvement. (Paragraph 34)

8. We consider that the crucial error that ECGD made was to proceed with the May 2004 procedures without any consultation. It then compounded the problem by embarking on what turned into a one-sided dialogue with one interested party, the

exporters, which excluded another, the non-governmental organisations. Without the efforts of the Corner House the less effective December 2004 procedures would have superseded the May 2004 procedures. We consider that both exporters and the non-governmental organisations have a clear interest in ECGD's bribery rules and we recommend that all parties, including small and medium-sized exporters, be consulted before future changes are made to the bribery rules, other than insubstantial amendments. (Paragraph 36)

9. We consider that for the public to have confidence in the anti-bribery rules it is essential that ECGD apply a consistent set of procedures uniformly to all their customers. To do otherwise undercuts the policy behind the procedures. Where the procedures offer applicants options—for example, to invoke the Special Handling Arrangements—these must be published and set out clearly and they must not be so extensive as to undermine the principles underpinning the arrangements. This was not the case from May 2004. We consider it was unacceptable and unfair to allow applicants for ECGD services to decide for themselves whether they followed the pre- or post-May 2004 anti-bribery procedures. In our view, once it became clear that the bulk of cover was being provided under the pre-May 2004 procedures, the May 2004 procedures served little purpose and Government should have withdrawn the May 2004 procedures. (Paragraph 39)

10. We received no representations criticising the consultation exercises which ECGD undertook after March 2005. We consider them to have been thorough and comprehensive and also responsive. At the end of the process we concur with the assessment of Ms Drew from the Corner House:

> [A]s a result of the process that we have all gone through the procedures have been changed again and we now have stronger anti-bribery rules in place and it shows that the results are better when all stakeholders are consulted and not just one side of the argument is listened to. I hope that is the lesson that has been learned from all of this. (Paragraph 47)

11. In our view the Government made a serious error in failing to draw the Export Guarantees Advisory Council into the formulation of the May and December 2004 procedures. As well as having expertise on points of detail the Advisory Council was in a position to give a perspective on the broader issues such as the role of ECGD. We invite the Government to set out the improvements that it proposes to make to the way it involves the Export Guarantees Advisory Council in any future consideration of changes to ECGD's policy and practices. In line with our predecessors' Report in April 2005, we recommend that the Secretary of State alter the terms of reference he has set for the Advisory Council, to include asking them to advise ECGD when proposed changes in ECGD's policies, products or practice should be subject to consultation. This should not, in our view, remove the need for the Government itself to consider or initiate consultation exercises but we consider it would help to remind the Government of its responsibility. (Paragraph 52)

The procedures: use of Agents

12. During our inquiry we received no new evidence to shake the conclusion of our predecessor Committee expressed in its Report in 2005—and endorsed by the Government in the Final Response—that information about agents should be disclosed to ECGD. We add that, if agents are an integral part of legitimate business activities as the exporters' representatives told us, there should be little or no reason for withholding information about agents. (Paragraph 62)

13. We share Transparency International (UK)'s misgivings about the need for Special Handling Arrangements for information about agents. In view, however, of the possibility that information about a defence contractor may have been released by ECGD on one occasion we accept that exporters' concerns are not unfounded. In these circumstances and given that supplying information about agents is a new departure and that use of the procedure is optional we consider that the Special Handling Arrangements, which the Government is now implementing, are an appropriate response to these concerns. At this stage we see no justification for a more broadly drawn scheme of the type proposed by exporters. (Paragraph 69)

14. We recommend that ECGD review the operation of the Special Handling Arrangements in December 2006 and we invite the Minister to inform us of the outcome of the review. Specifically, the review should include an evaluation of the extent to which ECGD's commitment to keep the identity of agents confidential has hampered its ability to undertake proper due diligence. (Paragraph 70)

15. We encourage ECGD to understand the needs of, and work with, its customers, particularly to set standards for due diligence by these customers, but we consider that the relationship must not preclude ECGD from checking and challenging the information that those applying for its services supply. (Paragraph 71)

16. We invite the Government when it responds to this Report to state in more detail its policy in respect of applications for ECGD support where the applicant refuses consent for knowledge about an agent to be more widely shared where ECGD has concerns and needs to make further enquiries, and to indicate how likely it is that ECGD will allow an application where the applicant has refused consent. (Paragraph 75)

17. We consider that there is much to commend a requirement for independent due diligence checks in high risk cases, irrespective of whether the applicant for ECGD's services has requested the Special Handling Arrangements. It would ensure that most scrutiny is directed to those areas of greatest risk of corruption and it would fit with best practice. We are not, however, recommending at this stage that ECGD require independent due diligence checks. Instead, we recommend that, when the July 2006 procedures are reviewed in three years, the possibility of such a requirement should be examined. In our view the crucial issue is the effectiveness of the checks which ECGD carries out on agents. If these are not effective, the case for introducing independent due diligence checks may well become compelling. (Paragraph 77)

Workability of the July 2006 procedures

18. In our view the anti-bribery and corruption procedures, including the Special Handling Arrangements, that came into operation of 1 July 2006 should be workable. (Paragraph 78)

Prevention of corruption by disclosure

19. In our view the disclosure provisions in the May 2004 procedures had the benefit of clarity and of fitting with best practice. We consider that the effective operation of the disclosure provisions in the July 2006 procedures will turn on, first, the construction put on the extent to which agents appointed by an applicant's joint venture partner are considered to be acting "on behalf of" the applicant. We recommend that ECGD define the phrase unambiguously in guidance to exporters. The second test will be the extent to which ECGD presses for further information on joint venture partners' agents and whether this information is supplied. If it turns out, as Transparency International (UK) fear, that in most cases exporters maintain that the agents are only acting on behalf of the joint venture partner and are not disclosed to ECGD, then the provision will, in our view, have failed. We recommend that, when the anti-bribery procedures are reviewed, the operation of the disclosure provisions in respect of partners' agents be examined. (Paragraph 92)

Role of sub-contractors

20. In our view, if those soliciting and paying bribes are looking for conduits for their corrupt activities, one avenue will be partners and contractors. We are concerned whether the July 2006 procedures are strong enough to block this possible new conduit. We recommend that the review in three years examine whether the conduit for bribery and corruption has extended from agents to partners and sub-contractors. (Paragraph 95)

Contractual right to reimbursement

21. Where a contract fails because of bribery or corruption—irrespective of the complicity of the UK exporter seeking cover—neither ECGD nor the taxpayer should have to assume liability. To do otherwise would mean that ECGD is providing insurance cover for corruption and bribery. We take reassurance from ECGD's advice that the buyer credit documentation specifically provides that failure to perform the export contract on the part of the applicant for its services is no reason whatsoever for the loan not to be repaid. We expect ECGD to insist that English law be applied to all loan contracts and to resist vigorously any attempts to enforce payments where a contract has been vitiated because of corruption. On this basis we find the recourse procedures acceptable at this stage and recommend that the review in three years examine the operation of the provisions. (Paragraph 101)

ECGD's rights of audit

22. We welcome the provision under the July 2006 procedures that ECGD has the power to audit at any time the accuracy of an applicant's representations, when considering possible bribery and corruption, rather than just when it suspects that bribery has taken place. (Paragraph 108)

23. ECGD's powers of audit are currently governed by private law when it enters into contracts between itself and exporters. In the absence of investigatory or regulatory powers, we accept that it is therefore reasonable for ECGD to frame the audit and inspection provisions as it has done in the July 2006 procedures. That is not to say we are content with the provisions: we consider the provision allowing five days' notice before an audit is too generous. In our view two working days' notice would have been sufficient for an exporter using ECGD's services to assemble the paperwork for inspection. (Paragraph 113)

ECGD as a regulatory and investigatory body

24. We are concerned by the inference in the Export Guarantees Advisory Council's minutes of 21 January 2004 that the impetus behind the May 2004 procedures was a desire to protect the reputation of, and to deflect criticism from, ECGD. If this is correct, it may explain why the Government failed to test the feasibility of the May 2004 procedures before announcing them. We have no doubt that a policy derived from a desire to protect ECGD is no basis from which to tackle bribery and corruption. We invite the Government to comment on the minutes in its response to our Report. (Paragraph 115)

25. We express no view in this Report whether ECGD should become a regulatory or investigatory body with a remit to tackle bribery and corruption. There may be good reasons why it should; for example, it may need greater powers to keep in step with export credit agencies in the OECD (see chapter 5). We are, however, clear about three points. First, such a change would be substantial and must be subject to full consultation with all interested parties. Secondly, when the operation of the provisions is reviewed in three years, we recommend that the Government invite views on the need to make ECGD a regulatory or investigatory body. We consider that by then it will be time to address the issue squarely. In the meantime we invite the Government to describe what expertise ECGD has, and does not have, to investigate bribery and corruption. Third, the Government's strategy for tackling bribery and corruption needs to encompass other government departments. (Paragraph 117)

International perspective

26. The UK's procedures are in the vanguard of those countries tackling bribery and corruption, although not on the front line. We consider this position is acceptable but we would be concerned if it were to slip, both in a comparison against all countries in the OECD and within the G8. (Paragraph 124)

27. We do not consider that there are grounds to revise the July 2006 procedures to reflect the OECD's Action Statement on Bribery and Officially supported Export Credits which was published in May 2006. (Paragraph 128)

28. We share the Minister for Trade's aspiration that all export control agencies—irrespective of membership of the OECD—should meet the requirements of the OECD action statement on bribery. Otherwise those companies willing to condone, or turn a blind eye to, the payment of bribes and corruption to secure business will gravitate towards the least rigorous export control agencies. If, notwithstanding the effort of the OECD and the UK, this occurs and as a consequence ECGD loses business, we consider that ECGD will be well rid of such business. (Paragraph 131)

29. The Government will, however, need to monitor the market for credit and insurance for exports as well as the adequacy of the procedures that export control agencies outside the OECD apply to counter bribery and corruption. We recommend that the Government review, and publish by 1 August 2007, its arrangements for monitoring the market for credit and insurance for exports and pass these analyses to those responsible for enforcing the law on bribery and corruption. (Paragraph 131)

General conclusions

30. We have concluded that ECGD's procedures, which came into operation on 1 July 2006, should be workable and will go a considerable way in reducing the risk of ECGD supporting contracts tainted by corruption. In some areas it may have been possible to have gone further, but given the tortuous development of the July 2006 procedures now in operation we are reluctant to recommend further changes. (Paragraph 132)

31. We consider that ECGD now has to show that it has the expertise and the will to use the procedures. If it cannot, we conclude that the adequacy of a regime based on private law will be open to question. (Paragraph 133)

32. We recommend that the Government monitor the operation of the July 2006 procedures and at least once a year report publicly to the Export Guarantees Advisory Council the outcome of the monitoring. (Paragraph 134)

33. There is a wider question which we consider will continue to surface: whether ECGD should have regulatory and investigatory powers to tackle bribery and corruption committed by exporters. We would be concerned if the need for these powers emerged in the charged aftermath of the publicity surrounding a high profile corruption case. There is a risk that such powers would be hastily formulated, draconian and grafted onto ECGD's current operations. In our view it would be much more satisfactory if the Government were to consider the need for such powers, including the role of ECGD, over the next three years and, if necessary, to bring forward proposals. (Paragraph 135)

34. Finally, the main lesson we draw from the saga of the development of the procedures is the gap between ECGD's policy statement committing it to consultation with interested parties and what has happened in practice since 2002, especially in the first half of 2004. We are concerned that it appears that no one in a position of

responsibility acknowledged that in implementing the May 2004 procedures without any consultation ECGD was in breach of its own business principles. It raises a question about the extent to which the business principles permeate the operations of ECGD. We conclude that had ECGD carried out a consultation in accordance with Cabinet Office Guidelines in 2003 or early 2004 a set of procedures broadly in line with those implemented in July 2006 would have been in place by the end of 2004. (Paragraph 136)

Formal minutes

Wednesday 12 July 2006

Members present:

Mr Roger Berry, in the Chair

Judy Mallaber
Rob Marris
Mike Weir

The Sub-Committee considered this matter.

Draft Report (Export Credits Guarantee Department's bribery rules), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 136 read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the First Report of the Sub-Committee to the Committee.

Ordered, That Mr Roger Berry make the Report to the Committee.

Several papers were ordered to be appended to the Minutes of Evidence.

Ordered, That the Appendices to the Minutes of Evidence taken before the Sub-Committee be reported to the Committee.

Several Memoranda were ordered to be reported to the Committee.

[Adjourned.

Formal minutes

Tuesday 18 July 2006

[Afternoon Session]

Members present:

Mr Peter Luff, in the Chair

Mr Roger Berry	Rob Marris
Mr Michael Clapham	Mr Mike Weir
Mr Lindsay Hoyle	Mr Anthony Wright
Judy Mallaber	

The Committee considered this matter.

Draft Report (Export Credits Guarantee Department's bribery rules), proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 136 read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Fifth Report of the Committee to the House.

Ordered, That the Chairman make the Report to the House.

Ordered, That embargoed copies of the Report be made available in accordance with the provisions of Standing Order No. 134 (Select committees (reports)).

Several papers were ordered to be appended to the Minutes of Evidence.

Ordered, That the Appendices to the Minutes of Evidence taken before the Committee be reported to the House.

Several Memoranda were ordered to be reported to the House.

[Adjourned till Wednesday 19 July at 9.15 am

Witnesses

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Oral evidence

Taken before the Trade and Industry Committee

Sub-Committee on the Export Credits Guarantee Department's Bribery Rules on Wednesday 17 May 2006

Members present:

Roger Berry, in the Chair

Judy Mallaber
Rob Marris
Mr Mike Weir

Witnesses: Mr Andy Scott, Director, International and UK Operations, **Confederation of British Industry** (CBI), Mr James Caldwell, Chairman, CBI Export Finance Committee, Mr Clive Jones, Chairman, British Bankers' Association Export Finance Committee, member, British Exporters Association's Council, and Ms Sue Walton, Chairman, **British Exporters Association** (BExA), gave evidence.

Chairman: Good morning and welcome. Before we go any further, as a new one-off sub-committee, we, as Members, have to declare any interests, so we will briefly do that. I have constituents who work for major aerospace companies and I am a member of the trade union Amicus. To the best of my knowledge, they are the only interests relevant to this issue.
Mr Weir: I have nothing to declare.
Rob Marris: I have constituents who work in aerospace and I am a member of the Transport and General Workers' Union and the GMBU.

Q1 Chairman: Welcome. Would you introduce yourselves for the record and then we will start the evidence.
Mr Caldwell: Thank you for your welcome. My name is James Caldwell; I am here in my capacity as the Chairman of the CBI Export Finance Committee.
Mr Scott: I am Andrew Scott and I am the Director of CBI responsible for our international and UK operations.
Ms Walton: I am Sue Walton and I am here in my capacity as Chairman of the British Exporters Association.
Mr Jones: I am Clive Jones and I am here in my capacity as member of the British Exporters Association's Council and I am also Chairman of the BBA[1] Export Finance Committee.

Q2 Chairman: Thank you for your written submissions and thank you again for being here this morning. It is a public evidence session. There will be a record of the proceedings on the internet, I think within a week is the target and that is usually what happens. So, that will be the first place you will see it. May I begin by referring to the CBI's memorandum. In paragraph 6 you state that it is, "The UK Government's intention to be at the forefront of introducing enhanced anti-bribery provisions risks putting both the UK Export Credit Agency and UK exporters at a competitive disadvantage." Do you think the arrangements set out in the Government's final response of March of this year increased that risk or reduced that risk?
Ms Walton: It is true that ECGD has certainly been at the forefront of applying anti-bribery and corruption procedures and we are very pleased to see that, through some of ECGD's good efforts, the OECD working party on export credits is now promoting a multilateral approach which is much closer to that of ECGD although I would have to say that ECGD is still probably clearly ahead of what the OECD is proposing. It will be interesting to see how other OECD countries actually implement these new guidelines and, until we see how that is done, it will be difficult for us to determine whether or not UK exporters have been particularly disadvantaged. I think that it is a move in the right direction but there is also the issue of watching very closely what non-OECD countries are doing through their export credit agencies and we see more frequently that ECAs from India and China are very active in some of the markets that our members are competing in but they do not subscribe to the same OECD guidelines and I think that is something that we would like to see the UK pursuing to ensure that we are left on a level playing field. I think this very recent announcement—it was only last week, I think 11 May—is a move in the right direction and we are more comforted by that than we were before.

Q3 Chairman: In your memoranda, you both refer to the fact that Germany, Japan, Belgium and the Czech Republic were against tighter OECD guidelines. Do you think they are now coming round to the view that we should all subscribe to OECD guidelines?
Ms Walton: Unfortunately, as none of us were privy to what went on in those OECD meetings, it may be a question that is more properly posed to ECGD who were represented there. Looking at the guidelines that have come out, it is clear that they are not as strong as ECGD's and I suspect that that may be due to the influence of some of those parties who were less convinced that this was the way to go.

[1] British Bankers' Association.

Q4 Chairman: In summary, you are not unhappy about the ECGD position?
Ms Walton: We are happier that others are now following it more closely. Where we are today, we can work with ECGD's guidelines. It is more onerous. It will be more difficult particularly for some of our smaller members to comply with because they do not have the manpower and resources to deal with it, but certainly we are in a better position than we were back in the year 2004 when many of our members were simply unable to do these things.

Q5 Chairman: Finally on this point, do you believe that the procedures outlined in the Final Response are workable? After all, they are more stringent than December 2004 but they are less onerous than May 2004.
Ms Walton: The proof of the pudding is going to be in the eating here. They appear to be more workable to us. Our members have been consulting with ECGD on safe handling arrangements, but I think we will come on to that later.
Chairman: Yes, we will come on to that later. Thank you, that is helpful.

Q6 Mr Weir: Both organisations advocate an alternative approach to combating bribery based on ECGD "knowing their customers". Would you outline for us how you see that working, please.
Mr Scott: I think the comment in our submission on that was really trying to put the new provisions into context. We fully accept that ECGD has decided to go down what we would probably describe as a more pre[G1]scriptive and procedural approach, but what we were saying was that if ECGD wanted to have greater confidence that none of its dealings could be described as having been tainted with bribery and corruption, then one of the most effective ways of doing that is to have a very close understanding and working relationship with the customer. We do not regard that as being cosy, as some might describe it; we regard that as being a very practical and positive thing for ECGD to do who actually understand what the due diligence procedures are which the customer himself operates and understand what it does in terms of its own codes of practices. To be fair, in some respects, it does have that full and close understanding with the customer but we believe that it could be developed even further. We actually believe that that would have been an approach which could have given ECGD and then ultimately the taxpayer greater confidence that there was a clear understanding of how companies were approaching this issue, which many do from their own due diligence and their own internal procedures. That was our comment setting it in context. We acknowledge though that what ECGD has decided to do is to tighten up its procedures. It will still need to have that understanding of the companies' own codes of practice, but we would have felt that that approach would have been able to give a degree of confidence which it was looking for and we have acknowledged that it decided to go a more prescriptive approach.

Q7 Mr Weir: How do you feel that that approach assists given the transparency necessary to assure taxpayers that their taxes are not underwriting projects tainted by bribery and the fact that they want to see what is going on in these contracts?
Mr Scott: I do not think that the revised procedures as opposed to that more closer understanding of what the individual companies are doing themselves by ECGD working closely with them produces any different approach to that transparency. As far as we were concerned, we would believe that ECGD understanding its customers, having information about the due diligence processes which those customers operate and requiring them to produce codes of practice would be a very fair and legitimate way to approach this whole issue.

Q8 Mr Weir: I take it from your earlier answer that you have reached the conclusion that you will work with ECGD's anti-bribery rules. If your members did ever find them too onerous, are there other sources of support open to them for export purposes?
Mr Scott: Obviously, one of the issues concerned throughout all of this where a company has an option is to look at whether it might get that finance from another ECA. Where some of the larger exporters certainly do have an option, then clearly what it will look at is the procedures and the bureaucracy and the burden of going through an ECGD route as opposed to going through another ECA. It has that option open to it and clearly the acid test will be how this will operate and how, when it operates, it will be implemented, relatively speaking, in other ECAs. If they find that another ECA presents a route which is less burdensome, then clearly that is an option which a company, if it can indeed go to those other ECAs, may choose to take.
Mr Caldwell: I would like to add something to that which is to make a point of which I am sure you are well aware. English law will apply to the exporter irrespective of which country they are exporting to and irrespective of which export credit agency they employ, or indeed if they employ no export credit agency at all and simply put in place a commercial bank finance structure. They are still subject to English law and its provisions against bribery and corruption.

Q9 Rob Marris: One way in which people get round English law is by the use of agents. You may recall that in the Select Committee's report in March 2005, we said, "We are not persuaded by the arguments put forward by ECGD's customers that the Department had no right to information on the agents they use and the money to be paid to them". Does the CBI accept that one of the common conduits for bribes is through agents and that therefore, if one accepts that and you may not, the control or regulation of agents is rather important?
Ms Walton: I think the way in which we would like to address this is to say that actually agents play a perfectly normal and legitimate role in our members' business day to day and again, reiterating the point that James has just made, UK companies are subject

to some of the most stringent rules in this regard around the world and those laws have extraterritorial effect. So, our membership is very concerned that they and their agents are deemed to be working within the law.

Q10 Rob Marris: I am not suggesting that all agents are corrupt by any means. I am saying that those are commonly taken to be, for reasons I will get on to, a conduit for bribery where bribery and corruption take place. I am not saying that every agent is corrupt or that there is bribery and corruption in every case, not at all, but in some cases there is but part of the difficulty is of course discovering the identity of agents and whether ECGD will have that information and is prepared to disclose this. Do you think that all agents' details should be given to these people?
Ms Walton: ECGD will, under its new guidelines, be given details of those agents—

Q11 Rob Marris: I am asking you if you think that is appropriate.
Ms Walton: What our members were concerned about was the confidentiality of that information. I do not think there was a particular problem with sharing the information if our members could be confident that ECGD was going to keep what is very commercially sensitive information confidential and, as we were all working to understand, for example, the impact of the Freedom of Information Act—and there is no case law in that respect yet—it was difficult for our membership to say categorically that they were happy for ECGD simply to have this information on the face of an application form.

Q12 Rob Marris: Are they now reassured?
Ms Walton: Having been through very recently a consultation on safe handling arrangements, I think that we are getting to a stage where members are more reassured though we actually have not had yet the outcome of that consultation, so we will have to wait and see on that.

Q13 Rob Marris: Do you have a date for the outcome of the consultation?
Ms Walton: I do not believe we do on safe handling.
Mr Caldwell: I am not sure.
Mr Scott: We did not have a date for the outcome, we had a date by which we had to make our submissions.
Ms Walton: The new arrangements for ECGD's anti-bribery and corruption procedures come into effect by 1 July, so one would hope it would happen before that.

Q14 Chairman: It has been noted. Before I move on to the question I have on special handling arrangements, you may have heard a whistling. There is a whistle. Attempts have been made to sort it out but the only way to eliminate it for sure is to stop the sound recording and webcasting and so on. So, since we clearly would not want to do that, I apologise for the whistling. If you cannot hear it, you are lucky! Paragraph 7 of the special handling arrangements to which there has been reference advises that where an applicant refuses consent for knowledge about agents to be more widely shared, ". . . it is likely in those circumstances that ECGD would be unable to process the Application further". I appreciate that this may be a contentious point, so I would like to ask whether you believe there are circumstances in which a company could reasonably refuse that consent and still expect ECGD to consider its application for support.
Mr Caldwell: I think it is probably more a question for ECGD.

Q15 Chairman: Do not worry, we will ask them! Your views on these matters are, as always, extremely important to us. Are they being reasonable or are they being unreasonable?
Mr Caldwell: I think it will depend upon the circumstances of the case; it will depend upon the information that is available to them. It is a hypothetical case, so it is quite a difficult question to be able to answer with any certainty.

Q16 Chairman: Can you think of circumstances in which a company could reasonably refuse consent to give that information and still expect ECGD support?
Mr Scott: I think at this stage, as James has said, it is difficult to identify what those circumstances would be. I think the reason why we would have argued it the other way is to leave that option open in the event that such circumstances do arise. At the end of the day, the decision ultimately will be ECGD's. It will decide whether it feels that there is any basis for continuing to provide support if the customer decides not to give that information, but all I think we would have argued for is that that would give that option should a situation arise in the future rather than having a blanket automatic refusal. At the moment, we have not identified what those specific circumstances might be.

Q17 Chairman: If you take the TV licence, you do not have the choice. If you want to pick up a TV program, you have to pay the licence fee. What is being said here is, if you want ECGD's support, there are certain conditions that you have to satisfy including disclosure of knowledge about agents. Either you think that is a reasonable thing for taxpayers through ECGD to be expecting of those applying for support or you think it is unduly intrusive and unnecessary.
Mr Caldwell: If it is an absolute requirement, then it is an absolute requirement. There is no flexibility and the question does not arise.

Q18 Chairman: The question of whether you think it should be a requirement does arise. I have asked it!
Ms Walton: I think that potentially there would be a case where, for example, a customer/applicant for ECGD services has actually provided ECGD with a great deal of information about the agent already. They may have been through a review which has involved a third party. A number of our members use agencies to do very detailed scrutiny and analysis

of their agents abroad. They may have provided ECGD with that information already and they may be in the middle of a very sensitive and very competitive campaign where they do not want further information potentially leaked into the market that might jeopardise their campaign. If ECGD is actually happy with the information that has been provided to them by the exporter, I think that in those circumstances the exporter might well be valid in its decision to say, "No, we don't want you to do any further exploration in the country because we are at a very sensitive stage of this campaign and you have had every piece of information that we have diligently collected on our agent".

Q19 Chairman: That is helpful. Do you think that many companies will invoke the special handling arrangements?
Mr Scott: I think it is difficult for us to say how many will do that. Again, it will be entirely up to that company to make that decision. All that we have been looking for in this is to give that option, so that the exporting company can take that option if it so chooses. At this stage, it is difficult to predict how many will take that route.
Mr Caldwell: That is right. The answer to that and the previous question is that, to the extent that flexibility is permitted from an exporter's perspective, that is a good thing.

Q20 Chairman: Are there any particular circumstances when you might advise your members to use the arrangements?
Mr Scott: As far as the CBI is concerned, we would not be advising our members one way or the other. All we have been involved in throughout this exercise is to look at what is practical and what is workable and to put on the table a serious option, and it would then be up to the individual customer to make the judgment themselves. We will not be advising members to either use it or not to use it. It is an option there for them to make their own commercial judgments on.
Ms Walton: And the same is true for the British Exporters Association.

Q21 Mr Weir: Would you tell us what, if any, consultation you have had with ECGD prior to the issue in May 2004 of anti-bribery procedures.
Mr Caldwell: In 2000, there was what we thought was a fairly significant consultation process over some significant amendments to ECGD's anti-bribery and corruption provisions. It is not clear whether that was a consultation with a capital C but it certainly was a consultative process which involved ECGD's customers and trade bodies. There were, as a consequence of that discussion, amendments to ECGD's original proposed wording were made and were implemented in 2000. Between then and May 2004, we are not aware of any consultation, with or without a capital C, with ECGD's customers and trade bodies. So, when new provisions were announced, they did come, as far as we were concerned, as a complete surprise.

Q22 Mr Weir: How did you lobby for them to be changed? Did you lobby for them to be changed after they were announced in 2004?
Mr Caldwell: The events that followed from after May 2004 are well recorded. There was considerable concern expressed by the major British exporters and by the BBA about the practicality of some of the provisions that had been proposed in May, in particular the breadth of the undertakings that were required. Ultimately, the then Secretary of State requested that the CBI establish a so-called solutions group to work with the exporting community and ECGD to try and find a resolution to these practical problems.

Q23 Mr Weir: Do you have a relationship with the Export Guarantees Advisory Council? Were they involved in this procedure at any time?
Mr Caldwell: Individual members meet with the Advisory Council and I think that the trade bodies also meet with them. There was not, as far as I am aware, a specific discussion with them on this issue.

Q24 Mr Weir: Should there have been?
Mr Caldwell: They are the Council that advises ECGD and we would expect them to have that discussion with ECGD.

Q25 Mr Weir: Do you think that if these discussions with the Advisory Council had taken place prior to May 2004 or April 2004, the subsequent problem would not have arisen in the same way?
Mr Caldwell: I really cannot say whether that would have had any effect or not.

Q26 Mr Weir: Had discussions between ECGD and you taken place before that?
Mr Caldwell: Indeed, one would hope so in that, when they did consult with us in 2000, then a solution was found and I have no doubt that, had they done the same prior to May 2004, a solution would also be found.

Q27 Chairman: The May 2004 procedures operating until December 2004 were—
Mr Caldwell: No, I am sorry, that is not correct. An interim arrangement was agreed pending the outcome of the solutions group.

Q28 Chairman: Yes. Let me rephrase my question. Were most of your members content with the May 2004 procedures?
Mr Jones: Certainly from the point of view of the Banking Association, we came to the view fairly early on that it was not possible to work with the 2004 procedures because of the breadth of the undertakings that were required. From the point of view of the undertakings we were required to sign, aspects of them were impractical and, as the exporters were likewise asked to sign not dissimilar undertakings, I think a number of exporting companies also had grave reservations that they could actually complete the formalities.

Mr Caldwell: I do not think there was a full survey conducted by the trade bodies but what I think it is fair to say is that the majority, if not all, of the CBI's and BExA's members who were actively involved in major export campaigns were not content with the provisions.

Q29 Chairman: As you said, the focus of the opposition and the main opposition to the May 2004 procedures came from aerospace and defence manufacturers.
Mr Caldwell: If you study the ECGD's annual reports, then you can see who are the principal constituents of their customer base.
Ms Walton: I think that the problem hit those customers first because they are consistently users of ECGD's products. There were certainly many other members of BExA who also had similar concerns. I think we should make it very clear that our members take making these representations very, very seriously. They want to be sure that everything they are telling ECGD in their application forms is true and accurate but, when they are being asked to make representations about third parties over whom they have no control and to make representations about future behaviour of those parties where they actually exercise no control over them, they found that was impractical and something that they simply could not do, and that prompted these discussions to try and find a way to get ECGD what it needed in order to feel comfortable about its anti-bribery and corruption procedures and to find a way to make it practical for the exporters who were having to sign up to those representations and warranties in their application forms.
Mr Scott: I would like, just so that we understand, to put into context some of the volume of business which we understand took place between May 2004 and December 2004, again just to reiterate the point about the concerns expressed to us reflecting the structure of the ECGD customer base. We understand that something like £55 million of business was done on the new procedures whereas about £900 million of business had to be done on the interim procedures because those were the customers who were finding difficulty with it. It is important to put into context that the reason why particular focus seemed to be on the aerospace and defence-rated customers is that they were the largest customers with the most significant contracts at that particular stage, and that relative balance to the volume of business—

Q30 Chairman: Were the interim arrangements put in place at the request of those customers?
Mr Scott: They were put in place at the request of those customers having identified some of the problems and I think, as Clive Jones has just said, particularly the banks found it very difficult, indeed almost impossible, to be able to provide the cover because of some of the provisions being sought in those May 2004 arrangements. As a result of that, in order to be able to continue doing business, there had to be some interim arrangement to enable that business to continue until resolution of this issue could have been found.

Q31 Chairman: What precisely were those interim arrangements? How were they different from the May 2004 procedures?
Mr Jones: I think the interim arrangements were really a continuation of the arrangements which had existed prior to the introduction of the May 2004 procedures. I do not think there were any fundamental differences. One was effectively working with a situation which we all knew and understood. We thought that was probably the most appropriate methodology to move forward on whilst a solution to the new procedures was put in place.

Q32 Chairman: Am I right that basically what happened was that in May 2004 we have the ECGD procedures, some key clients said, "Sorry, they are impracticable; it is not workable; we are not going to do business on these procedures" and therefore somebody, presumably ECGD, the Secretary of State or somebody somewhere, said, "Right, okay, we had better agree some interim procedures until we sort this out"? Is that roughly what happened?
Mr Jones: I believe so, yes.
Mr Caldwell: Whilst the solutions group was trying to find a solution, the interim arrangements continued as pre-May.
Ms Walton: We should not forget that, throughout all of this, as ECGD had had the right before, it still had the right to refuse cover if it felt there was something untoward going on.

Q33 Chairman: Absolutely. I am trying to think of other examples of public policy where a policy is set down and those who are affected by it say, "Sorry, it won't work" or whatever and the policy enforcers say, "It's okay, don't worry about it, we'll have a chat and change it". I am being slightly facetious but you get my point. Clearly, what did happen in that period of time is quite important essentially for ECGD rather than for the business community. I am sorry, I am not asking questions, I am commenting. Just to explain, the purpose of my question was to get to the role of ECGD because our inquiry is into ECGD's role in pursuing its own bribery policy.
Mr Scott: I think I can answer that question.

Q34 Chairman: It was not actually a question but it is nice of you to rescue me!
Mr Scott: I think all we were saying as the CBI and indeed BExA was, here were a set of circumstances which the customers were presented with in May. Prior to May, they had not had any opportunity to comment on those.

Q35 Chairman: That is significant. I did not know that.
Mr Scott: As far as representative business organisations are concerned, it is what we are here to do which is to lobby government or other bodies to say, "Here are concerns which we have for which we

feel the procedures introduced are impractical. Did you actually mean to have this impact when you were introducing these procedures?" Ultimately, it is for the Government and indeed in this case ECGD to decide if it feels that those submissions which we and others have made had substance. As far as we were concerned as the representative of the business community, we were doing what was absolutely the legitimate thing to do which is to say, "Procedures have been introduced; no consultation took place prior to them; here are the concerns that we have as representing those interests; it is for you to decide whether you feel those are fair or not" and our reflection of that discussion is that ECGD took some of those key points which we had all made and, as a result of it, we are where we are today.

Chairman: Thank you for that. That was very clear and very helpful.

Q36 Rob Marris: I would like to deal with anti-corruption declarations and we were talking just now about the workability. For shorthand, as I understand it under the Final Response, a supplier who is looking for ECGD support has to give a clean bill of health for the previous five years from various other bodies down the chain over which that supplier has control. Does that work?

Mr Jones: When the supplier is providing such a declaration, I think it is qualified to the extent of "after making due inquiry".

Q37 Rob Marris: Yes, that is right, "reasonable inquiry".

Mr Jones: Obviously it is going to be up to the individual suppliers to make what inquiries they deem appropriate amongst their colleagues who they are working with and, if they feel comfortable making such a declaration, then I hope they will do so. There may well be occasions where exporters say, "We cannot give such a declaration covering a five-year period". It may be that the subject has only been in business for two or three years. There could be a number of issues which will need to be settled.

Mr Caldwell: I would like to say that this is a complex area.

Q38 Rob Marris: I did say that I was doing it in shorthand.

Mr Caldwell: To the extent that we have sought an analysis of the declarations that are required of exporters and the extent to which some of those declarations are absolute, which a good many are, and others are subject to reasonable inquiry. So, it very much depends upon which question you are asking as to what the answer is, but there are a good number of declarations that have to be made particularly concerning the applicants themselves and their directors and their employees which are absolute. Then, if you like, the further out you go away from the centre, the less absolute the declaration becomes but it never gets less absolute than reasonable inquiry.

Q39 Rob Marris: I know you said that it changes as you get further out and I understand that but, if there is a kind of absolute list and a reasonable inquiries list, are there bodies on the absolute list that should be on the reasonable inquiries list and vice versa?

Mr Caldwell: I suppose from a trade bodies' point of view the answer is "no" and that the distribution is the result of a good deal of discussion between us and ECGD and it is where ECGD comes to rest. I think that what we have ended up with is a situation where it is felt to be practical to comply with it, it is possible to comply with it. It does not mean that it is not time consuming to comply with it on occasions, but it is practical to comply with it.

Q40 Rob Marris: In terms of compliance—and we are going to move on to audit in a minute—the one thing I wanted to ask you about, which is surprising to me, if I have understood it correctly, is the Premium and Recourse Agreement, every clause with which I am sure you are intimately familiar. As I understand it, under clause 9, the liability of the supplier is not absolute if there is corruption but, under clause 7.3—and forgive me if I have the clauses round the wrong way—liability of the supplier is absolute if there is defective workmanship by a subcontractor. There are two different measures here—and forgive me for not reading it very well—in terms of whether the policy pays out. Do you think there should be equivalence or have I confused you by the way I have asked the question?

Mr Caldwell: This is a point that has been made by Transparency International in their submission. We read it but I am not quite sure that we understand the point of the argument.

Q41 Rob Marris: Should liability in respect of corruption lie with the supplier? Should liability in respect of corruption and bribery be absolute as it is for default by a subcontractor?

Ms Walton: I think it is very difficult for suppliers to take an absolute liability for a subcontractor in this particular case bearing in mind that—and certainly from our members' experience, this is not the way that they behave—they put into their subcontracts the types of behaviour that they expect from their subcontractor. So, if you explicitly stated in your subcontract that you expect them to behave in a particular way, that any kind of corrupt activity is absolutely against the terms of the contract, and then that subcontractor, without their knowledge, goes out and commits a corrupt act, then it does not seem equitable that the supplier should be held wholly responsible for the acts of a subcontractor who has breached the terms of their subcontract with the supplier.

Q42 Rob Marris: Could one make the same argument—and you might—in the supply of widgets by a subcontractor which breached the contract by not supplying sufficient widgets in time or of sufficient quality?

Ms Walton: Yes except that, in those circumstances, there is a remedy available, and it gets into the remedies available under contract. In those circumstances, there is a remedy available. The supplier can go to another subcontractor to supply the widget. What you cannot do is to somehow erase the corrupt act that that subcontractor has committed. You cannot do that; it is not within your control. This is something that the UK Government recognises in other dealings. For example, under PFI contracts, the supplier, if a subcontractor fails to produce something, can actually go somewhere else to get them to produce it and can then avoid a termination of contract in that way, but it is recognised in PFI contracts that if a subcontractor commits a corrupt act, that should not terminate the terms of that PFI contract because the supplier cannot be held responsible for the corrupt act of somebody further down the chain because it is not something that they can correct—

Q43 Rob Marris: Which means they have to have done the reasonable inquiries to which you just referred.

Ms Walton: Exactly, yes. If you have made those reasonable inquiries, that is the test, and again we come back to this, "knowing your customer". If ECGD is happy with the supplier and is happy that that supplier will have done everything within his power to make inquiries of subcontractors and be happy to get them to sign up to the right kinds of agreements, then they should have more comfort that that is not going to happen, but you cannot unfortunately prevent an individual from committing a corrupt act. It is not something that you can proactively do. If they do it, there is no way that you can then go back and erase that act in the same way that you could go back and get a supplier to be replaced by another supplier if they have not produced goods that you need.

Mr Caldwell: I am slightly struggling with the circumstances which are envisaged here. If you are a prime contractor and you have won a contract, you appoint your subcontractor to perform that contract. Why is the subcontractor at that point going to go and commit a corrupt act? He has already been appointed. If the suggestion is—and I am not sure that this is the suggestion—that the prime contractor goes to the subcontractor and says, "We are going to use you as a conduit to bribe the customer", then I think the prime contractor would be caught by existing legislation in any event and would be subject to the same recourse provisions as they would if they had failed in their contract performance. So, I am not sure that the distinction which has been identified in reality exists but, if there is an example which does prove that distinction, I would be interested to look at it.

Q44 Mr Weir: Is it not the case that many main contractors would use the same subcontractors for various contracts and a subcontractor could have a reasonable expectation, if the main contractor obtained the contract, that they would get the subcontract from that contractor? That might be an impetus for ensuring that the subcontractor committed a corrupt act to make sure that the main contractor gets the contract.

Mr Caldwell: Well, it is theoretical question. I would have thought that, in those circumstances, the subcontractor is more dependent upon the goodwill of the prime contractor than the goodwill of the customer.

Chairman: Perhaps we need to think about this. I am looking at the time. Can we move on to audits.

Q45 Judy Mallaber: Moving on to audit, under the Final Response procedure, ECGD will give exporters five days' notice before conducting an audit. Why do we need that requirement?

Mr Scott: I think it is also important to put the audit requirement in context. Customers have always fully accepted, and rightly so, that ECGD can audit or sub-audit even now, but it is important that in the Government's response/ECGD's response, they acknowledge that they are not an investigatory body, they do not have search and seize powers, and therefore what we would argue is that, by having five days, this is a constructive approach because some of the information which ECGD quite rightly wishes to audit may have to be gathered together, it may not all be in one place, and rather than just literally turning up unannounced on the doorstep, it would be much more practical to be able to have large amounts of the information which it is seeking to have clarification upon and that is why we feel that five days is an appropriate response for an organisation like ECGD to conduct its inquiries. It is not the SFO arriving on the doorstep, this is the ECGD quite legitimately wanting to have audit provisions and we believe that having five days is a legitimate way in order for both parties to be able to get the information that is required.

Q46 Judy Mallaber: I can understand and appreciate the argument but how do we make sure that, where there is something a little dicey going on, the five days are not just used to clean up the evidence and get rid of things that maybe ECGD ought to be looking at?

Mr Scott: I think that is why it is important to understand what EGCD's role in all of this is and what actually at the end of the day are the legal provisions. If at the end of the day there is some evidence which has been uncovered, then that is where the due force of the legal process will come into place and that is when you would have an inquiry or you would have a search and seize type of inquiry which you have through an SFO type of inquiry, but ECGD is not an investigatory body of that nature. So, I think it is not an appropriate response to the role which ECGD has been given.

Q47 Judy Mallaber: There must be some purpose for doing the audit and surely there must be some safeguards to make sure that, in the cleaning up of a presentation of information to ECGD, things that a company does not have to show are not hidden in

the background in another filing cabinet or at the office. Are there any safeguards to ensure that ECGD is getting a full and proper audit picture?
Mr Scott: Again, let us just be clear what the purpose of all of this is, coming back to my point about it not being an investigatory body. If, for whatever reason when ECGD does this audit, it feels uncomfortable with the outcome of the audit, it has the ultimate sanction to either withdraw some of that provision or not give it to the customer. I think it is important that we are clear about what ECGD is able to do as an organisation with an audit provision as opposed to what it would do if it were a search and seize type of audit inquiry.
Mr Jones: I would like to make the observation that if ECGD feels uncomfortable with the outcome of its auditing such as items being kept from view, it does have the power to report the issue directly to the appropriate authorities so that they can come in with search and seize orders and undertake due inquiry.

Q48 Judy Mallaber: The whole point is that ECGD has to be in a position to know that there might be something that does need further investigation. Can you explain to me exactly what you would see as being the difference in practice of what ECGD would wish to look at if it were a search and investigative operation as compared to it being an audit operation. What is the difference in practical terms of the actual information that they would want to see? Surely it is the same sort of information anyway, is it not?
Mr Jones: I would concur, yes, it probably is.
Mr Caldwell: Perhaps the question that one should ask is, what is it that has triggered the requirement for the audit in the first place? I do not know how ECGD works these things out but if they have a strong suspicion of illegal activity, then I would have thought that what they would do is not go and investigate it themselves but they would report that to the SFO straightaway. I think that might be the answer to your question, that the purpose of the audit is not the same as an SFO investigation. When they are in front of you, perhaps you can ask them what they think the purpose of the audit is.

Q49 Judy Mallaber: It may be interesting to get an answer from your point of view. What would you regard the purpose of the audit as being?
Mr Caldwell: I would have thought what our members think is that the purpose of the audit is to make sure that the transactions which ECGD is providing support for are as described in the application. So that it covers the goods manufactured in the locations at the prices delivered at those times, that sort of thing, to make sure that the transaction is as described in the application.

Q50 Judy Mallaber: Should it also cover the procedures that a company uses to make sure it abides by the requirement?
Mr Caldwell: I think most of our members who work regularly with ECGD will have gone through those procedures in advance of doing transactions. So, I would not have thought that an audit post the fact is really going to add anything to that.

Q51 Judy Mallaber: Moving on to the other side where there were concerns expressed that ECGD might use those powers to go on a fishing expedition, do you have any evidence of those fears taking place or of commercial information leaking? Those were some of the ones that were expressed by companies.
Mr Scott: First of all, these provisions are still under discussion with ECGD under special handling arrangements where some of those issues might arise and I think that companies do have concerns that, with the wider access to some of this information, there could be risks that some of it might be inadvertently released in the public domain. Do we have individual examples? I think we have some concerns that that might be the case. There has been concern in the past going back to a case of a South African defence related contract where information from an ECGD file did appear in the public domain and it is that sort of example where I think companies do have fears and concerns that unless there is a very careful arrangement put in place for the handling of this sensitive information, it could emerge in the public domain inadvertently and therefore to the detriment of the commercial confidentiality of the customer.
Mr Jones: In relation to the fishing comment, I would comment that at this point the provisions about which we are talking are the new ones and therefore ECGD has not yet undertaken any examination of companies' files in relation to this particular bribery and corruption issue.

Q52 Chairman: During the consultation exercise in 2005, exporters were concerned that the audit process might leak classified or commercially sensitive information. Has an auditor appointed by ECGD ever passed on sensitive information to someone who has used it for their own benefit?
Mr Caldwell: I do not think this was an audit point. There were concerns expressed but this was to do with the provision of information to ECGD about identities of agents and other relevant agency details. That was the point where there was concern.

Q53 Chairman: So, you are saying that it was not a concern of the audit process?
Mr Caldwell: It was an audit point, it was a point about provision of information.

Q54 Chairman: So, you would not have made the point because you do not have those concerns?
Mr Scott: We do not have any evidence of those concerns.
Mr Caldwell: As to audits, no, I do not think so.
Chairman: I just wanted to see if you did. Thank you very much indeed for your time this morning, we

really appreciate it. Due to Parliamentary business coming up later this morning, I am sorry that we have to stick to our timetable. Thank you very much again. If we have any further questions, we will drop you a line but we are very grateful for the information you have given us. Thank you.

Witnesses: Mr Neill Stansbury, Project Director Construction and Engineering, and Mr Graham Rodmell, Director Corporate and Regulatory Affairs, **Transparency International (UK)**; and Ms Kirstine Drew, **The Corner House**, gave evidence.

Q55 Chairman: Welcome and thanks to both organisations for your written submissions and so forth. For the record, would you introduce yourselves, please.

Ms Drew: My name is Kirstine Drew and I am a representative from the Corner House in place of Dr Susan Hawley.

Mr Stansbury: I am Neill Stansbury. I am Project Director of Transparency International's Construction and Engineering initiative which is designed to stop corruption in the construction industry internationally. I am a lawyer and have worked for more than 20 years in the international infrastructure sector and I have worked on projects where there have been agents and where there have been export credits over those 20 years.

Mr Rodmell: I am Graham Rodmell. I am Director of Corporate and Regulatory Affairs for Transparency International.

Q56 Chairman: Thank you. May I begin by asking whether you accept that the Government have to take account of the views of business and that there is a point at which anti-bribery procedures may deter UK companies from seeking customers abroad.

Mr Rodmell: Of course we accept that ECGD has to take account of the view of business. Is there a point at which anti-corruption procedures deter companies from doing business abroad? I do not think that should arise. I think there are two separate questions. I would say that it is not the procedure that deters, it is the conditions generally in the countries in which they are seeking to operate, where extortion is prevalent. That is a factor which will deter. Other things which will deter include the fact that contriving by whatever means to secure business by some illicit commission or payment is a criminal act in this country which is visited by up to seven years imprisonment and unlimited fines and so on. That also might be a deterrent. I think that the most major deterrent for most of the companies—we have many corporate supporters of the TI position—is what damage it does to the reputation of the company if it comes to be known that it wins business as a result of illicit means rather than by fair and open competition.

Q57 Chairman: It is often said that the most productive approach to tackling bribery, as other issues, is to have common international standards, international agreements and so on. In the case of bribery, do you believe that is feasible and, if so, where?

Mr Rodmell: It is feasible and we have examples. We have an OECD convention; we have the multinational guidelines which have a chapter on corruption; we have, very importantly now, the UN Convention which we have just ratified which will have potentially up to about 45 countries ratifying. So, you have international understandings to have objectives to improve matters. When it comes to anti-bribery procedures for export credit agencies, we have also the OECD export credit group who have been working and we have heard this morning about the new standards which have come out of them which I think are a considerable step forward. The problem with asking whether we can have international understandings is that you are likely to go for the lowest common denominator, the most laggard, what will he or that country subscribe to, and I think that part of TI's position now is to encourage the UK to actually take a lead, and having UK PLC known as being a country that does not tolerate bribery in international business is, in the medium to longer term, a much better position than trying to accommodate it in the short term. Most companies find that and I think the same is the case for the Export Credit Guarantees Department and also for the individual companies concerned.

Ms Drew: May I take the opportunity to answer the question?

Q58 Chairman: We are very happy for you to respond as long as you do not repeat the points that have already been made as we are very pressed for time. Please, forgive me saying that.

Ms Drew: I will be very brief. On the first point, the events of the last two years have not been about accepting the views of business, they have been about including the views of other stakeholders and I would very strongly like to make that point. The second point is that business has been at the forefront of the anti-bribery agenda. In 1977, at the time of the Foreign Corrupt Practices Act, the International Chamber of Commerce wrote its first report on bribery and corruption and the ICC is at the forefront and takes a very strong stand. So, if the framing of the question is that anti-bribery is an NGO question and an NGO issue, I would like to say that it is not. On the issue of international standards, we heard about the OECD statement that is out and I want to just pick up on a couple of things. We heard about the ECGD being a leader and the cost to business of it being a leader. There is a comparative survey that comes out from the OECD which documents exactly what practices the ECAs are implementing and ECGD is not at the top of that list. An index has been done on compiling the

answers that are given and the ECGD is not in the top five. It is the case that much has been done at the multilateral level, it is the case that there are different practices, there are different leaders in different areas. I just wanted to make that point.
Chairman: Thank you very much.

Q59 Rob Marris: I wanted to explore a bit again the question of agents, spreading the net a bit wider in terms of applicants having to provide the names of agents of consortium partners or other group companies, which I think was the ECGD requirement until May 2004 and is in a sense up for discussion now in respect of the final response. Why should companies have to spread the net that widely, beyond the immediate contract, if I can put it that way?
Mr Stansbury: Because of the contractual situation. If you have a main contractor he is responsible contractually for the acts of his joint venture partners, his agents and his sub-contractors under normal commercial principles. Therefore, if a contractor is working as part of a joint venture, the joint venture partner appoints an agent, and that agent pays a bribe in connection with the award of the main contract to the joint venture, the UK exporter will be responsible for the consequences of that as far as the client is concerned, even though it is the joint venture partner's agent who paid the bribe. The client can terminate, under most legal jurisdictions, that contract as a result of illegality, and the whole contract will fail. The UK exporter can then turn to its joint venture partner and say "Your fault, you caused this, compensate us" —assuming he has any assets to obtain compensation—but the contract has failed. The ECGD then has a problem because they have provided an export credit to the UK exporter, they have probably paid the bank, the bank will have paid the UK exporter, how then can the ECGD get recourse? Therefore the ECGD is at risk, however the bribe is paid, whether it is paid by a joint venture partner, a sub-contractor, an agent or whoever. It does not matter whether or not the bribe is paid by the exporter's agent. When we give a lot of training workshops around the world to many companies on this issue, we always recommend to companies when you have a joint venture partner, a consortium partner, a major sub-contractor, always as a matter of commercial commonsense and due diligence find out exactly what they are doing in relation to their agent, find out if the agents are reputable because that joint venture partner's agent can bring you down. Therefore, most companies are doing proper due diligence in this respect, they will have all the details of the joint venture partner's agents *et cetera* and they will easily, therefore, be able to hand it over to the ECGD. The suggestion raised in the ECGD's reports that it may be impossible for an exporter to provide details of the agent of its consortium partner is, frankly, ludicrous because you would always as a matter of commonsense find out your consortium partner's agent.

Q60 Rob Marris: You should as a matter of commonsense.
Mr Stansbury: You should as a matter of commonsense.

Q61 Rob Marris: Have you got a sense of what proportion do and what proportion do not find out that information?
Mr Stansbury: A lot of companies are not taking all the steps they properly should, but certainly when we do work with companies, as we do very closely, more and more companies are taking this view. Also, when it comes to a point raised which is relevant in relation to sub-contractors, can sub-contractors pay a bribe, as I say we work in many countries and we are coming across a lot of situations now where because agents are being closed down as an avenue for bribery because of the huge emphasis placed on agents, many corrupt clients in developing countries are now indicating to contractors or exporters to appoint a certain joint venture partner, they say you must appoint X as a 49% joint venture partner, or you must appoint X as a sub-contractor, particularly in the case of the construction sector where there is a lot of local work. Therefore, the onus then is on the contractor to say why is this joint venture partner being imposed on me, why is the sub-contractor being imposed on me, what is their price, because that is now how the bribes are being paid, because if the sub-contract price is higher than the market price an element of the bribe can be in the sub-contract price. It is increasingly common and increasingly well-known that the contractor's joint venture partners can be a conduit for bribes, so that is why we say as a matter of commercial commonsense, find out about these partners. Having found out, hand over the information to ECGD, just a page of information, take 10 or 15 minutes to fill in the form.

Q62 Rob Marris: What you suggest will protect itself anyway whether the ECGD is involved or not.
Mr Stansbury: Absolutely, it is best practice.

Q63 Rob Marris: Shifting a bit sideways from that into special handling arrangements, which we discussed when Dr Berry was asking questions about it, if an applicant refuses information about its agents to the ECGD it is likely that their application will be refused, but not certain. Do you think that is the right balance, to have a kind of rebuttable presumption that the application will be refused in the absence of that information?
Mr Stansbury: We have serious concerns about this confidentiality arrangement anyway because again when we are doing corporate training we say if you are appointing an agent one of the questions you should find out initially is, is the agent willing to disclose to the client and to the banks involved who he is, what his commission is and what his scope of work is? A reputable agent will say, "no problem, no problem at all", and the fact that it is public information will not be damaging to anyone. We say to companies if the agent says do not disclose to anyone who I am or what I am being paid, alarm

bells should ring all the way through the hall, and our recommendation in that situation is do not appoint them, because the chances are very extreme that they could be corrupt agents, because we do not accept for a second the argument that it is a competitive disadvantage to disclose the agent because in all contractual fields there are good companies and bad companies. If you want to do an exclusive deal with a company you sign an exclusivity agreement, so you say to that sub-contractor, that joint venture partner, we work together exclusively, no one else can take you, it is public. Why then should agents be kept secret because you are worried about someone poaching them, you just sign an exclusivity agreement. We believe the confidentiality arrangement is based on a false premise.

Q64 Rob Marris: You do not think that should be rebuttable, because the presumption of the special handling arrangements is that there should be no such effect if possible.
Mr Stansbury: We think that there should be no rebuttal presumption and that the special handling arrangements should not be there, but if they are there, we would then say to ECGD if a company says please keep the details confidential, the ECGD would say "My God, this is very suspicious, why?" and therefore they would immediately go into enhanced due diligence, but how can they do enhanced due diligence if only three senior executives are allowed to know who the agent is? It is almost impossible to carry out enhanced due diligence when you are trapped, so what we are saying is, firstly, the whole logic is flawed, about agents needing to be kept confidential and, secondly, if any attempts are made by the exporter to keep the agent confidential, ECGD should then do full due diligence, and if they cannot, they should refuse cover.

Q65 Mr Weir: In your memorandum you express serious misgivings about the recourse provisions in the procedures in ECGD's Final Response, but is it reasonable to make an exporter absolutely liable for corrupt activity, over which it has no control and of which it may have been unaware?
Mr Stansbury: In previous discussions Sue Walton explained very clearly the logic of this position and my disagreement with that logic is that if it is unfair on the contractor or the exporter to take responsibility, why should it be fair on ECGD to assume that liability? I go further than that and say how is it correct that the taxpayer should actually provide, effectively, insurance against the corrupt acts by the exporters' sub-contractors or joint venture partners, because that is effectively what will happen. If there is a corrupt act which takes place, exporter is paid by bank, client does not pay bank because of the illegality, ECGD has to compensate the bank, who can they get recourse against—not the client and not the bank—and they have now stopped the ability to get recourse against the exporter. Therefore, effectively, ECGD is providing anti-corruption insurance against the corrupt acts of the sub-contractors and the joint venture partners. It is not part of their function, firstly, so it is wrong but, secondly, we have moved on in fact, I am pleased to say, because the OECD action statement published last week is quite clear on this point, and I think ECGD will now need to revise its recourse provisions because basically what they say in paragraph (j) is "If, before credit, cover or other support has been approved, there is credible evidence that bribery was involved in the award or execution of the export contract . . ." Note, it is nothing to do with complicity by the exporter or limited responsibility, just bribery in the award or execution, which we fully support, then the action they will take will be: "suspending approval of the application during the enhanced due diligence process. If the enhanced due diligence concludes that bribery was involved in the transaction, the Member shall refuse to approve credit, cover or other support. If, after credit, cover or other support has been approved bribery has been proven, taking appropriate action, such as denial of payment, indemnification, or refund of sums provided." The way we see the action statement it is very clearly saying that any corruption in the award or execution of that export contract would lead to indemnification. Under OECD guidelines, the ECGD must now revise its recourse provisions in line with what we were saying in our submission.

Q66 Mr Weir: So effectively there is absolute liability.
Mr Stansbury: It is absolute liability, there is no qualification, it is OECD best practice.

Q67 Mr Weir: Where does that leave the exporter, how far do they then need to go in investigating third parties who may be involved within these contracts?
Mr Stansbury: It is very difficult for exporters. Many companies we work with have actually taken the decision to withdraw from countries where they cannot do honest work and many of the major contractors are now pulling out of many countries, so we say to them: you cannot do everything possible, there is always a business risk, but if there is corruption in your contract, you are responsible for it, you bear the civil and possibly criminal responsibility, so you have to be very careful. They do what they reasonably can, if they assess the risk as reasonable they take it, if they do not they withdraw, and that is happening more and more frequently around the world.

Q68 Mr Weir: That is fine, but from what you were reading out earlier from OECD it does appear that there is effectively absolute liability now. Surely many exporters will be looking at any country where there is any corruption and saying what is the commercial risk to us, do we want to get involved in that country at all. Is that going to impact seriously on exports from the UK?
Mr Stansbury: I do not see why it necessarily should, because businesses do business in countries without export credit cover to cover corrupt circumstances. Export credit covers a very small part of the business

done overseas, other companies take on the corruption risk themselves, but secondly we need to work with other export credit agencies in other countries to make sure that we are all moving in alignment. We firmly believe that at TI.

Q69 Mr Weir: That is the point I was getting to, do you believe that all other countries are moving in the same alignment, are all other countries exercising the same control that ECGD are exercising on UK exporters?
Mr Stansbury: There is a great disparity between countries, certainly, and I agree with Kirstine that the UK is certainly not the leader in this field. There are disparities in different areas and we at TI, working through our 90 national chapters, are trying to make sure that everyone is moving ahead; inevitably some countries are always ahead in some aspects, but we have to keep moving forward.

Q70 Rob Marris: Who is the leader?
Mr Stansbury: You cannot say who is the leader in any respect because some countries are better at prosecuting, other countries are better in their due diligence, other countries are more careful, I do not think I would like to say that.
Ms Drew: If I could just make an additional point, the discussions at the OECD are behind closed doors so it is hard to know which countries have which position, but the one exchange mechanism they have is this questionnaire, the survey of practices. We have compiled an index on the basis of that and we could forward it to you because it would give you a good idea of where they are in terms of what they say. We cannot say that is in fact what they do, there is no monitoring, but it is based on information exchanged. We can forward that to the Committee.
Mr Weir: That would be useful.

Q71 Chairman: We would be very grateful, that would be very helpful. Thank you very much indeed.
Ms Drew: I have to say that the index is compiled on the basis of the May 2004 procedures, not the changes.

Q72 Judy Mallaber: Can I move on to the Corner House proposal in your evidence that in particularly high risk countries or sectors the ECGD should commission independent due diligence checks on the agents by an independent and reputable risk consultancy. Can you explain why such checks are needed?
Ms Drew: Firstly, we do not think those checks are going beyond what is generally accepted good business practice. If one reads anything about compliance in the United States under the Foreign Corrupt Practices Act—and it is relevant to talk about the Foreign Corrupt Practices Act because it is the only national anti-bribery legislation that has been in place for a very long time and it is the only significant body of case law where companies have developed their internal procedures—many of the companies going for export credit support in the UK will in fact be listed on the New York Stock Exchange so therefore they will be subject to the Foreign Corrupt Practices Act and they will have FCPA internal compliance already. Our first point is, therefore, that we think this is not additional and companies should be commissioning due diligence checks on their agents anyway; the second point is that we do believe that the special confidentiality arrangements limit the ability of the ECGD to do due diligence and therefore this is a counter-mechanism that they will be required to submit a due diligence report to the ECGD as evidence that there were no red flags to merit further investigation.

Q73 Judy Mallaber: Do you know who pays for those checks in the States and who do you think should pay for them?
Ms Drew: In the United States it is the companies that pay, but it is a good question because there is therefore an incentive to get something cheap and quick, but then that gives you less protection. It is a good question and it is an interesting question about who should pay, but the practice to date, certainly in the United States, is that it is the company who pays.

Q74 Judy Mallaber: They choose who should do the checks.
Ms Drew: Exactly, it raises the question of who they choose and who is monitoring the monitors, if you like. From our point of view we would be concerned about that and wondered if there were any precedents in the context of the UK for social and environmental legislation where in fact it is the public purse that pays in order to protect the integrity of expenditure.

Q75 Judy Mallaber: Do you think there should be any point at which the cost of such due diligence checks meant that particular work was being lost in a particular sector or country that we should be concerned about? From your point of view would you just say "good"?
Ms Drew: If there is any such point we certainly have not reached it. It is not as if there have not been any corruption cases involving companies with ECGD support. I think you are familiar with the report done by Dr Hawley which documented nine case studies through the 1990s, and of course one could say that since the 1990s everything in the anti-corruption agenda and policy world has changed, but unfortunately there are cases involving ECGD support since 2000 which involve allegations of corruption.
Mr Rodmell: Could I just come in there very briefly? We should think about where that question is coming from. It is not the ECGD imposing a burden, this is the point, a company in selecting its agent will want to carry out the most appropriate due diligence which could be through a due diligence agent—a risk group or something of that nature, a consultancy—or it could do it through its own resources. It is not a burden that is being in some way imposed by ECGD, the company does it for its own purpose and in terms of cost, if it gets a good agent that is going for clean business and will not render the company liable to have voidable contracts because there is some bribe behind the deal, then it

is a cost which will repay itself many times over. It will be a good agent and it will have the opportunity to do good business. That is a cost saving, it is not a cost expenditure.

Q76 Judy Mallaber: It slightly implies that actually all businesses would want to be good businesses and so one wonders why we need these criteria.
Ms Drew: If I could also say that this is the business position. The International Chamber of Commerce has its own recommendations and it has a manual to back up those recommendations and it gives good practice. One of the good practices that it cites is that a company would conduct formal reviews with agents, not only with its own agents but the agents of its partners. These are the good practice principles that have been developed by industry.
Chairman: Thank you, we do need to move on. Mike.

Q77 Mr Weir: In your memorandum Transparency International identifies what it says are deficiencies in the audit procedures: for example, that only records in the UK can be inspected and that records can only be inspected for the sole purpose of verifying statements and information given to ECGD by the supplier in the application. You appear to be calling for a substantial increase in the role and powers of the ECGD far beyond even the May 2004 procedures. Can you tell us what justification you see for such a change?
Mr Stansbury: We do not say that the May 2004 procedures are the international benchmark against which we measure everything, all we do is look at what we believe should be done to protect against corruption and to protect ECGD's interest. I find it very hard to understand why an agency like ECGD providing taxpayer subsidised money for a guarantee is tying its hands in such a way, because if you are talking about export contracts it is inevitable that a lot of documentation will be overseas—you have overseas subsidiaries, overseas suppliers or whatever—so why on earth are you saying that the only right of audit is to go to the UK supplier's premises? In an industry which has to sub-contract and joint venture the whole time, why limit the disclosure only to the supplier's own records? It is an absurd situation, I think, and whether ECGD want to go overseas and check the supplier's or sub-contractor's records is another issue, but at least they should have the right to do so and I do not see why they have tied their hands, so what we have put there is what we believe ECGD should have the right to do.

Q78 Mr Weir: Are you saying then that ECGD should in effect become an investigatory body to combat bribery and corruption, have overseas agencies to look into contracts in the numerous countries in which British exporters work?
Mr Stansbury: We are not saying they should be investigatory but they are providing insurance on a commercial basis and when you provide insurance on a commercial basis you always ensure in your contracts that you have the full right of audit and inspection. That is (a) a deterrent against corruption and fraud because people know they can be inspected, and (b) if there is a suspicion it enables you to go and investigate. It is a commercial investigation; if they subsequently find criminal evidence, they will then surely hand it over to a criminal investigation agency, but as a commercial organisation they should not tie their hands in such a way.

Q79 Mr Weir: That is all very well but they would have to have a massive increase, presumably, in resources and personnel to be able to do that in the first instance before handing over to the criminal investigation agency.
Mr Stansbury: You would not audit every contract all the time, you have the right to audit. You may make the decision to do random audits or random partial audits, or only to audit in the event of suspicion, but you need to have the right.

Q80 Mr Weir: It would still need a substantial increase in resources from its current level to enable them to do so, would it not?
Mr Stansbury: Maybe they should increase their resources because they have commitments to prevent corruption, and if the exporters do not believe there is a reasonable chance of being audited then the exporters may not take sufficient steps to prevent it.

Q81 Mr Weir: What proportion of corruption has been found so far in export contracts?
Mr Stansbury: I am sorry, I missed that.

Q82 Mr Weir: What proportion of current export contracts are showing some corruption involved in them?
Mr Stansbury: We do surveys around the world about this and everything we get is obviously word of mouth and confidential because there is not much prosecution at the moment. In some countries we are informed that nearly all contracts in certain sectors involve bribery, in other sectors, other countries, people believe that 40 to 50% of the contracts involve bribery. I have no idea how many contracts involving UK exporters involve corruption, but our evidence from around the world is that there is significant corruption still in many, many countries.

Q83 Chairman: The famous interim arrangements that ECGD set up between May and December 2004, I would be grateful if you could briefly comment on why you believe these arrangements were put in place and how they in fact operated.
Mr Rodmell: I do not think in truth we have any real information about them other than what has been published as a result of Parliamentary questions and so on.

Q84 Chairman: An extremely honest and transparent reply. Kirstine, did you want to comment?

Ms Drew: Only that we do not know what the arrangements were, we are not privy to what they were, but we do know that eight meetings were held with representatives of business, many attended by British Aerospace, Rolls Royce attended six of them and Airbus five of them. These were discussions only with industry, there were no other stakeholders present.

Q85 Chairman: Do you have any direct evidence about why those particular aerospace and defence manufacturers might have been concerned, or is it just that they are major clients of ECGD?
Ms Drew: I do not have any knowledge.

Q86 Mr Weir: You said you have no direct knowledge of the interim arrangements. If I understood correctly from our last set of witnesses they indicated that it was the same arrangements as applied up to the change; are you saying that is not correct?
Mr Rodmell: It is just that we do not know.
Ms Drew: We have no way to know what those interim arrangements were.

Q87 Chairman: We will ask them when we take evidence.
Ms Drew: It is an interesting question to know what is happening now. We know that the new procedures are coming in on 1 July 2006 but are they still operating the interim procedures or are they back to the May 2004 procedures? I would be very grateful to know the answer to that.

Q88 Chairman: We are very grateful that you suggest that question be put to them, certainly. To pursue this business about what do exporters do if ECGD tightens up controls, may I start by asking if an exporter decided that ECGD's anti-bribery rules were too onerous—rightly or wrongly, if that was the view they adopted—the only alternative source of support for them would be other ECAs, would it not?
Mr Rodmell: That would be one alternative resort, but of course they can, as Neill says, accept the risk themselves; the vast majority of exporters do in fact accept the risk themselves.

Q89 Chairman: If they were driven to seek alternative providers of support and those alternative providers were not so rigorous in their anti-bribery rules, is there not an argument that this is therefore counterproductive?
Mr Rodmell: No argument at all, with great respect.

Q90 Chairman: I was simply asking the question. I knew what the reply was going to be but we need it for the record.
Mr Rodmell: Let me just develop that. Why should it become too onerous, why would they find less rigorous questioning more to their liking? I should think the red flags ought to be flying and I am put in mind of a question that I heard at a BBA conference actually when the Wolfsberg Principles against money laundering were introduced. They had the person in charge of Barclays Bank private client business there and they said, "If you observe all these principles against money laundering, will you not lose business?" He said "Yes". They asked "How much will you lose?" "Perhaps 20 to 25% of my private client business." "How do you view that?" "That is the kind of business I do not want." ECGD could well take an equivalent position, that if it is driving customers away because they want to engage only with much less rigorous anti-bribery controls, it sends a very clear message about the kind of business that they were being applied to to underwrite. That is the kind of business that ECGD and the British taxpayer could do without.

Q91 Chairman: Are you not making two arguments? One is the argument you have just made which is that ECGD in these circumstances may reasonably say we will go away. The argument you used earlier is that good companies do not behave this way anyway, or should not behave this way anyway, and yet we do know that there was extensive lobbying, as you have noted, it is in the public domain, after the May 2004 rules were published, and the major aerospace companies in this country seem to be working very hard indeed to water down the provisions. How do you explain that?
Mr Rodmell: The point you make is very interesting actually. One of the key people in those meetings, according to the information which was public, was BAE Systems.

Q92 Chairman: Indeed.
Mr Rodmell: When I look at their latest corporate responsibility report in April this year—it was an excellent report—it talks about ethical conduct and it talks about the operational framework. It says "This is supported by detailed policies covering such matters as anti-corruption. Our anti-corruption programme has been established in alignment with international standards such as those developed by the International Chamber of Commerce and Transparency International." I can tell you that the Transparency International standards, which are the *Business Principles for Countering Bribery* are very clear about what they should be doing about subsidiaries and joint ventures, what exactly they should be doing about agents and so on, and if they comply with those principles they will have no difficulty complying with the ECGD anti-corruption procedures which would not appear in the least burdensome, and we welcome that.

Q93 Chairman: Thank you, we will certainly get a copy of that document.
Ms Drew: If I could just follow on with a couple of points, on the first question the alternative is other ECAs, especially for consortia which are made up of different companies. There has to be some sort of national interest normally and that puts the focus back on the OECD, the negotiations there and the fact that the ECGD must take a lead role in bringing standards up. That is my first point. The second is

that I also have a quote from BAE's corporate responsibility report but this time it is from Robert Barrington of F and C Asset Management.
Mr Rodmell: We did not liaise on this!

Q94 Chairman: It matters not.
Ms Drew: It is a long one so I will get to the crux. He says, "But the company [BAE] does need to tackle head on its residual reputation as being a laggard in corporate transparency, an opponent of NGOs and an abrasive partner in discussions about its business practices." Then it goes on to say "Becoming a champion for stronger anti-bribery positions in international defence procurement would be [one of their demands]. As shareholders, we fully respect commercial confidentiality, but we also live in a transparent and information-rich age, which requires companies to be accountable." In acknowledgement BAE say: "We acknowledge Robert Barrington's view that we could have better communicated our stance on the debate with ECGD and are constantly seeking to improve our communication to our stakeholders . . ."
Chairman: Thank you very much. The final question is from Rob.

Q95 Rob Marris: Speaking of transparency and openness, I understand that in its Mission and Status Review about six years ago the ECGD said it was going to be more transparent and more open. Has it been, particularly in the two years since April 2004? Has that been your experience of it, more open, less open, about the same?
Mr Rodmell: It has gone in stages. You say from 2004 and in recent years it has been unfortunate because I think they have aspirations to be more transparent—

Q96 Rob Marris: I know, that is what their Mission and Status Review said six years ago.
Mr Rodmell: I have to say the fact that we only had the consultation on these procedures as a result of a settlement to an action for judicial review brought by the Corner House, it does not exactly say much for transparency. It has been a great shame that this has happened because the Government has been saying all the right things in regard to the Africa Commission report and the G8 communiqué last year about ECAs needing to tighten up on their anti-bribery provisions because it has such a damaging effect on developing countries; it is running counter in a way, or it has run counter, unfortunately, to the fact that the World Bank themselves are taking this a whole notch further forward in their anti-bribery policies and in their statement the other day in Indonesia. They are starting a completely new anti-corruption strategy. It has pulled the UK back and the UK does not deserve that reputation, it needs to move on. I just hope that out of this whole process, supported by what might come from the Trade and Industry Select Committee, we can move forward with a much more transparent way of dealing with the matter.

Q97 Rob Marris: I am going to ask you in a minute for two things that they could do to be more open and transparent, but to give you time to think about it I wonder if Kirstine from the Corner House could give her views on the initial question, are they more open and transparent?
Ms Drew: The fact that the Corner House had to take legal action against ECGD in order to force a consultation suggests that the answer is very clearly no. The original May 2004 procedures were brought in without any consultation, despite efforts by Dr Hawley to secure meetings and discussions, and also despite ECGD's position that the Corner House, together with Transparency International, are the two primary NGO stakeholders on anti-corruption, yet they brought those procedures in without consultation and they then revised the procedures with consultation with only one set of stakeholders. Our answer therefore is no. If I could also say on that that as a result of the process that we have all gone through the procedures have been changed again and we now have stronger anti-bribery rules in place and it shows that the results are better when all stakeholders are consulted and not just one side of the argument is listened to. I hope that is the lesson that has been learned from all of this.

Q98 Rob Marris: Graham is busy doing his exam question which I am now going to ask you while I ask for his answer, which is if you could point to two things which the ECGD could do to be more open and transparent. Have you got an answer there, Graham?
Mr Rodmell: I have one answer, which in a way is sufficient for the present purpose, and it would be to look again at the proposals which TI(UK) very carefully put to them and see whether they cannot actually move towards accepting those proposals for amending their forms and so on, and I suppose secondly, because I have to have two answers, they should now look at the ECA action statement and take the additional steps which they would seem to need to, and look at their recourse arrangements, to make sure they do in fact comply. It is perhaps a little tame.

Q99 Rob Marris: No, no, it is fine. You may just agree with those, but have you got a couple of steps they could take?
Ms Drew: We have new procedures in place, I think everyone agrees that they are a step forward and that they are reasonable and practicable. The next steps are to monitor those procedures and to publish the results of the monitoring of those procedures periodically, openly, so that all stakeholders can have basic information on how they are being implemented, and that will provide the basis for ongoing improvements to which everybody can contribute. If there are two things to do, therefore, it is to monitor and to publish the results of the monitoring.
Rob Marris: Thank you.
Chairman: Thank you very much indeed, it has been really helpful to the Committee. Thank you not only for being here today but for your written

submissions which, if I might say, as always have been very helpful and very detailed, so thank you again. If we can dream up any third or fourth questions we will certainly write to you and be very happy to take a written response. Thank you very much indeed.

Wednesday 14 June 2006

Members present:

Roger Berry, in the Chair

Mrs Claire Curtis-Thomas
Judy Mallaber
Mr Mike Weir

Witnesses: **Rt Hon Ian McCartney**, a Member of the House, Minister of State for Trade, **Mr John Weiss**, formerly ECGD's Deputy Chief Executive and Director of Business Group and **Mr Nicholas Ridley**, General Counsel of the Export Credits Guarantee Department (ECGD), gave evidence.

Chairman: May I first of all welcome you warmly to the meeting of this Trade and Industry Sub-Committee looking at ECGD procedures in relation to bribery. Before I ask you to introduce your officials may I first of all invite two of my colleagues to declare any relevant interests?
Judy Mallaber: I should declare that a number of my constituents work for Rolls-Royce and related companies who obviously had an involvement in this issue and, on the other hand, I am also a member of Amnesty who I believe, are in the coalition of organisations from the NGO side which are interested in the issue.
Mrs Curtis-Thomas: I wish to declare that I am also a member of Amnesty and a significant number of my constituents are also interested in Rolls-Royce. I work with members of the Rolls-Royce company on a number of engineering-related projects.

Q100 Chairman: Thank you very much. Minister, would you like to introduce your officials for the record?
Mr McCartney: May I also declare an interest in that my father was a convener and a shop steward at Rolls-Royce Glasgow and was sacked for his trade union activities. The family have forgiven him it was such a long time ago.

Q101 Chairman: A very encouraging start.
Mr McCartney: First of all, I hope the Committee had an opportunity to read my letter of 12 June. I hope this will provide helpful background to our responses today, as well as avoiding the need for any lengthy opening statement from me. May I introduce the officials in charge of our anti-bribery and corruption procedures: John Weiss and General Counsel Nick Ridley? As you know, I am a new minister to this portfolio and the issue of anti-bribery procedures has a rather long history. I shall, as appropriate, if you agree, refer questions to John and Nick who experienced this from the absolute beginning. Some of the issues we will touch on may be technically and legally complex and in the interests of accuracy some of the responses will necessarily reflect this. I shall provide explanatory memoranda on some of these, if the Committee would find that helpful. If you require a written explanation on any other part of our evidence today, I am happy to provide that also. Finally, if you are unable to ask any questions today because of the time constraints placed on the Committee, if you send them to me I shall ensure that you receive responses to all other questions that you were unable to put during this period.

Q102 Chairman: Thank you very much Minister; we appreciate that. We are hoping that the session will last no more than an hour or an hour and 15 minutes, but if there are questions that we do not have time to pursue, we shall take up your offer of writing to you. The events that exercised our Sub-Committee and the events that exercised the Trade and Industry Committee when they produced their report last year I guess start with the procedures that ECGD announced in May 2004. May I ask why those procedures were issued without consultation?
Mr McCartney: It was at a previous hearing on 16 November 2004 that an explanation was given that we had not envisaged that changes being introduced in May 2004 were of a nature to justify prior discussions with customers. ECGD had introduced some of the enhancements to its anti-bribery procedures in 2002 and 2003 without prior discussion with customers. This had not given rise to particular concerns and it was not thought at the time that the position would be different in 2004. At the same hearing on 16 November, we acknowledged that, given the workability problems which subsequently emerged regarding, for example, the scope of the representations to be made by applicants about their employees in affiliated companies, it would, with the benefit of hindsight, have been better if a longer period of notice had been allowed in order to resolve those problems before the new procedures went into effect. Nevertheless, having said that, we did give two months' notice of our intention to introduce the new procedures, offering customers the opportunity to discuss them with the ECGD if they required further explanation.

Q103 Chairman: Two things strike me which I put to you. The first is that, from ECGD's point of view, the Department's statement of business principles of December 2001 includes a specific commitment to wide consultation during the development of services *et cetera*. Cabinet Office guidelines have a fair bit to say about consultation as well. Does the Department now recognise that consultation before the publication of the May 2004 procedures would have been in harmony with both its own business principles and indeed the recommended Cabinet Office procedures?

Mr McCartney: I think we could say that with hindsight and I did say in my comments that we have learned lessons in regard to this. Having said that, it was not a breach of any principle of the way in which we operate this. It is a complex difficult area with a range of conflicting opinions about the process here. I shall ask John to come in, but it is my understanding, although I was not around at the time, that a great deal of care was indeed taken in respect of following up industry's concerns, NGOs' concerns, there was also production of an interim report in various areas. There has been a genuine effort here at all stages, albeit the indication at the beginning of the process was that because we had done similar things previously to enhance the procedures which had caused no difficulties, there was an expectation that we would go the same way. We received more representations than expected and I apologise for that, but I would not want to give the impression that the NGOs or indeed a customer base has any conception that we do not want to consult or be involved with them. Indeed it is in our interests that we are and we want to build on those relationships.

Q104 Chairman: May I just put this to you finally on this point? When we took evidence from the CBI, they said that between 2000 and May 2004, they were not aware of any consultation, with or without a capital C, with ECGD's customers and trade bodies. Is that correct or are the CBI telling 'porkies'?

Mr McCartney: Nobody is telling 'porkies'. It may well be perceptions and I want to make sure the answer we give to you is accurate. I was not around at any of that period and I am not using that as an excuse. John was, so I shall ask John to answer that.

Mr Weiss: In 2000, when we were first introducing anti-bribery procedures, we did act somewhat similarly to 2004 in that we gave notice of our intentions to introduce these new procedures. In 2000 we actually went out to the trade associations and asked for their feedback before we introduced them. We then, in 2002 and 2003, enhanced that regime and on those occasions we did not have any consultation with a small C, any discussions with customers and, as the Minister has said, it did not give rise to particular concerns. In May 2004, we again did not have prior discussions; we gave two months' notice of the intention to bring in the new regime. I have to say that we thought that this would not, as in 2002 and 2003, give rise to problems but, with hindsight, we were mistaken in that view. In terms of a big C Consultation, the May 2004 procedures were actually heavily grounded in a report that the NGOs had put in at the end of 2003, so we had one set of views in with us. We brought that into play in the May 2004 procedures, but I have to say we did not envisage that that was going to give rise to particular problems. However, it took quite a long time to sort those problems out afterwards.

Q105 Chairman: Indeed; we shall come to that. The criticism of the May 2004 procedures from industry resulted in the ECGD inviting the CBI to convene the ECGD Solutions Group, did it not? Why were NGOs like Corner House and Transparency International not invited to join that group?

Mr McCartney: It was because the discussions were aimed at making the procedures workable. The concept in principle had been outlined and what was then at issue was whether it was practicable or workable. Therefore it was important for those who needed ECGD to support their customer base, so we thought it was appropriate for industry and representatives of trade associations to participate in finding an effective way of implementing, what in the end were some of the most effective anti-corruption procedures anywhere in the world and that did not lose sight of this. You will see later, and I am sure you have received written and indeed verbal representations to that effect, that these are some of the most rigorous processes in place anywhere and that, despite the difficulties we have had, is the best outcome surely. I am sure nobody would want us to go through a process which was either inappropriate or not practical in terms of improving, practical with a concept in principle of preventing bribery and corruption in the pursuit of trade agreements.

Chairman: I suspect we would probably all believe that, with one or two qualifications, where we have ended up now is actually a very good position to be in, but, to put it mildly, the procedure, the challenge in court, then the forced consultations and so forth, the procedures that brought this about were less than satisfactory.

Q106 Mr Weir: As you know, we have had evidence from the CBI and the British Exporters Association who have said to us that the majority if not all of their members actively involved in major export campaigns were not content with the May 2004 procedures. In your view is that correct and if so did you not anticipate this reaction from exporters?

Mr McCartney: As John said, when we tightened up the previous procedures, there was no negative response whatsoever. As soon as we had the response to the events that you are talking about, then a process was put in place to look at how we could operate in an effective way the procedures that we were trying to put in place. I am sorry to labour the point but it is really important. What ECGD was attempting to do here was to protect the interests of UK business and the interests of the UK Plc, and, unlike many of our competitor countries, we were taking steps to make good our commitment in terms of the practicability of giving an effective commitment to anti-corruption procedures. That is very important in international trade terms. It is a really big signal and it may well be it was rough at the edges in terms of getting there, but I would rather have rough at the edges, and come out with a system which we can hold up in the international community as being a very effective one and giving leadership to the rest of the international trade community, than having a glossy discussion which ends up getting nowhere. The reason I say that is that there are many competing interests here and there are legitimate interests and to get to where we have got we have had to take a lot of time, but having

got where we are, in the main, with NGOs and industry accepting what we have got, it is the best practical outcome in terms of enhancing what we wanted to do.

Q107 Mr Weir: While accepting the mere fact that so many of the exporters seemed to react so violently against the procedures, I just wonder whether perhaps some consultation before would have dealt with that.
Mr McCartney: There is a first group of smaller companies who, because of their nature, have a smaller number of employees and also fewer sub-contractors. There is a very large group of multinationals of course, which worldwide have tens of thousands of employees and tens of thousands of relationships. The third group, for a very similar reason, is banks and that is why we had the discussions in terms of the workability of the proposals, because there were two areas, as I understand it. One was the practicality of making contact with thousands and thousands of employees, many of whom would have no role whatsoever in relation to this. Second, I was making contact with other organisations which may not have a relationship in some contracts, but have a relationship to the particular contract in question. That is what the three groups are broken down into, to put it that way, and that is why the discussions were held with the CBI Solutions Group: to come up with a workable solution and not give the principle up. We have not given the principle up and that was a very important principle to win, given the diverse views we had to deal with at the time.

Q108 Mr Weir: What about the Export Guarantees Advisory Council? What part did they play in advising on these roles prior to the publication of the proposals?
Mr Weiss: In relation to the May 2004 procedures, ECGD did keep the Export Guarantees Advisory Council informed at its bi-monthly meetings throughout the process of the review of the policies which led to the May procedures and I recall that the Council was supportive of what we were proposing to put in place in May, so they were quite well involved in that process leading up to May 2004.

Q109 Mr Weir: What about the different procedures between May and December of 2004?
Mr Weiss: Similarly ECGD did keep the Council informed of the progress because then we were in a situation where we were having discussions with the CBI Solutions Group. We did keep the Council informed of the progress of those discussions running up to December. However, we now accept that possibly was rather a passive process in that we were just reporting where we had got to rather than signposting where we wanted to end up. We perhaps did not give the Council the opportunity for active intervention and that is one of the other lessons learned from this process. We recognise the need to improve the way in which we involve the Council in future in this sort of matter. They did not really have an opportunity to sit down and sign-off where we got to in December in so many terms. They saw it build up and they were invited to play rather more of a passive than an active role.

Q110 Mr Weir: One thing the Committee has been concerned about in our other sessions was that, when faced with a negative reaction to the May 2004 proposals—certain industries obviously took a very bad view of them—we wondered why the Government did not just say that you considered that to be the minimum to combat bribery and you would expect a company committed to corporate responsibility to accept these requirements. If they were not prepared to, then ECGD just was not prepared to deal with them. It seemed an odd procedure to then start negotiations.
Mr McCartney: At one level it is a very reasonable question, but I believe that to have taken that action would have been unreasonable in that ECGD has accepted that industry raised these concerns with them about the workability of the May 2004 procedures, such as the requirement for applicants to make representations about all their employees, which I dealt with in the previous question, and the requirement for applicants to make a no-corruption declaration in respect of all of their affiliates, whether or not they controlled them. This is a view shared by all the consultees and it was appropriate then to sit down and work through the processes. At the end of it, having worked through all the processes, everyone is on board for operating these processes which will be rigorous.

Q111 Mr Weir: But it seems a slightly back-to-front process. If the discussions had been greater beforehand, perhaps you would not have had this reaction when publishing the proposals.
Mr McCartney: Again that is a very fair point to make. May I also make this point that whatever way we organised the consultation and discussions that took place, it was always going to be a difficult process. There are many conflicting views out there, not about the concept in principle of what we are trying to achieve, but how to achieve it. Therefore this was never going to be an easy process. It was always going to be a difficult process but it was a process worth having for all concerned because at the end of it we have procedures here which we can hold up in the whole of the world of trade and they are recognised as such and let us hope other countries will follow suit.

Q112 Chairman: At this stage we do not need to disagree about where we are today. The fact of the matter is that the procedures which were adopted by ECGD did lead to a legal action by the Corner House. It meant that on the day the application for judicial review went to court, the taxpayer basically had to pick up the legal costs and then there had to be proper consultation. It is that part of the history we are trying to resolve at this stage: how ECGD got itself into that situation. We do not always need to be reminded about where we are today, which is the

important thing, but we are concerned in part about how we actually got there and that is what my colleague was probing.

Mr McCartney: I apologise. I was actually saying it was a very fair question to ask. I was trying from our perspective to look at it like you in hindsight, to see why we got where we got.

Mr Weiss: Perhaps I should just say there are two elements of consultation here. We have been discussing why it was that ECGD did not get these practical issues sorted out with its customers before introducing new procedures in May. We have said that we did not think there were going to be problems but we were wrong about that and therefore we had a bit of a problem on our hands. We then tried, as quickly as possible but it took rather a long time, to resolve those practical issues with industry. Having resolved them and announced the new regime in November for coming into force in December, the NGOs expressed their concern that those discussions had been one-sided, just between us and industry, and had not involved them. Their application for judicial review was that there should have been a capital C Consultation around those changes. Now the Government has never accepted that those changes, in themselves, justified a capital C Consultation, although it did accept as a settlement of the judicial review that it would conduct such a consultation and that is what we have been doing for the past 18 months. We accept that the outcome of that consultation is now a better balanced package of measures than we had either in May 2004 or December. It is sort of positioned somewhere between the two, but it is actually better balanced and is a good outcome. There are those two different issues and we need to understand that.

Q113 Judy Mallaber: Can we just look at the interim arrangement that ECGD did put in place between May and December 2004? What was the basis on which those arrangements were promulgated and applied?

Mr Weiss: May I just start by saying the interim arrangements started to get capitals I and A as though they were a very formal set of procedures that we announced and published, but they were not like that. The problem we confronted was that our major customers and all the banks that do ECGD financed business had said they could not work with the May procedures and the Government accepted that we had to give time to sort out with industry the workability problems that they were telling us about. So we went into discussions with the CBI Solutions Group with the aim of trying to come to some agreement with them on a new regime. We did not want to withdraw the May procedures. As I said earlier, some companies were able to work with them and apply for cover under them, but we did have some other customers who were finding them more difficult to live with, who had urgent business to transact, exports to make. Ministers accepted that we could not leave them to hang out to dry; we had to give them ECGD cover. So our aim was, on a case-by-case basis, to see whether we could give them some support which retained some of the May procedures if at all possible, just to get the cover given and support the exports while we were trying to bring the discussions with the CBI to a close.

Q114 Judy Mallaber: It seems as though some of the industry customers and some of the banks just refused to go along with those procedures. Was it up to them as to whether they applied the original procedures or the interim ones? Did they decide or did you take a decision on what applied?

Mr Weiss: We decided whether we should give support to those customers who were having these difficulties. Our position was that while the jury was out in a sense on whether the May procedures were workable or not, we did not feel it was right to say to these companies that we were sorry but we were not offering them any solution to this, they either took the May procedures or they did not do their exports.

Q115 Judy Mallaber: So were those interim arrangements in effect the same as the pre-May 2004 procedures and if they said to you that they could not go along with your new procedures, did you just say that they could go along with the procedures as they were?

Mr Weiss: The interim arrangements were done on a case-by-case basis. They were pre-May with one or two enhancements to reflect some of the elements of May, so that was why we called them interim. They were not exactly pre-May, nor were they what came in in December.

Q116 Judy Mallaber: But basically it was up to them to say whether they could go along with the new ones or whether they needed to go along with these enhanced pre-May procedures.

Mr Weiss: We knew we were never going to offer them cover on a basis less than that which applied pre-May. That was the backstop on it. Our objective was to see whether we could get some elements of post-May in the cover. We were not trying to prejudge the workability issues and we simply felt it was reasonable. In the end, if we could not have got any of the May enhancements, then we would have accepted that; we would have given the cover pre-May. We did get one or two elements of post-May in, but the objective was to not frustrate exports while the discussions went on.

Q117 Judy Mallaber: To clarify the figures, the figure which was quoted to us before was that about 95% of the business between May and December was actually under interim arrangements. Is that right? Was it about that sort of figure?

Mr Weiss: That is correct. It was £900 million versus £55 million.

Q118 Chairman: Is that not a little odd in the sense that I cannot think of other examples where there is a government policy on something and those who are expected to comply with it say "Sorry, we can't" and the response seems to be "Well hey-ho, why don't we sit down and sort out some temporary arrangements until we have had a look at it again?". Your argument has been that it was not necessary for

proper consultation before May 2004 because there were no big surprises, then what happens is that some powerful companies come along and say "We're not going to cooperate with this" and it looks as though hands go up and you say "Fine okay, you can have interim arrangements". Do you understand that, as reasonable people, we find it a bit difficult to understand how this came about?

Mr Weiss: I have accepted that we were surprised by the difficulties that our customers faced, but we recognised that they had fairly raised some concerns and we needed to deal with them. Ministers recognised that it would not be reasonable for us to prevent exports going ahead while we were dealing with concerns fairly and legitimately raised. The awkwardness for ECGD in this was that we had introduced procedures perhaps too quickly. With hindsight, we should have given longer for those discussions with industry before bringing the new measures into play and then we would not have had a need to think about interim arrangements.

Mr McCartney: There is a practical issue here as well and those who have been involved in industry in the Committee will understand this. With exports of the nature we are talking about here people do not lift the phone over a weekend and ask for a delivery. These things are planned months and months in advance and I imagine some of them had been planned for a long time, some of them even a year in advance and the companies found themselves in that situation. Whilst the Solutions Group was meeting with us to come up with a workable solution to the principle which we were not going to concede, then it seemed reasonable to put in place arrangements to carry out what was a legitimate business commitment.

Q119 Chairman: That is a fair point. Perhaps I ought to make this point at this stage. We are aware that those with ministerial responsibility at the time are not here and perhaps we are frankly being slightly gentle in some of our questions because of that; I certainly feel that way. However, we do know that none of you three had ministerial responsibility at the time. Perhaps that is why we have been very calm; temperatures might be rising otherwise.

Mr McCartney: Having said that, and I do not invite further attack, we are where we are and we still have a responsibility to Parliament to explain what the position is. I still accept responsibility.

Chairman: Indeed. I understand and I respect that.

Q120 Judy Mallaber: Can we move on to one of the most important issues that has been a contentious one, the question of agents. When this Committee reported in March 2005, we certainly were not persuaded by the arguments of those who said that the Department did not have the right to information on the agents used. Does ECGD accept that one of the main conduits for bribes is through agents and so the control or regulation of agents is an absolute prerequisite for tackling bribery?

Mr Weiss: May I open with a bit of a disclaimer. ECGD is not a criminal investigatory agency and perhaps is not therefore in a position to comment expertly on the most common means of making bribes.

Q121 Judy Mallaber: You must have a view from your experience.

Mr Weiss: We do and we think it is possible that bribes might be paid via agents and therefore we should do what we can, within the terms of our role, which is as an insurer and not an investigatory agency, to deter such practices. Equally it is important not to overlook the fact that agents do play and can play a very important part in helping our customers win important business, the commission paid to them is perfectly legitimate remuneration for the services they provide and it would be dangerous to make what is paid synonymous with bribes. Finally, just to keep this in perspective, although there have been allegations of bribery, there is no instance of an ECGD customer being convicted or admitting bribery in relation to an ECGD supported transaction.

Q122 Judy Mallaber: But if you are seeking to make sure that the company that you are supporting is legitimate and operating properly, presumably it is also a legitimate part of that to know about their agents. Why are you not requiring applicants to give details of the agents of their consortium partners and their group companies? Surely that is an important part of the process of ensuring the legitimacy of the way in which the companies are operating so that indeed we do not get into situations where we find the companies we are involved with could possibly be accused of giving or accepting bribes.

Mr Weiss: This is, in a way, a very specific aspect of seeking the names of agents. We did ask for the names of agents under the December procedures, although there were exemptions around that, which we are now proposing to remove in the July measures which are coming in. The question you were asking was in relation to why we should not have the names of agents of consortium partners which actually is, on the whole, a smallish part of ECGD's business. Most of our exports are done by companies on their own: BAE, Airbus, Rolls-Royce. The definitive answer to your question is actually in paragraph 77 of that rather weighty tome of our final response to the public consultation. May I emphasise that that is the definitive answer and if I try to paraphrase it that takes precedence over what I say in case I say anything slightly inconsistent with it. First of all, we do require the name of the agents of consortium partners if they are also acting on behalf of the applicant, but where they are not acting on behalf of the applicant, they are acting solely for the consortium partner, our view is that it could be very difficult, indeed possibly impossible for our exporter and our applicant to get hold of that information. It has been represented to us by British industry during the consultation how sensitive it is for the names of agents to be disclosed and disclosed to the British Government in the shape of ECGD.

This is postulating that a consortium partner, who may well be French or German or whatever, is to give the name of their agent to our applicant to be given to us and, given that the consortium partner and the applicant in another transaction may well be competing with each other—they come together in consortia for specific deals, but there may be another project in that country where they are actually competing—it seems to us that it may well be that the consortium partner would refuse to give this information to the applicant and we have effectively built in a condition to our cover that they would be incapable of fulfilling. May I also say one general point on this? The questions in our application form are meant to apply to the great majority of our business and consortium business is not the great majority of our business, so they are in a way starter questions. If we have a transaction coming along which has other features to it, and it could be a consortium partner, we have made it absolutely clear throughout the consultation that we have the right to ask more questions and we could well ask in a particular circumstance, if we felt there was reason to do it, for the name of the agent of the consortium partner. We have not put it in our standard application.

Q123 Judy Mallaber: You putting it like this is really worrying me because it is almost an invitation for the consortium partners' agent to become the route for bribes, if that was what was going to happen. We are surely seeking to root out bribery and corruption across the board amongst our competitors as well. Transparency International said that it is both commonsense and good practice for an applicant to find out who their partners' agents are and surely if an agent is saying to an exporter or someone from the consortium is saying to another member of the consortium "Don't tell anybody. We don't want to tell you who our agents are", the alarm bells would then ring? It almost seems to me to be an invitation for that new route for bribery because we are saying that one element of where that bribery route could be should be kept hidden.
Mr Ridley: If that were to happen, of course the applicant is obliged under the standard application forms to make reasonable inquiries about the absence of corruption on the part of his consortium partner and he is obliged to represent he has done that and he is obliged to represent that the results of those inquiries give him no cause to believe that the consortium partner has been corrupt.

Q124 Judy Mallaber: How does he know that if he is not even asking for the information? Surely it is reasonable for one of our exporters to say to their consortium partners "Tell us who your agents are" and, if they will not give them that information, that surely sets suspicions going?
Mr Ridley: We do not prevent him from asking that and he may well ask that. What we do not do is require, as a condition of the cover, that he shall produce something that it may not be in his power to get. We do not stop him at all from asking that from a consortium partner and, if he does and if he gets an answer which does not satisfy him and there is a question of what constitutes a reasonable inquiry, it may be prudent on his part to go further.

Q125 Judy Mallaber: But I cannot see why it is unreasonable for you to ask them for that information. What are they trying to hide?
Mr Ridley: We do not think that it is necessarily unreasonable for him to ask. It may be not reasonable for him, and/or beyond his power, to insist on being provided with it and it would possibly be unreasonable for us to insist on it being provided to us.

Q126 Chairman: If we were talking about one of the most corrupt countries in the world, and we know the rankings, if it were a country in the top five of the most corrupt countries in the world, and we are talking about taxpayers' money here, would it not be reasonable to expect disclosure of the agents of other members of the consortium?
Mr Weiss: We are not sending a signal out that we will never ask for this information. We are saying that our standard application forms will not ask it because consortium business is not a regular feature of our business. It could well be, if we have a consortium situation, for example, in one of the countries you mention, that we decide, perhaps for other reasons surrounding the application, that we do indeed want that information. As I say, we are not sending a signal out that we will not ever ask it.

Q127 Judy Mallaber: I am just a bit worried that by putting it in this way signals are being sent out. Obviously we hope our companies are not involved in those areas of corruption but we do not know second-hand of the people they are dealing with, whether contracts are being awarded and gained in a way that is not acceptable. Is it reasonable for our local diplomats in an area to make discreet inquiries about how a company operates and how their agents operate and who they are or is that not something that we regard as being a reasonable course of action for our diplomatic service to operate?
Mr Weiss: We may well ask the embassy in the country to give us advice on how the project was awarded, what they know about the agent, and it could well be a feature of our own investigation of the application.

Q128 Chairman: Have you ever done that? Has this ever arisen?
Mr Weiss: Oh yes.

Q129 Chairman: It has?
Mr Weiss: Yes.

Q130 Judy Mallaber: Would our diplomats tend to be fairly clued up on it?
Mr Weiss: Could I be very precise? I do not know whether it was in the situation of a consortium, but we have certainly asked the embassy to give us information about agents on a transaction.
Chairman: It would be useful to know because that is part of the picture that we are unclear about.

Q131 Mr Weir: I do not know whether I am being unduly cynical but I got the impression from your earlier question that perhaps you would only ask for the information if you were suspicious about the consortium. Is that the case?
Mr Weiss: I hope what I said was that there may be a set of issues around a case—and I cannot forecast what they would be—where in a sense it would not be good enough for us not to know the identity of the agent.
Mr McCartney: To be fair to Mr Weiss, on a case-by-case basis there will be a range of different features and some of those features, to be fair to the Committee, have been mentioned as reasons why in some instances the question should be automatically asked. Can I give the Committee an assurance, having got this far, that we shall try to make these arrangements work effectively and if occasions arise where the profile of the circumstances are such, then a range of inquiries will be made.

Q132 Mr Weir: There is also the question of special handling arrangements. Are the special handling arrangements for agents' details the price you had to pay for exporters to divulge any information about agents?
Mr McCartney: There was never a case of having to get the agreement of any party to the public consultation in the terms of the Government's final and concluding responses. These terms were our own view of what achieved the best balance between regulation and the practicability of the proposals. In the course of the consultation we had noted applicants' concerns over the possible damage to their competitiveness which could arise from inadvertent disclosure of information about agents' identities. The special handling arrangements are designed to minimise this risk, thus making more workload for the applicant. In fact they were voluntarily offered to industry during the June 2004 discussions when we met the CBI Solutions Group and the workability issues were being addressed. Whether they use the special handling arrangements or the other arrangements, that information will be made available to us.

Q133 Mr Weir: Do you think the need for such special arrangements indicates that some companies at least have a lack of trust in the ECGD?
Mr McCartney: No. There are no grounds to have a lack of trust in ECGD. One thing is certain: if you want to export and use the facilities of it, then people will be required to work with us to their fullest to implement the proposals. I see no grounds for that not to happen and it will not happen. We want to try to assure our customer base that our investigations and our inquiries are as effective and exhaustive as they need to be to make a decision and at the same time recognising any instances of protecting confidentiality. We shall balance that and do that and that is exactly why we have put these arrangements in place. That is why we offered them; we were not asked for them, that is why we offered them.

Q134 Mr Weir: Have you made any estimate of the proportion of applicants who may request special handling?
Mr McCartney: No. I could not possibly predict at this stage exactly how many would. If it helps the Committee, and I have no brief to say this but it is a reasonable thing to say in the circumstances, once this is up and running we shall have a review in three years but in the meantime, because of the Committee's quite right interest in this, once these arrangements are in place and up and running, I shall come back and advise the Committee.
Chairman: Thank you very much. That would be helpful.

Q135 Mr Weir: If a company comes to you and asks for special handling arrangements, would you treat that company any differently from someone who just comes in with an ordinary application? Would you consider that by asking for special handling arrangements, they needed to be looked at more closely than a run-of-the-mill application?
Mr McCartney: No. A request for special handling arrangements does not, in ECGD's view, mean that it is more likely to be corrupt. It simply reflects the applicant's view of their own commercial position, no more no less than that. But that does not mean, having said that, because of the answer I gave to a previous question, that if the profile is such as to require us to make an extensive range of inquiries, we shall not do exactly that. All this process means in the end is that the details of the agent are given in a different way, but the details are given.

Q136 Mr Weir: Would the special handling arrangements give a company any additional protection from disclosures under the Freedom of Information Act or inquiries by Parliament?
Mr Weiss: The answer is no. We sent the Committee what was called the concluding response to the public consultation, which had the special handling arrangements attached to it and at the foot of that document we refer to that position under freedom of information. The fact is that for any information given to us under the special handling arrangements, if an application were made under FoI for disclosure, we would have to look at that on its own merits. The fact that it has been given to us under these arrangements would make it no different from the same information given to us outside those arrangements.
Mr McCartney: As I understand it, it falls within it, unless it is protected under the law of commercial confidence, or other exceptions. I am not a lawyer, but I can think of maybe two or three instances where this could happen: prejudicial to commercial interest, prejudicial to international relationships or prejudicial to criminal investigations. Outside of those, the arrangements are subject to legal obligations placed by the Department.

Q137 Chairman: I note you have said that the idea for special handling arrangements came from the Department and not from clients. When we took evidence from the CBI last month, they did however

say that companies did have concerns that information might, inadvertently, be released. It might find its way into the public domain. We obviously then asked whether there were any example of this and they cited the case of a South African defence contract where they alleged information from an ECGD file appeared in the public domain. Does ECGD know anything about this? Had the CBI reported this to you or anyone else?
Mr Weiss: Yes, we are aware of it and indeed to the point where, because the journal was claiming to have ECGD papers, we conducted a thorough internal investigation into this alleged leak of what were claimed to be ECGD papers which concerned the South African defence package. The outcome of the investigation was that it simply was not possible to identify who might have leaked, whether from within ECGD or wherever else. Yes, we are aware of that instance and therefore understand the concerns of industry in this area.

Q138 Chairman: Have there been any other such instances that you are aware of?
Mr Weiss: There is no evidence of ECGD staff having been responsible for any other leaks.

Q139 Chairman: And that is just a possibility. You have said you did not find evidence that the source of the problem was ECGD; it could have been, but it might not have been.
Mr Weiss: Yes.
Mr McCartney: If there had been—and this is important for the Committee and all concerned—if there had been, I am absolutely certain that rigorous action would have been taken at the time. I deprecate any attempt to leak.

Q140 Mr Weir: Paragraph 7 of the special handling arrangements advises that where an applicant refuses consent for knowledge about agents to be more widely shared "it is likely in those circumstances that ECGD would be unable to process the Application further". Can you tell us whether there are any circumstances in which a company could reasonably refuse consent and still expect ECGD to provide support?
Mr Weiss: The first point is to say that it is unlikely, if a company refuses consent for us to make wider inquiries, that we could continue to process the case. However, it would be inappropriate for us in advance to state for absolute certain that that will be the outcome. We have to accept the possibility that our information needs might be met by some other way which would then be sufficient for the case to proceed. One point the Minister made in his letter to the Committee was that there is this administrative law point which Nick might want to put better than I. To say in advance that if they refuse consent, we shall not process the cover, would be out of order legally as well. We have to leave this discretion available to the Secretary of State to find another way around this if he can.

Q141 Chairman: Is this not taxpayers' money? Can you not lay down whatever rules you want?
Mr Ridley: You can have a policy not to do things, as indeed we have on, for example, blacklisting. What you cannot say for once and for all, for all time, in advance, is that we shall never ever in any circumstances whatsoever until eternity do that. The reason is that Parliament has actually given the Secretary of State an absolute discretion and it is not for anybody else, whether it be him or us on his behalf, to circumscribe it.

Q142 Chairman: I knew I should have been a lawyer. Thank you.
Mr McCartney: As a non-legal minister, I take your point very much to heart.

Q143 Mr Weir: But it is fair to say that it would be unusual for it to continue.
Mr Ridley: Exactly, yes.

Q144 Judy Mallaber: Moving back to partnerships again, I know you said earlier that on the whole you are not dealing with companies which are in those sorts of partnerships. You tend to be dealing directly with the main company, but if we do have tighter regulation of agents, which has been one of the big areas we have tried to clamp down on, almost inevitably those that are looking for a channel for bribery and corruption are going to want to find other routes. In evidence that was given to us last month, again by Transparency International, they said that they were coming across more situations where corrupt clients in developing countries were now putting the pressure on contractors and exporters and saying they must go along with this joint venture partner or with that sub-contractor. I do not know whether you are seeing this in the companies we are dealing with, but what is or can ECGD do to try to block those sorts of new avenues for pressure towards corruption and bribery?
Mr Ridley: I leave to John the question of how often this might have come up, because I am not sure I know the answer to that myself. The answer to the question of what we will do about it is this. Just to be clear, so that I am sure what is on your mind, I think the assumption is that a potential sub-contractor in country X, because of course he is not a sub-contractor until he actually gets the contract, but he wants to be a sub-contractor, goes along and proffers a bribe to somebody and what he gets in return for the bribe is an undertaking that the overseas purchaser will force the British main contractor, as a condition of getting the main contract, to use the sub-contractor. So the sub-contractor is the one actually guilty of corruption, but it works in that way. What we say in essence about that of course is that nobody can actually force the British main contractor to agree to use a sub-contractor; in the end it has to be his decision. If what is happening, which is perhaps what is envisaged, is an enormous pressure is put on the main contractor to say "You will use this guy to fulfil your contract with us" then this would be something of an oddity, because it would invert the usual

arrangement where the main contractor chooses whom he is going to sub-contract various portions of his business to and it would obviously, or it may in certain circumstances, be the case that that pressure would merit inquiry. If that is the case, then that takes us back to the discussion we were having about 10 minutes or so ago. Where, in relation to that matter, the main contractor knows this, then the current documentation works quite well because the main contractor will, if he is sensible, be well advised to make such inquiries as will make him happy. I do not know whether the Committee would like us afterwards to set some of this out because it does get rather technical, but, for instance, the main contractor is obliged to represent absolutely that he has not authorised, consented or acquiesced in the corrupt activity on the part of any person—any person. So if he is coming under an extraordinary or unusual pressure to employ a sub-contractor that he himself would not have chosen, indeed he may not have thought about employing any sub-contractor at this stage of the process, and he knows that he is going to have to represent to us that he has not been complicit in any corrupt activity, even if he himself did not carry it out, then we think that it would be prudent on his part to make some further inquiry.

Q145 Judy Mallaber: It could be done in such a way as "It would show a sign of your good faith that you are employing this local contractor to provide local work". I can imagine it being presented in a way that was dressed up and where they would not necessarily know the position. Does ECGD require, or should you be requiring, further details about partners and sub-contractors so you could make your own inquiries about them, maybe checking it out locally whether it was a legitimate partnership to have gone into or not?
Mr Ridley: If I may repeat something John said in another connection quite recently, the application forms should not really be viewed as a sort of be all and end all. They are not a mechanical process: you tick all these boxes, you get our cover. They are a starting proposal form or application and if the circumstances merit it, we are perfectly able and have always expressly reserved this right—although we do not technically need expressly to reserve it—that we can ask such further questions as the circumstances suggest to us should be asked. It may be that circumstances such as those that you have mentioned would cause further question.

Q146 Judy Mallaber: But you do not automatically ask for details of any sub-contractors.
Mr Ridley: We do not automatically because we have to craft the standard documentation to deal with as many of the standard things that come into us as possible. If we covered every possible circumstance, and John was explaining before that we do not do a lot of consortium partner business, we would overload the application forms for the absolutely standard stuff to a degree which we thought would make them overly bureaucratic.
Mr Weiss: I believe that our application form does ask the applicant to tell us if there is a consortium partner and the fact of it and who it is. It does not ask about sub-contractors.

Q147 Chairman: You said that our procedures for dealing with bribery are amongst the strongest in the world. OECD figures suggest that we are ninth. There are clearly eight export credit agencies which OECD data suggest are doing better than we are. Do you have any comment on that? I know somebody has to be number nine.
Mr McCartney: It is a very fair question. ECGD's analysis and UNICORN's analysis are both based on the same data from OECD. What differs is the methodology being used. For instance, UNICORN gives credit to ECAs who claim to be able to withhold support or invalidate cover on the basis of suspicions of bribery. This appears to be contrary to the UK policy of innocent until proven guilty. Also, UNICORN analyses ECAs like ECGD that are prepared to consider providing cover for agents' commissions. ECGD considers that most agents are not corrupt, they provide a worthwhile service that forms part of the expenditure to secure a contract, so considers that agents' commissions are eligible for its support. Despite the differences in methodology, I should point out that ECGD is second in the UNICORN league table for G7 countries, Italy being top and ninth place in the overall table compares well with France at 19, the United States at 25, Germany at 27.

Q148 Chairman: If you could let us have a note on that, it would greatly assist us in writing our report. That is important; I appreciate that.
Mr McCartney: Yes, we can.

Q149 Mr Weir: The OECD published a new agreement in May to combat bribery in export credits. Do the procedures in the final response meet the terms of the OECD's latest agreement?
Mr Ridley: The latest action statement?

Q150 Mr Weir: Yes.
Mr Ridley: Yes, indeed they do. They not only comply, but exceed the requirements of the latest action statement in the July procedures that we are bringing in.

Q151 Mr Weir: Does paragraph (j) in the OECD agreement, which removes the requirement to show complicity by the exporter in bribery, run counter to the approach in the final response that the recourse obligations apply only where there has been some degree of complicity by the applicant for ECGD support, in other words it is not an absolute?
Mr Ridley: Yes. May I just read that back to make sure I am answering the right question. This is a suggestion that the action statement will cause us to change the recourse arrangements.

Q152 Mr Weir: The OECD agreement, if I understand it correctly, removes the requirement to show that the applicant for the credit guarantee has been complicit in the bribery, which is a different approach from the one you are taking.
Mr Ridley: Yes. I think that is Transparency International's view. We have read the evidence that they gave to you. May I just begin by explaining what recourse effectively means in these circumstances? It is a contractual right that we will take, pursuant to a contract between ourselves and the applicant, to reimburse us if we pay money and certain specified events happen. The one specified event which is relevant here would be an act of corruption on somebody's part in which there is no complicity. I think Transparency suggest that paragraph 2(j) of the new action statement suggests that we shall have to change that policy on recourse to give ourselves the right to take recourse even where there is no complicity and no fault, no knowledge on the part of the applicant. I have to say that we are a bit puzzled by that. I apologise but this is going to get very technical and semantic. I am very happy to distribute the action statement or to give you a memorandum afterwards or both. Briefly, article 2(j) deals with what an ECA should do if, before export credit is agreed to be given, there is credible evidence of corruption. It does not deal with what terms you have to put in the contract if you do decide, having obeyed what the action statement says in 2(j), to give support. It did occur to us that perhaps Transparency meant to refer to 2(k), which deals with what you put in the support agreement when you do give grant support, but in that case, our answer would still be no, we are not obliged to change the recourse provisions because of the action statement for two reasons really: one because the OECD action statement itself, and I can take you to this if you wish to see it, says that actions taken under any of 2(j), 2(k) or indeed 2(a) to wherever it runs to, are not to be prejudicial to the rights of parties not involved in the corruption. Secondly, 2(k) says that we shall take only appropriate action, leaving it to the ECAs to judge what is appropriate. Then there is an issue as to whether it is appropriate to take a right of recourse from an innocent party.

Q153 Chairman: Mr Ridley, you recklessly offered a memo. The Committee will have to take you up on this one. That would help on that.
Mr McCartney: Here is one we cooked up earlier.

Q154 Mr Weir: May I probe it slightly further? As I understand it, certainly as Transparency International put it to us, under the ECGD agreement there is absolute liability on companies applying to ECGD in a number of areas including defective workmanship, for example, by a sub-contractor, but there is none in respect of corruption. Did I take it from what you have been saying that is because the applicant for the finance might not necessarily have control over the corruption in the first place, if it is being done by a third party?
Mr Ridley: Yes.

Q155 Mr Weir: I just wondered why there is a difference between that and the workmanship of a sub-contractor, because you could make the same argument there surely.
Mr Ridley: Yes indeed. I am going to be doubly reckless because I am going to offer you another memorandum. Very briefly may I say, because I should like to say this, that we have read the Transparency submission to the Sub-Committee and there is a suggestion that we take recourse not in relation to bribery and corruption, but just where there is a circumstance where the British exporting contractor misperforms. The Transparency submission states that what will happen there is that we shall be able to take recourse against him if the loan should not be repaid and we have to pay instead. The reason that the loan will not be repaid is in the submission of the defective performance of the main contractor. I have to say that that is not the case and the buyer credit documentation specifically says the contrary, that failure to perform the export contract on the part of the applicant for our services whom we have supported, is no reason whatsoever for the loan not to be repaid. So in those circumstances we should still be looking to the borrower through our ability to instruct the bank. There are several other points, but I am conscious of time and detail and you need the papers before you.
Mr Weir: A memo might be very useful in this situation.

Q156 Chairman: May I quickly just ask you about the OECD guidelines? We have been told that those against tighter OECD guidelines included the Germans, Japanese, Belgians and Czechs. Is that an accurate description? Where did the UK stand on this? Did we get something near what the UK wanted or those who wanted less stringent guidelines?
Mr McCartney: The answer to this is a simple one. These international discussions with the OECD are confidential. It would therefore be wrong for me to reveal individual negotiations.

Q157 Chairman: Okay; let us move on then. Any comment about whether India and China have export credit agencies that meet OECD standards or is that also confidential information?
Mr McCartney: It is not clear whether the anti-bribery and corruption procedures of the export credit agencies of China and India meet the requirements of the OECD action statement on bribery on officially supported export credits, but it is of course very desirable for all ECAs to meet such levels and that includes India and China. Given the importance the Sub-Committee have accorded this issue, I have asked my international officials to seek from their Indian and Chinese counterparts more information about their anti-bribery procedures. Once they have received this response, I shall let the Committee have a written memorandum. Several international events are occurring in the context of

the OECD outreach programme which I could mention to the Committee, but it might be better if I included those in the memorandum as well.
Chairman: Thank you. We should be very grateful.

Q158 Judy Mallaber: When we reported last year the Select Committee was concerned that ECGD would not be allowed to look for corrupt activity and you referred earlier to what kind of a body you are or are not. Do the procedures in the final response allow you to look for corrupt activities and bribery or are you very circumscribed in terms of what you are or are not allowed to manage to do?
Mr Ridley: As my colleagues mentioned earlier on, we are not a criminal investigation agency and the purpose of the contractual right to audit is to satisfy ourselves that the information given in the application is accurate and that is really what we think is appropriate to our role as a commercial contracting party. However, if, as a result of that commercial auditing, if one wants to call it that, we should have come to believe that an offence may have been committed, we would report that to the appropriate investigatory authorities who are in the proper position to take decisions as to what action may be appropriate.

Q159 Judy Mallaber: But you are quite circumscribed in terms of what you can look at and where you can visit and so on. In particular, does the procedure for allowing exporters five days' notice before conducting an audit not just enable any incriminating evidence to be destroyed and therefore make it impossible for you to know whether they were or were not legitimately presenting their activities in their responses to you?
Mr Ridley: We go back to what our function in this is. Our primary function is not the enforcement of the criminal law. We are in the position of a contracting party, whether the insured or insurer, who is trying to find that they have not been misrepresented to, about corruption in this instance, and the Corner House themselves in their representations in the course of the consultation drew analogies with the insurance industry and the reinsurance industry. When, for example, a reinsurance inspection takes place, that will take place on reasonable notice and it will take place at a place which will not disrupt the cedant's business because these are two parties to a civil contract who are checking their civil rights against each other. All that said, if in fact we had suspicions of criminal behaviour before we conducted an audit, not as a result of conducting it but beforehand, we should refer those to the appropriate bodies to take more drastic action if they saw fit. The overwhelming likelihood is that they would instruct us not to muddy the waters by going and conducting our own commercial audit on notice.

Q160 Judy Mallaber: So how does that mean that you plan to use the new audit procedures, the current procedures? Does that mean that if you already have suspicion of fraud you will not go and do an audit or do you expect to pick up examples where there might be fraudulent behaviour through going and doing the audits?
Mr Ridley: Well there is a bit of both. We have in the final response made the audit rights random, so that we do not need to show any reason to go and audit. We would therefore pick audits at random. The likelihood is that, if we have a suspicion, we would liaise with the criminal authorities before we went in. If we did not have a suspicion before we went in, but we acquired one as a result, then we would refer that as well.

Q161 Judy Mallaber: What are the chances, if you go in not knowing that it is suspicious, given the five days' notice? Is there any chance at all you would be able to find out in order to then get the investigatory bodies to go or is it just a lost cause at that point?
Mr Ridley: There a supposition there that there is necessarily something to find.

Q162 Judy Mallaber: We hope there is not.
Mr Ridley: We should be going in generally at random without suspicion. One would hope that we would not acquire any whilst we were there. It is conceivable, one has to concede, that if in fact, although we did not suspect it, a company that we went in to look at had been guilty of criminal activity, then the circumstances to which you refer might occur. That is an unavoidable result of taking audit rights in the first place on the part of a body which does not have criminal powers and we cannot acquire the right to turn up in the early hours of the morning with a search warrant.
Mr McCartney: It is also true to say, we have a signed a memorandum of understanding with other departments requiring us to notify allegations of bribery and corruption to the Serious Fraud Office. Alongside that there are the Ministry of Defence police and a range of other law enforcement agencies where we would have no compunction, where suspicions arose through audit or the receiving of information outside of the audit, about passing these on.

Q163 Chairman: What would you do if a company, rightly or wrongly, acquired a reputation of being linked with bribery, allegations in the media for example? You do not have any specific evidence, information, that you would pass on to the investigatory authorities, but you have a responsibility for making prudent decisions on behalf of taxpayers. How would you deal with that? Do you not need a degree of investigatory power to be able to address a problem like that?
Mr Weiss: Might I suggest that when we say the audit rights are random, it is not necessarily putting a pin in a piece of paper and saying "We will do this case". We do decide whether there are particular companies, perhaps a newish customer with whom we are not familiar, and we might want perhaps to have that as a reason for an audit or perhaps, as you say, an allegation. I am not saying these are the definite conditions, but it is sort of deliberate in that we try to cover the ground and cover a broad spread

of our business with these audits. Those may be the factors that would lead to a particular choice of case to audit.

Q164 Chairman: Okay. Unless any of my colleagues have any very final question, and it looks as though they do not, Minister may I thank you and Mr Ridley and Mr Weiss very much for your time this afternoon; it has been greatly appreciated. We look forward to a plethora of memoranda winging in our direction, some of which some of us might understand; Mike certainly will as a lawyer. Seriously, thank you very much, we appreciate your time and if we have any further questions, we shall write to you. That has been very helpful indeed.

Mr McCartney: May I also thank the Committee for bearing with me last week in rearranging this because of my family circumstances. It was greatly appreciated. I did not want to use that as a reason not to come before the Committee. I should also let you know that John Weiss has informed me today, rather recklessly it seems, that this is his last day and he is going to take retirement. I am sure it is not down to the question of the Committee; it was a pre-planned event.

Chairman: We wish you well, Mr Weiss.

Written evidence

TAKEN BEFORE THE TRADE AND INDUSTRY COMMITTEE

APPENDIX 1

Memorandum by the CBI

1. CBI is the UK's leading business organisation speaking for some 240,000 businesses that together employ around a third of the private sector workforce. It covers the full spectrum of business interests both by sector and by size.

2. This submission complements the memorandum submitted by CBI to the Trade and Industry Committee in February 2005 and CBI's comments on the Committee's Fifth Special Report of Session 2005–06 sent to the Chairman, Mr Peter Luff MP, on 6 September 2005.

Compliance with the Law

3. We believe it is important to re-state that CBI is against any form of bribery and corruption. UK business is subject to some of the world's most stringent anti-bribery legislation which provides severe sanctions applicable to both individuals and corporations. In addition to compliance with this legal and regulatory framework, UK companies are some of the world leaders in integrating anti-bribery policies into their management systems.

Use of Agents

4. The use of agents is a perfectly normal business practice. Whilst there may be a misplaced perception remaining in some quarters that payment of commission or fees to agents is a method to pay bribes, this is not a reality for UK business in today's business environment. Applicants have been resistant to the requirement to divulge agents' details to ECGD because in some cases the information can be extremely commercially confidential. This is particularly relevant for the UK's largest exporters operating in a highly competitive environment for whom the identity of their overseas agents represents a significant commercial advantage.

Deterrence

5. Whilst CBI recognises that ECGD's processes should be consistent with wider Government policy it is open to question what additional deterrence to bribery and corruption is provided by ECGD's latest proposed provisions over and above the very real deterrent which arises from current applicable legislation. Any applicant prepared to flout existing legislation will scarcely be concerned about giving an untruthful response in an ECGD Application form. CBI believes that procedures based on ECGD knowing their customers—analogous in may ways to the requirements on financial institutions for anti-money laundering regulations—could have been preferable to a prescriptive, procedural-based system which requires the same level of compliance whether the customer is known to ECGD or not. CBI also questions the use ECGD will make of the information provided by customers, given that it has already recognised that it is not an investigatory organisation.

6. The prime issues for business have been the workability of any procedural changes and the impact on competitiveness of complying with additional layers of regulation. This is rightly at the heart of the Sub-Committee's current inquiry. The UK Government's intention to be at the forefront of introducing enhanced anti-bribery provisions risks putting both the UK Export Credit Agency (ECA) and UK exporters at a competitive disadvantage. In a Financial Times report (Wednesday 15 February 2006), it was stated that Germany, Japan Belgium and the Czech Republic were against tighter OECD guidelines. They appear to share our assessment that the rationale for providing names as an additional deterrent is not proven.

The Final Response—Business Views

7. In broad terms, CBI believes that the procedures set out in the Final Response have the potential to be workable with the important proviso, that at the time of writing, an ECGD consultation on the safe handling of information on agents is still underway, with a deadline of end April 2006. A submission has been made to ECGD, a copy of which is attached for the Sub-Committee's information. We stress that, in order to arrive at a practical workable solution, agreement must be reached on, *inter alia:*

- the applicability of the special handling arrangements to all information relating to overseas agents, and not just names and addresses;
- precisely what steps ECGD will take when provided with the information on agents which they have requested. ECGD has acknowledged that it is not an investigatory body; and

— the treatment by ECGD of information provided to it in confidence by exporters.

8. In summary the CBI:

— supports the Government's anti bribery and corruption objectives;

— does not accept that agents are synonymous with bribery;

— believes that there are occasions when details of agency arrangements should legitimately be treated as confidential;

— is not convinced that ECGD's latest provisions enhance the existing legislative deterrent to bribery and corruption; and

— is concerned at the potential impact on the UK's competitiveness of complying with additional layers of regulation introduced by ECGD.

9. This exercise in agreeing ECGD's revised anti-bribery and corruption procedures has cost business many thousands of pounds and man hours in a diversion away from core business activity. In addition, we believe that the ongoing costs and procedures for monitoring these changes by businesses will have an impact on companies, and particularly, though not exclusively, SMEs. CBI now looks for an agreement on the special handling arrangements acceptable to industry and to a period of stability which will allow ECGD to concentrate on its primary objective of helping UK exporters win more business.

April 2006

APPENDIX 2

Memorandum by the British Exporters Association

Thank you for your letter of 30 March 2006 inviting the British Exporters Association ("BExA") to give oral evidence to the Sub-Committee on Export Credits Guarantee Department's bribery rules. You requested a written memorandum focusing on whether or not the procedures published in the Government's Final Response (i) reduce as far as reasonably practical the risk of ECGD supporting contracts tainted by corruption and (ii) are workable. This follows below.

BExA welcomes the fact that after more than two years of discussion and uncertainty we appear to be in the final stages of the consultation process. BExA believes that ECGD and its customers now need a period of stability and confidence within which to grow their business.

As a general comment we would like to assure the sub-committee that despite a continuing misperception that Agents employed in international business dealings are all involved in making or facilitating the payment of bribes, Agents play an important and legitimate role in the contractual process. We therefore believe our members should be free to pay commissions to their Agents without the burden of providing ECGD with details that are often confidential and commercially sensitive. We do not understand what additional comfort the holding of these details will give ECGD—the only effect is to place an additional burden on applicants for ECGD support, which could have an adverse effect on the competitiveness of our members in an internationally competitive market.

Focusing on the first of the Sub-Committee's questions, we have mentioned in our previous submissions in relation to ECGD's Consultation that UK businesses are subject to some of the most stringent anti-bribery and anti-Money laundering legislation in the world that, since February 2002, has been given extra-territorial effect. We believe that rigorous enforcement of existing law by the appropriate investigating authorities serves to ensure that the highest standards are maintained. While it is clear that ECGD's procedures should be consistent with wider Government policies it is difficult to see what the new procedures can add to the very real sanctions that face UK exporters and their directors under English law, particularly as ECGD is not an investigating body (as acknowledged again in the Final Response). Indeed as Transparency International pointed out in one of its submissions, a company that is willing to break the law through payment of bribes would hardly baulk at the prospect of deceiving ECGD on an application form. We believe the best way to address this is for ECGD to know its customers, in much the same way that commercial banks do when addressing money-laundering issues, rather than to impose ineffective measures, including revealing commercially sensitive information about the applicants' Agents.

With regard to whether the new proposals are workable, there is no doubt that ECGD's new provisions will put a much heavier burden on industry, imposing additional layers of regulation that are unlikely to be implemented by any other OECD country. Germany, Japan, Belgium and the Czech Republic have already stated publicly that they will not support tighter guidelines at the OECD meetings in Paris this week as they believe, as we do, that the real deterrent to corrupt activity is in appropriate legislation and not in regulation imposed by their Export Credit Agencies.

We should also note that there is an ongoing consultation with respect to ECGD's safe handling of information relating to Agents. We have attached the BExA response to this final consultation for your information.

We must be very clear that the expression of the Views contained in this memorandum should not be interpreted as a lack of support for our shared objective with Government to combat bribery and corruption in export business. We should reiterate that our members are fully committed to complying with both UK and host country anti-bribery and corruption legislation.

27 April 2006

APPENDIX 3

Memorandum by the Corner House

BACKGROUND

1. The Corner House is a not-for-profit research and advocacy group, focusing on human rights, environment and development. Over the past six years, it has closely monitored the policies and operations of the UK Export Credits Guarantee Department (ECGD) with regard to corruption.

2. On the 15 March 2006, the ECGD announced that it would reintroduce key anti-corruption measures that it had watered down in December 2004 following industry lobbying.

3. The changes made in December 2004 reversed strong, anti-corruption provisions that the EGCD had introduced in May 2004 and exposed considerable loopholes in the Department's anti-corruption procedures.[1]

4. The ECGD's March 2006 announcement follows its year-long consultation on its anti-corruption procedures, initiated after a successful court challenge by The Corner House.[2]

5. The various changes made to the ECGD's anti-bribery procedures between 2004 and 2006 are summarised in Annex 1, with an accompanying analysis in Annex 2.

6. The Corner House welcomes the opportunity to comment on the new March 2006 procedures. Its comments are set out below, following the questions posed by the Trade and Industry's Sub-Committee in its invitation to submit evidence.

Do the procedures published on 16 March 2006 in the Government's Final Response to the Export Credits Guarantee Department's consultation on the changes made to its anti-bribery and corruption procedures in December 2004 reduce as far as reasonably practical the risk of ECGD supporting contracts tainted by corruption?

7. The Corner House believes that the reintroduction of several anti-corruption measures are a genuine and important step forward that will go some way towards restoring the ECGD's—and ultimately the UK Government's—reputation on tackling corruption. The weakening in December 2004 of the improved May 2004 procedures considerably damaged the UK's reputation, particularly during 2005 when the UK-initiated Commission for Africa emphasised the importance of tackling corruption. The Commission's report specifically highlighted export credit agencies as a key factor in contributing to corruption and governance problems in Africa.

8. Nonetheless, some loopholes still remain in respect of agents, audits and anti-bribery declarations, which need to be addressed in order to reduce as far as practical the risk of ECGD supporting contracts tainted by corruption.

9. The Corner House's analysis of positive aspects of the new arrangements and the remaining loopholes and deficiencies are set out below.

AGENTS

Positive aspects of new arrangements

10. The ECGD will now require exporters requesting ECGD support to provide the ECGD with the name of any agent involved in the transaction that has been appointed by or on behalf of the exporter (subject to confidentiality procedures for companies concerned about the information getting into the hands of competitors or into the public domain).

[1] See: Hawley, S., Submission by The Corner House to the ECGD Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004, http://www.thecornerhouse.org.uk/item.shtml?x=369015

[2] The grounds of The Corner House court case were that the ECGD had weakened its anti-corruption measures in December 2004 without proper consultation, and that stakeholders known by the ECGD to be interested in its anti-corruption measures (such as The Corner House) had been excluded from what were in essence secret negotiations with industry groups alone. The ECGD settled out of court with The Corner House in January 2005, agreeing to pay all costs and to carry out a full public consultation.

Under the December 2004 weakened procedures, companies had been able to cite commercial confidentiality as a reason not to disclose agents' identities; they also had to disclose details only of those agents that were engaged by the exporter or one of its controlled companies.

During the ECGD's 2005–06 consultation, some exporters argued that they should not have to provide information about agents to ECGD as it was commercially sensitive information that represented part of the company's commercial assets and intellectual property. The ECGD noted in its consultation response, however, that:

> "no compelling evidence of 'unworkability' or 'inappropriateness' . . . has, in [the government's] judgement been furnished in relation to the provision to ECGD by Applicants of the identity of Agents."

11. The Corner House welcomes the requirement on exporters to provide the names of their agents to ECGD. The Corner House considers this a reasonable and practical provision that will greatly enhance the effectiveness of ECGD's efforts to reduce the risk of corruption.

Loopholes and deficiencies in new arrangements

12. Nonetheless, a number of loopholes remain with respect to the provisions on agents, which the ECGD must address if the new procedures are to reduce as far as reasonably practical the risk of corruption in ECGD-backed projects.

— *Exporters have to provide information only about those agents who are instructed by them or appointed on their behalf.* This provides a clear loophole whereby an exporter can encourage a joint venture partner, subsidiary, parent or sister company to appoint an agent without the exporter's explicit authorisation—and therefore not on its behalf—and thus avoid having to provide any details of the agent to ECGD. Under the May 2004 procedures, exporters had to provide details of any agent involved by either themselves or any of their "affiliates", and affiliates included any group company, whether controlled or not, and any joint venture, consortium or business partner. ECGD has said that where an agent is appointed by a consortium of which the exporter is a member, the agent will be deemed to have been appointed on the exporter's behalf and will therefore need to be declared under the new procedures. This is not clearly stated on the application forms, however.

— *Exporters are no longer required to state whether there is a relationship between the agent and the buyer of the exporter's goods or services or to provide any details of such a relationship.* Given that the agent might be a public official, or a relative of a public official, this is important information that the exporter should be required to declare.

— *The Corner House also has concerns over the adequacy of the ECGD's new procedures for handling information about agents' identities.* The Corner House believes that the security of information for customers on the identities of agents must never be at the expense of ECGD being able to conduct adequate and thorough due diligence on whether there is a risk that a bribe payment may be made through the agent of a customer. The ECGD would expose itself and the taxpayer to unnecessary risk if it were to put security of information above its duty and right to conduct such due diligence.

The Corner House believes that it will be extremely difficult, if not impossible, for ECGD to conduct adequate due diligence on an applicant's agent solely through open source, web-based searches. The ECGD will be missing out on vital information about the background and reputation of an agent if it limits itself to such searches, and is not able to access local knowledge about the agent.

13. With respect to the handling of agents' identities, The Corner House recommends that the following further reasonable and practical improvements be made to the ECGD's procedures:

(a) *Addition of representative of local diplomatic mission to those permitted knowledge of an agent's identity*

Under paragraph 4 of the "Special Handling Arrangements", the ECGD can add a fourth person who will be given the knowledge of the identity of the agent under similar conditions of confidentiality as those that will apply to ECGD personnel. This fourth person should be a representative from the local diplomatic mission where the agent is based. This local diplomatic official would have responsibility for making discreet enquiries about the background and reputation of an agent and is likely to be able to access local information about an agent without alerting anyone as to the purpose of the enquiry. Where either ECGD or the local diplomatic official has concerns, the local diplomatic official should be responsible for conducting further enquiries, including making a possible visit to the agent's offices to check that they are bona fide and what experience they have.

The Corner House believes that the "Special Handling Arrangements" will be seriously deficient if they do not enable ECGD to access local knowledge as part of its initial due diligence searches. The Corner House does not believe that approval from the applicant should be sought before

involving such a fourth official, but that it should be a condition of cover, specified in the Arrangements, that such a fourth local diplomatic official be one of the people given knowledge of the agent.

(b) *Independent due diligence*

The Corner House believes the new procedures on agents could reasonably be improved by the ECGD requiring the applicant to commission an independent "due diligence" check on their agent/s by an independent and reputable risk consultancy and to provide the ECGD with the full results of that check in cases where an applicant requests "Special Handling Arrangements" for high risk projects, such as a project in a country where the World Bank and Transparency International regard corruption as high, or a project in a high risk sector, such as infrastructure or defence. Companies listed on the New York Stock Exchange regularly commission such checks on their agents in order to ensure and be able to document their compliance with the Foreign Corrupt Practices Act (FCPA). The Corner House believes that the ECGD's due diligence on agents should be at least as strong as, if not stronger than, best industry practice, given that taxpayers' money is at risk.

(c) *Refusal to supply consent should result in a halt to the processing of an application*

The Corner House believes that paragraphs 6 and 7 of the "Special Handling Arrangements" are essential, but that paragraph 7 should make it clear that, if the applicant refuses consent for knowledge to be more widely shared where ECGD has concerns and needs to make further enquiries, ECGD will not be able to proceed with the application. The current phrasing "it is likely in those circumstances that ECGD would be unable to process the Application further" leaves open the possibility that ECGD may still proceed with an application despite such an unsatisfactory situation.

Audits

Positive aspects of the new arrangements

14. The ECGD's new audit clause will now permit the ECGD to audit the contract records of an exporter so as to verify declarations that the exporter has not engaged in corrupt activity on a random basis. This is welcomed by The Corner House as a reasonable and practical measure to reduce the risk of corruption in ECGD-backed projects.

Under the December 2004 weakened procedures, the ECGD had first to confirm in writing to the exporter that it had reasonable grounds for suspecting wrong-doing by an employee, agent or partner of the exporter before it could conduct an audit.

Exporters argued during the consultation that, during such audits, ECGD staff might become aware of "commercially sensitive information". They objected to the fact that, under the ECGD's May 2004 procedures, ECGD had been able "to investigate at will any aspects of the Supply Contract award and post-award administration" (CBI submission, June 2005).

In its final response to the consultation, the ECGD has accepted that audit rights are a normal part of both private and public sector insurance contracts and stated that it no longer considered it:

> "appropriate that ECGD needs to have, or shall have, expressed a suspicion about bribery and corruption in order to trigger an audit".

Loopholes and deficiencies in new arrangements

15. The Corner House has, however, identified the following loopholes that the ECGD must address if the risk of bribery is to be reduced. The most significant are as follows:

— *The ECGD will give exporters five days' notice before conducting an audit.* This provides ample time for a company to destroy or hide any incriminating documents, and runs counter to recommendations made by Parliament's Trade and Industry Select Committee in March 2005 that the ECGD remove this clause.

— *The audit clause allows ECGD to audit documents "only to the period up to the date of the award of the Contract" and does not allow ECGD to inspect documents relating to measures taken by exporters to prevent, detect and deal with corruption or relating to the placing of subcontracts.* As The Corner House and others have pointed out to ECGD, commission payments are often made after the award of a contract, and ECGD will not therefore be able to audit any documents relating to such payments, or to any administration of the agency agreement after that date. Furthermore, the fact that ECGD cannot inspect documents relating to how exporters prevent, detect and deal with corruption means that it cannot verify statements made in the application forms and repeated in the contract documentation that companies are requiring anyone acting on their behalf not to engage in corrupt activity, that they are monitoring that requirement and have taken appropriate

action against anyone involved in corrupt activity. The placing of subcontracts, meanwhile, is an area open to considerable corruption. The fact that the ECGD can still not audit this area of a transaction, as it could under the May 2004 procedures, is a considerable weakness.

Anti-corruption Declarations

Positive aspects of new arrangements

16. The ECGD will now require companies requesting ECGD support to declare that they have made reasonable enquiries of all other companies involved in the transaction in which there is an element of control (eg parent companies that control the exporter; sister companies controlled by the parent company; and controlled subsidiaries of the exporter itself) and that, following these enquiries, they do not believe that any of these companies, their consortium partners or their agents have engaged in corruption. Companies will also be required to declare that they have made reasonable enquiries as to whether any of these parties has been debarred for, convicted of, or admitted to corrupt activity in the previous five years. Again, The Corner House welcomes these provisions, which it views as both reasonable and practical.

Under the December 2004 weakened measures, a company had to declare only that neither it nor its controlled subsidiaries had engaged in corruption, or been debarred for, convicted of, or admitted to corrupt activity in the previous five years. If a joint venture partner engaged in corruption, ECGD required exporters only to notify it promptly once the exporter became "aware" of it Furthermore, some parts of the required declarations were qualified with the phrase "to the best of our knowledge and belief"; the ECGD's definition of this phrase did not require the exporter to make any enquiries whatsoever to ensure the truth of their declaration.

During the consultation, exporters argued that the undertakings required of them by the May 2004 procedures about bribery in respect of third parties were unworkable. They also argued strongly that the ECGD should keep the qualification "to the best of our knowledge and belief". The Corner House, however, argued that, if the phrase "to the best of our knowledge and belief" was defined as "requiring reasonable enquiries", the May 2004 declarations essentially required exporters only to have conducted appropriate due diligence on its business partners—something that any responsible exporter should carry out in any case.

In its final response to the consultation, the ECGD has drawn up declarations that are not qualified by the phrase "to the best of our knowledge and belief", that require exporters to state that they have made reasonable enquiries of their business partners involved in the proposed transaction, and that they are satisfied that there has been no corruption. Exporters are still required to notify ECGD promptly if they uncover any corruption in relation to the transaction, including by any consortium partner.

Loopholes and deficiencies in the new arrangements

17. The Corner House has, however, identified the following loopholes that the ECGD must address if the risk of bribery is to be reduced. The most significant is as follows:

— *Companies do not have to make any declarations about non-controlled subsidiaries, parent companies that do not control them, or sister companies that are not controlled by the parent companies.* Ideally, the ECGD should have required exporters to declare that they had made reasonable enquiries of all parties involved in the transaction. Furthermore, the required declarations specifically exclude subcontracts. Subcontractors and non-controlled parties may therefore become an obvious conduit for bribes to be paid on ECGD-backed transactions.

Are the Proposals Set Out in the Final Response Workable?

18. The Corner House views the new procedures as workable and notes that no objections were raised by many of ECGD's customers to the May 2004 procedures, despite their being more onerous in several areas.

Making the Procedures Effective: Transparency and Monitoring

19. The Corner House believes that the key to ensuring that the ECGD prevents bribery occurring on projects it supports now lies in effective and consistent implementation of its new procedures.

20. One way of ensuring this is full transparency. The Corner House believes that ECGD should publish results of how its new policy is working in practice, including information about how many audits it has conducted to verify anti-bribery declarations, how many transactions it has refused because of suspicions or evidence of bribery, and how many suspicions of bribery it has passed on to the law enforcement authorities. The ECGD should also report how many companies request the confidentiality arrangements for their agents on an annual basis.

Taking a Lead Multilaterally

21. The Corner House believes that the UK must now, on the basis of this March 2006 announcement, play a strong role in pushing for improved export credit agency procedures multilaterally through the Organisation for Economic Cooperation and Development (OECD). At the time of writing, negotiations are underway at the OECD to improve an agreement on how export credit agencies deter, detect and sanction bribery.

22. As the country that presided over the G8 Summit in Gleneagles in July 2005, the UK has a special responsibility to seek to ensure that its G8 partners meet the commitments made at the Summit. The ECGD's new procedures represent emerging best practice for how export credit agencies deal with corruption, and the UK should be encouraging both its G8 and EU partners to adopt similar procedures.

April 2006

APPENDIX 4

Further memorandum by the Corner House

Introduction

The Corner House is a not-for-profit research and advocacy group, focusing on human rights, environment and development. Over the past six years, it has closely monitored the policies and operations of the UK Export Credits Guarantee Department (ECGD) with regard to corruption.

The Corner House is pleased to submit evidence to the Committee in relation to the support provided by the Export Credits Guarantee Department (ECGD) to the UK exporter Mabey & Johnson for a bridge-building programme in the Philippines. The bridge-building contracts are the subject of allegations of corruption and over-pricing in the Philippines. These came to light following a complaint filed at the Ombudsman by the Philippine NGO, Sinag ng Bayan Foundation in 2005.

The Corner House considers that the case illustrates a number of points that are relevant to the questions posed by the Committee:

Agents

It is alleged that the agent used by Mabey & Johnson was a member of the President's Bridge Programme (PBP). This demonstrates the value of the steps taken by the ECGD to require exporters requesting ECGD support to provide the ECGD with the name of any agent involved in the transaction that has been appointed by or on behalf of the exporter. It also underlines the need for the ECGD to go further and require exporters to provide information on the relationship between the agent and the buyer of the exporter's goods or services and to include the use of the local diplomatic mission for obtaining local knowledge on agents in its "Special Handling Procedures".

Audit

The case underlines the importance of the ECGD having in place adequate audit provisions.

Case Details

A breakdown of contracts won in Philippines by Mabey & Johnson ("M&J") and other companies has been provided showing the marked disparity between the value of contracts won by M&J and those awarded to their competitors (see Annex 1A).

The National Economic Development Authority ("NEDA"), the "Planning Ministry", evaluation through its Technical Board of the most recent M&J contract did not require individual bridge site economic evaluations as has been the case on all contracts proposed by other suppliers. Instead, NEDA accepted that the economic evaluation of a prototype bridge installed previously by M&J was sufficient evidence to justify proceeding without further evaluation. This was despite there being great disparities in the locations of proposed bridge sites. Why was such an important requirement waived? The NEDA evaluation (see extract in Annex 1B) also states that Director Sadain of the Department of Public Works and Highways ("DPWH") advised that feasibility studies were under way and could be provided in time for discussion at the ICC-Cabinet Board on 10/12/04, ie the next day. These studies were never submitted, but the contract was nonetheless approved.

The NEDA evaluation also noted that "the Secretariat" had only been able to provide cost comparisons with previous M&J contracts (ie for panel or "Bailey" bridges), but had been unable to provide cost comparisons with "longer span bridges" supplied by other companies despite contracts having been

awarded to such companies and other proposals from such companies currently being at an advanced stage of evaluation. Evidence available indicates that M&J's prices for such bridges are much higher than available from other companies. NEDA's evaluation also states that this evidence was requested. However, it was never submitted but the contract was nonetheless approved. How could approval have been given without such key information being made available, especially when it seems that it was widely known that other suppliers' prices were lower?

The Department of Budget & Management ("DBM") approval for the allocation of budget funds to M&J's most recent contract was signed by DBM Secretary Boncodin on 28/6/05 just 24 hours before she resigned (copy of Forward Obligation Authority, the key DBM approval, attached in Annex 1B). It is a law in the Philippines that no senior members of Government may indulge in "midnight" signatures of this kind, yet the validity of Sec Boncodin's signature was not questioned.

Opposition politicians, in the light of the current wide ranging accusations of corruption against President Arroyo, have recently picked up on the anomalies surrounding the approval of M&J's current contract and the dominant position that M&J hold in the bridging sector. It has also been suggested that several bridges under M&J's previous contracts have been installed in locations where they provide no value and that such installations only took place to secure election funds and/or votes for President Arroyo and her colleagues. This has been countered by a propaganda offensive by both M&J and the Government including several articles and paid-for advertisements in newspapers containing a number of key untrue or misleading "facts".

One fact that is generally concealed by the Government and M&J is that the latter's bridges supplied under all their previous contracts are temporary (as defined by the Government themselves) as opposed to those supplied and proposed by other companies which are permanent. This means that the lifespans of M&J bridges have probably been overstated (or even overlooked) and so, in addition to the price of M&J's bridges being significantly higher, the bridges apparently have shorter lifespans. This was even evident in the data provided to NEDA when comparing the NPV of concrete bridges against those proposed by M&J as the latter were assumed to have a lifespan of 50 years. As many of the bridges included in their most recent contract are for short span "Bailey" bridges and therefore temporary, this is a very misleading comparison and even the flyovers that have been erected previously by M&J (eg at San Fernando) are clearly temporary so that one would assume that any flyovers to be supplied under this contract would fall into the same category.

Another fact is that all M&J's contracts have been supported by the British Government's ECGD. There have been several quotations from Philippine Government officials stating that this means that the British Government has been closely monitoring the implementation of the contracts and thus it is wrong to say that bridges have been installed in economically unviable locations. In fact, the British Government (whether through ECGD or other bodies) plays no monitoring role whatsoever in such projects. The British Government only does so through DFID when the latter is providing its own funds to finance a contract. This was only the case in the very first M&J contract signed in 1994.

M&J's former agent, Mr Ted Haresco (see Annex 1C), until recently was concurrently a member of the President's Bridge Programme ("PBP") committee which was part of the Office of the President. He was therefore highly influential in determining which suppliers should be awarded contracts. As the PBP has now been moved to DPWH, this is no longer the case and Mr Haresco has been elevated to Business Development Director of M&J's Philippine operations. However, why was he allowed to play such an influential role in contract awards for so long when he was in the pay of M&J?

May 2006

APPENDIX 5

Memorandum by Transparency International (UK)

SUMMARY

1. The UK Export Credits Guarantee Department ("ECGD"), after a year long consultation, published in March 2006 its revised anti-bribery and corruption procedures (the "March 2006 procedures"). The March 2006 Procedures replace ECGD's December 2004 Procedures, which in turn replaced its May 2004 Procedures.

2. The House of Commons Select Committee on Trade and Industry has set up an inquiry which has asked the following two questions:

(a) *"Do the procedures published on 16th March 2006 in the Government's "Final Response to the Export Credits Guarantee Department's consultation on the changes made to its anti-bribery and corruption procedures in December 2004 reduce as far as reasonably practical the risk of ECGD supporting contracts tainted by corruption?"*

(b) *"Are the proposals set out in the Final Response workable?"*

3. This submission is made by Transparency International (UK) in response to the Select Committee's questions.

4. The term "Supplier" is used in this submission to mean the exporting company which is applying for and/or receiving the benefit of an export credit guarantee from ECGD.

5. TI(UK) believes that the March 2006 Procedures do not "reduce as far as reasonably practical the risk of ECGD supporting contracts tainted by corruption".

6. The March 2006 Procedures are fundamentally flawed in three key areas, and ECGD is as a result at risk of facilitating corruption:

(a) *Recourse:*

Recourse provisions specific to corruption prevent ECGD from having recourse against the Supplier unless it can be proved that the Supplier was complicit in the corruption. ECGD must therefore bear the cost of corrupt acts of the Supplier's employees, group companies, agents, joint venture partners, and sub-contractors, unless the Supplier's complicity can be proved. Such provisions increase the likelihood that ECGD will support contracts tainted by corruption. Corrupt Suppliers have the comfort that there will be no recourse against them so long as their complicity in corruption can be concealed. Non-corrupt Suppliers have a reduced incentive to endeavour to ensure that their business partners do not engage in corruption, as they are aware that ECGD will not have the right of recourse in the event of corruption by these parties. The inability of ECGD to obtain recourse in these circumstances means that ECGD is actually providing insurance against corruption by these parties. As ECGD is a publicly funded body, the UK taxpayer is unwittingly being obliged to underwrite corrupt acts. The inability of ECGD to obtain recourse in these circumstances is contrary to normal contractual principles, to the UK's treaty obligations, and to the UK Government's and ECGD's express commitment to combat corruption.

(b) *Disclosure:*

Defective disclosure provisions unnecessarily restrict ECGD's ability to assess whether it is guaranteeing a corrupt contract. Such provisions result in the following:

(i) The Supplier is required to disclose only the identity of agents appointed by it, or on its behalf. Therefore, agents appointed by group companies of the Supplier, or by the Supplier's joint venture or consortium companies do not need to be disclosed, even though it is well known that agents appointed by such parties could pay bribes in relation to the export contract. It would be possible for the Supplier to be complicit in such appointments even if it could not be proved that the appointments were made on the Supplier's behalf.

(ii) Exceptions on the grounds of confidentiality allow a Supplier to require details of its agents to be revealed only to a few select staff at ECGD. These restrictions will make it difficult for ECGD to undertake proper due diligence on the agent. There is no commercial or other justification for these concessions. On the contrary, requests for such confidentiality suggest that corruption may be involved. These concessions will only serve to hamper the purpose of disclosure, which is to help identify whether agents have been appointed for corrupt purposes.

(iii) The Supplier is required to disclose to ECGD the identity of any Agent appointed by it in relation to the Supply Contract and any Related Agreement. However, it is only required to disclose to ECGD the amount of the commission paid to the Agent in relation to the Supply Contract. Thus the cost of a bribe may be concealed in a Related Agreement, and ECGD would have no opportunity of detecting this.

(c) *Inspection:*

Defective inspection provisions unnecessarily restrict ECGD's rights to inspect. The threat of inspection helps prevent corruption. Actual inspection helps uncover corruption. However, ECGD's inspection provisions are unduly restrictive in that:

(i) The inspection rights are limited to the Supplier's UK premises.

(ii) The inspector does not have access to the records of the Supplier's parent, associated and subsidiary companies, agents, joint venture and consortium partners, sub-contractors or suppliers.

(iii) Records can only be inspected if they relate to the period up to the date of award of the Supply Contract.

(iv) Records can be inspected only for the sole purpose of verifying statements made and information given to ECGD by the Supplier in the Application.

(v) Five business days' notice is required for inspection.

7. TI(UK) analyses the above issues in more detail below, and provides recommendations for the rectification of these flaws. If ECGD rectifies these flaws in the manner recommended by TI(UK) then, in TI(UK)'s opinion, the revised procedures would:

(a) "reduce as far as reasonably practical the risk of ECGD supporting contracts tainted by corruption"; and

(b) be "workable".

Detailed Analysis

Recourse

8. The recourse provisions in clauses 7.3 and 9 of the Premium and Recourse Agreement provide for the circumstances in which ECGD may seek recourse against the Supplier to recover amounts paid out by ECGD under the guarantee. Clause 7.3 specifies the recourse provisions relevant to corruption. Clause 9 specifies the recourse provisions in all other circumstances.

9. Under clause 9, ECGD has recourse against the Supplier in circumstances relating to material Supplier default under the supply contract (which would include default by the Supplier's agents, sub-contractors, joint venture partners and group companies). This right of recourse applies absolutely, therefore including cases where the Supplier was not complicit in the default. An example of such default for which the Supplier would be absolutely liable is defective work by a sub-contractor of the Supplier. In such a case, ECGD would have right of recourse against the Supplier even where the Supplier was not complicit in, or had no knowledge of or control over the defective work.

10. Under clause 7.3, without good reason, and against the normal basis of liability otherwise followed in the recourse provisions, ECGD has singled out corruption as the one circumstance in which it would not impose absolute liability, irrespective of fault or complicity, upon the Supplier. As a result, ECGD has no right of recourse against the Supplier in respect of a corrupt act unless it can be proved that the Supplier was complicit in the corruption.

11. This point is best illustrated by an example which shows how contractual liability is normally managed under a contract, how an ECGD buyer credit works, and how corruption in this case would impact on ECGD.

(a) *Normal contractual liability:*

Take a power station contract as an example. The Supplier bids to a utility to build a power station overseas. The Supplier sub-contracts parts of the works to other companies, who in turn sub-sub contract smaller parts. The result is a complex contractual chain, with hundreds, sometimes thousands of links. The utility will insist that the Supplier assumes full liability for the acts of all its sub-contractors, and of their sub-sub-contractors. Therefore, if the power station is defective or late, the utility will seek compensation from the Supplier. It will not matter to the utility whether the Supplier itself, or one or more of the sub-contractors was responsible for the defect or delay. The Supplier will compensate the utility, and it will be up to the Supplier to seek indemnity from the responsible sub-contractor. In some cases, the Supplier may form part of a joint venture comprising several companies. In this case the utility would require the Supplier and each of its joint venture partners to be jointly and severally liable to the utility for the acts of the other partners. The utility would not need to allocate responsibility between joint venture partners, and will not release the Supplier from liability because the default was that of its joint venture partner.

(b) *ECGD Buyer Credit:*

An ECGD buyer credit works as follows in relation to the above example. The utility takes a loan from a bank to finance the construction of the power station. As the works proceed, the Supplier periodically obtains payment from the bank to cover the cost of the works completed to date. These payments are made by the bank under the loan arrangements with the utility. Once the works are fully complete, the Supplier has been paid in full by the bank, and the utility must repay to the bank capital and interest over the life of the loan. The bank is insured against non-payment by the utility by an export credit guarantee issued by ECGD to the bank. The premium for this guarantee is paid by the Supplier to ECGD. Under the guarantee, if the utility does not pay the bank, ECGD will pay the bank, and will try to obtain recourse from the utility. If the reason for non payment is due to material defaults by the Supplier, then ECGD would not be able to get recourse from the utility, and would instead obtain recourse from the Supplier. For example, ECGD would obtain recourse from the Supplier if non payment by the utility was due to delay, defective work or other default by the Supplier (or any of its joint venture partners or sub-contractors).

(c) *Impact of bribery: How could bribery impact on the above scenario?*

The Supplier may win the power station contract as a result of a bribe paid to a senior executive of the utility, or to a minister or senior government official in the country in which the power station is being built. The bribe could be paid direct by the Supplier. Alternatively, it could be paid indirectly through the Supplier's agent, group company, joint venture or consortium partner or sub-contractor. The group company, joint venture or consortium partner or sub-contractor could themselves pay the bribe indirectly through an agent. In each of the above scenarios, there are various possibilities as to the degree of the Supplier's involvement and knowledge. The Supplier may have approved the bribe. Alternatively, it may be aware that a bribe is likely, but not have formally approved it (therefore effectively turning a blind eye to it). At the other end of the scale, the Supplier may have done all that is reasonably possible to prevent a bribe being paid. There are a number of options open to the utility in the event that it discovers that a bribe has been paid in order to procure the contract. Even if the bribe has been paid to the chief executive of the utility, this will be an illegal act by the chief executive which will not normally be binding on the utility. The contract will (depending on the law of the relevant country) either be void, or the utility will be able to terminate the contract and claim damages, or the utility will be able to affirm the contract and claim damages. In each case, it is highly likely that the utility will not re-pay the loan in full to the bank, as the contract price will probably have been inflated both by the cost of the bribe and the additional profit which the Supplier, joint venture or consortium partner or sub-contractor may have been able to secure as a result of the bribe. The bank will therefore seek indemnity from ECGD for the unpaid portion of the loan interest and capital. In this case, it is unlikely that ECGD can obtain recourse from the utility. It would seem obvious that ECGD should therefore seek recourse from the Supplier, as the Supplier has either paid a bribe, or the bribe has been paid by an organisation for which the Supplier would, under normal contractual principles, be liable. If the Supplier had not itself paid, approved or acquiesced in the bribe, it would then, under normal contractual principles, be able to recover the bribe and consequent damages from the party who paid or approved the bribe.

12. However, ECGD has only retained very limited rights of recourse against the Supplier in the above scenario. Paragraph 7.3 of the Premium and Recourse Agreement provides that ECGD has the right of recourse against the Supplier when "the Supplier or anyone (including any employee) acting on the Supplier's behalf (with due authority) or with the Supplier's prior consent or subsequent acquiescence, has engaged, or engages, in any Corrupt Activity in connection with the Supply Contract or any Related Agreement . . .". Therefore, this right of recourse would not apply, for example, to the following situations:

(a) A Corrupt Activity undertaken by an employee of the Supplier unless it could be proved that the employee was acting with "due authority, prior consent or subsequent acquiescence" of the Supplier. For example, the Supplier's project director may authorise a bribe without board authority, and contrary to the company's anti-corruption code. Authority may be difficult to prove.

(b) A Corrupt Activity undertaken by an agent of the Supplier unless it could be proved that the agent was acting with the "due authority, prior consent or subsequent acquiescence" of the Supplier. In practice, a company would be unlikely to give an agent express authority or consent to bribe. Acquiescence may be difficult to prove.

(c) A Corrupt Activity undertaken by the Supplier's parent, associated or subsidiary company, joint venture or consortium partner, sub-contractor or supplier, or by any of their employees or agents unless it could be proved that:

(i) These parties were acting "on behalf of" the Supplier. This may be difficult to establish. If a consortium partner, for example, paid a bribe which assisted the consortium win the contract, the Supplier would probably allege that the consortium partner was acting in its own right, and not on behalf of the Supplier; or

(ii) These parties were acting with the Supplier's "due authority, prior consent or subsequent acquiescence". In practice, a company would be unlikely to give one of these parties express authority or consent to bribe. Acquiescence would be difficult to prove.

13. TI(UK) dealt with this point as follows in paragraph 46 of its November 2005 Submission to ECGD (which was supplementary to TI's June 2005 Submission to ECGD, and which responded to ECGD's October 2005 Interim Response):

> "TI(UK)'s June 2005 Submission stated that the Premium and Recourse Agreement should be amended so that it expressly states that ECGD will have full right of recourse against the Supplier in the event of any Corrupt Activity in relation to the Supply Contract and any Related Agreement undertaken by the Supplier, its Controlled Companies, Associates, Agents, sub-contractors, suppliers and anyone acting on their behalf, whether or not the Supplier had consented to, or knew of these activities, and whether or not the Supplier had taken reasonable steps to prevent them. It cannot be correct that the taxpayer indemnifies the Supplier in any circumstance against Corrupt Activities by organisations which are within the Supplier's control or contractual domain. This is a serious flaw in the allocation of risk. ECGD's October 2005 Interim Response does not incorporate this recommendation. This is a serious deficiency."

14. ECGD responded to this point as follows in paragraph 134 of its Final Response: "It was suggested that the declaration in the Buyer Credit Application Form and the recourse provision in the Premium and Recourse Agreement 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 circumstance to see whether there had been any complicity."

15. Therefore, ECGD is acknowledging that there would be no recourse against the Supplier unless complicity by the Supplier could be established. Therefore, if the utility justifiably defaults on repayment of the loan due to a corrupt act by the Supplier's employee, group company, joint venture or consortium partner or sub-contractor, ECGD and not the Supplier will bear the loss in the absence of proof of complicity by the Supplier.

16. This exception to the recourse provisions, in relation to corruption, has three consequences:

(a) It leaves open the possibility for concealed complicity by the Supplier (which will not be difficult to contrive—particularly in view of the limitations now placed by ECGD on the Supplier's disclosure requirements and ECGD's inspection powers—see below). Such concealment is quite probable given that companies who wish to participate in corruption will, of necessity, try to conceal their complicity.

(b) The taxpayer must bear the cost of corrupt contracts where such complicity cannot be proved (even though it may well have existed). ECGD apparently believes that while it is unreasonable for the Supplier to bear the cost of corruption in such circumstances, it is quite reasonable for the taxpayer (who is considerably more remote from the contract) to do so.

(c) It leaves an inexplicable inconsistency in the recourse provisions. While ECGD sees it as reasonable to have an absolute right of recourse against the Supplier in respect of all other defaults, it sees it as unreasonable to do so in respect of corruption.

17. ECGD has therefore chosen to make an exception in its recourse arrangements for corrupt (and, therefore, illegal) contracts. It is, therefore, obliged to bear the cost of such contracts in circumstances where either the Supplier has no complicity in the corruption, or where the Supplier succeeds in concealing its complicity. Such provisions increase the likelihood that ECGD will support contracts tainted by corruption. Corrupt Suppliers have the comfort that there will be no recourse against them so long as their complicity in corruption can be concealed. Non-corrupt Suppliers have a reduced incentive to endeavour to ensure that their business partners do not engage in corruption, as they are aware that ECGD will not have the right of recourse in the event of corruption by these parties. The inability of ECGD to obtain recourse in these circumstances means that ECGD is actually providing insurance against corruption by these parties. As ECGD is publicly funded, the UK taxpayer is unwittingly being obliged to underwrite corrupt acts. The inability of ECGD to obtain recourse in these circumstances is contrary to normal contractual principles, to the UK's treaty obligations, and to the UK Government's and ECGD's express commitment to combat corruption.

18. *TI(UK) Recommendation:* The Premium and Recourse Agreement should be amended so that it expressly states that ECGD will have full right of recourse against the Supplier in the event of any Corrupt Activity in relation to the Supply Contract and any Related Agreement undertaken by the Supplier, its employees, Agents, group companies, Consortium Partners, sub-contractors, suppliers and anyone acting on its or their behalf, whether or not the Supplier had consented to, or knew of these activities, and whether or not the Supplier had taken reasonable steps to prevent them.

Disclosure

19. ECGD's requirements in relation to disclosure by the Supplier continue to be materially inadequate.

20. Banks normally only require export credit guarantees in high risk countries, and in relation to high risk borrowers. Perhaps, unsurprisingly, these countries tend to be those which, according to Transparency International's Corruption Perceptions Index, are perceived to be the most corrupt. Most of ECGD's business is in the infrastructure and defence sectors which, according to TI's Bribe Payers' Index, are the two most corrupt sectors in the world. ECGD is therefore on notice that there is a very high risk of corruption in relation to projects it is requested to guarantee. As most cases of corruption never come to light, prevention is vital. While there is a limit to what ECGD can achieve, TI(UK), and other NGO's such as the Corner House and ECA Watch, have long argued that ECGD and other export credit agencies should require greater disclosure in relation to the project participants. In particular, the very high risk of corruption by the agents of the Supplier, or of the Supplier's group companies and joint venture and consortium partners has been pointed out, and it has been stressed to ECGD that full disclosure should be required in relation to these agents.

21. Three major issues of concern remain in this area in relation to the March 2006 Procedures.

Disclosure of the identity of agents

22. ECGD has revised its anti-bribery procedures in relation to disclosure of agents three times during the last two years (in May 2004, December 2004, and March 2006).

(a) ECGD's May 2004 procedures required disclosure by the Supplier of details in relation to the agents appointed by the Supplier, or by the Supplier's group companies, or by the Supplier's joint venture, consortium and similar partners.

(b) ECGD's December 2004 procedures required disclosure only of agents appointed by the Supplier, or by companies controlled by the Supplier.

(c) ECGD's March 2006 procedures only require disclosure of details in relation to agents appointed by or on behalf of the Supplier. While it could be argued that an agent appointed, for example, by the Supplier's joint venture partner was also acting "on behalf of" the Supplier, in most cases the Supplier would maintain that the agent was only acting on behalf of the joint venture partner, and would not therefore provide disclosure to ECGD. In practice, therefore, disclosure is only likely to be made in relation to agents appointed by the Supplier. There has therefore been a gradual scaling back by ECGD of its disclosure requirements in relation to agents.

23. It is well known that agents appointed by group companies of the Supplier, or by the Supplier's joint venture or consortium companies, could pay bribes in relation to the export contract. TI(UK)'s June 2005 and November 2005 Submissions therefore recommended the reinstatement of the obligation under ECGD's May 2004 procedures to disclose details of agents appointed by the Supplier's group companies, or by its joint venture, consortium or similar parties.

24. ECGD's response to this issue is as follows (paragraph 77 of ECGD's Final Response): "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."

25. This is an astonishing statement from ECGD, and is totally incorrect. All ethical companies are now aware of the extreme criminal law and civil law risks of corruption by agents, and would require disclosure of these details by their group companies and joint venture and consortium partners as a matter of proper anti-corruption due diligence and good business sense. It would therefore be easy for the Supplier to provide these details to ECGD. It is difficult to comprehend why ECGD, when the risks of bribery by agents are so well known, and have been extensively pointed out by TI(UK) and other organisations during the consultation, should have effectively limited disclosure requirements only to agents of the Supplier.

26. *TI(UK) Recommendation:* ECGD should reinstate the obligation on the Supplier under its May 2004 procedures to disclose details of agents appointed by the Supplier, and by the Supplier's group companies, and by the Supplier's joint venture, consortium or similar parties.

Confidentiality provisions

27. ECGD has established under its March 06 Procedures a special highly confidential disclosure system in relation to agents. If the Supplier requests these "special handling arrangements", only a few senior executives in ECGD are permitted to know the identity of the Supplier's agent. These arrangements include mandatory destruction by ECGD of all electronic records of due diligence on these agents.

28. The reason for this "Cold War" type of confidentiality is hard to comprehend. Many agents and intermediaries are companies or individuals of the highest integrity, and provide legitimate business services for fair remuneration. Often they are appointed as an alternative to the Supplier establishing a subsidiary in that territory. The agent may provide services such as an office, engineers, translation, co-ordination, liaison with the client, show room or warehouse. They would be paid a market rate for these services. If they are reputable, there is no reason why these agents should not be willing to be open and transparent in their business dealings, and be willing to have details of their identities, scope of work and commission payments made available as part of the due diligence procedures. They should have nothing to hide. Agents would be likely to wish their experience and expertise to be widely known so that they attract more business.

29. At the other end of the spectrum are the murky intermediaries who "assist in winning the contract", and are paid amounts vastly disproportionate to the actual work they undertake. Their commissions are often used wholly or partially to pay bribes. They are normally people of influence with government officials, and are often related to senior officials. Sometimes the agents are companies owned by the senior officials themselves. These agents would not wish their identities to be known. If the local population or press knew who the agent was, or what he was being paid, there could be adverse publicity and repercussions for the Supplier and its agent. In particular, the press or local whistle-blowers may reveal that the agent had a close relationship with a senior official connected with the transaction. Therefore, there should always be extreme concern where the Supplier attempts to keep these details confidential. Suspicion must be present that the details of these agents are being kept confidential because of their close links to someone who has influence over the contract award or contract management process.

30. It is therefore impossible to understand why ECGD has permitted these special confidential arrangements under its March 06 procedures. The justification given by ECGD (that the details have to be kept confidential because disclosure of the identity of the agent may damage the Supplier's "competitiveness and commercial interests") is simply not credible.

31. TI(UK)'s advice to any export credit agency would be that the less willing the Supplier is to reveal details of its agent to the public, the higher the suspicion is that the agent may be corrupt, and the higher the level of due diligence which the export credit agency should undertake. However, by its commitment to keep the identity of the agent secret, ECGD has made it very difficult for itself to undertake proper due diligence. Due diligence requires more than a search of the internet. It requires actions such as making enquiries about the agent in the relevant territory, and making visits to the agent's premises to ascertain whether he exists, and is capable of undertaking the services required. This type of due diligence enquiry would normally be undertaken by professional companies who specialise in this field. How can this be undertaken if only a few very senior officials in ECGD are entitled to know the agent's identity? As it would be virtually impossible for ECGD, under the restrictions of the confidentiality arrangements, to undertake proper due diligence, ECGD's only alternative when a Supplier asks to use the special confidentially arrangements would be to refuse cover. Allowing the Supplier special confidentiality arrangements is therefore an unacceptable position.

32. *TI(UK) Recommendation:* This confidentiality concession should be withdrawn.

Agency Commissions

33. Under the March 2006 Procedures, the Supplier is required to disclose to ECGD the identity of any agent appointed by it or on its behalf in relation to the Supply Contract and any Related Agreement (paragraph 7.1 of the Guarantee Schedule). However, the Supplier is only required to disclose to ECGD the amount of the commission paid to the agent in relation to the Supply Contract (paragraph 7.5 of the Guarantee Schedule).

34. This is a weakness in the procedures, as it would permit a Supplier to appoint an agent under a Related Agreement, and therefore avoid disclosure of the commission.

35. *TI(UK) Recommendation:* The Supplier should also be obliged to disclose details of commission paid to the agent in relation to any Related Agreement. This may be a drafting error by ECGD in preparing the March 2006 Procedures, and is easily corrected.

Inspection

36. ECGD's March 2006 Procedures do not retain adequate powers for ECGD to undertake effective post-contract inspection to help ensure that no corruption has taken place, or could take place (clauses 1.8 and 6.2 of the Premium and Recourse Agreement). The purpose of wide ranging inspection powers is not only to identify corrupt behaviour. The retention of these powers acts as a powerful deterrent, as the Supplier is always aware that ECGD may inspect. Both TI(UK)'s June 2005 and November 2005 Submissions commented that the wording in ECGD's Procedures was deficient, and suggested improvement. While two of TI(UK)'s points have been dealt with by ECGD, the other deficiencies remain in the procedures contained in ECGD's Final Response. These are as follows:

(a) The inspector can only visit the Supplier's UK premises to inspect records. However, the issue concerns exports and overseas bribery. Records may be kept at the Supplier's overseas premises, and the right to inspect should extend to these premises also.

(b) The inspector does not have access to the records of parent, associated and subsidiary companies, agents, joint venture and consortium partners, sub-contractors or suppliers, even though bribes may, with or without the knowledge or wilful blindness of the Supplier, have been arranged through these companies.

(c) Records can only be inspected if they relate to the period up to the date of award of the Supply Contract. However, most bribes will actually only be paid after award of the Supply Contract (for example out of the contract down-payment or out of a contract variation). An inspection of pre-award documents would be unlikely to reveal this. Inspection should not be limited to this period.

(d) Records can only be inspected for the sole purpose of verifying statements made and information given to ECGD by the Supplier in the Application. Records cannot therefore be inspected for the general purpose of ascertaining whether there has been corruption in relation to the award or performance of the Supply Contract or any Related Agreement.

(e) Five business days' notice is required for inspection. This removes the very powerful weapon of spot checks, and would enable a corrupt Supplier to destroy or falsify documents.

37. *TI(UK) Recommendation:* To deal with the above points, TI(UK) recommends (as it did in its June 2005 and November 2005 submissions) that clauses 1.8 and 6.2 of the Premium and Recourse Agreement should be amended with the result that:

(a) The inspector can at any time visit the premises of the Supplier, parent, associated and subsidiary companies, agents, joint venture and consortium partners, sub-contractors or suppliers, wherever located.

(b) The inspector can at any time have access to the records and staff of the Supplier, parent, associated and subsidiary companies, agents, joint venture and consortium partners, sub-contractors or suppliers. Such records and staff should be limited to those relevant to the Supply Contract and Related Agreements.

(c) Records can be inspected and audited in relation to the period before, during and after the signing and performing of the Supply Contract and Related Agreements.

(d) Records can be inspected not only for the purpose of verifying statements made and information given to ECGD by the Supplier in the Application, but also to ascertain whether there is any evidence of Corrupt Activity in relation to the Supply Contract and Related Agreements.

(e) Records can be inspected on a spot-check basis (ie no requirement for notice).

(f) Copies of all the above documents can be requested.

Conclusion

38. The UK has ratified both the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the United Nations Convention against Corruption.

39. ECGD's anti-bribery procedures will be assessed in relation to major anti-corruption commitments the UK has made. For instance, on the initiative of the UK, the G8's Gleneagles Communiqué of July 2005 committed the G8 to:

> "Reduce bribery by the private sector by rigorously enforcing laws against the bribery of foreign public officials, including prosecuting those engaged in bribery; strengthening anti-bribery requirements for those applying for export credits and credit guarantees, and continuing our support for peer review, in line with the OECD Convention; encouraging companies to adopt anti-bribery compliance programmes and report solicitations of bribery; and by committing to co-operate with African governments to ensure the prosecution of those engaged in bribery and bribe solicitation".

40. The Commission for Africa, whose recommendations have the full support of the UK Government, stated in its 2005 Report that:

> "Developed countries should encourage their Export Credit Agencies to be more transparent and to require higher standards of transparency in their support for projects in developing countries".

41. ECGD states in the introduction to its Buyer Credit Guarantee that "the OECD countries, including the United Kingdom, are committed to combating corruption and money laundering". It also states on its web-site that it is ECGD's policy to:

> "deter illegal payments, corrupt practices and money laundering by Applicants for ECGD's support" and to "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."

42. However, despite the above express commitments, and after a year of consultation, ECGD's anti-bribery procedures are still fundamentally flawed in the areas referred to above, despite these issues being raised in detail with ECGD by TI(UK) and others during the consultation. It is hard to understand the reluctance of ECGD to require proper recourse against the Supplier, and to require more onerous disclosure and due diligence obligations by those whose projects are guaranteed by UK public funds. At present, ECGD's procedures not only facilitate corruption by inadequate disclosure, but may perversely underwrite corruption through defective recourse provisions.

43. TI(UK) calls on ECGD to implement the above recommendations as a matter of urgency, and to enforce its anti-corruption procedures with rigour.

44. This submission has been made on behalf of Transparency International (UK). TI(UK) is the UK national chapter of Transparency International, which is the world's largest non-governmental anti-corruption organisation. TI(UK) works with governments, business and civil society with the aim of helping bring about a reduction in both domestic and international corruption. This submission has been developed by a working group established by TI(UK) for this purpose.

Transparency International (UK)

April 2006

APPENDIX 6

Memorandum by the Export Credits Guarantee Department

INTRODUCTION: CURRENT POSITION

1. On 16 March, the Government published its Final Response to ECGD's Consultation on its anti-bribery and corruption procedures introduced on 1 December 2004 (the Final Response).

2. The Government's key aim throughout the consultation process has been to ensure that ECGD's procedures are rigorous yet workable. ECGD will make a number of changes to its procedures as a result of the Consultation. The revised procedures will come into effect on 1 July 2006. The changes made take into account many of the recommendations made by the Trade and Industry Committee in the Ninth Report of Session 2004–05 on the Implementation of ECGD's Business Principles.

3. ECGD and Ministers are considering the views of consultees on ECGD's proposed Special Arrangements for handling information provided to it about the identities of agents. ECGD hopes in the next month to be in a position to provide details to consultees of the final form of the Special Arrangements decided upon after taking account of representations received.

EVENTS LEADING UP TO THE CONSULTATION

4. In order to avoid unnecessary repetition, the Committee will find in Paragraphs 2 to 12 of the attached Final Response (Annex A) a brief account of the events, beginning in 2000, which has led to the formulation of ECGD's new anti-bribery and corruption procedures.

CONSULTATION PROCESS

5. The question on which representations were invited 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?*

6. ECGD's Consultation was carried out under Cabinet Office guidelines. In the process of considering making changes to its procedures, ECGD sought the views of Departments across Whitehall as well as the Export Guarantees Advisory Council, whose statutory purpose is to give advice to the Secretary of State at his request in respect of any matter relating to the exercise of his functions under the Export and Investment Guarantees Act 1991.

THE CHANGES MADE AS A RESULT OF THE CONSULTATION

7. The main changes ECGD has made to its procedures are summarised below.

Audit Provisions:

8. ECGD will have the power to audit the accuracy of those representations relating to the issue of bribery and corruption on giving notice at any time, rather than just when it suspects that bribery has taken place.

9. ECGD now has audit rights in respect of records held by the exporter which relate both to the obtaining and the performance of the supply contract. These rights will be exercisable by ECGD at any time on 5 days notice. Audit powers in respect of records relating to the obtaining of the contract may be used only for the purpose of verifying the accuracy of information given to ECGD in the exporter's application.

10. A full explanation of the reasons for the changes made can be found at Paragraphs 44 to 48 of the Final Response.

Details of Agents:

11. ECGD's standard forms will now require details about applicants' agent(s), including their names and addresses, in all cases.

12. As noted in paragraph three above, ECGD is seeking comments from consultees on its proposed internal handling arrangements to minimise the risk of the inadvertent disclosure of this information (attached at Annex B).

13. A full explanation of the reasons for the changes made can found at Paragraphs 52 to 54 and 68 to 73 of the Final Response.

Representations in Application Forms and Warranties in Contracts:

14. ECGD will require no-corruption representations from UK exporters and investors about certain companies involved in winning the contract for which ECGD support is being requested. Where these representations are qualified, they will be based on reasonable enquiries, which the applicant will be obliged to make.

15. As a result of the changes, an applicant will be required to make absolute no corrupt activity representations about itself and its directors. Qualified representations (on the basis of reasonable enquiries) will be required in respect of the applicant's agents and group companies materially involved in obtaining the contract and any consortium partners connected with that contract.

16. A full explanation of the reasons for the changes made can found at Paragraphs 115 to 126 and 129 to 135 of the Final Response.

Banks' Letter of Undertaking:

17. UK Banks will now be required to represent that they have made reasonable enquiries about Group Companies with a material involvement in obtaining the bank mandate and that those enquiries do not give it cause to believe that they have committed corrupt acts in relation to the negotiation and obtaining of the mandate to finance the supply contract. A Non-UK Bank will give the same representation in respect of its London Branch only.

18. Banks will continue to represent that they are regulated by the Financial Services Authority in relation to, amongst other things, money-laundering Regulations. Banks will also continue to represent and warrant that they are not aware or, alternatively, have no reason to suspect that the Supply Contract had been used for the purposes of money laundering or that they have complied with their obligations under the Proceeds of Crime Act 2002.

19. A full explanation of the reasons for the changes made can found at Paragraphs 154 to 164 of the Final Response.

Future Opportunities

Strengthening of the International Anti-Bribery and Corruption Rules

20. ECGD procedures remain among the strongest of the world's leading Export Credit Agencies. In support of the Government's commitment to combat bribery and corruption in business and in order to help to create a level playing field for UK exporters, ECGD is now stepping up its work on the international stage to persuade other Export Credit Agencies to adopt similar procedures. As such, ECGD is playing a full part in OECD negotiations on a revised Action Statement on Combating Bribery in Officially Supported Export Credits, which is expected to be agreed in the course of this year.

27 April 2006

APPENDIX 7

First supplementary memorandum by ECGD

LETTER FROM RT HON IAN McCARTNEY MP TO DR ROGER BERRY MP

I refer to the letter of my predecessor, Ian Pearson, to the Committee of 16 March 2006 announcing the publication of the Final Response to ECGD's consultation on its Anti-Bribery and Corruption procedures. In advance of my appearance before the Sub-Committee on 14 June, I set out in more detail why ECGD's new Anti-Bribery and Corruption procedures, to be introduced on 1 July (the 1 July procedures) meet the Government's aim of ensuring that ECGD's procedures are rigorous yet workable.

Support for the Final Response

Given the often polarised views of those that contributed to the consultation, difficult judgements had to be reached as to what would represent the right balance between rigour and practicability. I believe that the 1 July procedures achieve that balance. This is a view shared on the whole by consultees: the British Exporters Association has stated: "We can work with the guidelines"; while anti-corruption NGO, The Corner House, has said: "The ECGD deserves credit for taking a fair but robust line". The Chairman of ECGD's Export Guarantees Advisory Council (EGAC), John Elkington, who is also the Founder/Chief Entrepreneur of SustainAbility, an independent think tank and strategy consultancy which advises on

sustainable development, said: "EGAC is confident that the rules announced today will send a clear message that the UK will not support corrupt practices ... We conclude that the procedures do not place uncompetitive restrictions on exporters".

Factors Involved in Coming to a Final Set of Procedures

Notwithstanding this broad praise, some consultees have raised issues concerning particular aspects of the 1 July procedures. In relation to the points that have been raised, it is important to bear in mind some of the factors HMG took into account when formulating the 1 July procedures.

First, it must be emphasised that ECGD is not a criminal investigation agency. It does make enquiries to satisfy itself, as far as it is able to do so, that contracts it is associated with are unlikely to be tainted by bribery or corruption. But it has neither the powers, resources, nor the expertise to undertake the role that would be required to investigate suspicions or allegations of criminal behaviour in relation to business it is supporting. Nor has it ever been intended to fulfil that role which is carried out by investigatory authorities, principally the Serious Fraud Office. Instead, ECGD reports all allegations of corruption to those investigatory authorities.

Second, the initial questions posed by ECGD in its application forms—and which have been the focus of attention during the public consultation—are just that; ECGD has said all along that this does not preclude it from asking more questions of any applicant if it considers this to be necessary in the circumstances of an individual application. In the interests of clarity and user-friendliness, ECGD has avoided overloading its application forms with questions that may apply only to a minority of cases.

Third, it is a principle of administrative law that a discretion granted by Parliament to Ministers, such as that granted by the Export and Investment Guarantees Act 1991, may not be cut down by anyone else. This means that wherever a Minister is given by Act of Parliament a right to choose what decision to make, neither he nor the Departments who act on his behalf may completely foreclose any decision in advance.

I set out below some of the ways in which ECGD has ensured that its procedures are both robust yet practicable.

Information About Agents

The exemptions under the December 2004 procedures which allowed applicants in certain cases not to provide information about their agents have been removed. ECGD accepts that this information, which enhances the transparency of applicants' representations, is of some value to ECGD in meeting its objective of avoiding giving support to contracts tainted by bribery or corruption and has some value in deterring corruption. However, ECGD has noted the practical concerns expressed by consultees from industry about the risks that may be posed to their commercial interests should the information which they supply to ECGD about the identity of their agent be inadvertently disclosed. Therefore, as the final outstanding issue under the consultation, ECGD has considered representations from industry and NGOs on its proposals for special arrangements for the handling of information supplied to ECGD about the identities of customers' sales agents. These proposals are designed to minimise the risk of inadvertent disclosure of such information, thus making the procedures more workable for industry than those in place in May 2004.

Following publication of its Final Response to ECGD's consultation on 16 March, the Government published a Concluding Response to the consultation on 9 June (attached at Annex A). This consisted of the final form of ECGD's arrangements for the handling of information about agents, known as the "Special Handling Arrangements". The Special Handling Arrangements will come into effect as part of ECGD's new Anti-Bribery and Corruption procedures on 1 July.

Powers of Audit

ECGD will now have the power to audit documentation relating to the obtaining of an ECGD-supported contract at any time (rather than, as currently, just when ECGD suspects that bribery has taken place) upon giving five days' notice (which is ECGD's standard audit notification period). Any such audit will be solely for the purpose of verifying the accuracy of information given to ECGD in the exporter's application.

Taking account of ECGD's non-investigatory role, ECGD's 1 July procedures are fitting for the type of check appropriate to the nature of its commercial contracts with the exporter or bank. The purpose of an ECGD audit is to satisfy itself that information given in the application is accurate; not to investigate allegations of criminality. The five-day notice period provides applicants with the time they need to assemble the information that ECGD requires without undue interference with their business. In short, ECGD has extended its audit powers, allowing it to make appropriate checks at random which are sufficient to play a part in deterring corruption, in a way that remains workable for applicants.

Representations Made to ECGD About Past/future Involvement in Corrupt Activity

Applicants will continue to have to make representations that they and certain individuals and companies (i) have not committed, and will not commit, corrupt activity in respect of the relevant contract, and (ii) are not on the World Bank list of debarred firms, nor have been convicted of, nor admitted to, any corrupt acts during the last five years.

However, the scope of those about whom representations are required has been changed from all companies controlled by the applicant to those companies within its group which have had material involvement in the winning of the contract. The extent to which representations are qualified has also changed: only those made by the applicant itself are to be absolute. Those about involved group companies and consortium partners are given on the basis of the applicant having made "reasonable enquiries" as to their veracity.

These changes ensure that ECGD obtains the assurances it needs while taking account of the criticisms about the workability of the May 2004 procedures. For example, under the May procedures, applicants were required to make representations about all their employees, potentially thousands of people, a requirement which no consultee advocated retaining. ECGD is also no longer requiring representations about an applicant's group companies if they are not materially involved in the contract, ensuring that unnecessary burdens are not placed upon applicants. Applicants were also required under both the May and December 2004 procedures to make certain representations "to the best of their knowledge and belief." Under the 1 July procedures, applicants are instead required to make representations after having made "reasonable enquiries." This provides applicants with greater clarity as to what ECGD expects of them.

Transparency

A number of consultees have suggested to ECGD that it should report on its use of the 1 July procedures. I will consider this matter further in consultation with the Export Guarantees Advisory Council before coming to a final view.

Improving Procedures Internationally

ECGD's Anti-Bribery and Corruption procedures were, and remain, among the strongest in use by any of the leading Export Credit Agencies internationally. As The Corner House stated in its memorandum to this Sub-Committee: "ECGD's new procedures represent emerging best practice for how Export Credit Agencies deal with corruption, and the UK should be encouraging both its G8 and EU partners to adopt similar procedures." I am pleased to be able to inform the Committee that the OECD's revised Action Statement on Bribery in Officially Supported Export Credits now goes some way towards bringing the procedures of ECGD's counterparts in line with its own. But we are only part of the way there. ECGD officials will continue to work internationally in OECD fora to level the playing field for UK exporters in this area, including with non-OECD Export Credit Agencies through the OECD outreach programme, in order to encourage them to adopt similar procedures.

I hope the Sub-Committee finds this information useful. I look forward to answering any further questions on 14 June.

June 2006

APPENDIX 8

Second supplementary memorandum by ECGD

The Impact of the May 2006 OECD Action Statement on ECGD's Standard Recourse Rights Relating to Corrupt Activity

1. "Recourse" in this connection means a liability owed to ECGD, as a result of a contract between ECGD and an Applicant, to pay ECGD if certain specified events, including corrupt activity, occur. The Transparency International ("TI") assertion is that ECGD's recourse provisions will have to change to penalise Applicants in circumstances where they are not guilty of any complicity in the corrupt activity.

2. It is important to bear in mind that ECGD does already take sweeping recourse rights against Applicants in relation to corrupt activity. Not only where the Applicant itself has been guilty of corrupt activity but where it has consented to, authorised or acquiesced in the corrupt activity of others it must provide recourse to ECGD for all sums which ECGD has had to pay out. In all these cases the recourse right is for 100% of whatever ECGD has had to pay out. The TI assertion is that the Action Statement obliges ECGD to go even beyond that. In HMG's view, this is not the case.

3. Insofar as material, the Action Statement (full copy attached as Annex A) provides:

> ". . . the Members of the OECD Working party on Export Credits and Credit Guarantees (ECG) agree: . . .
>
> 2. To take, appropriate measures to deter bribery in international business transactions benefiting from official export credit support, in accordance with the legal system of each member country and the character of the export credit and not prejudicial to the rights of any parties not responsible for the illegal payments, including: . . .
>
> (j) If, before credit, cover or other support has been approved, there is credible evidence that bribery was involved in the award or execution of the export contract, suspending approval of the application during the enhanced due diligence process. If the enhanced due diligence concludes that bribery was involved in the transaction, the Member shall refuse to approve credit, cover or other support.
>
> (k) If, after credit cover or other support has been approved bribery has been proven, taking appropriate action, such as denial of payment, indemnification, or refund of sums provided."

4. TI quoted paragraph 2(J) of the new Action Statement to the Committee in support of their assertion that HMG will have to change its policy on recourse. The change that TI say is compelled is that, in future, ECGD's recourse provisions must include an obligation that an Applicant will pay to ECGD everything that ECGD is obliged to pay out where a corrupt act has been committed by anyone irrespective of whether the Applicant has knowledge of or complicity in the commission of that act.

5. Paragraph 2(J) of the new Action Statement deals with whether Export Credit Agencies should give cover at all where there is "credible evidence" of corruption which is discovered before support has been approved. Paragraph 2(J) thus has no bearing on the terms of recourse provisions to be included in a Support Contract which is approved, which provisions give future rights in circumstances where corrupt activity is subsequently discovered.

6. Paragraph 2(K) deals with action to be taken of corruption is discovered in a transaction after support has been granted. But it remains HMG's position that the Action Statement does not oblige it to alter ECGD's standard recourse rights.

7. HMG does not believe that imposing an absolute liability, irrespective of fault or complicity, for what could be a very substantial sum of money is an "appropriate action" within the meaning of paragraph 2(K). This view is shared by the OECD since the Action Statement makes clear that any measures taken pursuant to it should not be "prejudicial to the rights of any parties not responsible for the illegal payments".

June 2006

APPENDIX 9

Third supplementary memorandum by ECGD

THE TRANSPARENCY INTERNATIONAL SUBMISSION ON "ABSOLUTE RECOURSE"

The Transparency International Submission

1. We have carefully read the submission of Transparency International ("TI") to the Sub-Committee on the alleged inadequacy of ECGD's recourse rights. "Recourse" in this connection means a liability owed to ECGD as a result of a contract between ECGD and an Applicant to pay ECGD if certain specified events occur. TI submit that should be an "absolute" liability on the exporter to repay ECGD in all circumstances money which it has paid out where the Borrower's duties to repay the lending Bank have been vitiated by acts of corruption committed by a sub-contractor of ECGD's Applicant. Those submissions and their TI's reasons are to be found at paragraph 8 to 18 of their submission to the Sub-Committee. We adopt TI's terminology.

2. In order to understand the argument, and why we believe it to be flawed, it is helpful to set out the argument found in those paragraphs in the following propositions:

(i) A main contractor is liable for the acts of his sub-contractors.

(ii) Where a sub-contractor fails properly to perform his contractual duties, the main contractor will be liable to the "utility" for the acts of the sub-contractor.

(iii) In those circumstances the utility may, or will, be entitled to decline to repay the ECGD-guaranteed Bank.

(iv) To meet this contingency, ECGD takes recourse rights against the main contractor for all sums at risk which rights bite whether or not the main contractor is personally at fault.

(v) If, instead of failing in contractual performance, the sub-contractor commits an act of corruption, it may be the case, depending upon the circumstances and local law, that the Borrower's obligations to repay the ECGD-guaranteed Bank will be similarly affected.

(vi) It follows that ECGD should take a recourse right as against the main contractor which is equally independent of the main contractor's personal fault for any sums which ECGD may have had to pay out in those circumstances.

HMG's Views

3. Of the first five propositions none, in our submission, are fully correct. In consequence the conclusion (proposition (VI)) does not follow.

4. With regard to propositions (i) and (ii), although many different contractual structures are possible, in the structure hypothetically suggested by TI, where the main contractor is liable to the utility, the liability is that of the main contractor itself in respect of the contractual duties which he owes to the utility under the head contract. The main contractor has promised to the utility to perform the whole of whatever constitutes the contractual performance. It is likely to be of great commercial advantage to the utility to have one point in liability for everything. The main contractor may or may not choose to use sub-contractors. This is immaterial. If he does so choose and those sub-contractors fail to perform properly, the main contractor is directly liable under his own contract to the utility. What, in law, he is liable for are his own defaults. The sub-contractor will normally have no contract with or liability to the utility. The main contractor is content voluntarily to agree to the potential liability described because it relates to a contractual performance, the details of which he knows and has negotiated, and over the execution of which he has control, either through his employees or, if he has chosen to use them, his sub-contractors. In consequence, it is in our submission, misleading to say that a main contractor is liable for the acts of his sub-contractors.

5. Proposition (iii) is incorrect. If the main contractor is in default under the main contract, it is express in ECGD's Buyer Credit loan documentation that this constitutes no justification for non-repayment of the Borrower's loan. Clause 4.7 of the standard ECGD Buyer Credit Loan Documentation states: "The liability of the Borrower to pay in full any sum due under this Agreement on the due date for payment thereof is in no way conditional upon performance of the Supply Contract by the Supplier nor shall such liability be affected in any way by reason of any claim which the Buyer may have or may consider that it has against the Supplier".

6. ECGD therefore would be able to enforce through its guaranteed Bank the repayment of that loan and does not need recourse from the main contractor. That, by a considerable distance, is ECGD's most important right and remedy in those situations. Thus proposition (iv) is also incorrect.

7. Whether the commission of an act of corruption by the sub-contractor affects the borrower's obligations to repay the ECGD guaranteed Bank depends, in the submission of TI, in part upon local law. We agree that it might do so. There may be rather nice points of private international law, that is to say conflicts of law, in relation to any purported vitiation of the Loan Contract. The Loan Contract is something which ECGD will normally insist is governed by English law and, if it were, English private international law would generally hold that potential vitiating factors, such as corruption in the making of that contract, would also be governed by English law. Nonetheless, it is conceivable that there would be circumstances where, as TI say, local law would be relevant. For the purposes of this discussion, we assume however English law applies throughout.

8. If substantive English law applies throughout, we do not believe that it is an accurate statement of the current law that an act of corruption by a sub-contractor which the main contractor, ECGD's Applicant, did not know about or authorise will vitiate either the Applicant's main contract with the utility or, still less so, the utility's contract with a Bank to repay the loan.

9. Our view is based on the case of *Armagas v Mundagas ("The Ocean Frost")* [1985] 1 Lloyds Rep 1. At first instance, it was held that a gift or promise which was made without the knowledge or authority of (in TI's hypothesis) the main contractor is not a ground upon which the utility could rescind a contract with the main contractor. On appeal, Goff LJ reserved the position whether a party to a contract (ie in the hypothetical situation the main contract) induced by the bribery of his servant by a stranger (ie in the hypothetical situation, a unauthorised potential sub-contractor) should be prevented from rescinding the contract on the basis that rescission would be inequitable for the innocent main contractor. In the House of Lords, the bribery point was rendered irrelevant by the Court's decision on a prior point.

10. We believe that the current state of English law is therefore as expressed by the first instance judge in *Armagas v Mundagas.* The Court of Appeal have indicated a willingness to revert to this point in a future case; but if they do, the circumstances in which Goff LJ contemplated the issue of rescission being open for argument, were those where it would be inequitable for the main contractor to hold the overseas utility to the contract. In the hypothesis that TI take, it is hard, in our judgment, to envisage that an English court would find it inequitable to hold the utility to the contracts in question. We draw support for that view from the cases of *Panama and South Pacific Telegraph Company v India Rubber, Gutta Percha, and Telegraph*

Works Company (1875) 10, Ch App 515, *Shipway v Broadwood* (1899) 1 QB 373, *Hovenden and Sons v Millhoff* (1900) 83 LT 41, *Industries & General Mortgage Co v Lewis* (1949) 2 All ER 573 and *Cadbury Schweppes plc v Somji* (2000) All ER (D) 1019.

11. It is HMG's position, therefore, that the concluding proposition cannot be correct since it rests on the premises whose flaws we have attempted to show. In summary, if, in fact, ECGD did take such a recourse right as TI propose, this would not be analogous to the situation of a sub-contractor failing in his contractual performance owed to the main contractor. The recourse right proposed would make the main contractor liable to ECGD in respect of acts committed by a sub-contractor where there is no consent, authority or acquiescence by the main contractor and, absent complicity, no liability to the utility. There is, in our submission, no contractual principle which makes the main contractor liable to the utility for the criminal act of third parties in which he has no complicity or knowledge. Moreover, the situation which the expanded recourse right would exist to meet will not, in our view, arise, at least under English law, since our view of English law is that the utility will not be able to set aside either the main contract, still less the Loan Contract, for an act of corruption in which neither the main contractor or Bank had involvement or complicity.

CONCLUSION

12. In conclusion, HMG feels that an absolute recourse right against all corrupt acts is not mandated by TI's argument; and such a right, in circumstances where the main contractor had no complicity in the corrupt act, would be inequitable. ECGD already takes stringent recourse rights against Applicants where they have consented to, authorised or acquiesced in corrupt acts of others as well, of course, as where the Applicant commits corrupt acts itself.

June 2006

APPENDIX 10

Fourth supplementary memorandum by ECGD

ECA "RANKINGS"

1. During the Trade and Industry Sub-Committee Hearing, the Chairman of the Committee asked the following question:

> *OECD figures suggest that the UK's export credit anti-bribery and corruption procedures are ninth in the world. There are clearly eight export credit agencies which OECD data suggest are doing better than we are. Do you have any comment on that?*

2. Following Ian McCartney's answer, the Chairman requested a follow-up note to further explain ECGD's position on this issue.

3. I would like to begin by explaining that it is in fact, UNICORN, an anti-corruption NGO, which places ECGD's procedures in ninth place. The OECD does not produce such a league table.

4. ECGD's analysis and UNICORN's analysis are both based on the same data from the OECD. What differs is the methodology. For instance: UNICORN gives credit to ECAs that claim to be able to withhold support or invalidate cover on the basis of suspicions of bribery. While it cannot be entirely ruled out that ECGD might refuse support where there was compelling evidence that the exporter had been involved in bribery, the only circumstances in which such action is likely to be feasible or appropriate is where the exporter has either admitted to, or been convicted after due process of law of, bribery. To purport to be willing to take such significant action on the basis of unproven allegations or suspicions would be quite inappropriate since it would imply that ECGD was capable of making judgements on the merits of those allegations or suspicions without the need to follow due legal process. To do so would also put ECGD and the taxpayer at risk of legal action if it were to take such a course against an exporter who could prove ECGD's decision was unreasonable.

5. Also, UNICORN penalises ECAs, like ECGD, that are prepared to consider providing cover for that element of the contract price represented by agents' commissions. ECGD considers that since most agents are not corrupt but provide a worthwhile service that forms part of the expenditure to secure a contract, agents' commissions that are included in the contract price should be eligible for its support. Indeed if the rationale of not covering agents' commission is that the commission is, or cloaks, a corrupt payment, then an ECA who believed that should be considering not giving cover at all rather than being congratulated for excluding the commission payment.

6. Although ECGD does not have access to the scores for individual questions for any countries, it would appear that the countries ranked higher by UNICORN achieve a higher score by a combination of withholding support or invalidating cover on the basis of suspicions of bribery; not providing cover for agents' commissions and always requiring details of the agent(s) to whom commissions are paid. ECGD's July 2006 procedures will address this latter issue and the increase in ECGD's score due to this change would move it up from ninth to sixth place in the UNICORN table.

7. Despite the differences in methodology, I should point out that ECGD is second in the UNICORN league table for G7 countries (Italy being top). And the ninth place in the overall table compares well with France (19th), the USA (25th) and Germany (27th). In addition, ECGD's new anti-bribery and corruption procedures not only meet, but exceed the principles of the recently agreed OECD Action Statement on bribery and corruption.

8. It is also worth noting that another NGO, The Corner House, in its memorandum to this Committee has stated that, "ECGD's new procedures represent emerging best practice for how export credit agencies deal with corruption, and the UK should be encouraging both its G8 and EU partners to adopt similar procedures".

June 2006

APPENDIX 11

Memorandum by the Export Guarantees Advisory Council

Introduction: About the Export Guarantees Advisory Council

1. The Export Guarantees Advisory Council (EGAC) is established under Section 13 of the Export and Investment Guarantees Act 1991. Its statutory purpose is to give advice to the Secretary of State, at his request, in respect of any matter relating to the exercise of his functions under the Act. Currently, the Council's broad remit from the Secretary of State is to provide advice on the principles that should guide the pursuit by the Export Credits Guarantee Department's (ECGD) of the aims and objectives set out in its Mission Statement, and how these principles should inform its business policies. Specifically in respect of ECGD's business policies, EGAC considers whether these support the Government's policies for good environmental standards, the promotion of sustainable economic development in emerging markets, and good governance. Advice is usually given direct to ECGD at regular Council meetings, which take place on four to six occasions through the year, and at a dinner with the Minister for Trade once a year. The Council also reports on its activities in ECGD's Annual Review and Resource Accounts.

2. Membership is drawn from a variety of fields, bringing outside expertise in a number of areas relevant to ECGD's Mission. For example, I am Founder/Chief Entrepreneur of SustainAbility, an independent think tank and strategy consultancy, which advises on corporate responsibility and sustainable development. The full EGAC membership list can be found at www.ecgd.gov.uk/index/pi__home/pi__ac/advisory__council__members__.htm. Council members are not paid in respect of the time they devote to Council matters.

ECGD's Anti-bribery and Corruption Procedures

3. ECGD's consultation on its anti-bribery and corruption procedures was an issue which the Council followed with interest and one on which the Council was given proper opportunity to contribute. EGAC received oral reports from ECGD on the progress of the consultation and the issues under consideration at every Council meeting and at a meeting dedicated to this topic on 16 November 2005. EGAC was accordingly able to provide advice on the relevant procedures as policy was being formulated. Council members were also given the opportunity to read all of the representations to the consultation and to offer written comments on the draft of the Government's Final Response before it was submitted to Ministers for approval. Minutes of all EGAC meetings are available on ECGD's website at www.ecgd.gov.uk/index/pi__home/pi__ac/the__advisory__council__-__minutes.htm.

4. EGAC's views on the outcome of ECGD's consultation are best summed up in my contribution on behalf of the Council to the press release that accompanied the publication of the Final Response:

> ". . . ECGD has consulted widely on the best ways forward, and EGAC is confident that the rules announced today will send a clear message that the UK will not support corrupt practices. Our assessment is that these new arrangements will helpfully clarify what is expected from exporters who want ECGD support. We conclude that the procedures do not place uncompetitive restrictions on exporters / and, importantly, give the UK a strong position from which to argue for equivalent standards to be introduced internationally."

5. The full quote, and press release, can be found on ECGD's website at www.ecgd.gov.uk/news__home.htm?id = 7001.

6. I thank the Committee for the opportunity to convey the views of EGAC at your upcoming evidence session. I suggest that, as this memorandum fully represents our position, it should represent our evidence to the Committee.

April 2006

APPENDIX 12

Memorandum by the Campaign Against Arms Trade

1. The Campaign Against Arms Trade (CAAT) is working for the reduction and ultimate abolition of the international arms trade, together with progressive demilitarisation within arms-producing countries. As a step towards this, CAAT is seeking an end to Government assistance for the export of military equipment, including the provision of export credit guarantees and insurance.

2. CAAT was dismayed that the ECGD's April 2004 anti-bribery procedures were watered down in December 2004 after behind the scenes lobbying by three companies, and that legal action by The Corner House was necessary before a consultation involving all interested parties was held.

Do the procedures in the Government's Final Response to the ECGD's consultation on Anti-Bribery and Corruption Procedures reduce as far as is reasonably practical the risk of the ECGD supporting contracts tainted by corruption?

3. The procedures announced on 16 March 2006 include key anti-corruption measures that were absent in those of December 2004.

AUDIT:

4. It is good that the ECGD will now be able to audit the contract records on a random basis to check declarations that the exporter has not engaged in corrupt activity. It is, however, undermined by giving the companies five working days' notice of the audit, as this will allow incriminating documents to be hidden. Likewise, limiting access to documents "up to the date of the award of the Contract" is almost an open invitation to corrupt companies to make an oral promise of an irregular payment beforehand, hide it somewhere in the costs and then pay up after the date of the contract avoiding all danger of scrutiny.

5. The ECGD should have the authority to conduct an unannounced audit and to be able to ask to see any documents relating to the contract which it is supporting, including those after the date of the contract.

AGENTS:

6. CAAT is pleased that the ECGD will require companies asking for ECGD support to supply the names of the agents being used. Agents have been frequently used for inappropriate payments in the past so CAAT welcomes the ECGD's rejection of the arguments advanced by some exporters that they could not supply information about them as this was commercially sensitive.

7. Paragraph 71 of the Final Response says that a significant number of applicants for ECGD support found it possible to provide details of agents under the May 2004 procedures. However, it is likely that it is those contracts where companies are most reluctant to give information about agents that are those where the possibility of corruption is at its greatest. For instance, in response to a Freedom of Information request to the ECGD, details were given of all BAE Systems projects supported except that in Saudi Arabia. CAAT found it disappointing, but not surprising, that this exception concerned the least transparent, as well as arguably the most repressive, of all the countries involved.

8. As your Committee will be aware, the ECGD is currently asking for representations on its arrangements for handling information about agent's identities. CAAT has welcomed the proposed Special Handling Arrangements set out in Annex C of the Final Response, but made three comments, below.

9. Firstly, it is important that, in addition to the electronic searches suggested, enquiries are made as to the agent's integrity in the country in which s/he is based. This should be done through an appropriate person in the UK's diplomatic mission, who will almost always have far more information about the agent's connections and reputation than an ECGD official in London.

10. Through such enquiries, it should be possible to ascertain whether there is a relationship between the agent and the purchaser of the goods, for instance whether the agent is a public official or the relative of one. In this way, for example, it should have been possible to establish that the agents being used to secure the export of Alvis vehicles to Indonesia in the mid-1990's were the daughters of a Brigadier-General and of the country's President. The latter controlled the monies necessary to make the purchase. This should have led to questions about propriety of the deal.

11. Secondly, paragraph 2/5 of Annex C says that only one copy of the agent's details will be kept. Since even the most "top secret" of Government documents are copied to several people, this seems to be secrecy bordering on paranoia. CAAT would suggest that at least one additional copy is kept.

12. Finally, in paragraph 2/7 of Annex C, it says that the ECGD will be unlikely to be able to proceed with an application if the applicant refuses to allow the ECGD to share an agent's identity with another person to allow further enquiries to take place. In these circumstances the application should always be refused. The applicant has no automatic right to taxpayer support, and cannot expect it to be given unless the ECGD is supplied with the information it needs to be completely satisfied that no bribery or corruption is involved.

Representations Regarding Associated Companies:

13. Companies asking for ECGD support will have to make enquiries of other companies where there is some element of control and state that, as a result they do not believe these companies or their agents have engaged in corruption.

14. However, the companies do not have to make any declarations about non-controlled subsidiaries, sub-contractors or others involved in a project, thus leaving an obvious loophole for the payment of bribes. Likewise, the information about agents only has to be provided where they are appointed by or on behalf of the applicant, leaving the way open for companies to use non-controlled subsidiaries, or the like, for this purpose in order to avoid the provisions of the ECGD's anti-bribery procedures.

Are the Proposals Workable?

15. These proposals are workable, as, indeed, were those of May 2004 as evidenced by the companies who used them. Additionally, CAAT notes that the opposition to the tough May 2004 procedures came from a handful of companies and the Committee may wish to inquire how representative the stance taken by the Confederation of British Industry (CBI) was of its membership. For instance, it is noticeable that the "CBI delegation" that went to the ECGD on 10th November 2005 comprised a staff member from BAE Systems and another from Rolls Royce, both companies which had opposed the May 2004 procedures, along with the CBI employee. No-one from companies which had used the May 2004 procedures was included.

16. The chief requirement for the Final Proposals to work is a recognition by the UK government as a whole that it may be necessary to put the commitment to stamping out corruption before supporting a deal, however lucrative, with an overseas government, institution or company if the contract can only be realised with the help of a bribe.

17. If the UK takes a tough stance, and restores the reputation that was damaged through the introduction of the weak December 2004 procedures and their genesis, it is in a good position to push for improved export credit agency procedures multilaterally through the Organisation for Economic Cooperation and Development.

Transparency and Monitoring

18. The ECGD Annual Report should include information about the Anti-Bribery and Corruption procedures saying how many audits it has conducted to check anti-bribery declarations, how many applications have been refused because of suspicions or evidence of bribery, and how many cases it has passed on to the law enforcement authorities. The numbers of applications and companies requesting the special handling arrangements for their agents should also be reported.

19. In addition, it would be helpful if information on agents' commission, aggregated in the way in which it has been supplied in answer to Freedom of Information requests, could be included in the Annual Report. For each of Aerospace, Civil and Defence sectors it should state:

(a) the total amount of agents' commission not underwritten by the ECGD;

(b) the number of cases supported by the ECGD where

  (i) no commission was involved;

  (ii) agents' commission was paid and underwritten by ECGD;

  (iii) agents' commission was paid and not underwritten by ECGD;

(c) the total value of guarantees issued supported by the ECGD where:

  (i) no commission was involved;

  (ii) agents' commission was paid and underwritten by ECGD;

  (iii) agents' commission was paid and not underwritten by ECGD;

(d) for cases supported by the ECGD, the breakdown of how much agents' commission was paid for by each type of ECGD facility (eg: buyer credit, overseas investment insurance, etc).

April 2006

APPENDIX 13

Supplementary memorandum by the CBI

Thank you for the opportunity to express out members' views at the sub-committee hearing on 17 May. We thought you might find it helpful if we were to reiterate the following points which were all touched on to some extent during the sessions which we attended.

1. UK exporters are subject to the relevant English Law anti-corruption legislation wherever they operate in the world, irrespective of which Export Credit Agency's support they are employing and indeed, even if they are not employing any Export Credit Agency support at all.

2. It is that legislation, not ECGD's procedures, which constitutes the primary deterrent and which provides the most severe sanctions against bribery and corruption by UK exporters. The significance of the legislation is internationally recognised. The OECD Bribery Working Group reviewed the legislation in 2003 and concluded that "UK law now addresses the requirements set forth in the [OECD] Convention".

3. Our members' well publicised concerns about ECGD's procedures should not be interpreted as a desire to "water down" ECGD's provisions or to weaken the UK's stance on bribery and corruption. The points at issue have been principally the practicalities of compliance, and the ability of ECGD to manage commercially confidential information. The first issue has we believe been substantially addressed by the recent consultation's Final Response, and the second is the subject of the continuing discussion on ECGD's "Special handling arrangements".

We hope you find these additional comments to be useful and remain at your disposal to answer any other questions you feel we could usefully address.

26 May 2006

APPENDIX 14

Supplementary memorandum by the British Exporters Association

We have received the transcript of exchanges on 17 May between representatives of the British Exporters Association (BExA) and the Sub-Committee on the Export Credits Guarantee Department's bribery rules.

In addition to the comments made at the hearing, Sue Walton, BExA's Chairman, would like to refer the following clarification to the Sub-Committee:

> On reviewing our records in relation to Q52, the concern that our members had with respect to the audit process leading to a leak of information related to ECGD's new language suggesting that ECGD or a third party appointed by them would conduct the audit. Our members wanted to be sure that any third party conducting an audit on behalf of ECGD was acceptable to the supplier as there was a concern that ECGD could appoint an auditor who was a competitor to the supplier company allowing that competitor to gain access to confidential data. ECGD agreed that this was not their intention.

There is in addition a concern related to the leaking of commercially confidential information provided by exporters to ECGD which is separate from the concern about third party auditors.

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