



A review of ECGD's anti-Bribery and Corruption Procedures



EXPORT CREDITS GUARANTEE DEPARTMENT

REVIEW OF ECGD's ANTI-BRIBERY AND CORRUPTION PROCEDURES

INTRODUCTION

- 1 The Export Credits Guarantee Department ("ECGD") introduced revised anti-bribery and corruption procedures on 1 July 2006 following a public consultation conducted under Cabinet Office Guidelines.
- 2 In its Fifth Report of the 2005-06 session¹, published on 25 July 2006, the then Trade and Industry Committee ("TIC") commented on the new procedures, and made a number of recommendations.
- 3 The Government's response to the TIC report's recommendations² was published on 27 October 2006. In that response, the Government gave an undertaking to review the revised anti-bribery and corruption procedures in three years.
- 4 Specifically, the Government said that the review would:
 - (a) benchmark ECGD against the then current OECD Export Credits Group position on bribery and corruption and against the then current anti-bribery and corruption procedures of similar official Export Credit Agencies ("ECA"s);
 - (b) consider ECGD's experience during the three years relating to workability, resource and/or other difficulties in the implementation of the July 2006 procedures, including the operation of the Special Handling Arrangements;
 - (c) consider the case for the use of independent third parties in conducting enquiries about joint venture participant's agents;
 - (d) consider ECGD's experience of applying the July 2006 procedures to applications that involve joint venture partnerships; and
 - (e) review experience of the operation of ECGD's recourse provisions in the context of bribery and corruption and the application of English law to loan contracts.

¹ Available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmtrdind/1124/1124.pdf>

² Available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmtrdind/1670/1670.pdf>

- 5 In the light of further developments since 2006, the Government has decided that the review will additionally:
- (a) consider ECGD's experience of applying the July 2006 procedures to applications that involve ECGD acting as reinsurer to other ECAs; and
 - (b) address ECGD-specific recommendations made by the OECD Working Group on Bribery in International Business Transactions in its 'United Kingdom: Phase 2bis' report dated 16 October 2008³, namely that ECGD should:
 - (i) in any case where a criminal investigation into a transaction supported by ECGD has been blocked for reasons other than on its merits, make vigorous use of all its powers, including notably its audit powers, to investigate whether the transaction involves foreign bribery (Convention Article 3(4), Revised Recommendation Paragraph I); and
 - (ii) review its general contracting policies for future transactions to address policy issues raised by cases that cannot be investigated by criminal law enforcement authorities (Convention Article 3(4), Revised Recommendation Paragraph I).
- 6 As recommended by the Export Guarantees Advisory Council ("EGAC") at its meeting on 1 December 2008⁴, this review takes account of the Woolf Committee's Report into the ethical policies and processes of BAE Systems plc (BAES)⁵, the Report by the Committees on Arms Export Controls,⁶ and the OECD Phase 2bis report referred to above.
- 7 This review addresses each of the above points and makes a number of recommendations.

CONTEXT

- 8 The revised procedures were introduced following an extensive Public Consultation. The Consultation documents, including the Government's Interim, Final and Concluding Responses, can be found on ECGD's website – www.ecgd.gov.uk. Paragraph 28 of the Government's Final Response sets out ECGD's role in regards to anti-bribery and is reproduced at Appendix A.

³ Available at <http://www.oecd.org/dataoecd/23/20/41515077.pdf>.

⁴ Minutes of the meeting are available at <http://www.ecgd.gov.uk/index/public-information/export-guarantees-advisory-council/minutes.htm>

⁵ Available at <http://ir.baesystems.com/investors/woolf/>

⁶ Available at <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmquad/cmquad.htm>

REVIEW AND ANALYSIS

Benchmarking ECGD against the current OECD position and similar official Export Credit Agencies

- 9 The current OECD position is set out in the OECD Council Recommendation on Bribery and Officially Supported Export Credits (“the Bribery Recommendation”)⁷, which was adopted by the OECD Council on 14 December 2006.
- 10 An OECD Recommendation is an OECD act adopted by the OECD Council in accordance with Article 5b of the OECD Convention. It is not legally binding, but expresses the common position or will of the whole OECD membership.
- 11 The Bribery Recommendation recommends that: “Members take appropriate measures to deter bribery in international business transactions benefiting from official export credit support, in accordance with the legal system of each member country and the character of the export credit and not prejudicial to the rights of any parties not responsible for the illegal payments.”
- 12 It then makes a number of specific recommendations that should be undertaken, as reproduced below:
- (a) informing exporters and, where appropriate, applicants, requesting support about the legal consequences of bribery in international business transactions under its national legal system including its national laws prohibiting such bribery and encouraging them to develop, apply and document appropriate management control systems that combat bribery;
 - (b) requiring exporters and, where appropriate, applicants, to provide an undertaking/declaration that neither they, nor anyone acting on their behalf, such as agents, have been engaged or will engage in bribery in the transaction;
 - (c) verifying and noting whether exporters and, where appropriate, applicants, are listed on the publicly available debarment lists of the following international financial institutions: World Bank Group, African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development and the Inter-American Development Bank;
 - (d) requiring exporters and, where appropriate, applicants, to disclose whether they or anyone acting on their behalf in connection with the transaction are currently under charge in a national court or, within a five-year period preceding the application, have been convicted in a national court or been subject to equivalent national administrative measures for violation of laws against bribery of foreign public officials of any country;

⁷ See http://www.oecd.org/document/62/0,3343,en_2649_34177_37858750_1_1_1_1,00.html

- (e) requiring that exporters and, where appropriate, applicants, disclose, upon demand:
 - (i) the identity of persons acting on their behalf in connection with the transaction, and
 - (ii) the amount and purpose of commissions and fees paid, or agreed to be paid, to such persons;
- (f) undertaking enhanced due diligence if:
 - (i) the exporters and, where appropriate, applicants, appear on the publicly available debarment lists of one of the international financial institutions referred to in (c) above; or
 - (ii) the Member becomes aware that exporters and, where appropriate, applicants or anyone acting on their behalf in connection with the transaction, are currently under charge in a national court, or, within a five-year period preceding the application, has been convicted in a national court or been subject to equivalent national administrative measures for violation of laws against bribery of foreign public officials of any country; or
 - (iii) the Member has reason to believe that bribery may be involved in the transaction;
- (g) in case of a conviction in a national court or equivalent national administrative measures for violation of laws against bribery of foreign public officials of any country within a five-year period, verifying whether appropriate internal corrective and preventive measures have been taken, maintained and documented;
- (h) developing and implementing procedures to disclose to their law enforcement authorities instances of credible evidence⁸ of bribery in the case that such procedures do not already exist;
- (i) if there is credible evidence at any time that bribery was involved in the award or execution of the export contract, informing their law enforcement authorities promptly;
- (j) if, before credit, cover or other support has been approved, there is credible evidence that bribery was involved in the award or execution of the export contract, suspending approval of the application during the enhanced due diligence process. If the enhanced due diligence concludes that bribery was involved in the transaction, the Member shall refuse to approve credit, cover or other support; and

⁸ Defined as “evidence of a quality which, after critical analysis, a court would find to be reasonable and sufficient grounds upon which to base a decision on the issue if no contrary evidence were submitted”.

- (k) if, after credit, cover or other support has been approved bribery has been proven, taking appropriate action, such as denial of payment, indemnification, or refund of sums provided.

- 13 It is the responsibility of each Member to translate these recommendations into specific provisions that take account of the systems and processes of each ECA and the national laws of that ECA's country.
- 14 Members of the OECD Working Party on Export Credits and Credit Guarantees approved the 2006 Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits. The Survey reflects the undertakings contained in the 2006 Council Recommendation and provides for the ongoing monitoring and review of Member ECAs' anti-bribery measures. Responses were last updated in July 2009.⁹
- 15 This review draws on the OECD Survey to benchmark ECGD against each specific recommendation and against "similar official Export Credit Agencies". The table at Appendix B sets out ECGD's position against each specific recommendation followed by the positions of the ECAs of other G7 countries (Coface – France; Hermes – Germany; SACE – Italy; Ex-Im Bank – US; EDC – Canada; JBIC & NEXI – Japan).
- 16 It will be seen from this benchmarking that ECGD is compliant with all the recommendations. All other member ECAs report that they are compliant. It is worth noting, however, that ECGD applies the Recommendation differently to most other ECAs in regards to paragraph 1(e): this contains a discretion to seek the names of agents but ECGD routinely requires agent's details to be disclosed at the time of application. Other G7 ECAs (except Italy)¹⁰ *sometimes* require details to be provided in respect of amounts of agents' commissions associated with the transaction; Italy, like the UK, *always* requires this information. ECGD has also extended its audit rights so that they now also allow it to inspect exporters' records / documentation relating to the award of the contract.
- 17 In cases where bribery has been proven *after* credit, cover or other support has been approved, there are differences in the actions that the different ECAs take (for example, whether cover is invalidated or recourse is sought for claims paid). This is a function of differences in ECAs' products and the nature of the cover being provided, as well as being a reflection of the different legal systems of the G7 countries.

⁹ Available at http://www.oecd.org/document/13/0,3343,en_2649_34177_38608717_1_1_1_37431,00.html

¹⁰ The explanatory remarks from Canada state that "details would be required if there is reason to believe bribery may have been involved in the transaction. Exporters/applicants, through the declaration, agree to disclose details upon EDC's request for such." US Ex-Im Bank states that "Exporters are required to disclose on the Exporter's Certificate, prior to approval of disbursements, any fees or arrangements that are not regular commissions or fees to regular sales agents, brokers or representatives or that are not readily identifiable on the exporter's books as to amount and purpose. Exporters also are required to provide information regarding the recipient of any such commission".

- 18 The provisions ECGD has in place for the purposes of being compliant with the OECD Recommendation also fulfil those recommendations in the above mentioned Report by the Committees on Arms Export Controls that relate specifically to bribery and corruption¹¹: ECGD provides information about the extra-territorial provisions of the UK's anti-corruption laws; ECGD carries out due diligence checks on all applications for cover, including obtaining details as to how the contract was awarded; ECGD requires anti-bribery warranties and declarations; ECGD requires Agents' details; ECGD has recourse rights.
- 19 Although ECGD does not apply an automatic debarment policy in respect of companies convicted of corruption (as it cannot fetter the discretion of Ministers), ECGD's publicly stated policy is that, whilst it cannot blacklist companies, a company's conviction for corruption would be a *prima facie* reason for refusing it cover.
- 20 In summary, ECGD is compliant with its international obligations and continues to support the UK Government's wider commitment to combat bribery and corruption in business.

Experience during the last three years, including operation of the Special Handling Arrangements

- 21 Since the inception of the new procedures, ECGD has reported annually to the EGAC on its experience in the previous year (1 July to 30 June). These reports are published on ECGD's website.
- 22 The statistics for 2006-07, 2007-08 and 2008-09 have been collated at Appendix C. The number of applications received has ranged from 36 in 2006-07 to 34 in 2007-08 to 68 in 2008-09. The number of cases supported was 8 in 2006-07, 15 in 2007-08 and 26 in 2008-09.
- 23 As will be seen from the 'Due Diligence' section of Appendix C, all applications in all three years were subject to checks against the debarment lists of the International Financial Institutions (IFIs) specified in the Bribery Recommendation. All applicants that had a code of conduct provided ECGD with a copy of it. Furthermore, no applicant refused to provide any additional information that was requested.
- 24 It is usual for ECGD to make enquiries on the standing of the agent with the relevant UK overseas diplomatic mission. In 2008-09, the overseas post was consulted on all such cases.
- 25 Experience shows that, in broad terms, the procedures have been workable. ECGD has not encountered problems with regard to obtaining information on request from applicants. Many companies have adopted Corporate and Social

¹¹ Recommendations 35, 36 and 37.

Responsibility policies, as advocated, for example, by the Woolf Committee, and so, therefore, have an understanding of ECGD's policy in this area.

- 26 ECGD operates Special Handling Arrangements ("SHAs") to protect the identity of agents where the applicant is concerned about maintaining commercial confidentiality. The SHAs limit the number of people in ECGD with access to the information but, otherwise, the enquiries that are carried out do not differ in any respect from those where the agent's name is openly disclosed. The number of applications received which requested use of the SHAs were: one in 2006-07, none in 2007-08 and six in 2008-09. Applicants have provided the information that ECGD required in order to carry out its enquiries.
- 27 The TIC Report recommended that this review should include "an evaluation of the extent to which ECGD's commitment to keep the identity of agents confidential has hampered its ability to undertake due diligence". Given the full co-operation that ECGD has had from applicants under the SHAs, ECGD's ability to conduct enquiries has not been inhibited by use of the SHAs.
- 28 Some difficulties have arisen with the internal operation of the SHAs, as the process within ECGD largely centres around a single individual, the Head of the Business Principles Unit ("BPU") or his delegate in the BPU. These individuals are frequently abroad on case-related travel and because of this the ability to make enquiries can be subject to delays.
- 29 It is not necessary for the Head of the BPU to have personal responsibility for dealing with applications under the SHAs. Given the practical and logistical issues that have arisen, it is proposed that responsibility will be transferred to the Underwriting Policy and Practice Branch in Business Division 3.

Experience of applying the procedures to applications that involve joint venture partnerships *and* consideration of the case for the use of independent third parties in conducting enquiries about joint venture participant's agents

- 30 In its Report, the TIC said (at paragraph 92):

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

31 The Government's response was:

"The Government does not accept the recommendation to define any further the meaning of 'on behalf of' in its applications. The Government considers that the current definition is applicable to a range of circumstances and it would be wrong to attempt to anticipate all those future circumstances in the definition. Refining the current definition is likely to result in the narrowing of its scope. The Government accepts the recommendation to review the disclosure arrangements insofar as joint venture partners are concerned. ECGD's experience of applications from exporters who are in joint venture arrangements will be included in its review of its procedures in 2009."

32 It will be seen (at Appendix C) that applications involving a consortium were low relative to the total number received: four cases in 2006-07, two in 2007-08 and four in 2008-09.

33 Where an application involves a joint venture partnership, ECGD's procedures are no less rigorous than in cases of single applicants; the same enquiries are undertaken and checks are made on all parties, including any agents acting on behalf of the joint venture partnership.

34 It has been suggested by some special interest groups that ECGD should use consultants to conduct independent enquiries about a joint venture participant's agents, as these might be a conduit for the payment of bribes. These groups were particularly concerned about situations where the joint venture partner was a local company (in the country where the contract is performed).

35 ECGD does require the names of the agents of consortium partners to be disclosed if they are also acting on behalf of the applicant, but, where they are not, ECGD's view is that it would be very difficult, if not impossible, for the applicant to obtain that information. However, the applicant is required, under ECGD's standard application forms, to make reasonable enquiries about the absence of corruption on the part of his consortium partners; there is an obligation to represent that this has been done and also to represent that the results of those enquiries give no cause to believe that the consortium partner has been corrupt.

36 Of the ten applications received over the period of this review that involved joint ventures, no cases also involved the existence of an agent acting on behalf of that joint venture. Furthermore, none of the joint ventures involved a partnership between a British exporter and a local company in the country where the contract was to be performed.

37 Experience of the new procedures since their inception has not revealed any problems or issues in respect of applications involving joint ventures. ECGD is unaware of any evidence that such cases increase the bribery and corruption risk for ECGD.

38 The TIC Report considered but made no recommendation on whether independent due diligence checks should be undertaken in the case of joint-venture applications, especially in respect of agents. The report stated that the

“possibility” of such a requirement should be examined and added that: “...the crucial issue is the effectiveness of the checks which ECGD carries out on agents. If these are not effective, the case for introducing independent due diligence checks may well become compelling”.

- 39 In the light of experience of operating the new procedures, the need to consider the use of independent third parties in conducting enquiries about joint venture participants’ agents has not occurred.

Experience of the operation of ECGD’s recourse provisions in the context of bribery and corruption and the application of English law to loan contracts

- 40 The TIC’s view was that where a contract fails because of bribery or corruption, ECGD should have the right to decline liability “irrespective of the complicity of the UK exporter seeking cover”. However, the Committee said that they found ECGD’s recourse provisions ‘acceptable’ but recommended that this review should examine the operation of the provisions.

- 41 The Government did not accept that its support, whether provided to an exporter or bank, should be made void where bribery and corruption was found to have taken place irrespective of the complicity of the exporter or bank.

- 42 ECGD support is more often than not provided to a bank which makes loans available to foreign buyers and project sponsors to enable them to purchase exports from British suppliers. There has been no occasion over the past 3 years where a bank that has benefitted from ECGD support has admitted, or been implicated or found guilty of bribery and corruption that has resulted in ECGD suffering loss and, therefore, required ECGD to consider voiding its support. Moreover, ECGD cannot refuse to indemnify a bank for the corrupt actions of another party.

- 43 Where an exporter has engaged in any corrupt activity in connection with the supply contract and ECGD has suffered loss, then under the recourse provisions the exporter will be required to reimburse any amounts ECGD has paid to the lending bank under its guarantee, along with any amounts which ECGD incurs by way of interest, costs, expenses and legal fees.

- 44 No applicant has refused to enter into the anti-bribery and corruption related recourse arrangements required by ECGD - specimen wording from ECGD’s standard recourse agreement is at Appendix D. In addition, ECGD has not had cause to make use of its recourse provisions. Therefore, the need to examine the operation of the provisions has not arisen.

- 45 The TIC also expressed the expectation that ECGD would insist that English law be applied to all loan contracts. As will be seen from Appendix C, in all cases supported by ECGD since July 2006, the loan contract was governed by English law.

- 46 As a result of examining the recourse provisions, it is recommended that some minor drafting changes could be usefully made to further clarify ECGD’s recourse

provisions. The principal one of these is that, in contractual circumstances where ECGD guarantees the repayment of a loan due to a bank, the definition of Corrupt Activity should, for the avoidance of doubt, provide that Corrupt Activity includes activity which has rendered the Loan Agreement illegal, void, voidable or unenforceable under its governing law, in the same way, and subject to the same safeguards, as Corrupt Activity may so render the Supply Contract in the Premium and Recourse Agreement.

- 47 Further drafting changes will almost certainly be required as and when the Bribery Bill becomes law: this is due to repeal the Acts which are currently the foundation of the definition of Corrupt Activity. ECGD may also need to consider at that juncture its questions in application forms concerning an applicant's Code of Conduct in relation to Corrupt Activity.

Experience of applying the procedures to applications that involve ECGD acting as reinsurer to another Export Credit Agency

- 48 "Reinsurance" in this context means any form of conditional commitment which an ECA undertakes to another ECA. It is usually given by way of counter-indemnity in respect of a guarantee given by the "reinsured" ECA. ECGD has no standing commitments to reinsure other ECAs against a particular risk or particular classes of risk; it can accept, reject or qualify any propositions put to it.

- 49 Propositions put to or by ECGD in relation to reinsurance fall into two categories. First, there are occasions when a number of exporters in different countries each have a separate direct contract with the same purchaser, i.e. parallel contracts. However, for the sake of the convenience of the purchaser, one ECA (usually the ECA in the country of the exporter with the largest value contract) may provide support for all the contracts and take reinsurance from the ECAs of the countries in which the other exporters are operating in relation to the value of the share of those exporters.

- 50 A second, and separate, instance of reinsurance is where an exporter in the UK has a contract, not with an end-buyer, but with another exporter abroad, i.e. a sub-contract. The overseas exporter then incorporates the goods of the UK exporter in a product which is sold to an end-buyer. For example, Rolls-Royce provides, on occasion, civil aeroplane engines to the Boeing Company of the USA which incorporates them on aeroplanes that it then sells under a 'head-contract' to airlines and aeroplane leasing operators. In these circumstances, it is often the case that the ECA in the country of the ultimate exporter will support the whole of the transaction, i.e. is the Lead ECA, and take reinsurance from the ECA in the country of the sub-contractor to the value of the sub-contract portion. In the case of the example quoted, this will invariably happen where there is ECA support for the transaction because US Ex-Im Bank is prohibited from supporting non-US content.

- 51 Issues have not arisen in reinsurance situations where:

- (a) ECGD is the ECA which provides support as the Lead ECA in a situation where the applicant is in the UK and is the main contractor and ECGD is reinsured by other ECAs in respect of sub-contracts; or
- (b) there are parallel contracts, whether ECGD is being reinsured or is the reinsurer.

Issues have arisen, however, where ECGD is providing reinsurance to a foreign ECA in the situation where the UK exporter sub-contracts with a foreign exporter who on-sells to the end-buyer.

- 52 The first issue which has arisen in the case of sub-contract reinsurance by ECGD is this: ECGD has, since 2006, attempted to apply all its standard provisions to the sub-contracts between British exporters and foreign exporters. In most cases this has been satisfactorily workable. However, there have been instances where this procedure has caused difficulty as a result of the multiplicity of sub-contracts involving a single foreign exporter; and, in particular, where those sub-contracts have been of small or negligible value.
- 53 In one case, fifty-nine UK aero-engineering firms each entered into a sub-contract with a foreign exporter, forty of which had a value of less than US \$10,000. The smallest sub-contract had a value of US \$5.17. The value of the foreign export under the head-contract was US \$3.9m.
- 54 The application of ECGD's standard procedures resulted in exporters having to complete application forms and provide representations and contractual rights including audit rights and recourse rights. The exporters considered that the documentation and obligations imposed on them were burdensome and out of proportion to the risk of bribery having occurred. Many of the smaller exporters were nervous about the potential costs involved in managing an ECGD audit. As a result, complaints were made to ECGD by some of the UK exporters concerned. An official complaint was also made by the US Head Contractor to ECGD's Secretary of State. ECGD was informed that its approach did not assist British exporters in winning business from the US exporter concerned.
- 55 In all applications of Government policy there is always a balance to be struck between different factors which indicate different, and sometimes opposite, courses of action. In this situation, the balance is between, on the one hand, the deterrence of corruption and protection to Exchequer funds and, on the other, not placing unworkable or unduly burdensome regulatory impositions upon British exporters in circumstances where the likelihood of corruption (due to the very small amounts involved) is very low.
- 56 It is considered that future policy, therefore, should be that ECGD, in circumstances where it reinsures a foreign ECA in a sub-contract situation, would exercise its discretion as to what procedures it ought to apply. It is inherent in the nature of a discretion that it is not possible to set down in advance exactly which procedures would be applied or disapplied in any particular future set of circumstances. It is expected, however, that the circumstances in which the discretion would be used would be similar to those described above and that the procedures most likely to be disapplied would be, in relation to the sub-

contractor, those of audit and recourse rights, and that the sub-contracts to which they are most likely to be disapplied would be those of small or negligible value, either absolutely, or in relation to the value of the completed product to be exported between the foreign exporter and the foreign buyer.

- 57 Against this background, it is recommended that ECGD should consult on making changes to the operation of its anti-bribery procedures where it provides reinsurance to another ECA in respect of sub-contracts in the circumstances described.
- 58 The second reinsurance issue which has arisen relates to the method of considering the propriety of the head-contract. The anti-bribery and corruption procedures fall into two broad categories. First, an ECA obtains information on which it may take a view, although it can never be a conclusive one, on whether the transaction is sufficiently likely not to be tainted by corruption that support should be provided. Second, ECAs take recourse provisions to deal with the situation where, despite evaluation of the information available in the first instance, the contract does prove to have been tainted by corruption and an ECA has suffered loss after its support has been provided.
- 59 Where an ECA provides reinsurance in a sub-contract situation, it may still obtain satisfactory recourse provisions by taking appropriate rights against a Lead ECA if that Lead ECA itself has such rights against the foreign exporter; or by taking recourse rights from the foreign exporter. The question arises as to whether a reinsuring ECA should attempt to form a judgement about the propriety of the head-contract in addition to that which the Lead ECA will make.
- 60 Practical issues arise if the reinsuring ECA does attempt to make an additional judgement about the propriety of the head-contract. The information about the head-contract, a contract in which the sub-contractor is not directly involved, is provided by the foreign exporter to the Lead ECA in whatever format that Lead ECA operates for the provision of that information. This raises issues about how an ECA that reinsures the Lead ECA should form its judgement if the information provided to a Lead ECA is not identical with that requested under the procedures of a reinsuring ECA; and if it is not, moreover, capable of being provided to the reinsuring ECA.
- 61 For example, a foreign exporter, and the Lead ECA, may be unwilling to provide some commercially confidential information to a reinsuring ECA. As was set out in paragraph 77 of the Final Response to the Consultation on ECGD's anti-bribery procedures in 2006, in relation to the names of agents of Consortium Partners of British exporters, it is unworkable to expect potential rivals and competitors to exporters to provide confidential information to those exporters, or to the ECA of those exporters. The logic of that situation applies as much to the sub-contract scenario as to the situation where there are Consortium Partners.
- 62 ECGD's experience of these situations during the last three years has not been extensive. In such cases as have arisen, it has, in the first instance, explored the possibility of making an additional judgement of its own on the propriety of the head-contract. The effect of ECGD attempting to make its own judgement on something on which it is the duty of an OECD Lead ECA, pursuant to the Bribery

Recommendation, to make a judgement has been to cause some friction with overseas ECAs and that has a potentially detrimental effect upon the business opportunities of British exporters.

63 In a small number of cases it has not been feasible to form an additional judgement on the propriety of the head-contract based on all the information that ECGD would have if it were the Lead ECA. The difference has been about the head-contractor's agent. ECGD's view in those cases has been that it is not necessary to form its own view on the basis of information it would have if it were in the lead; and that it is appropriate to rely on the judgement of an ECA (US Exim in all the material cases) which was a member country of the OECD and thus applied the Bribery Recommendation with enquiry procedures of broad equivalence to those of ECGD.

64 It is therefore proposed that, where ECGD reinsures an ECA of a country that is a member of the OECD, to elaborate and formalise the view taken in the cases referred to above in the following way:

- (a) in respect of the sub-contract, it will be ECGD's policy to apply all its standard procedures¹². This would involve amongst other things the submission of an application form and appropriate recourse provisions to take effect should the British exporter have been complicit in corruption; and
- (b) in respect of the head-contract, ECGD should accept the processes of the Lead ECA to decide whether the head contract is likely to have been tainted by bribery or corruption and, in relation to recourse rights, follow one of two courses:
 - (i) investigate with the Lead ECA what its recourse rights are against the foreign exporter and, if in ECGD's judgement they are satisfactory, take recourse rights from the Lead ECA; or
 - (ii) take recourse rights from the foreign exporter.

In both cases, the recourse rights would be co-extensive with ECGD's contingent loss.

65 This procedure would not apply where ECGD reinsures an ECA of a country which is not a member of the OECD; in such a situation, ECGD would seek to apply all its procedures to the head contract. Nor does this procedure apply to the reinsurance by ECGD of the French and German ECAs on Airbus transactions; in such transactions the supply by the British parts of the Airbus group is regarded as a supply to the end-purchaser rather than a sub-contract.

Response to OECD Phase 2bis recommendations

66 In 2008, the OECD conducted a peer review of the UK's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in

¹² Subject to paragraph 55 above.

International Business Transactions. In its report dated 16 October 2008¹³, the OECD Working Group on Bribery made two recommendations concerning ECGD which are addressed below.

67 Recommendation 7(a) of the Working Group on Bribery and International Business Transactions states: “.. in any case where a criminal investigation into a transaction supported by ECGD has been blocked for reasons other than on its remits, [ECGD should] make vigorous use of all its powers, including notably its audit powers, to investigate whether the transaction involves foreign bribery (Convention Article 3(4), Revised Recommendation Paragraph I). ECGD notes the recommendation.

68 Recommendation 7(b) of the Working Group on Bribery and International Business Transactions states: “... the Working Group recommend that the Export Credits Guarantee Department (ECGD): (b) review its general contracting policies for future transactions to address policy issues raised by cases that cannot be investigated by criminal law enforcement authorities (Convention Article 3(4)¹⁴, Revised Recommendation Paragraph I¹⁵).”

69 In elaboration of this, the Working Group stated:

“283. Second, if support is still to be provided under some circumstances where there is risk of foreign interference with UK criminal proceedings, a second more technical policy question relates to who should bear the risk of financial loss if there is alleged bribery by a client or someone acting on its behalf in relation to an insured contract after the insurance is issued, but it cannot be proved in court because investigation is precluded under UK law by national security or other concerns unrelated to the merits. Given the current standard which requires a conviction or an admission of bribery, it would appear that this risk may remain with ECGD which may not be appropriate.

284. A variety of approaches could be considered. Consideration could be given to requiring clauses that would seek to exclude coverage in the event of any foreign government interference in the future with regard to the newly covered transaction. Such clauses

¹³ www.oecd.org/dataoecd/23/20/41515077.pdf

¹⁴ Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official. The explanatory note says:

Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

¹⁵ Revised Recommendation Paragraph I:

[The OECD Council]
RECOMMENDS that Member countries take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.

would appear to be justified not only by the fight against corruption, but also by the financial interests of the export credit agency because its recourse may be limited in the event criminal proceedings are discontinued.

285. Changes could include giving ECGD the power to terminate its support or seek recourse in defined circumstances. They could also include a requirement that insured contracts in appropriate cases expressly clarify that any “confidentiality” understandings, such as those that were alleged to be implicit in the Al Yamamah arrangement, should be understood by all parties not to affect normal UK criminal proceedings. They could provide ECGD with special audit and other rights if the criminal process is terminated other than on the merits.”

70 The Working Group’s concern is predicated in the first instance on the view that ECGD may be bearing a risk of financial loss where it should not be doing so. The risk of financial loss referred to might mean either financial loss caused by corruption, or financial loss caused in any other way.

71 In the former case, such a financial loss would only occur when the exporter, or (in the majority of cases) the bank, whom ECGD agrees to indemnify, is not paid that which is owed to it because the obligations to repay have been vitiated by corruption. Where the indebted party does not seek to have its debt obligations vitiated in such a manner¹⁶ it would be impossible that ECGD should suffer financial loss, or the risk of it, as a result of corruption.

72 If the latter meaning is intended - that the financial risk of loss caused otherwise than by corruption should be transferred to the exporter or bank - a number of issues arise, since the effect would be to penalise an exporter because of the combination of an unproven allegation and an act of another party beyond his control. Moreover, the penalisation would take the form of a removal of protection against a potential loss not caused by the substance of the allegation even if it were proven.

73 ECGD is not aware that any other OECD ECA puts such terms in its contracts and considers that it would be unworkable to do so because:

- (a) of the formidable difficulty of defining “foreign government interference” and how such interference could be evidenced or proven;
- (b) where representations have been made by a foreign government which has caused Her Majesty’s Government to consider, in the British national interest, that a criminal investigation should not be continued, it follows that the British national interest will, equally, not lie in favour of ECGD asserting and, if necessary, litigating in a British Court, the proposition that there has been “foreign government interference”;

¹⁶ In the case the Working Group was considering, it was the reaction of the indebted party which allegedly caused the investigation to be halted.

- (c) the removal of cover from an exporter, which it has contracted and paid for, in circumstances where an investigation of alleged corruption has been halted because of representations made by an overseas Government or there has been “foreign government interference”, would take place where there will not have been an admission by, or proof of guilt against, the alleged wrongdoer. It is inappropriate to penalise such a party or prejudge what defence that party might have put forward if the case had proceeded;
- (d) the purpose of any ECA support is to further the interests of the exporters of the country concerned, and to insert a restriction on the provision of that support, if a foreign government has chosen “to interfere”, would render any ECA’s contract of negligible or non-existent interest to an exporter because of the absence of certainty as to what would constitute foreign government interference, the conditionality of the support and the fact that the occurrence of the event which would trigger the removal of support was beyond the control of the exporter; and
- (e) removal of support would to an even greater extent be unjust (and defeat the purpose of ECA support) in most ECGD transactions since its support is usually provided to a bank that makes loans available to finance the purchase of goods and services from UK exporters. There have been no instances in ECGD transactions where it has been alleged or asserted against a bank that it has been guilty of corruption and for ECGD to deny coverage to a bank in circumstances where there has been “foreign government interference” in relation to a prosecution of an exporter would be unfair and inappropriate.

74 ECGD considers that paragraph 285 of the Working Group’s report is misconceived. The suggestion made to the Working Group by ECGD, both in writing and in oral evidence in 2008, was not that “any confidentiality understandings” precluded UK criminal proceedings; what they precluded was ECGD making any comment to the Working Group about what information it had or had not received from the prosecuting authority and what actions it had or had not taken as a result. The suggestion therefore made in paragraph 285 as to what might be placed by ECGD in contracts of support appears to be based on a misunderstanding.

CONCLUSION AND SUMMARY OF RECOMMENDATIONS

75 ECGD’s revised anti-bribery and corruption procedures have operated satisfactorily since they were implemented in July 2006. The changes proposed are, in summary:

- (a) minor drafting changes should be made to ECGD’s application forms and standard documentation in order to further clarify the recourse provisions;
- (b) for reinsurance cases, where ECGD is the reinsurer in a sub-contract situation, it should consult on having the discretion to determine the

occasions on which it will apply its procedures to sub-contracts of low value.

ECGD

1 December 2009

Appendix A: The role of ECGD in regards to bribery and corruption

Appendix B: ECA Benchmarking

Appendix C: Data related to experience July 2006-June 2009

Appendix D: Specimen recourse wording

Role of ECGD in regards to bribery and corruption

Extract from the Government's Final Response to ECGD's Consultation on changes to its anti-bribery and corruption procedures.

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

- (i) ECGD is expected to take reasonable precautions, including making reasonable enquiries, to avoid financial loss by becoming involved in transactions tainted by bribery or corruption;
- (ii) judgements about those precautions have to be made within the timescale of the commercial transactions which ECGD has been asked to support and in the absence of statutory powers of investigation;
- (iii) whilst ECGD must make the best judgement it reasonably can on whether a transaction is likely to involve corrupt practices, ECGD cannot guarantee that a transaction with which it is involved may not subsequently prove to be tainted because it is working at arms length from those entering into export contracts and because of the timescale referred to and the absence of statutory investigative powers;
- (iv) it is appropriate, in consequence, that any investigations which ECGD is able to make before entering into arrangements should be supplemented by contractual powers enabling ECGD to have financial recourse to Applicants in specified circumstances should transactions subsequently prove to have been tainted by corruption;
- (v) the responsibility for the detection, prevention and suppression of criminal offences resides with law enforcement bodies, who carry out investigations when appropriate;
- (vi) it is legitimate and appropriate nevertheless for ECGD, in view of both the moral and business cost of corruption, to play a wider part in that effort than one restricted solely to the protection of the Exchequer interest in transactions to which it makes a commitment;
- (vii) but that wider role does not extend to its conducting a more thorough-going pre-contract investigation of the potential existence of bribery and corruption. As a result, it cannot guarantee to expose every incident of bribery and corruption;
- (viii) the wider role, instead, involves the deterrence of bribery and corruption, for instance: by the reporting of all suspicious circumstances to the Serious Fraud Office, with the consequence that a decision will be made regarding investigation by criminal investigative bodies; by the imposing of appropriate contractual consequences should bribery and corruption transpire to have taken place in a supported transaction; and/or by applying the principles set out in Annex D to the Interim Response on the withholding of support in future transactions for those who have been found guilty of bribery and corruption.

ECA BENCHMARKING

The table below sets out the positions of the ECAs of the G7 countries (ECGD – UK; Coface – France; Hermes – Germany; SACE – Italy; Exim – US; EDC – Canada; JBIC & NEXI – Japan) against each of the specific recommendations OECD Council Recommendation on Bribery and Officially Supported Export Credits.

The key source document for this information is the OECD Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits (members' responses as at 31 July 2009)¹.

Important note: This Annex seeks to summarise the positions of each G7 country's ECA by analysing their responses to the above Survey, but it should be noted that apparently differing practices can be due to different interpretations being made of the questions asked.

a) Informing exporters and, where appropriate, applicants, requesting support about the legal consequences of bribery in international business transactions under its national legal system including its national laws prohibiting such bribery and encouraging them to develop, apply and document appropriate management control systems that combat bribery.	
UK	Information is provided in application forms (which also specifically ask applicants if they have a Code of Conduct in place to discourage and prevent corrupt activity and, if so, to attach a copy) and on ECGD's website. Provisions are also included in policy documentation.
France	Information is provided in application forms, in a standalone document submitted by applicants, in the general conditions of cover and on the web.
Germany	Information is provided in application forms, in the general conditions of cover, on the web and in customer publications.
Italy	Information is provided in application forms, in a standalone document provided to applicants, in the general conditions of cover and on the web.
US	Information is provided in application forms, on the web and in customer publications.
Canada	Information is provided in application forms, in a standalone document provided to applicants, on the web and in customer publications. EDC also writes to all new customers to provide them with a copy of an anti-corruption brochure.
Japan	Information is provided in application forms, in a standalone document submitted by applicants, in the general conditions of cover, in customer publications, on the web and communicated orally (in meetings and in exporter briefing sessions).
b) Requiring exporters and, where appropriate, applicants, to provide an undertaking/declaration that neither they, nor anyone acting on their behalf, such as	

¹ Available at http://www.oecd.org/document/13/0,3343,en_2649_34177_38608717_1_1_1_37431,00.html

agents, have been engaged or will engage in bribery in the transaction.	
UK	Required.
France	Required.
Germany	Required.
Italy	Required.
US	Required.
Canada	Required.
Japan	Required.
c) Verifying and noting whether exporters and, where appropriate, applicants, are listed on the publicly available debarment lists of the following international financial institutions: World Bank Group, African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development and the Inter-American Development Bank.	
UK	Always verify.
France	Always verify.
Germany	Always verify.
Italy	Always verify.
US	Always verify.
Canada	Always verify.
Japan	Always verify.
d) Requiring exporters and, where appropriate, applicants, to disclose whether they or anyone acting on their behalf in connection with the transaction are currently under charge in a national court or, within a five-year period preceding the application, have been convicted in a national court or been subject to equivalent national administrative measures for violation of laws against bribery of foreign public officials of any country.	
UK	Required.
France	Required.
Germany	Required.
Italy	Required.
US	Required.
Canada	Required.
Japan	Required.
e) Requiring that exporters and, where appropriate, applicants, disclose, upon demand: (i) the identity of persons acting on their behalf in connection with the transaction, and (ii) the amount and purpose of commissions and fees paid, or agreed to be paid, to such persons.	
UK	(i) Identity of agent <u>always</u> required. (ii) Amount of commission <u>always</u> required. Purpose of commission <u>always</u> required.
France	(i) Identity of agent sometimes required. (ii) Amount of commission sometimes required. Purpose of commission sometimes required.
Germany	(i) Identity of agent sometimes required. (ii) Amount of commission sometimes required. Purpose of commission sometimes required.
Italy	(i) Identity of agent sometimes required. (ii) Amount of commission always required. Purpose of commission sometimes required.
US	(i) Identity of agent sometimes required. (ii) Amount of commission sometimes required. Purpose of commission sometimes required.
Canada	(i) Identity of agent sometimes required. (ii) Amount of commission sometimes required. Purpose of commission sometimes required.
Japan	(i) Identity of agent sometimes required. (ii) Amount of commission

	sometimes required. Purpose of commission sometimes required.
f) Undertaking enhanced due diligence if: (i) the exporters and, where appropriate, applicants, appear on the publicly available debarment lists of one of the international financial institutions referred to in c) above; or (ii) the Member becomes aware that exporters and, where appropriate, applicants or anyone acting on their behalf in connection with the transaction, are currently under charge in a national court, or, within a five-year period preceding the application, has been convicted in a national court or been subject to equivalent national administrative measures for violation of laws against bribery of foreign public officials of any country; or (iii) the Member has reason to believe that bribery may be involved in the transaction.	
UK	Enhanced due diligence is taken in all the above cases.
France	Enhanced due diligence is taken in all the above cases.
Germany	Enhanced due diligence is taken in all the above cases.
Italy	Enhanced due diligence is taken in all the above cases.
US	Enhanced due diligence is taken in all the above cases.
Canada	Enhanced due diligence is taken in all the above cases.
Japan	Enhanced due diligence is taken in all the above cases.
g) In case of a conviction in a national court or equivalent national administrative measures for violation of laws against bribery of foreign public officials of any country within a five-year period, verifying whether appropriate internal corrective and preventive measures have been taken, maintained and documented.	
UK	Yes, would verify.
France	Yes, would verify.
Germany	Yes, would verify.
Italy	Yes, would verify.
US	Yes, would verify.
Canada	Yes, would verify.
Japan	Yes, would verify.
h) Developing and implementing procedures to disclose to their law enforcement authorities instances of credible evidence of bribery in the case that such procedures do not already exist.	
UK	Procedures are in place.
France	Procedures are in place.
Germany	Procedures are in place.
Italy	Procedures are in place.
US	Procedures are in place.
Canada	Procedures are in place.
Japan	Procedures are in place.
i) If there is credible evidence at any time that bribery was involved in the award or execution of the export contract, informing their law enforcement authorities promptly.	
UK	Law enforcement authorities are always informed.
France	Law enforcement authorities are always informed.
Germany	Law enforcement authorities are always informed.
Italy	Law enforcement authorities are always informed.
US	Law enforcement authorities are always informed.
Canada	Law enforcement authorities are always informed.
Japan	Law enforcement authorities are always informed.

j) If, before credit, cover or other support has been approved, there is credible evidence that bribery was involved in the award or execution of the export contract, suspending approval of the application during the enhanced due diligence process. If the enhanced due diligence concludes that bribery was involved in the transaction, the Member shall refuse to approve credit, cover or other support.	
UK	Approval of the application would be suspended pending the outcome of the enhanced due diligence process.
France	Approval of the application would be suspended pending the outcome of the enhanced due diligence process.
Germany	Approval of the application would be suspended pending the outcome of the enhanced due diligence process.
Italy	Approval of the application would be suspended pending the outcome of the enhanced due diligence process.
US	Approval of the application would be suspended pending the outcome of the enhanced due diligence process.
Canada	Approval of the application would be suspended pending the outcome of the enhanced due diligence process.
Japan	Approval of the application would be suspended pending the outcome of the enhanced due diligence process.
k) If, after credit, cover or other support has been approved bribery has been proven, taking appropriate action, such as denial of payment, indemnification, or refund of sums provided.	
UK	Cover is sometimes invalidated; claims are sometimes not indemnified; recourse is sometimes sought for claims paid.
France	Loan disbursements are always interrupted; claims are always not indemnified; recourse is always sought for claims paid.
Germany	Loan disbursements are always interrupted; cover is always invalidated; claims are always not indemnified; recourse is always sought for claims paid.
Italy	Cover is always invalidated; claims are always not indemnified; recourse is always sought for claims paid.
US	Recourse is sometimes sought for amounts disbursed; recourse is sometimes sought for claims paid.
Canada	Loan disbursements are sometimes interrupted; cover is sometimes invalidated; claims are sometimes not indemnified; recourse is sometimes sought for amounts disbursed; recourse is sometimes sought for claims paid.
Japan	JBIC: Loan disbursements are always interrupted; recourse is sometimes sought for amounts disbursed. NEXI: Cover is always invalidated; claims are always not indemnified; recourse is always sought for claims paid.

DATA RELATED TO EXPERIENCE – JULY 2006-JUNE 2009

(Years run from 1 July to 30 June)

APPLICATIONS

	06/07	07/08	08/09
Total number received	36	34	68
Number of applications disclosing the existence of an agent	8	6	11
Number of applications disclosing the existence of JV/consortium partner	4	2	4
Number of applications involving SMEs	12	11	13

REINSURANCE TO ANOTHER ECA

	06/07	07/08	08/09
Applications	4	2	2
Issued cases	2	3	4

USE OF SPECIAL HANDLING ARRANGEMENTS FOR AGENTS (“SHAs”)

	06/07	07/08	08/09
Number of applications requesting use of SHAs	1	0 ¹	6 ²
Number of applications on which an applicant's consent was sought for the making of inquiries	1	0	5
Number of applications on which an applicant refused consent for the making of inquiries	0	0	0
Number of applications where cover was refused because (i)the applicant refused its consent for inquiries or (ii) ECGD was not satisfied, following its enquires, concerning the agent	0	0	0
Number of cases supported on which the applicant refused consent to make inquiries concerning its agent	0	0	0

¹ Six applications were received where the SHA box had been ticked. However the applicant either misunderstood the purpose of the SHA or the relevant box on the application form had been ticked in error (eg there was no agent involved).

² One application requested SHA but on a superseding application did not and provided details of the agent.

JOINT VENTURES AND CONSORTIUM PARTNERS

	06/07	07/08	08/09
Number of applications disclosing the existence of JV/consortium partner	4	2	4
What proportion of applicants, who were party to a JV, disclosed all parties to that JV	100%	100%	100%
What proportion of applicants, who were party to a JV, refused to disclose any of its JV partners	0%	0%	0%
Number of JV applications disclosing the existence of an agent	0	0	0
What proportion of applicants, who were party to a JV, disclosed the names of all agents acting on their JV's behalf	N/A	N/A ³	N/A

DUE DILIGENCE

	06/07	07/08	08/09
What was the proportion of applications on which all relevant names were checked against the publicly available debarment lists of the IFIs specified in the OECD Recommendation	100%	100%	100%
What proportion of checks against the above identified any potential problems/issues	0%	0%	0%
What proportion of applicants disclosed the existence of a corporate code of conduct or the equivalent	70%	61%	68%
What proportion of those applicants with a code of conduct provided a copy (where not previously provided)	100%	100%	100%
What proportion of Applicants refused to provide any additional information, when requested, relating to a bribery and corruption issue	0%	0%	0%
What proportion of Applicants disclosed that they, or anyone acting on their behalf, were under charge or, within the last five years, had been convicted of bribery or corruption in a UK court	0%	0%	0%
What proportion of Applicants disclosed that they, or anyone acting on their behalf, had been subject within the last five years to any administrative sanction or measure in the UK for bribery or corruption	0%	0%	0%
What was the proportion of Applicants that were the subject of allegations made to ECGD relating to bribery or corruption in respect of the contract for which ECGD support was requested	0%	0%	0%

³ No agents involved.

What was the proportion of Applications rejected by ECGD because of bribery or corruption-related issues	0%	0%	0%
What proportion of Applications, in which the existence of an agent was disclosed, were subject to inquiry by ECGD with the relevant UK overseas diplomatic mission on the standing of that agent	25%	66%	100%

CASES SUPPORTED BY ECGD

	06/07	07/08	08/09
Number of cases supported	8	15	26
Number of supported cases on which the existence of an agent was disclosed	2	3	2
Number of supported cases on which the existence of a JV was disclosed	3	1	0
Number of supported cases on which the Loan Contract was not governed by English Law	0	0	0

ALLEGATIONS AND RECOURSE

	06/07	07/08	08/09
Number of specific allegations of corruption received by ECGD	0	0	0
Number of specific allegations of corruption referred to the appropriate UK authorities	0	0	0
Number of cases in which ECGD sought to enforce its recourse rights against an exporter because of corrupt activity	0	0	0

SPECIMEN RECOURSE WORDING

6 ANTI-CORRUPTION PROVISIONS

6.1 The Supplier warrants and undertakes that it:

6.1.1 has not engaged, and will not engage, in any Corrupt Activity in relation to the Supply Contract or any Related Agreement; has not authorised and will not authorise any person to engage in such Corrupt Activity; has not consented to or acquiesced in, and will not consent to or acquiesce in, any such Corrupt Activity on the part of any person; and has required, or, as the case may be, shall require, anyone acting on its behalf (with due authority) who has been, or is, involved in obtaining or performing the Supply Contract or any Related Agreement not to engage in any Corrupt Activity (or any activity which, subject to the occurrence of the subsequent events referred to in Clauses 1.9.1, 1.9.3 and 1.9.4, would amount to Corrupt Activity) in relation to the Supply Contract or any Related Agreement;

6.1.2 will monitor compliance with that requirement; and

6.1.3 will take appropriate action against anyone who has engaged, or engages, in any Corrupt Activity.

6.2 If the Supplier becomes aware that any Consortium Partner or anyone (including any of the Supplier's or that Consortium Partner's employees) has engaged in Corrupt Activity (or any activity which, subject to the occurrence of the subsequent events referred to in Clauses 1.9.1, 1.9.3 and 1.9.4, would amount to Corrupt Activity) in connection with the Supply Contract or any Related Agreement, the Supplier shall promptly notify ECGD accordingly and supply ECGD with full details of the Corrupt Activity in question save where such notification would, or might reasonably be argued to, constitute the offence of "tipping off" under section 333 of the

Proceeds of Crime Act 2002.

6.3 If the Supplier or anyone (including any employee) acting on the Supplier's behalf (with due authority) or with the Supplier's prior consent or subsequent acquiescence, has engaged, or engages, in any Corrupt Activity in connection with the Supply Contract or any Related Agreement, the Supplier [Companies] will, on demand, pay to ECGD:

6.3.1 any amounts that ECGD certifies it has paid to the Banker in respect of any loss or expense the Banker has incurred in respect of amounts advanced under the Loan Agreement; [and]

[6.3.2 any amounts that ECGD certifies as being the net cost to ECGD of making payments to the Banker in respect of advances under the Loan Agreement by way of interest equalisation or make up; and]

6.3.[3] any amounts that ECGD certifies it has incurred by way of interest, costs, expenses and legal fees, under or in connection with the Loan Agreement, the [Premium and] Support Agreement or this Agreement

following the earlier of the date on which the relevant Corrupt Activity occurred or the date with effect from which the Supply Contract, or any Related Agreement, became illegal, void or unenforceable under its governing law as a result of that Corrupt Activity.