

TRANSPARENCY INTERNATIONAL (UK)



**CONSULTATION ON CHANGES TO ECGD'S
ANTI-BRIBERY AND CORRUPTION PROCEDURES
INTRODUCED IN DECEMBER 2004**

TI(UK)'S SUBMISSION

June 2005

CONSULTATION ON CHANGES TO ECGD’S ANTI-BRIBERY AND CORRUPTION PROCEDURES INTRODUCED IN DECEMBER 2004

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ECGD’S QUESTIONS IN THE CONSULTATION

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

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

TI(UK)’S SUMMARY RESPONSE TO THE QUESTIONS

2. In TI(UK)’s opinion, the “Revised ECGD Procedures to Combat Bribery and Corruption” issued on 5th November 2004 and introduced in December 2004 (the “December Procedures”) are substantially weaker than those issued by ECGD in May 2004 (the “May Procedures”), and materially increase the risk that:
 - a) bribery will occur in relation to projects covered by an ECGD guarantee;
 - b) ECGD (and the UK taxpayer) will suffer unnecessary loss;
 - c) ECGD managers may be at risk of prosecution for aiding and abetting bribery.

The December Procedures do not *“have the effect of ensuring that, so far as practicable taxpayers’ money is not used to support transactions tainted with bribery and/or corruption”*.

- 3A. TI(UK) has proposed amendments to the ECGD forms which are attached in Schedule 1 to this Submission. The forms used by ECGD but not annexed in Schedule 1 should have equivalent amendments made to them. In TI(UK)’s view:
 - a) If ECGD were to use the forms as amended in Schedule 1 and were effectively to implement the recommendations referred to in this Submission, then ECGD would be *“ensuring that, so far as practicable, taxpayers’ money is not used to support transactions tainted with bribery and/or corruption.”*
 - b) Adoption by ECGD of TI(UK)s’ recommendations referred to in paragraph a) above would not result in *“an undue burden”* being *“placed on exporters and/or banks”*.

- 3B. The Commission for Africa Report (Executive Summary, page 12) states as follows:

“Developed countries should encourage their ECAs to be more transparent and to require higher standards of transparency in their support for projects in developing countries. Developed

countries should also fully implement the Action Statement on Bribery and Officially Supported Export Credits agreed by the OECD”.

TI(UK)’s recommendations in this Submission are consistent with the CFA’s recommendation that ECGD should require higher standards of transparency of its applicants for cover.

ATTACHMENTS

4. Attached to this submission are the following documents:

a) Schedule 1: The following ECGD forms amended in red by TI(UK):

i) **“Application for an ECGD Buyer Credit”**.

ii) **“ECGD Buyer Credit Application – Schedule”**.

TI(UK) refers ECGD to these amended forms. The forms used by TI(UK) as the basis for its amendments are those introduced in December 2004.

b) Schedule 2: **“TI(UK)’s Comments on the Effectiveness of the Revised ECGD Procedures to Combat Bribery and Corruption Issued on 5th November 2004”**. This document (dated February 2005) was submitted by TI(UK) to the House of Commons Trade and Industry Committee’s hearing in relation to the “Implementation of ECGD’s Business Principles” held on 23rd February 2005. As this document covers points which are relevant to the Consultation, and as the Trade and Industry Committee refers extensively to this document in its Report, TI(UK) has annexed the document in its original form. TI(UK) refers ECGD to this document in full.

c) Schedule 3: **The House of Commons Trade and Industry Committee’s Ninth Report of Session 2004-05 on the “Implementation of ECGD’s Business Principles”**. TI(UK) refers ECGD to this document in full. TI(UK) will also refer in its reasoning below to some specific paragraphs of this document.

d) Schedule 4: **TI’s report dated March 2005 “Risk Assessment and Proposed Actions for Banks, Export Credit Agencies, Guarantors and Insurers”**. This document:

- gives examples of different types of corrupt practices which can take place during the various phases of a construction project;
- shows how the cumulative cost of corrupt practices can make the project uneconomic, with resultant damage to all those affected;
- assesses the risk to banks, export credit agencies, guarantors and insurers (“funders”) as a result of corruption; and
- proposes actions which could be taken by funders to reduce the risk of corruption on construction projects.

This report was published internationally by TI in March 2005. A copy was sent to ECGD in March 2005. Copies were also circulated by the OECD’s Working Party on Export Credits and Credit Guarantees to all OECD export credit agencies. On 22nd April 2005, TI (at the invitation of the OECD Working Party) gave a presentation on this report at OECD headquarters in Paris to representatives of the export credit agencies of Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Japan, Korea, Luxemburg, Mexico, Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, Turkey, UK and USA. TI(UK) refers ECGD to this document in full. TI(UK) will also refer in its reasoning below to some specific paragraphs of this document. Although this report relates to construction projects, similar principles would apply to other sectors.

TI(UK)’S DETAILED RESPONSE

5. In this section, TI(UK) has incorporated and expanded upon paragraphs 46 to 95 of TI(UK)’s Comments submitted to the Parliamentary Committee in February 2005 (Schedule 2 to this Submission).
6. The “Revised ECGD Procedures to Combat Bribery and Corruption” were issued on 5th November 2004 and introduced in December 2004. In TI(UK)’s Comments submitted to the Parliamentary Committee in February 2005 and attached as Schedule 2, these amended procedures are referred to as the “November Procedures”. Both the Parliamentary Committee in its report (Schedule 3) and ECGD in its consultation paper refer to the procedures as the “December procedures”. So as to be consistent with ECGD and the Parliamentary Committee, TI(UK) will refer below to the “December Procedures”. They are the same procedures as the “November Procedures” referred to in TI(UK)’s Comments (Schedule 2).

APPLICATION FOR AN ECGD BUYER CREDIT GUARANTEE

7. The following comments apply to the “Application for an ECGD Buyer Credit Guarantee” and its Schedule. The procedures being compared are the “May Procedures” issued by ECGD in May 2004, and the significantly weakened “December Procedures” introduced by ECGD in December 2004. Under each of the following issues, TI(UK) considers:
 - a) whether the procedure is effective in ensuring that the transaction is not tainted with bribery;
 - b) the Parliamentary Committee opinion on the issue;
 - c) TI(UK)’s proposed amendment to make the procedure effective;
 - d) whether TI(UK)’s proposed amendment would place an undue burden on exporters (the Applicant).

Issue 1: The December Procedures do not require disclosure of agents’ commissions if they are 5% or less of the contract price and are not subject to the export credit

Is the procedure effective in ensuring that the transaction is not tainted with bribery?

8. Under Paragraph 7 of the Schedule to the Application in the May Procedures, ECGD required the Applicant to give disclosure of specified details in relation to any agent involved by the Applicant or any Affiliate in relation to the Supply Contract. There was no percentage or financial limit to the disclosure.
9. Under Paragraph 7 of the Schedule to the Application in the December Procedures, the Applicant is no longer required to provide any details of an agent where the agent’s commission is 5% or less of the contract price and where it is not to be covered in any way by ECGD support.
10. This amendment leaves a significant gap in ECGD’s anti-corruption procedures. As explained in paragraph 17 of TI’s report dated March 2005 “Risk Assessment and Proposed Actions for Banks, Export Credit Agencies, Guarantors and Insurers” (Schedule 4 attached), it is a relatively common mechanism in international business for an exporter (the Applicant for ECGD cover) to appoint an agent who is paid a commission by the Applicant if the Applicant is awarded the contract. The agent may use the whole or part of the commission to pay a bribe to an influential person in the buyer’s company, or in the buyer’s government, who can help secure the contract for the Applicant. In some cases, the Applicant intends the agent to pay a bribe. In other cases, the Applicant may not be certain that the

agent will pay a bribe, but suspects that it will, and is “wilfully blind” to the circumstances. In other cases, the Applicant may not want the agent to pay a bribe. In circumstances where the Applicant intends the bribe to be paid, or is “wilfully blind” to the payment, it would be relatively easy for the Applicant to structure the agency appointment and commission in such a way to fall within the exception to ECGD’s disclosure requirements referred to in paragraph 9 above. For example:

- a) A separate fund maintained by the Applicant could be used to pay a commission up to 5%. This payment, as it does not exceed 5%, and does not fall within the ECGD cover, would not require disclosure to ECGD.
- b) Where the aggregate commission falls above 5%, the Applicant could appoint several agents, each of whose commission is less than 5%. These agents could then be paid out of the separate fund so as to avoid disclosure. As many agents are shell companies based in haven jurisdictions, it would be easy to appoint several agents, and to divide the commission between them. Even if ECGD does not intend this result, the wording of the Schedule does not prohibit this. If the Applicant chooses to adopt this interpretation, ECGD will not discover the agents’ appointments, as they will not be disclosed to ECGD by the Applicant.

11. The following hypothetical examples illustrate the above points.

12. **Example 1:**

The Applicant appoints an agent in relation to a tender for a £100 million power station. The agent is the sister of the President of the country in which the power station will be built. The commission will be 5% (£5 million) payable into a “haven” jurisdiction. The commission is paid out of a separate fund which the company maintains to pay commissions. The commission therefore does not fall within the ECGD support. The Applicant wins the project, and pays the commission. The sister of the president provides only minimal legitimate services. The payment is a bribe which she shares with the President. Under the May Procedures, the Applicant would have had to notify ECGD of the name and address of the agent, details of the services to be provided by the agent, the amount of the commission, and the country where the commission was payable. Under the December Procedures, the Applicant has no obligation to declare the existence of the agent, or the commission, or any related information to ECGD, as the commission is not more than 5%, and does not fall within the export credit. Whether or not the commission is included in the credit, the contracts on which the project relies are voidable as a result of the bribe and may collapse prejudicing the entire project with potentially huge economic consequences.

13. **Example 2:**

The facts are as in Example 1, except that the commission is 20% of the contract price (£20 million). So as to avoid ECGD’s disclosure obligations under the December Procedures, the President’s sister sets up four separate shell companies in a “haven” jurisdiction. Each shell company signs a separate agency agreement with the Applicant. Commission of 5% (£5 million) is paid to each agent. Although the aggregate commission is in excess of 5%, the December Procedures only seem to require disclosure if the commission exceeds 5% per agent. This arrangement would have needed to be disclosed under the May Procedures. It does not need to be disclosed under the December Procedures.

14. Disclosure of agents and their commissions must be made in sufficient detail to enable ECGD to detect possible corruption. Consequently, disclosure to ECGD should include the identity of the agent, the amount of the commission, the country in which the commission will be paid, the agent’s scope of work and related details. Such disclosure could highlight potentially suspicious circumstances (e.g. payment of the agent’s commission into an offshore bank account, payment of a commission which is disproportionate to the services to be provided, or a potential connection between the agent and an official or Government minister involved in the tender process). Disclosure to ECGD also puts both the

Applicant and the agent on notice that ECGD may undertake subsequent due diligence on the agent to ascertain whether it was in fact carrying out the services in question. This has an important preventative effect.

15. The Commission for Africa Report (Executive Summary, page 12) states as follows:

“Developed countries should encourage their ECAs to be more transparent and to require higher standards of transparency in their support for projects in developing countries. Developed countries should also fully implement the Action Statement on Bribery and Officially Supported Export Credits agreed by the OECD”.

ECGD therefore should ensure that it does require higher standards of transparency. Allowing applicants not to disclose potentially crucial information runs contrary to this principle.

16. The May Procedures provided for disclosure in relation to all agents. The December Procedures allow non-disclosure of an agent where its commission is 5% or less of the contract price and is not subject to the export credit. As such, the December Procedures are materially defective, and do not *“have the effect of ensuring that, so far as practicable taxpayers’ money is not used to support transactions tainted with bribery and/or corruption”*.

Parliamentary Committee Opinion

17. In paragraph 51 of its Report (Schedule 3), the Parliamentary Committee states:

“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 recognized 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.”

TI(UK)’s proposed amendment to make the procedures effective

18. TI(UK) has amended Section 7.1 of the Schedule to the Application to require disclosure in relation to all agents without a percentage limit, and whether or not the commission is covered by ECGD support (Schedule 1). TI(UK) has also introduced a new definition of agent in Section 4.1 of the Application.

Would TI(UK)’s proposed amendment place an undue burden on exporters?

19. Disclosure of this information to ECGD will not be difficult for the Applicant. An Applicant faces significant risks if an agent pays a bribe on its behalf. An Applicant would normally be liable under the contract with the buyer for the acts of its agent. A contract is often either void, or can be terminated, in the event that a bribe has been paid in relation to the contract award. Therefore, if the Applicant’s agent pays a bribe to a senior officer of the buyer, and the buyer terminates the contract as a result of the bribe, and/or claims damages, then the Applicant may be liable to the buyer and other parties for the consequences, even if the Applicant had no knowledge of the bribe. Termination is most likely to occur in the event of a change of management of the buyer, or a change of government in the buyer’s country. In addition, the Applicant and its relevant employees face possible criminal liability for bribery where they intend the bribe to be paid, or are “wilfully blind” to the circumstances. Therefore, it is a

commercial imperative for a company that it conducts proper due diligence on its agent, and takes necessary preventative steps, so as to try to avoid this type of liability.

20. As shown by paragraphs 21 to 25 below, international best practice recognises the importance to a company of ensuring to the best of its ability that its agents do not pay bribes.
21. The need for due diligence on agents has been acknowledged as international good practice by many leading international companies. TI and Social Accountability International in 2002 published the “Business Principles for Countering Bribery”. These principles were developed as a benchmark for international good practice in conjunction with many leading international companies such as General Electric, Norsk Hydro, PricewaterhouseCoopers, Rio Tinto and Shell. The Business Principles require the enterprise to prohibit bribery in any form, whether direct or indirect, and to implement a programme to counter bribery. Paragraph 6.2.2 of the Business Principles states as follows in relation to agents:
- “6.2.2.1 The enterprise should not channel improper payments through an agent.*
 - 6.2.2.2 The enterprise should undertake due diligence before appointing an agent.*
 - 6.2.2.3 Compensation paid to agents should be appropriate and justifiable remuneration for legitimate services rendered.*
 - 6.2.2.4 The relationship should be documented.*
 - 6.2.2.5 The agent should contractually agree to comply with the enterprise’s [anti-bribery] Programme.*
 - 6.2.2.6 The enterprise should monitor the conduct of its agents and should have a right of termination in the event that they pay bribes.”*

22. A zero tolerance to bribery approach has also been adopted by 67 companies from 25 countries with a combined turnover of over US\$400 billion under the auspices of the Partnering against Corruption Initiative, which is led by the World Economic Forum, Transparency International and the Basle Institute of Governance. The companies which have endorsed this initiative include major international corporations such as Fluor, Bechtel, Newmont Mining and Occidental Petroleum (USA), SNC Lavalin and Alcan (Canada), ABB and Schindler (Switzerland), Areva (France), Autostrade (Italy), Biwater, Halcrow, and Rio Tinto (UK), Skanska (Sweden), Norsk Hydro and Statoil (Norway), Hochtief (Germany) and Obayashi (Japan). These companies have endorsed the “Partnering against Corruption Principles for Countering Bribery”, which are based on TI’s Business Principles referred to in paragraph 21 above. Paragraph 5.2.3 of the Partnering against Corruption Principles states as follows in relation to agents:

“5.2.3 Agents, advisors and other intermediaries

- 5.2.3.1 The enterprise should undertake due diligence before appointing an agent, advisor or other intermediary, and on an on-going basis as circumstances warrant.*
- 5.2.3.2 The [anti-bribery] Program should provide guidance for conducting due diligence, entering into contractual relationships, and supervising the conduct of an agent, advisor or other intermediary.*
 - 5.2.3.2.1 Due diligence review and other material aspects of the relationship with the agent, advisor or other intermediary should be documented.*
 - 5.2.3.2.2 All agreements with agents, advisors and other intermediaries should require prior approval of senior management*

- 5.2.3.2.3 *The agent, advisor or other intermediary should contractually agree in writing to comply with the enterprise's Programme and should be provided with materials explaining this obligation.*
- 5.2.3.2.4 *Provision should be included in all contracts with agents, advisors and other intermediaries relating to access to records, co-operation in investigations and similar matters pertaining to the contract.*
- 5.2.3.2.5 *Compensation paid to agents, advisors and other intermediaries should be appropriate and justifiable remuneration for legitimate services rendered and should be paid through bona fide channels.*
- 5.2.3.2.6 *The enterprise should monitor the conduct of its agents, advisors and other intermediaries and should have a contractual right of termination in case of conduct inconsistent with the Programme."*

23. The 10th Principle of the United Nations Global Compact, endorsed by more than 2,000 major international companies, states:

"Businesses should work against all forms of corruption, including extortion and bribery".

24. The OECD Guidelines for Multinational Enterprises states as follows in Section VI (Combating Bribery):

"Enterprises should not, directly or indirectly, offer, promise, give or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Nor should enterprises be solicited or expected to render a bribe or other undue advantage. In particular, enterprises should:

1. *Not offer, nor give in to demands, to pay public officials or the employees of business partners any portion of a contract payment. They should not use sub-contracts, purchase orders or consulting agreements as means of channelling payments to public officials, to employees of business partners or to their relatives or business associates.*
2. *Ensure that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents employed in connection with transactions with public bodies and state owned enterprises should be kept and made available to competent authorities.*
3. *Enhance the transparency of their activities in the fight against bribery and extortion. Measures should include making public commitments against bribery and extortion and disclosing the management systems the company has adopted in order to honour these commitments. The enterprise should also foster openness and dialogue with the public so as to promote its awareness of and co-operation with the fight against bribery and extortion."*

The national contact point for the OECD guidelines is within the DTI. Therefore, DTI needs to be consistent in application of the OECD guidelines and in its supervision of ECGD.

25. The ICC Rules of Conduct to Combat Extortion and Bribery, produced by business for business, include the following provisions in respect of agents (Article 3):

"Enterprises should take measures reasonably within their power to ensure

- (a) *that any payment made to any agent represents no more than an appropriate remuneration for legitimate services rendered by such agent;*

- (b) *that no part of any such payment is passed on by the agent as a bribe or otherwise in contravention of these Rules of Conduct; and*
- (c) *that they maintain a record of the names and terms of employment of all agents who are retained by them in connection with transactions with public bodies or State enterprises. This record should be available for inspection by auditors and, upon specific request, by appropriate duly authorised governmental authorities under conditions of confidentiality.”*
26. Some major UK companies which utilise ECGD’s services expressly state their compliance with some or all of the above principles. For example, in their Corporate Responsibility Report 2004, BAE Systems states as follows:
“Our compliance policies and processes have been reviewed by legal experts in the UK and US to ensure they accord fully with the relevant laws. They are also in accordance with the anti-corruption rules of the International Chamber of Commerce (ICC) and are aligned with Transparency International’s Business Principles for Countering Bribery.”
27. A well run company will as a matter of course undertake detailed due diligence on its agents, will have access to full details of its agents, and can easily pass these details to ECGD. The OECD Guidelines for Multinational Enterprises and the ICC Rules specifically recommend that these details are made available to governmental authorities. A 5% cut-off makes no sense as there could be an enormous disparity depending on the contract price. 5% of £100 is £5. 5% of £100 million is £5 million. Furthermore, a bribe does not cease to become a bribe merely because it is 5% or less of the contract price. However small, it still constitutes a crime under the UK anti-bribery legislation, which does not distinguish between the sizes of the bribe. The bribery risk remains, whatever the amount in question. It is the monetary amount of the commission relative to the services performed which is important, not the percentage. It is also not relevant whether or not the agent’s commission is to be covered in any way by ECGD support. If a commission is paid in relation to the project in question, and the whole or part of the commission is used as a bribe, then the project contract may be terminated, the project may collapse and prosecutions may follow. ECGD will then face economic, criminal and reputational risk in relation to the project, irrespective of whether or not the bribe was actually paid out of funds supported by ECGD. Banks and customers are also exposed to reputational risk. Disclosing these details to ECGD will impose minimal burden on the Applicant, particularly bearing in mind that the Applicant is applying for a tax-payer underwritten guarantee for the contract.

Issue 2: The December Procedures allow the Applicant not to disclose the name and address of the agent

Is the procedure effective in ensuring that the transaction is not tainted with bribery?

28. Under Paragraph 7.3 of the Schedule to the Application in the December Procedures, ECGD requires the Applicant to provide details of the name and address of the agent. This is critical information, as it may highlight a possibly suspicious circumstance (for example a connection between the agent and a representative of the project owner or government of the country in which the project will be located, or the fact that the agent is located in a “haven” jurisdiction). However, ECGD expressly provides in this paragraph that *“If you are unable to provide this information, please give your reason(s) for not being able to do so.”*
29. The May Procedures allowed no such concession.
30. As it is inconceivable that the Applicant would not know the name and address of an agent it was appointing, it seems that ECGD is providing the opportunity for Applicants not to disclose this

information. Correspondence in relation to the December Procedures between ECGD and some industry groups recently published on ECGD's website suggests that this exemption may be to allow non-disclosure in the event of "commercial confidentiality". There can be no reason for any such exemption, which would allow a company to conceal bribery. Agents have commonly been one of the most common routes through which bribes are paid. The whole purpose behind disclosure of an agent's details to ECGD is to make it more difficult to use agents as a conduit for a bribe.

31. Many agents and intermediaries are companies or individuals of the highest integrity, and provide legitimate business services for fair remuneration. 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 to ECGD 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. There should always be extreme concern in relation to projects where the Applicant attempts to conceal these details from ECGD. 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. Therefore, if an Applicant refused to disclose these details to ECGD, and ECGD allowed such non-disclosure and proceeded to support the project, ECGD and its officers may be criminally liable for aiding and abetting bribery (on the basis that they were willfully blind) if the agency arrangements have concealed a bribe.
32. The following hypothetical example shows an obvious situation where ECGD's procedures would not be effective in this regard.

Example 3:

The Applicant, an exporter of military equipment, appoints the Minister of Defence of the importing country as agent in relation to the sale of military jets. The Applicant wishes to keep this appointment secret, as it is aware that this information, if made available to ECGD, would put ECGD on notice of the significant possibility that the agent's commission is a bribe. The Applicant is also aware that this information would provoke adverse comment if leaked to the press. It therefore informs ECGD that it cannot disclose the information as it is "commercially confidential". ECGD is therefore never aware of the identity of the agent, and is unable to make a proper assessment of the likelihood of bribery.

33. Therefore, in all cases, details of the agency arrangement should be disclosed to ECGD. There may be exceptional circumstances where extra care needs to be taken by ECGD to ensure that ECGD keeps these details confidential under secure arrangements that would equate, for example, with Inland Revenue practice.
34. The December Procedures are materially defective in failing to require disclosure of the name and address of the agent in all circumstances, and do not "*have the effect of ensuring that, so far as practicable taxpayers' money is not used to support transactions tainted with bribery and/or corruption*".

Parliamentary Committee Opinion

35. In paragraph 51 of its Report (Schedule 3), the Parliamentary Committee states:

"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 recognized 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.”

TI(UK)’s proposed amendment to make the procedures effective

36. TI(UK) has amended Section 7.2 of the Schedule to the Application so as to delete the provision allowing the Applicant to avoid disclosing the name and address of the agent (Schedule 1).

Would TI(UK)’s proposed amendment place an undue burden on exporters?

37. The name and address of the agent should be in the possession of the Applicant if it has undertaken even the most limited due diligence. Disclosure of the name and address of the agent is a simple administrative matter, and this should not place an undue burden on the Applicant.
38. Commercial confidentiality, as explained in paragraphs 30 to 31 above, is not a valid reason for withholding this information. The Parliamentary Committee (paragraph 35 above) states that ECGD was right to attempt to get access to information on agents. The OECD Guidelines and ICC Rules (paragraphs 24 to 25 above) both recommend that disclosure is made to government bodies. The ICC Rules suggest conditions of confidentiality, which conditions ECGD should easily be able to agree upon in appropriate cases.

Issue 3: The December Procedures do not require disclosure of agents’ commissions if they are paid by or through parent or other group companies (other than Controlled Companies) or by joint venture and other business partners

Is the procedure effective in ensuring that the transaction is not tainted with bribery?

39. Under Paragraph 7 of the Schedule to the Application in the May Procedures, ECGD required the Applicant to disclose specified details in relation to any agent appointed by its Affiliates in relation to the Supply Contract. An “Affiliate” included *“in relation to [the Applicant], 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] in connection with the Supply Contract”* (paragraph 4.1 of the Application).
40. Under Paragraph 7 of the Schedule to the Application in the December Procedures, the Applicant is no longer required to provide any details of an agent appointed by a parent or other group company (other than a Controlled Company) or by a joint venture or consortium partner. The Applicant’s obligation is now limited to providing specified details of agents *“engaged by [the Applicant] or any Controlled Company”*. A Controlled Company is one which the Applicant controls by virtue of any contractual arrangements or through owning a majority of the voting rights (paragraphs 4.4 and 4.5 of the Application). It would be unusual for the Applicant to control its joint venture or consortium partners.
41. This amendment leaves a significant gap in ECGD’s anti-corruption procedures. The agent could be appointed by a parent company or by another company in the Applicant’s group. Joint venture, consortium or other business partners, which may be resident in countries where bribes are less likely to be uncovered, may appoint the agents and pay the commissions. These commissions may be used as bribes. Bribes paid by or on behalf of these parties place both ECGD and the Applicant seriously at

risk. The Applicant is normally jointly and severally liable to the buyer for the acts of its joint venture and other partners. Illegal acts such as bribery normally entitle the buyer to terminate the contract. Termination as a result of a bribe paid by or on behalf of these parties could leave both ECGD and the Applicant exposed to losses, litigation, reputational risk and criminal liability.

42. The following hypothetical example shows an obvious situation where ECGD’s procedures would not be effective in this regard.

Example 4:

The Applicant forms part of an international joint venture in relation to a tender for a £500 million petrochemical plant. One of the joint venture partners is located outside the UK. It has good contacts with the chief executive of the national company which will be the owner of the petrochemical plant. The chief executive has requested, via an agent, a bribe of 15% (£75 million) of the contract price in return for ensuring that the joint venture is awarded the project. The joint venture partner located outside the UK agrees to pay the bribe through the agent, and includes part of the cost of the bribe into its part of the project price. The balance of the cost of the bribe is contributed to by each partner in the joint venture paying a “leadership fee” to the joint venture partner which is paying the bribe. The bribe is concealed as a “commission” payable to the agent. No disclosure of this arrangement needs to be made by the Applicant to ECGD under the December Procedures. The contract is awarded to the joint venture and the bribe is paid. A change of government in the country where the project is located leads to an anti-corruption investigation of the project. The bribe is revealed and the contract terminated, leading to massive losses falling on the project participants. Claims are made on ECGD. ECGD has to compensate the banks under the guarantee (although it may be able to argue contributory negligence or default by the banks in themselves failing to undertake adequate anti-corruption due diligence). ECGD also faces litigation costs and reputational risk. The country in which the project is located commences criminal proceedings against the joint venture partners, ECGD and the relevant individual employees of the joint venture parties and ECGD. The criminal cause of action against the joint venture partner which paid the bribe is that it paid the bribe either intentionally, or with willful blindness to the possibility that the commission could be used as a bribe. The criminal cause of action against the Applicant and ECGD, and their employees, is that they aided and abetted the bribery in that, despite being aware of the high risk of bribery, they deliberately or with willful blindness required no disclosure from the joint venture partner of the identity of the agent, the amount paid to the agent, and its scope of work (which may have alerted them to the bribery).

43. The May Procedures provided for full disclosure in relation to agents appointed by a parent or other group company, or by a joint venture, consortium or other similar party. The December Procedures eliminate the need for such disclosure. As such, the December Procedures are materially defective, and do not “*have the effect of ensuring that, so far as practicable taxpayers’ money is not used to support transactions tainted with bribery and/or corruption*”.

Parliamentary Committee Opinion

44. In paragraph 58 of its Report (Schedule 3), the Parliamentary Committee states:
“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.”

TI(UK)'s proposed amendment to make the procedures effective

45. TI(UK) has:
- a) amended the definition of “Associate” in paragraph 4.2 of the Schedule to the Application to include a member of the same group of companies as the Applicant (other than a Controlled Company) (See Schedule 1 to this submission).
 - b) amended Section 7.1 of the Schedule to the Application so as to reinstate the obligation under the May Procedures to disclose details of agents appointed by a member of the same group of companies, or by joint venture, consortium or similar parties (See Schedule 1 to this submission).

Would TI(UK)'s proposed amendment place an undue burden on exporters?

46. As stated in paragraph 41 above, a company is seriously at risk if a bribe is paid in relation to the project by a group company, or by a joint venture or other partner. Therefore, any Applicant which is genuinely concerned about protecting its position in relation to payments of bribes by its group companies, or by its joint venture and other partners would, as a matter of course, undertake due diligence on these parties. Part of this due diligence would normally be the requirement to obtain disclosure from these parties of details of agents appointed in relation to the project in question, as it is frequently through these agents that bribes are paid.
47. As shown by paragraphs 48 to 49 below, international good practice recognises the importance to a company of undertaking effective due diligence on its joint venture and other partners, and ensuring to the best of its ability that they do not pay bribes.
48. Paragraph 6.2.1 of the “Business Principles for Countering Bribery” referred to in paragraph 21 above states as follows:
- “6.2.1.1 The enterprise should conduct due diligence before entering into a joint venture.
6.2.1.2 The enterprise should ensure that subsidiaries and joint ventures over which it maintains effective control adopt its Programme. Where an enterprise does not have effective control it should make known its Programme and use its best efforts to monitor that the conduct of such subsidiaries and joint ventures is consistent with the Business Principles.”*
49. Paragraph 5.2.2 of the “Partnering against Corruption Principles” referred to in paragraph 22 above states as follows:
- “5.2.2 Joint Ventures (including non-controlled subsidiaries, consortium partners, teaming agreements and nominated sub-contractors):*
- 5.2.2.1 Due diligence should be conducted before entering into a joint venture, and on an on-going basis as circumstances warrant. The Programme should provide guidance for conducting due diligence.*
- 5.2.2.2 The enterprise should undertake appropriate measures, including contract protections, to ensure that the conduct of joint ventures is consistent with the Business Principles.”*
50. A properly run company will therefore have in its possession details of agents appointed by its group companies, and by its joint venture and other partners. It should therefore be very simple for the

Applicant to pass this information on to ECGD. This should not place an undue burden on the Applicant. The group companies and joint venture and other partners would have no cause to object, as disclosure of this information to appropriate government bodies is international good practice (see paragraphs 24 to 25 above). If appropriate in particular cases, ECGD could agree on suitable conditions of confidentiality.

Issue 4: The December Procedures do not require the Applicant to carry out due diligence on, or provide warranties in respect of, its parent or other group companies, or on its joint venture or other business partners

Is the procedure effective in ensuring that the transaction is not tainted with bribery?

51. In the May Procedures, the definition of “Affiliate” in paragraph 4.1 included *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] in connection with the Supply Contract*. Paragraph 8.2.1 of the May Procedures made it a condition of the guarantee that the Applicant certified that *“neither 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.”* Consequently, as a result of these provisions, the Applicant would need to undertake due diligence on its Affiliates so as to be reasonably sure that they would not engage in corrupt activities.
52. However, in paragraph 9.2 of the December Procedures, ECGD has removed most of the Applicant’s obligations in relation to its parent or other group companies, or its joint venture, consortium and similar partners. It has done this in the following ways:
 - a) The anti-bribery undertaking in paragraph 9.2.1 now only applies to the Applicant and a Controlled Company (any company which the Applicant controls by virtue of any contractual arrangements or through owning a majority of the voting rights (paragraphs 4.4 and 4.5 of the Application). The obligation under the May Procedures to give this undertaking in relation to any parent or other group company or to any joint venture, consortium or other partner has therefore been removed.
 - b) A significantly reduced obligation in relation to joint venture and other partners has been substituted for the previous more extended obligation. The new definition of “Associate” has been introduced which means *“a party to any joint venture, consortium or other similar arrangement”* (paragraph 4.1). Paragraph 9.2.2 provides that the Applicant is obliged to notify ECGD in relation to a Corrupt Activity by an Associate if the Applicant *“becomes aware”* of such activity. In other words, the Applicant has no obligation to take any active steps to ascertain whether such activity is being carried out, or to try to prevent it.
 - c) No obligation remains in relation to parent or non-controlled group companies.
53. ECGD, in paragraph 8.5.2.3 of its Consultation document, makes the following comments in relation to joint venture partners:

“Two points should be borne in mind. First, if an applicant company had used a joint venture partner as a means of passing a bribe at the time the Application Form was signed, this would constitute Corrupt Activity on the part of the Applicant and would be a breach of the representation that it has made. Equally, future conduct is caught by clause 5.11 of the Premium

Agreement and if such events were to happen after completion of the Application Form, the applicant would be obliged to repay to ECGD anything that ECGD has had to pay the lending bank. This is because the joint venture partner would be likely to be a person acting on behalf of the applicant.”

54. While these points raised by ECGD are valid, they do not deal with the following key issues:
- a) One of the primary purposes of the information provided by the Applicant to ECGD in the Application and Schedule is to prevent Corrupt Activity. The purpose of this Consultation is to ascertain whether the procedures *“have the effect of ensuring that, so far as practicable taxpayers’ money is not used to support transactions tainted with bribery and/or corruption”*. A properly structured Application and Schedule would require the Applicant to undertake due diligence on its joint venture partners, and would oblige the Applicant to provide information to ECGD which would assist ECGD in ascertaining whether the Applicant had undertaken due diligence, and would alert ECGD to possible “red flags”. Relying on the argument put forward by ECGD means that ECGD would be alerted to any Corrupt Activity in relation to joint venture partners only after it had taken place, and only if it came to light.
 - b) ECGD’s argument does not cover the situation where the Applicant may be aware that the joint venture partner may pay a bribe, but does not actually *“use a joint venture partner as a means of passing a bribe”*.
 - c) ECGD would suffer reputational risk even if it did manage to recover the payment from the Applicant.
 - d) If a bribe is paid, the supply contract may be terminated for illegality by the buyer. In that event, the Applicant may become insolvent, with the result that ECGD may not be able to recover the payment from the Applicant.
 - e) There are potential deficiencies in the recourse arrangements under the Premium and Recourse Agreement (see paragraphs 111 to 125 below).
55. The May Procedures provided for due diligence by the Applicant, in that they required the Applicant to give warranties to ECGD on behalf of its parent and other group companies, and its joint venture and other partners. The December Procedures eliminate the need for these warranties, and as a result remove the need for such due diligence. As such, the December Procedures are materially defective, and do not *“have the effect of ensuring that, so far as practicable taxpayers’ money is not used to support transactions tainted with bribery and/or corruption”*.

Parliamentary Committee Opinion

56. In paragraph 58 of its Report (Schedule 3), the Parliamentary Committee states:

“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.”

TI(UK)'s proposed amendment to make the procedures effective

57. It is evident from paragraphs 51 to 55 above that an obligation on the Applicant to provide warranties in relation to its parent and other group companies, and its joint venture and other partners must be restored. TI(UK) has therefore amended the Application (see Schedule 1 to this submission) so as to provide what it believes is a fair balance between the Applicant's duties and ECGD's necessary action and protection in relation to parent and group companies, and joint venture or other business partners:
- a) The distinction between "Associate" and "Controlled Company" introduced by the December Procedures has been retained.
 - b) TI(UK) has amended the definition of "Associate" in paragraph 4.2 of the Schedule to the Application to include a member of the same group of companies as the Applicant (other than a Controlled Company).
 - c) TI(UK) has amended paragraph 9.2.2 of the Application to impose a warranty given by the Applicant that to the best of its knowledge and belief, no Associate nor anyone acting on that Associate's behalf shall engage in any Corrupt Activity in connection with the Supply Contract or any Related Agreement. It is appropriate that this warranty is qualified by "to the best of its knowledge and belief", as the Applicant does not control its Associates, and so cannot give an unqualified warranty.
 - d) TI(UK) has replaced the extremely weak definition of "*to the best of our knowledge and belief*" included in the December Procedures (described in detail in paragraphs 62 to 66 below) with a definition which is fair to the Applicant, but which has substance. This is included as follows in paragraph 4.2 of the Application:
 - a) *"Best of our Knowledge and Belief" means that the person signing the declaration has:*
 - a) *made reasonable enquiries so as to satisfy himself that the matters being declared are correct; and*
 - b) *is not in possession of any facts or information which should have put him on notice that the matters being declared are incorrect; and*
 - c) *honestly believes that the matters being declared are correct."*
 - e) TI(UK) has, in amended paragraph 9.2.3 of the Application, extended the obligation on the Applicant to report to ECGD any Corrupt Activity of which it becomes aware so as to apply to a Corrupt Activity undertaken by anyone in connection with the Supply Contract or a Related Agreement. Previously, the obligation applied only to a Corrupt Activity undertaken by an Associate, which was unnecessarily restricted.
 - f) TI(UK) has added the words "*Related Agreement*" after "*Supply Contract*" in paragraphs 9.2.2 and 9.2.3 of the Application. Whenever the Applicant provides a warranty in relation to the Supply Contract, it should also provide the warranty in relation to any related agreement. This is defined by a new paragraph 4.10 in the Application which provides that:

"“Related Agreement” means any agreement, undertaking, consent, authorisation or arrangement of any kind which is related to or connected with the Supply Contract."

Major projects often have related agreements which are central to the contractual arrangements, and it is important that they are all included in the scope of the warranties. Related agreements were included in the May Procedures, but have been largely eliminated from the December Procedures.

Would TI(UK)'s proposed amendment place an undue burden on exporters?

58. If a company genuinely wishes to ensure that parent or other group companies, or joint venture, consortium and other partners do not pay a bribe in relation to the project, then proper due diligence on these parties would be a commercial necessity. The partners in a joint venture are normally jointly and severally liable under the contract with the buyer. A contract is often either void, or can be terminated, in the event that a bribe has been paid in relation to the contract award. Therefore, if a joint venture partner pays a bribe to a representative of the buyer (either directly or through an agent), and the buyer terminates the contract as a result of the bribe, and/or claims damages, then all the joint venture partners may be liable to the buyer and other affected parties for the consequences, even if they had no knowledge of the bribe. There is also the possibility of criminal liability. Therefore, it is a commercial imperative for a company that it conducts proper due diligence on these parties so as to try to avoid this type of liability. This commercial reality is recognised by the “Business Principles for Countering Bribery” referred to in paragraph 48 above, and in the “Partnering against Corruption Principles” referred to in paragraph 49 above. The real risks which result from involvement in a corruption-tainted project are illustrated by the on-going prosecutions in relation to the Lesotho Highlands Water Project, where several major international corporations have been convicted of bribery, and several more face prosecution.
59. The Applicant is receiving a guarantee underwritten by the taxpayer. It is as a result correct that the Applicant should adopt international good practice.
60. It would not therefore place an undue burden on the Applicant to provide this warranty, and to undertake the associated due diligence.

Issue 5: The December Procedures do not require the Applicant to give any effective anti-corruption warranty in relation to its controlled companies

Is the procedure effective in ensuring that the transaction is not tainted with bribery?

61. In the May Procedures, the definition of “Affiliate” in paragraph 4.1 included, inter alia, “*a member of the same group of companies*”. Paragraph 8.2.1 of the May Procedures made it a condition of the guarantee that the Applicant certified that “*neither 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.*” Consequently, as a result of these provisions, the Applicant would need to undertake due diligence on its controlled companies so as to be reasonably sure that they would not engage in corrupt activities.
62. However, in paragraph 9.2 of the December Procedures, ECGD has materially diminished the Applicant’s obligations in relation to its controlled companies. Under paragraph 9.2.1, the Applicant is required to declare as follows:

“That neither we nor, to the best of our knowledge and belief, any Controlled Company or anyone (including any employees) acting on our, or that Controlled Company’s, behalf with due authority, or with our, or that Controlled Company’s, prior consent or subsequent acquiescence, shall have engaged, or shall engage, in any Corrupt Activity in connection with the Supply Contract.”

This declaration is expressly qualified by the wording “*to the best of our knowledge and belief*”. The declaration has been materially weakened by the addition in the Appendix to the December Procedures of a new definition of “*to the best of our knowledge and belief*”. Under this definition, “*knowledge*” simply means “*the actual knowledge of the person concerned at the time of making the statement*”. “*The best of*” simply requires “*the maker of the statement to review his or her then state of knowledge and report all that that review tells him or her*”. Astoundingly, the definition expressly states that it “*does not require the person to make any enquiries or in any other way to seek to improve or augment his or her state of knowledge before making the statement*”. Similarly, the definition of “*belief*” is strictly limited. “*There is no requirement to seek to verify or bolster a belief by enquiry, other than by a diligent search of the person’s own conscience.*” The overall effect of this undertaking is that the person providing the statement simply puts down what is in his mind at the time of making the statement, with no obligation to make any enquiries.

63. Therefore, even if a subsidiary company of the Applicant were to pay a bribe, the Applicant would not be liable in this regard to ECGD as long as the person signing the Application on behalf of the Applicant did not actually know of the intention to pay a bribe at the time he made the statement.
64. The effect of the revised definition of “*to the best of our knowledge and belief*” is that it will be in the interest of the Applicant to have the Application signed by a representative who has as little knowledge as possible, and who has never made any enquiries, or by a director who has made it expressly or implicitly clear to his work colleagues that he does not want to be informed of anything which would prevent him signing the warranty
65. This revised definition is contrary to commercial common sense and good practice, which would require the Applicant to make constant enquiries of the true position, and to exercise effective supervision over companies which it controls.
66. This revised definition is also significantly weaker than the English criminal law test under which “*wilful blindness*” is sufficient to result in criminal liability.
67. As such, the December Procedures are materially defective, and do not “*have the effect of ensuring that, so far as practicable taxpayers’ money is not used to support transactions tainted with bribery and/or corruption*”.

Parliamentary Committee Opinion

68. In paragraph 65 of its Report (Schedule 3), the Parliamentary Committee states:
“We are not convinced by ECGD’s defence of its definition of the meaning of the phrase “to the best of our knowledge and belief”. While its action may be perfectly defensible in legal terms we are concerned that the Department has chosen to interpret the phrase in a way which is inconsistent with the rules of common sense. It is a nonsense to suggest that the December rules will ensure that due diligence will be carried out on “controlled companies”.”

TI(UK)’s proposed amendment to make the procedures effective

69. As stated in paragraph 57 d) above, TI(UK) has replaced the extremely weak definition of “*to the best of our knowledge and belief*” with a definition which is fair to the Applicant, but which has substance.
70. TI(UK) has amended paragraph 9.2.1 of the Application to impose a warranty given by the Applicant that neither it nor its Controlled Companies nor anyone acting on its or their behalf shall engage in any

Corrupt Activity in connection with the Supply Contract or any Related Agreement. The warranty is not qualified by “to the best of our knowledge and belief”. This qualification is not appropriate. The Applicant must ensure that companies or individuals over which it exercises control do not undertake corrupt activities.

71. TI(UK) has deleted the qualification to paragraph 9.2.1 of the Application which excluded from the scope of the warranty Corrupt Activities carried out by anyone acting on behalf of the Applicant or a Controlled Company, unless they were carried out “*with due authority, or with our or that Controlled Company’s prior consent or subsequent acquiescence*”. This is unnecessarily restrictive. It is not sufficient that the Applicant states that it will not give authority to anyone acting on its or its Controlled Company’s behalf to bribe, or will not consent to or acquiesce in a bribe. The Applicant must actually take steps to ensure that these parties do not bribe.

Would TI(UK)’s proposed amendment place an undue burden on exporters?

72. Paragraph 6.2.2 of the “Business Principles for Countering Bribery” referred to in paragraph 21 above states as follows:

“The enterprise should ensure that subsidiaries over which it maintains effective control adopt its [anti-corruption] Programme”.

73. Paragraph 5.2.1 of the “Partnering against Corruption Principles” referred to in paragraph 22 above states as follows:

“5.2.1 Subsidiaries

5.2.1.1 The Program should be designed and implemented on an enterprise-wide basis, applicable in all material respects to controlled subsidiary entities.

5.2.1.2 The enterprise should undertake measures to see that the conduct of subsidiary entities is consistent with the Business Principles.”

74. The ICC Rules of Conduct to Combat Extortion and Bribery include the following provision (Article 5):

“The board of directors or other body with ultimate responsibility for the enterprise should:
(a) take reasonable steps, including the establishment and maintenance of proper systems of control aimed at preventing any payments being made by or on behalf of the enterprise which contravene these Rules of Conduct.”

75. The Applicant is seriously at risk if a bribe is paid by a Controlled Company. Therefore, it is a commercial imperative for the Applicant that it conducts proper due diligence on its Controlled Companies, and exercises effective oversight and control, so as to try to avoid this type of liability. This commercial reality is recognised as good practice in the international rules and principles referred to in paragraphs 72 to 74 above.
76. The Applicant is receiving a guarantee underwritten by the taxpayer. It is imperative therefore that ECGD’s procedures require the Applicant to adopt international good practice.
77. It would not therefore place an undue burden on the Applicant to provide this warranty.

Issue 6: The December Procedures do not require the Applicant to make any effective enquiry as to whether it, or any companies it controls, or its parent or other group companies, or any of its joint venture or other business partners, have been debarred or convicted for corruption

Is the procedure effective in ensuring that the transaction is not tainted with bribery?

78. In the May Procedures, the Applicant is required to declare as follows:

“We declare that to the best of our knowledge and belief neither we, or any of our Affiliates nor any of our or their directors or employees:

5.1 appears on any list of contractors or individuals debarred from tendering for or participating in any project funded by the World Bank or any other multilateral or bilateral aid agency, and

5.2 has at any time freely admitted or been found by a court to have engaged in any Corrupt Activity.”

79. However, the December Procedures have materially weakened this obligation. In paragraph 5 of the December Procedures, the Applicant is required to declare as follows:

“We declare that, to the best of our knowledge and belief:

5.1 we or any Controlled Company or any board director of ours or of any Controlled Company:

5.1.1 neither appears on any list of contractors or individuals debarred from tendering for or participating in any project funded by the World Bank or any other multilateral or bilateral aid agency, nor

5.1.2 has at any time during the last five years, other than under duress, admitted having engaged, or been found by a court in any competent jurisdiction to have engaged, in any Corrupt Activity that has not previously been notified to ECGD;”

80. As a result, there is no longer any obligation on the Applicant to disclose to ECGD whether any of its parent or other group companies (other than Controlled Companies), or its joint venture or other partners, has been debarred or convicted for corruption. The December Procedures are also defective in that they do not require any disclosure in this regard in relation to Agents. This would be a necessary and obvious enquiry for an Applicant to make in relation to these parties in undertaking its own anti-corruption due diligence. It is also imperative that ECGD is informed whether the Applicant’s parent or other group company, or a member of the Applicant’s joint venture, or any Agent, has been debarred or convicted for corruption.

81. In addition, the remaining obligation of the Applicant to make a declaration in respect of itself and its Controlled Companies is expressly subject to the same extremely weak definition of “*to the best of our knowledge and belief*” referred to in paragraphs 62 to 66 above. Therefore, as long as the actual signatory did not know of any such debarment or conviction, the Applicant would not be in breach of this undertaking, even if the Applicant or a subsidiary or a director had been debarred or convicted. The signatory would not even have to ask any colleagues, or check any company records. It is impossible to comprehend why an Applicant would be relieved by ECGD of an obligation to make any enquiry as to whether itself or its own subsidiary company or director had been debarred or convicted for corruption.

82. In addition, the declaration no longer covers employees, but only board directors. However, senior managers who are not board directors can often undertake corrupt acts which are binding on the company.
83. The December Procedures are therefore materially defective, and do not “*have the effect of ensuring that, so far as practicable taxpayers’ money is not used to support transactions tainted with bribery and/or corruption*”.

Parliamentary Committee Opinion

84. In paragraph 70 of its Report (Schedule 3), the Parliamentary Committee states:
“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.”

TI(UK)’s proposed amendment to make the procedures effective

85. TI(UK) acknowledges that the obligation in the May Procedures to make a declaration in relation to all employees was too onerous. However, the revised obligation in the December Procedures which is limited to board directors is too restrictive, as senior managers who are not board directors can often undertake corrupt acts which are binding on the company. The Parliamentary Committee recommends that the obligation should be in relation to senior employees with executive power. Therefore TI(UK) has included in paragraph 4.12 of the Application (Schedule 1) a new definition of “Senior Executive” as follows:

“Senior Executive” means a director of the board, or a person with senior management responsibility over the whole or any part of the Supply Contract or Related Agreement;

86. It is essential that this declaration extends not only to the Applicant and Controlled Companies (as per the December Procedures) but also to Associates (as per the May Procedures) and to Agents. Senior Executives of Associates and Agents could undertake corrupt actions which bind the Applicant (e.g. through a joint venture or agency agreement) and which therefore have adverse impact on both the Applicant and ECGD. ECGD therefore needs reasonable assurance that Associates, Agents and their Senior Executives have not been blacklisted or convicted. TI(UK) has therefore included a new paragraph 5.2 of the Application which applies to Associates, Agents and their Senior Executives.
87. For the reasons stated in paragraph 81 above, it is not appropriate that a declaration given by the Applicant in respect of itself, its Controlled Companies, and their Senior Executives (paragraph 5.1 of the Application) is qualified by “to the best of our knowledge and belief”. These are companies and individuals over which the Applicant has control, and it should be able to ascertain with some certainty whether the facts are correct. However, it is acknowledged that the Applicant does not have the same degree of control or access to information in relation to its Associates and Agents, and therefore the declaration in respect of Associates and Agents (paragraph 5.2 of the Application) is qualified by “to the best of our knowledge and belief”. This qualification has the new meaning given to it by amended paragraph 4.3 of the Application.

Would TI(UK)'s proposed amendment place an undue burden on exporters?

88. Paragraphs 72 to 74 above refer to the due diligence which is recommended as good practice by various international groups and organisations. An Applicant is significantly at risk in the event of corrupt practices by its Controlled Companies, Associates and Agents. Corporations are inanimate. They carry out actions through their senior managers. It is therefore an obvious and sensible precaution for a company to wish to know whether its Controlled Companies, Associates, Agents, and its or their senior managers, have been blacklisted or convicted for Corrupt Activities.
89. As due diligence of this nature would in any event be carried out by an Applicant, it is not an undue burden on the Applicant to require it to disclose this information to ECGD.

Issue 7: The entire Schedule to the December Procedures is expressly qualified by a new definition of “to the best of our knowledge and belief” that is so weak that it materially diminishes the effect of the disclosures in the Schedule

Is the procedure effective in ensuring that the transaction is not tainted with bribery?

90. The introduction to the Schedule to the December Procedures states that *“All relevant questions in this Schedule must be answered fully and truthfully to the best of your knowledge and belief.”* As stated in paragraphs 62 to 66 above, this expression has been re-defined with the result that the information becomes virtually meaningless. The Schedule contains vital underwriting details, and information on the Applicant's agents. As the Applicant's signatory expressly does not have to make any enquiry whatsoever while filling in this Schedule, no error in the form will prejudice the Applicant as long as it was correct as far as the signatory's actual knowledge and actual belief was concerned. The signatory would merely have to swear in court that that was all he knew, and what he believed, and that would be the end of the matter. It would not be relevant that all other senior managers of the Applicant knew, or would have known, that the information provided by the Applicant was wrong. No commercial organisation would ever permit a director or employee to manage any part of the business expressly on the basis that they need never make any enquiry as to what was occurring.
91. This qualification results in a virtually meaningless and unenforceable Schedule, and leaves ECGD materially exposed. The December Procedures are therefore materially defective, and do not *“have the effect of ensuring that, so far as practicable taxpayers' money is not used to support transactions tainted with bribery and/or corruption”*.

Parliamentary Committee Opinion

92. In paragraph 65 of its Report (Schedule 3), the Parliamentary Committee states:
“We are not convinced by ECGD's defence of its definition of the meaning of the phrase “to the best of our knowledge and belief”. While its action may be perfectly defensible in legal terms we are concerned that the Department has chosen to interpret the phrase in a way which is inconsistent with the rules of common sense.”

TI(UK)’s proposed amendment to make the procedures effective

93. TI(UK) refers to paragraph 57 d) above, in which it explains how it has amended this definition.

Would TI(UK)’s proposed amendment place an undue burden on exporters?

94. The Schedule contains vital underwriting information for ECGD. The matters disclosed in the Schedule are those which a well run company would in any event ascertain as part of its own due diligence. Passing this information onto ECGD in return for a tax-payer funded guarantee would not place an undue burden on the Applicant.

Issue 8: Improvements in the disclosure requirements in the Schedule to the December Procedures

Is the procedure effective in ensuring that the transaction is not tainted with bribery?

95. Section 7 of the Schedule to the Application contains various questions designed to assist ECGD in ascertaining whether there is, on the face of it, any risk of an agent paying a bribe in relation to the Supply Contract. The scope of these questions could be improved so as to increase the chances that ECGD may be alerted in advance to potential corrupt transactions, while not imposing an undue burden on either ECGD or the Applicant.
96. TRACE is a well respected international non-profit organisation which specializes in working with both companies and intermediaries so as to reduce the risks of corruption in international business transactions. It has published the “TRACE Red Flags” which are questions designed to reveal whether, on the face of it, a high risk of bribery exists. TRACE recommends that more investigation is required if the intermediary:
- *“requests payment in cash or to a numbered account or the account of a third party*
 - *requests payment in a country other than the intermediary’s country of residence or the territory of the sales activity, and especially if it is a country with little banking transparency;*
 - *requests payment in advance or partial-payment immediately prior to a procurement decision;*
 - *requests reimbursement for extraordinary, ill-defined or last-minute expenses;*
 - *has a family member in a government position, especially if the family member works in a procurement or decision-making position or is a high-ranking official in the department that is the target of the intermediary’s efforts;*
 - *refuses to disclose owners, partners or principals;*
 - *uses shell or holding companies that obscure ownership without credible explanation;*
 - *is specifically requested by a customer;*
 - *is recommended by an employee with enthusiasm out of proportion to qualifications;*
 - *has a business that seems understaffed, ill-equipped or inconveniently located to support the proposed undertaking;*
 - *has little or no expertise in the industry in which he seeks to represent the company;*
 - *is insolvent or has significant financial difficulties;*
 - *is ignorant of or indifferent to the local laws and regulations governing the region in question and the intermediary’s proposed activities in particular;*
 - *identifies a business reference who declines to respond to questions or who provides an evasive response;*

- *is the subject of credible rumors or media reports of inappropriate payments.”*

TRACE recommends that even greater caution should be exercised if the intermediary is doing business in an industry or in a country with little business or financial transparency.

97. The ICC Rules of Conduct to Combat Extortion and Bribery include the following provisions in respect of agents (Article 3):

“Enterprises should take measures reasonably within their power to ensure

- (a) *that any payment made to any agent represents no more than an appropriate remuneration for legitimate services rendered by such agent;”*

Chapter Four of the ICC book “Fighting Corruption – a corporate practices manual” reinforces this by spelling out “red flags” and making detailed practical recommendations.

“When evaluating a prospective agent, it is very important to watch for “red flags” which could serve as advance warnings of potential illegal activities or violations of company policy. Specifically the company should be on guard if a proposed sales representative:

- *does not reside in the same country where the customer or the project is located;*
- *does not have any significant business presence within the country;*
- *represents any companies with a questionable reputation;*
- *requests that commissions be paid in a third country or to a numbered bank account or to some other person;*
- *requires payment of the commission, or a significant portion thereof, before or immediately upon award of the contract by the customer to the company;*
- *claims that he can help secure the contract because he knows all the right people;*
- *has a familial or other relationship that could improperly influence the customer’s decision;*
- *arrives on the scene just before the contract is to be awarded.*

Therefore, companies should

- write into their codes of conduct provisions requiring responsible company personnel to hire only qualified and reputable agents;*
- make clear in the code that all agents are bound by its anti-bribery provisions and by those of the OECD Convention;*
- before hiring an agent conduct a detailed background check on his professional competence and personal integrity;*
- require prospective agents to fill out a detailed application form listing their business details, product lines and references;*
- discuss the company’s “no bribery” policy with the proposed agent and be satisfied that he will comply;*
- establish specific compensation guidelines to ensure that an agent’s compensation is not excessive in relation to the services he renders;*
- require senior management’s approval of all sales representative appointments;*
- pay all agents’ commissions by cheque and not in cash;*
- require agents to sign a written agreement containing, among other provisions, a commitment not to pay bribes;*
- be alert to red flags which can signal questionable integrity on the part of an agent;*
- completely avoid, wherever possible, the appointment of agents in high risk countries where bribery is prevalent.”*

98. Paragraph 6.2.2.3 of the Business Principles (see paragraph 21 above) states:
“Compensation paid to agents should be appropriate and justifiable remuneration for legitimate services rendered.”
99. Paragraph 5.2.3.2.5 of the Partnering against Corruption Principles (see paragraph 22 above) states:
“Compensation paid to agents, advisors and other intermediaries should be appropriate and justifiable remuneration for legitimate services rendered and should be paid through bona fide channels.”
100. The TRACE red flags and the various rules and principles referred to in paragraphs 96 to 99 above relate mainly to due diligence to be undertaken by the Applicant rather than by ECGD. However, ECGD needs to ask sufficient questions of the Applicant so as to ascertain whether the Applicant has undertaken proper due diligence. If the answers by the Applicant alert ECGD to the risk of possible corruption, then ECGD needs to undertake enhanced due diligence.
101. TI is currently preparing due diligence guidelines for companies, banks and export credit agencies. These are expected to be published later this year. TI(UK) would be happy to send a copy of this to ECGD in advance of publication.
102. TI(UK) believes that the questions asked in the Schedule are not sufficiently comprehensive, and as a result do not *“have the effect of ensuring that, so far as practicable taxpayers’ money is not used to support transactions tainted with bribery and/or corruption”*.

TI(UK)’s proposed amendment to make the procedures effective

103. TI(UK) has included some additional questions in the Schedule to the Application which are designed to assist ECGD ascertain whether the Applicant has undertaken proper due diligence, and to alert ECGD to the risk of possible corruption.

Would TI(UK)’s proposed amendment place an undue burden on exporters?

104. The questions included by TI(UK) in the Schedule relate to good practice recommended by organisations such as TRACE, ICC and other international organisations. ECGD is entitled to expect the Applicant to be complying with international good practice. As the Applicant should therefore in any event be carrying out the due diligence envisaged by these questions, the supplying by the Applicant to ECGD of the answers to these questions should not place an undue burden on the Applicant.

Issue 9: The definition of “Corrupt Activity” and “Relevant Acts”

Is the procedure effective in ensuring that the transaction is not tainted with bribery?

105. The definition of “Corrupt Activity” in paragraph 4.6 of the Application relies on the definition of “Relevant Acts”. The definition of “Relevant Acts” makes no express reference to the Anti-Terrorism, Crime and Security Act 2001. Section 109 of this Act provides that bribery committed outside the UK by a UK national or corporation constitutes an offence in the UK and may be prosecuted in the UK. It is, therefore, a vitally important provision. The definition of “Relevant Acts” in paragraph 4.8 refers to

the “*Prevention of Corruption Acts 1889 to 1916 (as from time to time amended or re-enacted)*”. It may be argued that Section 108 of the 2001 Act is included in the definition (as it does amend the earlier Acts). However, it is by no means clear that Section 109 of that Act (which does not amend earlier legislation) is included. In view of the importance of Section 109 of the 2001 Act, it would be more satisfactory if the 2001 Act was expressly referred to as being within the definition of “Relevant Acts”, so as to avoid confusion and uncertainty.

106. Paragraph 4.6.4 of the Application and the sub-paragraph following paragraph 4.6.4 seek to exclude from the definition of “Corrupt Activity” any activity which is an offence “*by virtue of an amendment to the Relevant Acts having retrospective effect*”. What is the intended effect of this exclusion? If Parliament required an Act to have retrospective effect, why should the Applicant be exempted? This exclusion was not present in the May Procedures. TI(UK) believes that the procedures would be more effective if this exclusion was removed.

TI(UK)’s proposed amendment to make the procedures effective

107. TI(UK) has amended the Application so as to:
- a) Include reference to the Anti-Terrorism, Crime and Security Act 2001 in the definition of “Relevant Acts” (previously paragraph 4.8, now paragraph 4.11 of the Application); and
 - b) Remove the exception “*by virtue of an amendment to the Relevant Acts having retrospective effect*” from paragraph 4.6.4 of the Application and the sub-paragraph following paragraph 4.6.4 (now re-numbered paragraph 4.8.4)

Would TI(UK)’s proposed amendment place an undue burden on exporters?

108. TI(UK) cannot see how these amendments could place an undue burden on the Applicant.

PREMIUM AND RECOURSE AGREEMENT FOR THE BUYER CREDIT GUARANTEE

109. The following comments apply to the “Premium and Recourse Agreement” for the Buyer Credit Guarantee.
110. The key documents in terms of corruption prevention are the Application and its Schedule, which could lead ECGD to decline cover, or alert criminal authorities, before it assumes risk, and before the project commences. The Premium and Recourse Agreement is signed once ECGD has agreed to cover the Applicant, and the project contract has been signed. The terms of the Premium and Recourse Agreement are, as a result, very much an exercise in damage limitation. TI(UK) makes the following three key observations in relation to the Premium and Recourse Agreement.

Issue 10: ECGD has retained inadequate rights of recourse against the Applicant in the event of a Corrupt Activity

Is the procedure effective in ensuring that the transaction is not tainted with bribery?

111. Paragraph 5.11 of the Premium and Recourse Agreement obliges the Supplier (Applicant) to indemnify ECGD *“if the Supplier or any Controlled Company or anyone (including any employees) acting on the Supplier’s, or that Controlled Company’s, behalf with due authority, or with the Supplier’s, or that Controlled Company’s prior consent or subsequent acquiescence, has engaged, or engages, in any Corrupt Activity in connection with the Supply Contract ...”*

It therefore appears that the following actions are excluded from the scope of the above indemnity:

- a) A Corrupt Activity undertaken by an agent of the Supplier or Controlled Company without *“due authority”*. In practice, a company would be unlikely to give an agent express authority to bribe. Most bribes would be paid in situations where the Supplier is *“wilfully blind”* to the circumstances.
 - b) A Corrupt Activity undertaken by an employee of the Supplier or Controlled Company without *“due authority”*. For example, the project director may authorise a bribe without board authority, and contrary to the company’s anti-corruption code.
 - c) A Corrupt Activity undertaken by the Supplier’s parent company or non-controlled group company, or by any of its employees or agents.
 - d) A Corrupt Activity undertaken by the Supplier’s joint venture or consortium partner, or by any of its employees or agents.
 - e) A Corrupt Activity undertaken by the Supplier’s sub-contractor or supplier, or by any of its employees or agents.
112. The Corrupt Activities referred to in paragraph 111 above could comprise bribes paid by that party in connection with the award of the Supply Contract. These bribes will probably make the Supply Contract void or voidable, and could result in the Buyer terminating the Supply Contract, and/or refusing to re-pay the Bank under the finance agreement between the Buyer and the Bank. ECGD may in consequence be obliged to indemnify the Bank under the buyer credit guarantee. However, the right of ECGD to obtain recourse from the Supplier in this situation appears to be limited to the very restricted circumstances specified in paragraph 111 above. Therefore, ECGD (i.e. the taxpayer), and not the Supplier, is assuming the risk of Corrupt Activities which do not fall within the recourse provisions. This means that the Supplier is effectively purchasing anti-corruption insurance from ECGD to cover Corrupt Activities by the Supplier’s associated parties (as the Supplier will have been paid by the bank, and will not be obliged to repay either the bank or ECGD). This is surely not the intention of export credit cover? Export credit cover is intended to insure against defaults of the Buyer and political risk, not against the corrupt acts of the Supplier and its associated parties. Ensuring that the taxpayer, and not the Supplier, bears the consequences of these Corrupt Activities (which are illegal acts) is surely both not in ECGD’s interests, and contrary to public policy? It is also questionable whether it is legal for ECGD effectively to insure the Supplier against Corrupt Activities in these circumstances, as it may *“offend the public conscience”*. It also reduces significantly any incentive on the Supplier to try to prevent Corrupt Activities, as it will be aware that, once it has received payment from the bank, there is only limited chance of recovery of that money by ECGD.

113. The December Procedures are therefore materially defective, and do not “*have the effect of ensuring that, so far as practicable taxpayers’ money is not used to support transactions tainted with bribery and/or corruption*”. On the contrary, the effect of these recourse arrangements is that taxpayers’ money may, with the full knowledge and express contractual consent of ECGD, be used to pay for Corrupt Activities.

TI(UK)’s proposed amendment to make the procedures effective

114. TI(UK) believes 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 these parties. The taxpayers’ indemnity should only be in respect of acts of the Buyer, or political act.
115. It is unlikely that the existing recourse provisions in paragraph 7 of the Premium and Recourse Agreement will alter the effect of the analysis in paragraphs 111 to 113 above, as:
- a) The recourse provisions in paragraph 5.11 which relate specifically to Corrupt Activities, and which limit recourse only to specific circumstances, are likely to take priority over the general recourse provisions in paragraph 7;
 - b) The Supplier could argue that “*default of the Supplier*” in paragraph 7 does not include acts by Controlled Companies, Associates, Agents, sub-contractors, suppliers or anyone acting on their behalf. This is particularly the case as so much effort has been placed into distinguishing the actions to be taken by the Supplier in respect of these different parties in the Application and in the Premium and Recourse Agreement.

It makes no sense to have two separate paragraphs dealing with recourse in potentially conflicting ways. All the recourse provisions should be dealt with together in one clear section.

116. ECGD in the “Recourse” section of the explanatory notes to its products on its web-site states as follows:

“Amount of Recourse

We always set a limit on the amount of recourse for which you (and any recourse backers) may be liable. The exact amount on any individual case is a matter for the judgement of the underwriter. This limit is written into the Buyer Credit Premium/Recourse Agreement or the Supplier Credit Finance Facility Recourse Agreement, and it is usually based on a percentage of our maximum liability under our guarantee (the Departmental Maximum Liability or DML).

The minimum recourse limit is a figure representing ten per cent of the DML. Recourse can be set at any amount up to a maximum of 100 per cent of DML. However, most cases attract the minimum limit.”

TI(UK) maintains that recourse should always be 100% in relation to any Corrupt Activity.

Would TI(UK)'s proposed amendment place an undue burden on exporters?

117. There is no doubt that ECGD requiring full recourse against the Supplier in the event of a Corrupt Activity would place a burden on the Supplier. However, this is not an undue burden. The Supplier, and not the taxpayer, should assume the risk of a Corrupt Activity undertaken by itself, or by its Controlled Companies, Associates, Agents, sub-contractors and suppliers, or by anyone acting on their behalf. The Supplier cannot expect the taxpayer to indemnify it against the consequences of an illegal act undertaken by an organisation within the Supplier's control or contractual domain.

Issue 11: The defects in the Application and its Schedule are perpetuated in the Premium and Recourse Agreement

118. Many of the comments made in this Submission in relation to the weaknesses in the Application and its Schedule apply also to the Premium and Recourse Agreement, as the defects in the former documents are to a large extent perpetuated in the latter document. Equivalent amendments therefore need to be made to the Premium and Recourse Agreement to bring it into line with the amendments recommended above in relation to the Application and its Schedule.

Issue 12: ECGD has retained grossly inadequate post-contract audit and inspection powers

Is the procedure effective in ensuring that the transaction is not tainted with bribery?

119. ECGD has not retained power to undertake any effective post-contract inspection to ensure that no corruption has taken, or could take place. Article 5.9.2 of the Premium and Recourse Agreement provides as follows:

“IF ECGD confirms in writing to the Supplier that it has reasonable grounds for suspecting that an employee, agent or intermediary of the Supplier has been engaged in any Corrupt Activity ... in connection with the Supply Contract, [the Supplier shall] permit an independent third party acceptable to the Supplier and ECGD to visit any of its UK premises where records relating to the obtaining and performance of the Supply Contract and the making of Disbursement Claims under the Loan Agreement are kept during business hours for the sole purpose of inspecting and auditing any records, other than those covered by legal privilege, preserved in any medium or form including records stored electronically which relate (a) specifically to the Supplier's obtaining of the Supply Contract or the employment of, and payments to or for the benefit of, any agents or other intermediaries involved directly or indirectly at any time with the Supply Contract and (b) only to the period up to the date of award of the Supply Contract (the “Contract Records” and, together with the Administration Records, the “Records”), provided that ECGD may only inspect and audit Contract Records for the sole purpose of verifying statements made, and information given, to ECGD by the Supplier in the Application Form.”

Such inspection is, pursuant to article 5.9.3, subject to 5 business days' prior notice.

120. This wording contains the following major deficiencies:
- a) ECGD can only exercise these powers if it has reasonable grounds for suspecting a Corrupt Activity. Corruption is concealed, and most successful bribes are never uncovered. The power of ECGD to inspect is a powerful deterrent, and may also uncover bribes in relation to which ECGD

had no prior suspicion. This power to inspect should not be limited only to the situation where ECGD has reasonable grounds for suspicion.

- b) The independent third party needs to be acceptable to the Supplier. It is difficult to see why this approval is necessary.
- c) The inspector can only visit the Supplier's UK premises. 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.
- d) 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 the knowledge or willful blindness of the Supplier, have been arranged through these companies.
- e) 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). An inspection of pre-award documents would be unlikely to reveal this. Inspection should not be limited to this period.
- f) Records can only be inspected for the sole purpose of verifying statements made and information given to ECGD by the Supplier in the Application. As stated in this submission, the information requested in the Application is seriously inadequate. The inspection will therefore be equally inadequate. In addition, much of the information given in the Application is expressly qualified by the "to the best of our knowledge and belief" proviso, the power of which has been neutered by the definition of this term in the Application (see paragraphs 62 to 66 above). As a result, the inspector may in practice be confined to interviewing the signatory of the Supplier as to his state of mind at the time he signed the Application. This would be a worthless exercise.
- g) 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.

121. These inspection powers are grossly inadequate, and put ECGD materially at risk. The December Procedures therefore do not "*have the effect of ensuring that, so far as practicable taxpayers' money is not used to support transactions tainted with bribery and/or corruption*".

Parliamentary Committee Opinion

122. In paragraph 75 of its Report (Schedule 3), the Parliamentary Committee states:

"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".

TI(UK)'s proposed amendment to make the procedures effective

123. TI(UK) recommends that the Premium and Recourse Agreement is amended with the result that:

- a) ECGD can exercise its powers of audit and inspection at any time before, during and after the signing and performing of the Supply Contract and Related Agreements. These powers should not be limited only to the situation where ECGD has reasonable grounds for suspicion. ECGD could commit to cause as little disruption as possible to the Supplier’s business, consistent with carrying out a successful audit.
- b) The inspector or auditor need not be acceptable to the Supplier. The inspector or auditor should be suitably qualified, and be someone who could not be exposed to accusations of conflict of interest.
- c) The inspector or auditor can at any time visit the premises of the Supplier, Controlled Companies, Associates, agents, sub-contractors and suppliers wherever located.
- d) The inspector or auditor can at any time have access to the records and staff of the Supplier, Controlled Companies, Associates, agents, sub-contractors and suppliers. Such records and staff should be limited to those relevant to the Supply Contract and Related Agreements.
- e) 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.
- f) 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.
- g) Records can be inspected on a spot-check basis (i.e. no requirement for notice).
- h) Copies of documents can be requested.

Would TI(UK)’s proposed amendment place an undue burden on exporters?

- 124. As noted by the Parliamentary Committee in paragraph 75 of its Report (Schedule 3), *“the Department ... 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 ...”*.
- 125. While an inspection and audit of the Supplier will inevitably place some burden on the Supplier, this cannot in the circumstances be considered “undue”. These would normally, in the absence of suspicious circumstances, only be carried out on a random basis.

BURDEN ON BANKS

- 126. The focus of TI(UK)’s comments above has been on the undertakings and warranties to be given by the Applicant to ECGD, on the level of due diligence and disclosure to be undertaken by the Applicant, and on the level of recourse available by ECGD against the Applicant. TI(UK) does not believe that any of these recommendations imposes any undue burden on banks.

ADDITIONAL ACTIONS FOR ECGD

127. In TI(UK)'s view, the effective prevention of corruption requires a wide range of co-ordinated actions. Ensuring that application forms and contract documents contain the correct wording only constitutes a part (albeit an important part) of the actions which ECGD should take to ensure that *“so far as practicable taxpayers' money is not used to support transactions tainted with bribery and/or corruption”*.
128. Paragraphs 37 to 60 of TI's report dated March 2005 “Risk Assessment and Proposed Actions for Banks, Export Credit Agencies, Guarantors and Insurers” (Schedule 4 to this Submission) contains recommended actions which export credit agencies should take to combat corruption. As stated in paragraph 4 d) above, TI has recommended these actions to all OECD export credit agencies. TI(UK) acknowledges that some of these actions may take time to develop and implement, and will be pleased to work with ECGD in this regard.

THE VIEWS OF TI(UK)

129. In relation to paragraph 3.2.1 of the Consultation document:
- a) 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.
 - b) This submission has been approved by the Board of TI(UK). It was also, prior to submission to ECGD, published in draft form on TI(UK)'s web-site to allow members of TI(UK) and the wider public to comment.

DISCLAIMER

130. TI(UK) has provided this Submission and attachments to ECGD in good faith as part of the Consultation. Neither TI(UK) nor the authors can accept responsibility for the consequences of any action claimed to be taken by ECGD or any other party in reliance on the contents of this Submission and attachments.

Transparency International (UK)
June 2005