UK Export Finance

Proposals to make changes to the Secretary of State's powers under the Export and Investment Guarantees Act 1991 (as amended)

Government Response to the public consultation

June 2014

Contents

Introduction

1. The public consultation on proposals to make changes to powers under s.1(1) of the Export and Investment Guarantees Act 1991 as amended by the Industry and Exports (Financial Support) Act 2009 (the "**EIGA"**) was launched on 19 March. Responses were invited from interested parties by 16 April 2014.

2. The consultation document outlined the proposals and rationale to widen the powers of UK Export Finance[1] (under s.1(1) of the EIGA) in order to help to maximise its ability to support UK exports. For convenience, these are reproduced at Annex A.

3. There were 43 responses[2] received during the consultation period from a wide variety of sources including exporters, financial institutions, business groups and representative bodies, Non-Governmental Organisations (NGOs) and legal firms – see Annex B. The government is grateful for these submissions which have been taken into account in its Response.

4. Broadly, the proposed changes were welcomed; in particular, they received widespread support from industry.

5. A number of respondents proposed additional changes as follows:

    a. the legal status of the Department should be changed so that it operates as an "arms-length" body;
    b. the requirement to consult the Export Guarantees Advisory Council on reinsurance matters should be abolished;
    c. there should be only one name (legal and operational) for the Department;

[1] UK Export Finance is the operating name of the Export Credits Guarantee Department
[2] Three of these responses were jointly representing the views of more than one organisation.

d. the Secretary of State should be empowered to ban support for certain classes and types of exports i.e. be able to establish a "prohibition list";
e. there should be a requirement for all applications for support to be assessed for their environmental, social and human rights ("ESHR") impacts;
f. a statutory "duty of care" towards those affected by the provision of UK Export Finance support should be imposed; and
g. there should be a statutory duty for UK Export Finance to act in way that is always consistent with government policy.

6. A number of the submissions were concerned about the need for improvements to be made to UK Export Finance's products, processes, services and approach to supporting exports. None of these would require changes to be made to the EIGA if implemented. Although these comments and suggestions will not be ignored, they are outside the scope of the Public Consultation and are disregarded for the purposes of making the government's Response.

7. A number of submissions were concerned about the lack of an impact assessment, for example, in regards to debt sustainability, the environment and human rights. Moreover, one submission considered the proposals were not aligned with the government's trade policy in respect of achieving an increase in low carbon and green exports.

8. This Response addresses:

a. the comments made about the government's proposals;
b. the further proposals suggested by respondents that would require legislative change to bring about; and
c. the concerns expressed about the lack of consistency with government trade policy and of an Impact Assessment.

Comments on the government's proposals

9. Specific mention was made in some of the responses about the alignment of the proposals with the government's National Export Challenge; they were regarded as an important step in supporting businesses in contributing to meeting this challenge.

10. A number of responses specifically welcomed the proposal that UK Export Finance should have the ability to provide support for a wider variety of contractual arrangements than may currently be considered. Responses, including those from Caterpillar UK Ltd, Thales UK, BCECA/ Air Products, BIBA, Sovereign Star and Deutsche Bank, made references to the increasing prevalence of more complex sales and financing structures whereby exports take place from the UK through arrangements other than simple contracts of supply between a UK seller and an overseas buyer. It was noted by Deutsche Bank that:

> "the UK exporting community should benefit from greater flexibility in the type of exports that can be supported by UK Export Finance, but also the changes would appear to reflect the commercial reality of complicated supply chains and overseas JVs and subsidiaries used in many contracts".

11. The Scottish Council for Development and Industry (SCDI) welcomed the proposal that UK Export Finance should be able to provide support beyond established exporters to also include companies contemplating exporting or in an exporting supply chain.

12. There was significant support from respondents for the proposal to break the direct link between possible UK Export Finance support and actual or contemplated supplies of goods and services to overseas parties. RBS/ Nat West commented that businesses that are not the "exporter of record" were

recognised as vital contributors to the overall UK export effort through their supply to existing exporters.

13. The government's view is that having a broadly-defined power for UK Export Finance to support these different types of arrangements, which are reflective of the way in which cross-border trade takes place, will also allow UK Export Finance to respond more quickly and flexibility to different business and contracting models, without being unnecessarily constrained by statutory restrictions. Further, UK Export Finance support for businesses contemplating exporting or in export supply chains, as well as direct exporters, may help more companies to develop their own capacity to export directly over time.

14. Some respondents saw the proposals to broaden UK Export Finance's powers as important in the context of it being able to provide support that is closer to that offered by the export credit agencies ("ECAs") of other countries. The response from ADS expressed the view that a driver to the changes being sought should be to ensure that a level playing field existed for UK business when competing for overseas orders. SCDI also considered that the proposed changes were required to ensure that "UK exporters remain internationally competitive and receive support on par with their competitors".

15. Caterpillar UK cited other ECAs - ONDD in Belgium and EKN in Sweden - as having broader powers to support Belgian or Swedish interest in the widest sense. The response from Sovereign Star commented that the powers of EDC in Canada "are cast very widely so that it can operate to the fullest extent in the provision of support for Canadian business". Lloyds Banking Group highlighted US Ex-Im Bank's Supply Chain Finance Guarantee Program as an example of a type of product that could be offered by UK Export Finance under widened powers.

16. The government considers that broadening UK Export Finance's powers will help to bring about closer equivalence with the products and services offered by other comparable ECAs and permit UK Export Finance to provide to UK exporters, and businesses in the UK who wish to export or are involved in UK

exporting supply chains, similar support to that available to their overseas competitors.

17. Some responses specifically mentioned the proposal to broaden UK Export Finance's ability to support exports of intangibles (including intellectual property rights). They fully supported the proposal. The BBA's view was that "...businesses engaging in these [intangibles] can play a key role in providing new growth and contributing to the economy".

18. The government considers that exporters of intangibles such as intellectual property rights should also be able to benefit from UK Export Finance support as well as exporters of traditional goods and services.

19. The Corner House and ADS considered that an expansion of UK Export Finance's powers might result in off-shoring jobs from the UK and allow overseas companies to benefit from UK Export Finance support at the expense of those carrying on business in the UK.

20. With regard to support for specific export contracts, there are no plans to alter the existing requirement for there to be a minimum level of UK content.

21. The submission from Global Infrastructure Anti-Corruption Centre recommended that a corruption risk assessment should be undertaken by UK Export Finance in relation to new areas of business. This is unnecessary as UK Export Finance will continue to apply its anti-bribery policies[3] to all export transactions it is asked to support and, as far as practicable, to its support for export supply chains and exporters in general. It will also continue to follow the *OECD Council Recommendation on Bribery and Officially Supported Export Credits.*

Other suggested changes made by respondents

Amend the status of UK Export Finance

[3] http://webarchive.nationalarchives.gov.uk/20130109053809/http://www.ukexportfinance.gov.uk/Consultations/anti-bribery-corruption-procedures?cat=closedwithresponse

22. A number of respondents suggested that changes should be made to the governance and regulation of UK Export Finance. These included making UK Export Finance an “arms-length” body and removing the need for the Department to operate under Treasury Consent.

23. From time to time, a number of alternative operating models have been considered for UK Export Finance, including becoming a public corporation, but its status as a Department of State has remained. While being open to consider other models, the government has not on this occasion contemplated any statutory change to the present status of UK Export Finance. This would necessarily require a thorough review given that there will be advantages and disadvantages to different operating models. The government has no plans to review UK Export Finance’s status in the foreseeable future and, therefore, this suggestion will not be taken forward. Nor will the suggestion to remove the statutory requirement for UK Export Finance to operate under the Consent of HM Treasury, which protects the interests of the taxpayer.

Remove the requirement to consult the Export Guarantees Advisory Council on the provision of reinsurance

24. A proposal was made to remove the requirement to consult the Export Guarantees Advisory Council (EGAC) on the provision of reinsurance to the private sector - section 13(4) of the EIGA.

25. Under the EIGA the Secretary of State has a statutory duty to consult the EGAC on matters related to the provision of reinsurance by UK Export Finance to export credit insurers. This duty came about through the passage of the Export and Investment Guarantees Act 1991, which facilitated the privatisation of UK Export Finance’s Insurance Services Group that provided credit insurance for exports sold on short terms of credit. The purpose of the duty was to address Parliament’s concern that there should be no loss of support to exporters as a consequence of the privatisation. In practice, the

government has not had to consider the provision of reinsurance to the private market for over a decade.

26. The results of the Triennial Review of the EGAC were announced shortly before the start of this consultation in March 2014. It concluded that the EGAC's role of providing independent and expert advice to Ministers, principally on the application of UK Export Finance's ethical policies was still required and that it should be retained as an advisory non-departmental public body. The Review acknowledged that the current EGAC membership did not have any reinsurance expertise.

27. Given the focus of the EGAC on ethical issues, and taking into account that it has not been necessary to seek advice on reinsurance matters for many years, the government considers that the requirement for the Secretary of State to consult with the EGAC on reinsurance is a relic from the part privatisation of UK Export Finance over 20 years ago. The government will therefore propose an amendment to the EIGA to remove this requirement.

Remove the confusion of operating under two different names

28. A number of respondents argued that the use of the names "UK Export Finance" and "Export Credits Guarantee Department" (ECGD) in different forms, for example, legal documents, marketing material, etc. was unnecessarily confusing.

29. Whilst there is merit and simplicity in using only one name for the Department, the government has decided to retain both names. The formal name of ECGD is internationally recognised by overseas buyers and investors. Parties transacting with UK Export Finance often take comfort from its status as a Ministerial government department and retaining ECGD as its formal name serves to reinforce this status.

Empower the Secretary of State to prohibit sector classes and types of exports from receiving support

30. A number of responses, all from NGOs (Amnesty International, CAAT, CORE Coalition, The Corner House, ECA Watch, Friends of the Earth/FoE Scotland, Greenpeace, Jubilee Debt Campaign, Platform and WWF), argued that the Secretary of State should be given powers to ban support for certain exports including those relating to coal-fired power projects, fossil fuel energy extraction, production and generation, mining equipment which extracts coal and defence.

31. This suggestion would undermine the general principle of administrative law that Ministers and public bodies should not limit their discretion to exercise their statutory powers but should consider each case on its merits. The government takes the view that, in accordance with this principle, the Secretary of State (through UK Export Finance) should be able to consider each application for support on its own merits, taking into account government policy in the round. Prohibition lists by their nature do not allow Ministers to have an open mind and, through unforeseen consequences, may compel support to be rejected for projects that the government wishes UK Export Finance to support.

32. If the UK were to isolate itself through unilaterally prohibiting UK Export Finance support for certain types of export, other overseas ECAs would be under no obligation to follow suit and UK exporters would find themselves at a competitive disadvantage compared to their overseas rivals. Competition for UK exporters is coming increasingly from non-OECD countries such as China or Brazil, whose ECAs are not obligated to follow the OECD agreements in regards to ESHR that member ECAs must follow. The government is therefore concerned that unilateral prohibitions by UK Export Finance in certain sectors would simply force overseas buyers to purchase from suppliers in non-OECD countries, resulting in the potential for no or lower levels of ESHR due diligence than if UK companies were to be involved with support from UK Export Finance.

33. Furthermore, the leverage of the UK to effect multilateral change could potentially be reduced if the UK were no longer involved in export support for

certain sectors through operating a self-imposed unilateral prohibition on UK Export Finance support: it is through multilateral action that meaningful change is more likely to be achieved.

34. Finally, the government considers that unilaterally prohibiting UK Export Finance support for certain industry sectors would not be the most effective way to achieve wider policy objectives. Given that UK Export Finance supports a relatively small percentage of UK exports, any unilateral ban on UK Export Finance support may not have a major impact on wider policy objectives unless accompanied by an absolute ban on such exports. The government regulates exports through the export licensing system and policy for export licensing is the responsibility of the Export Control Organisation, not UK Export Finance.

35. A number of responses from NGOs specifically referenced coal fired power projects. The UK government has already taken steps to define its position on public financing for new coal power plants overseas and to play a leadership role internationally. In November 2013 the UK government announced (via a written ministerial statement by the Secretary of State for Energy and Climate Change[4]) that it will end support for public financing of new coal-fired power plants overseas, except in rare circumstances. This position was taken in recognition of the fact that support for coal-fired energy production risks locking countries in to higher levels of carbon emissions over the coming decades, reducing our chances of avoiding dangerous climate change.

36. The government is working to secure the support of other countries and Multilateral Development Banks (MDBs) to adopt similar policies on coal power.

37. In relation to export credits, UK Export Finance has co-sponsored a proposal with the US government to introduce an emissions performance standard for new power plants within the OECD rules on export credit support, at a level which would effectively rule out unabated coal. It should also be noted that UK

[4] http://www.parliament.uk/documents/commons-vote-office/November-2013/21%20November/3-DECC-Coal.pdf

Export Finance has not supported the financing of a new coal fired power plant overseas since 2002. Therefore, there is a strong case for seeking a multilateral solution.

Assess all Applications for support for ESHR impacts

38. Several responses proposed that the EIGA should be amended to include a requirement that all applications for support should be assessed for their EHSR impacts.

39. It is government policy that UK Export Finance should comply with international agreements that apply to ECAs. Such agreements principally emanate from the OECD. It is also government policy that UK Export Finance should not operate in a way which goes beyond the relevant international agreements. This was established in 2009/10, informed by a Public Consultation on revisions to UK Export Finance's (then) Business Principles[5]. The reason for this is that the government decided that British exporters should not be disadvantaged by UK Export Finance operating policies which are more onerous than those of other ECAs. In other words, UK exporters should compete on a level playing field.

40. One such international agreement is the OECD Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence ("OECD Common Approaches"). It sets out how ECAs should address the ESHR impacts of the projects they support. It relates to projects and the export of capital goods and services involving a repayment term of two years or more. The OECD Common Approaches requires projects to be categorised according to their potential ESHR impacts and to be constructed and operated in line with World Bank Group ESHR standards (or the local standards of the buyer's country if these are more stringent).

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5 http://webarchive.nationalarchives.gov.uk/20130109053809/http://ukexportfinance.gov.uk/Consultations/revisions-business-principles?cat=closedwithresponse

41. The reasons for the government's approach were explained in the Response to the 2009/10 Public Consultation. They remain valid. The government therefore has no plans to revise this policy.

Impose a "duty of care" on UK Export Finance towards those affected by its support.

42. Some responses from NGOs suggested that the changes to the EIGA should include the imposition of a statutory "duty of care" on UK Export Finance, specifically with regard to the ESHR impacts on anyone who might be adversely affected by UK Export Finance supported projects.

43. This suggestion lacked detail as to its purpose and scope but taking account of the context in which it was made, the government has assumed for the purposes of its Response that it is intended to create a legal duty owed to any person in any country affected by a project supported by UK Export Finance such that HM government should be liable for harm to persons or the environment caused by overseas companies or governments.

44. The government does not consider this suggestion is appropriate, reasonable, or one that to our knowledge, has been adopted by other ECAs. The primary responsibility for addressing the ESHR impacts of overseas projects lies with project sponsors and host governments. The World Bank Group standards set out how affected communities should be engaged by project sponsors, including the requirement to operate a grievance system.

45. In any event, a mechanism exists under the OECD Guidelines for Multinational Enterprises for parties to make complaints about business practices, including possible environmental and human rights abuses to a National Contact Point. In the UK, this is operated by the Department for Business Innovation and Skills.

Require all UK Export Finance's activities to be consistent with government policy

46. A number of NGOs argued that it should be enshrined in law that UK Export Finance must at all times follow government policy.

47. As is the case with all Departments of State, UK Export Finance operates within a government framework and is accountable, through Ministers, to Parliament in the exercise of its functions. No other Department of State is subject to a statutory requirement to follow government policy.

Alignment of proposals with government trade policy

48. The Corner House commented that the proposals to make changes to the EIGA ran counter to government policy objectives as referenced in the Trade and Investment for Growth White Paper (the "White Paper") to "help the shift to a green economy" and supporting a "rapid transition to a low carbon economy in the UK, and globally".

49. The White Paper makes clear that the government's trade policy is focussed on three overarching goals:

    a. maximising and realising the opportunities for businesses in the UK to trade and invest, and attracting investment into the UK;
    b. strengthening the multilateral trading system; and
    c. enabling developing countries to benefit from trade and investment

50. UK Export Finance plays a small but important role in achieving those goals in the context of its role to support exports by providing risk protection to exporters and to banks that finance exports, and, more recently, by lending directly to overseas buyers. In doing so, its role is to complement the provision of such support from the private sector. In other words, UK Export Finance responds to, rather than creates, demand for its products and services according to the ebb and flow at any one time of the private market's willingness to assume financial risk. Presently, UK Export Finance does not, and cannot, direct its support to particular classes and types of exports.

51. The sectors where demand for UK Export Finance's support will be high therefore reflect those in which UK exporters are most active. The quantum of demand for UK Export Finance support will reflect how successful those companies are in winning export orders.

52. The government does not consider that the EIGA, in its current form or as amended as contemplated by this consultation, runs counter to the goals of the White Paper. The White Paper explicitly committed an expansion in the support available to exporters from the government and the proposed changes to the EIGA are a further step in this direction.

Lack of an Impact Assessment

53. A number of NGO responses noted that no assessment of the human rights, social development, debt sustainability and environmental impacts of the proposed changes had been made by UK Export Finance. Although the objective of the proposals is to increase UK Export Finance's ability to provide support to exporters, or businesses who wish to be involved in exporting, the quantum of additional support that will result from this is not possible to gauge with any degree of confidence. It is expected that the majority of export transactions supported by UK Export Finance will continue to be related to actual or contemplated supplies of goods and services and could therefore be supported under its existing powers.

54. Evaluating the additional volume of business which might arise solely from export transactions that could not be supported under existing powers is impossible to judge, particularly as the demand for UK Export Finance services tends to be inversely proportional to the appetite of the private market for risk; during periods in which banks and credit insurers increase their appetite for providing finance and insurance relating to UK exporters and their overseas contracts, there is less demand for UK Export Finance's assistance but, conversely, a reduction in this risk appetite (such as occurred in 2008), tends to lead to an increase in the demand for UK Export Finance support. This pattern is expected to continue, regardless of widened powers.

55. It is also not possible to determine whether and to what extent any increase would result in ESHR impacts that could be measured. To do this it would be necessary to predict the types of exports, their destinations and the particular ESHR impacts which would result from those transactions that UK Export Finance might support under the proposed wider powers and that could not currently be supported. Plainly, so many variables are involved that the results of such an exercise would be meaningless.

Conclusion

56. On the basis of the support expressed, the government has decided to proceed with the proposals to make changes to the Secretary of State's powers under s.1(1) of the EIGA and will also remove the requirement under s13(4) to consult the EGAC on the provision of reinsurance. These changes, along with certain other technical amendments to the EIGA as mentioned in paragraph 12 of the Consultation document, will be taken forward in a Bill to be laid before Parliament.

Annex A: Proposed changes to the EIGA on which views were sought

1. The consultation outlined proposals to widen the powers of UK Export Finance (under s.1(1) of the EIGA) in order to help to maximise its ability to support UK exports, including by giving it:

   (i) a more generalised ability to assist and support businesses in the UK that are, or wish to become, involved in exporting or exporting supply chains, for example, by providing guarantees of general working capital facilities or by providing information or advice;

   (ii) the ability to support exports of intellectual property rights and other intangibles;

   (iii) more flexibility when supporting UK exports, in particular where there are complex contracting chains and financing arrangements or where exports are made via overseas subsidiaries or joint venture companies; and

   (iv) more scope to support projects and business ventures overseas to which goods or services sourced from UK exporters are directly or indirectly supplied.

Annex B: List of Respondents

Representative bodies

ADS
BBA
BExA
BCECA/Air Products
British Insurance Brokers' Association
North East Chamber of Commerce
Scottish Council for Development and Industry

Legal

Sullivan & Worcester UK LLP

Consultancy Services

Project Finance Services

MPs

Lisa Nandy MP

NGOs

Amnesty International
Campaign Against Arms Trade
Core Coalition
ECA Watch
Friends of the Earth/Friends of the Earth Scotland
Global Infrastructure Anti-Corruption Centre
Greenpeace
Jubilee Debt Campaign
Platform
The Corner House

Banking/Finance/Insurance

BNP Paribas
Deutsche Bank AG
HSBC
Lloyds Banking Group

RBS/NatWest
Societe Generale
Aon UK Ltd
TL Dallas & Co Ltd
Scion Capital (UK) Ltd
Sovereign Star

Exporters/Customers

BAE Systems
Bombardier
Caterpillar UK
GE Global Operations
Graham & Brown
JC Bamford Excavators Ltd
Macquarie AirFinance
NIS Holdings Ltd
Rolls Royce
Sabre Ballistics
Team Leyland International Ltd
Thales UK