Reports from the Business and Enterprise, Defence, Foreign Affairs and International Development Committees
Session 2008-09
Strategic Export Control: Her Majesty's Government's Annual Report for 2007 Quarterly Reports for 2008, Licensing Policy and Parliamentary Scrutiny
Response of the Secretaries of State for Defence, Foreign and Commonwealth Affairs, International Development and Business, Innovation and Skills

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Conclusions and recommendations

1. We conclude that we do not accept the comments of the then Economic and Business Minister that we had adequate opportunity to scrutinise the third tranche of secondary legislation. We therefore repeat our recommendation that, in future, the Government should ensure that interested parties have at least two months to comment on drafts of secondary legislation implementing the Government's conclusions on the outcome of its Review of Export Controls. (Paragraph 11)

The Government is sorry if the Committees feel that interested parties did not have sufficient time to comment on draft secondary legislation introduced as a result of the 2007 Review of Export Controls. We will endeavour in future to give stakeholders as much time as is possible to provide views in the event of further changes to the controls.

2. We conclude that it is of serious concern that the UK Government was unaware of the existence of a list of UK brokers granted licences by the Ukraine. We recommend that, in major arms exporting countries, such as Ukraine, the FCO should ensure that its embassies and diplomatic posts engage more effectively with the national export control organisations to obtain information on UK arms brokers licensed by overseas states. We further recommend that the Government should instigate an investigation into the list of UK brokers provided to us by the Ukrainian government and provide confirmation as soon as possible that the UK brokers on the list obtained any necessary licences from the Export Control Organisations and breached no UK legislation in the course of their business in Ukraine. We intend to return to this issue in our next Report. (Paragraph 22)

The Government would like to put on record again our thanks to the Committees for having undertaken the FCO-funded visit to Ukraine.

In answer to the Committees first point, the UK had already briefed the Ukrainian licensing authority on the introduction of the UK's new rules on licensing brokering transactions at an EU organised meeting in April in Kyiv prior to the Committees visit. This was part of a number of meetings and seminars organised by the EU with overseas governments at which UK officials from BIS, FCO and HMRC made presentations on the new controls. When the Deputy Foreign Minister handed over the list of brokering transactions to the Committees in May, we believe that he was doing so in the belief that he was handing it to the British Government, albeit indirectly.

However, the Committees are right to question how the Government is to publicise the new controls introduced in April, and how to obtain the cooperation of foreign governments in ensuring that HMG can police the system effectively. With hindsight, we accept that there was scope for this to be done in a more systematic way. As a result, the relevant departments are now in discussion about how this can be achieved. This may involve, as the Committees have highlighted, the use of our diplomatic posts overseas.

On the Committees final recommendation that the list of UK brokers provided by the Ukrainian Government should be investigated, the Government can confirm that the entities named are currently being reviewed to establish whether the activity listed may have been licensable under UK legislation. This involves approaching a number of UK entities, consumers and destination countries. This process is not yet complete. However, we recognise the importance of dealing effectively with unlawful trafficking offences and will keep the Committees informed of progress.

3. We conclude that the Government must now take the initiative and set a deadline for NGOs and industry to bring forward draft proposals for consideration on the further extension of the trade controls on activities by UK persons anywhere in the world to cover other weapons. We recommend that Government reports back to the Committees on progress on this work by the end of October 2009 (Paragraph 36)

The Government has received a proposal from NGOs and industry on the further extension of extra-territorial trade controls. Discussions on the proposal are taking place across Whitehall on that proposal and on a range of other options. We will be consulting Ministers on their preferred approach with a view to responding formally to the NGO/industry proposal by the end of October 2009.

4. We recommend that the Government extend Category B to include anti-vehicle land mines as a matter of priority. (Paragraph 41)

The Government will look again at whether anti-vehicle land mines should be placed into Category B of the trade controls.

5. We recommend that the Government should provide the Committees in its Response to this Report with more information, as previously requested, on the reason why it decided to exclude from the provisions of the draft Export Control Order 2009 UK sub-contractors to a UK concern that provides transport services, on what powers the Government had to seize goods in transit which did not fall within the specified categories, and how often the Government had seized goods under the then existing powers. (Paragraph 46)

The changes the Government made to the trade controls, following the review of export control legislation, were designed to more accurately align the controls to risk. The goods to which trade controls apply were separated into category A, B and C depending on the level of risk associated with them.

Category A goods are the most sensitive and there is little if any legitimate trade in these goods, so it is right that every UK entity involved in the activity should be subject to control. Therefore the legislation provides no exemption for transport providers. This is the same level of control as previously applied to the 'restricted' goods category and similar controls apply to goods being traded to embargoed destinations.

Category C goods are the least sensitive and there is significant legitimate trade in these goods. There are therefore no controls on someone whose sole involvement in the activity is the provision of transport services, unless the goods are going to an embargoed destination. Similar exemptions apply to the sole provision of general promotion/advertising, insurance/re-insurance, and financial services. This is the same level of control as previously applied to the 'controlled' goods category.

Category B is the middle category and contains goods that, on the basis of international consensus, have been identified as being of heightened concern. However it is important to note that there is legitimate trade in these goods and it is therefore necessary to align the degree of control with the risk represented by the activity, bearing in mind the additional burdens imposed on legitimate activities by those controls. In cases where a UK entity trades in Category B goods and then sub-contracts the actual transport of the goods to another UK entity, we did not consider it an appropriate response to the risk to also make the transport provider subject to control because in effect we would have been licensing the same (legitimate) activity twice. Therefore we created an exemption for UK transport providers whose only involvement in the activity is transporting the goods on behalf of another UK entity which is itself subject to the controls. However, a trade licence is still required by a UK entity who arranges the transport of the goods between the source and destination countries (because this is a more significant activity than simply moving the goods), and a licence is required by a UK transport provider who transports Category B goods on behalf of a non-UK trader (because we have not otherwise licensed the activity).

Under the Export Control Order 2008 HM Revenue & Customs can control the transit of goods falling within the scope of the Order utilising powers available in the Customs and Excise Management Act 1979. These include a power to seize goods imported into, or exported from, the UK contrary to a prohibition or restriction as liable to forfeiture. Where seizure occurs, an owner of the goods may appeal within one month of the date of seizure failing which the goods are deemed condemned as forfeit to the Crown. Where an appeal is made the matter is determined by a court.

6. We also recommend that the Government should provide information in its Response to this Report on what practical steps it is taking to simplify transit across various jurisdictions and to ensure that transport providers, and parties to shipments, are aware of the relevant regulations. We further recommend that the Government should specify also in its Response whether, and how often, the list of destinations of concern would change and whether that list of destinations referred to the final destination of the shipment, or all the intermediate destinations along the route. (Paragraph 47)

Following concerns raised by key stakeholders during the review, the Government concluded that controls on transit and transhipment needed to be tightened. The controls were therefore aligned with the new three tier trade control structure, which varied the level of control depending on the risks associated with the goods and destinations. The Government did engage with the transport sector when drafting the new controls and the guidance that accompanied them. In addition other awareness activities were undertaken. The Export Group for Aerospace

& Defence (EGAD) Awareness Sub committee, which comprises both industry and Government representatives, sent a letter to the British International Freight Association (BIFA). The letter highlighted the changes to the controls introduced with The Export Control Order 2008 and offered EGAD's assistance in raising awareness throughout BIFA's membership. EGAD also extended an invitation for a representative of BIFA to attend sub-committee meetings. The Export Control Organisation also organised an awareness seminar for industry specifically on the new trade controls, which included transport and transhipment.

The Government is considering what more can be done to raise awareness of the regulations among transport providers and parties to shipments. A range of existing guidance, including that for the transport industry and for goods transiting and transhipping through the UK, is also being reviewed to see if they can be simplified and improved.

The list of destinations included in Schedule 4 of The Export Control Order 2008 will be reviewed and amended when necessary and in response to a change in situation in countries e.g. an outbreak of conflict. The list applies to the final destination of the shipment. The controls do not apply to intermediate destinations if the goods are merely passing through that country.

With regard to simplifying transit across various jurisdictions Directive 2009/43/EC of the European Parliament and of the Council will simplify terms and conditions of transfers of defence-related products within the Community when it is implemented by Member States.

7. We conclude that the justification remains for the need for an additional element of vetting, whether through a separate system, or by some modification of the electronic export licence processing system. We repeat our recommendation made previously that the Government establish a register of arms brokers, the need for which was further confirmed by the Committee's visit to Ukraine. (Paragraph 51)

As the Government has previously said, we are not opposed in principle to the idea of a pre-licensing registration system under which traders have to be vetted before they can be registered. The Government will be happy to look at this issue again once we have assessed the effectiveness of other initiatives, such as clamping down on those who misuse open licences and focussing our awareness activity on traders. It is right that the Government takes the time to properly assess the effect of these new initiatives, particularly bearing in mind the burden a pre-licensing registration system could impose on legitimate businesses.

However, the Government does not agree with the assertion made by the Committees that a broker's register would have prevented the situation the Committees identified during their visit to Ukraine.

8. We recommend that the Government should provide the Committees in its Response with an update with its progress in pursuing end-use controls on torture equipment through the EU. (Paragraph 54)

The Government is working with the European Commission to take this forward, and has passed to the Commission a draft amendment to the existing Torture Regulation (Reg 1236 of July 2005). At a meeting in Brussels with the Commission in early September, officials confirmed that the draft proposal and text were about to be submitted to Commission Legal Services for consideration. Once the legal opinion is available, it will be clearer how quickly the amendment can be taken forward. However, it is not unreasonable to hope that work will be completed in the course of 2010. The Government will continue to push for early adoption of the proposed revision to the Regulation. We shall keep the Committees informed of progress.

9. We conclude that, despite the Government's view that it considers that non re-export clauses would be an unnecessary burden as they would be difficult to enforce, the requirement to have a non re-export clause in contracts for the supply of controlled goods would send a clear message to both parties to the contract that re-export to certain countries is unacceptable. We recommend that the Government gives further consideration to blocking this demonstrable loophole in its arms export controls regime. (Paragraph 64)

The Government has previously outlined to the Committees its concerns with regard to the enforceability of non re-export clauses and what in practice they would add to the Government's existing powers. Where we believe that goods will be re-exported by the recipient country, we assess the risks associated with that. Any risks posed by the country of ultimate destination or end user will be factored in to our risk assessment of the licence application. We can, and do, refuse applications because of concerns about re-export. We also take account of the effectiveness of the export licensing system of the recipient country as an additional safeguard, as well as that country's adherence to its international commitments and obligations.

However the Government will look again at whether non re-export clauses could be used to good effect in the licensing process, although the Government does not accept that there is a demonstrable loophole in its arms export controls regime.

10. We conclude that we do not agree with the Government's decision not to enhance controls on the exports of UK controlled goods produced under licence overseas and we recommend that the Government should explain in its Response why it came to this decision and whether it will reconsider its policy. (Paragraph 65).

The extent to which licensed overseas production should or should not be controlled featured strongly in the 2007 review. As noted in the Government's responses, it was concluded that there is no convincing case for enhancing controls on the export of controlled goods specifically in relation to licensed production. This is because any export of controlled goods or technology to an overseas Licensed Production Facility requires an export licence. When applying for the licence, the exporter is asked whether the export is for the purposes of overseas production

and is required to give a yes/no answer and to provide further details if applicable. This ensures that any such proposed exports are clearly visible and allows a risk assessment to be made on the basis of two destinations; the initial destination in which the goods will be incorporated or used in production and the onward destination to which the final product will be exported. The Government can, and does, refuse applications because of concerns about where they will be exported from the overseas facility.

There is a stronger case for enhancing controls on the export of non-controlled goods. The cases of overseas production where issues have arisen have all related to goods for military end use in embargoed or other destinations of concern, where the goods were not controlled when exported from the UK. The Government, therefore, considers that the most effective way of tightening controls on the export of non-controlled goods would be through an enhanced Military End-Use Control (see response to recommendation 11).

11. We recommend that the Government report back to the Committees by the end of 2009 with further detail on the discussions that have taken place with industry and a timetable for introduction of its proposals for an amended EU Military End-use Control. (Paragraph 71).

The Government notes the Committees recommendation and will report back by the end of the year.

12. We recommend that the Government ensure that Integrated Project Teams in the Ministry of Defence who deal with UK exporters are fully aware of the regulations surrounding End-User Undertakings. (Paragraph 73)

The relevant internal guidance is being updated by MOD. The original inadvertently included advice to Project Teams which suggested that end-user undertakings were not required between EU Member States. This is not the case in respect of military goods and that reference will be removed from the MOD's Acquisition Operating Framework, pending the updating of the entire section on international business. The revisions will be widely publicised in the MOD.

13. We repeat our recommendation that the Government take steps to demonstrate the effectiveness of the export control system through the commissioning of independent research. (Paragraph 77)

The Government agrees with the Committees' recommendation and is pleased to report that an independent study into compliance levels in the dual-use sector was commissioned and carried out earlier this year. The results of this study will be reported to the Committees and made public in due course.

14. We conclude that the Government's decision to introduce civil penalties for strategic export control is a welcome one and we recommend that the Government inform the Committees by the end of 2009 of the timetable for primary legislation necessary to bring in civil penalties. (Paragraph 85)

The Government notes the Committee's recommendation and will report back by the end of the year.

15. We recommend that the Government aim to publish its 2009 Annual Report on UK Strategic Export Controls by the end of May 2010. (Paragraph 87)

We note the Committees' recommendation and will aim to publish the 2009 Annual Report on UK Strategic Export Controls by the end of May 2010.

16. We conclude that the new Export Control Organisations Reports and Statistics website is an important step towards greater transparency of the work of the Export Control Organisation and we commend the Government for ensuring that the website was launched on schedule. We recommend that the Government publicises more widely the facility both nationally and internationally with the aim of influencing other countries to follow the UK's example. (Paragraph 90)

The Government thanks the Committees for their comments. The development and launch of the Export Control Organisation Reports and Statistics website, on schedule, was an important step and further demonstrates this Government's commitment to transparency and accountability in the operation of the UK's strategic export controls.

The Government has already publicised the website within the export licensing community and on the ECO and BIS websites, and will consider what further steps can be taken to publicising the website more widely, with the aim of influencing other countries to adopt a similar approach.

17. We conclude that the shifting of responsibility for anti-corruption from one Department to another raises questions over whether the Government has the necessary vigorous anti-corruption culture across all Departments to tackle the risk of bribery and corruption engaged in by UK-based companies and individuals. (Paragraph 97)

The Government takes the issue of tackling corruption seriously. International corruption is a multi-faceted problem and several departments co-operate and contribute to tackling this issue.

The anti-corruption champion, Jack Straw, Secretary of State for Justice and Lord Chancellor wrote to the Organisation for Economic Co-operation and Development (OECD) last October committing to develop a comprehensive strategy to combat foreign bribery and strengthen our work with international partners. This strategy is being developed by a cross-Whitehall group of officials and is supported by his anti-corruption secretariat in the Department for Business, Innovation and Skills.

18. We recommend that the Government report back to the Committees by the end of 2009 on how discussions with other EU Member States have progressed towards consensus on a revised EU Code of Conduct on Arms Exports to be adopted as a Common Position. (Paragraph 108)

The Common Position was adopted on 8 December 2008.

19. We recommend that the Government report back to the Committees by the end of 2009 the progress made by the EU Council Working Group on the implementation of the recommendations of the review on EU Council Regulation 1334/2000. In its Response the Government should set out the necessary steps that need to be taken by the EU to implement the recommendations of the review together with the Government's strategy for achieving implementation. (Paragraph 113)

A re-cast of the Regulation on the control of dual-use items (Council Regulation (EC) 428/2009) was adopted by the Council of Ministers on 5 May 2009 and entered into force on 27 August. In line with the EU non-proliferation Strategy and UNSCR 1540, the revised regulation provides a legal basis for Member States to prohibit transit of non-Community listed dual use items in the case of a serious risk of diversion to a WMD programme and for controls on brokering of listed dual-use items for the same purpose. The Regulation also enhances information exchange between Member States and provides for the establishment of a Commission run and funded online systems for sharing denials. Both these latter provisions will assist more consistent implementation of the Regulation throughout the Community. With regard to concerns raised by EGAD about non-compliance and enforcement in the dual-use sector, the Government will share the results and conclusions of our dual-use compliance study (see also 13) with our European partners.

20. We repeat our conclusion that the British Government and the EU should maintain their arms embargo on China, and that the Government should provide us in its Response with an update on its assessment of the human rights situation in China and of the adequacy of the current arms embargo in place. (Paragraph 116)

The EU Council of Ministers has concluded that the arms embargo on China should remain in place. However, it will be kept under regular review. The embargo is defined by most major European exporters to cover lethal weapons only, preventing the sale and export of weapons; ammunition; military aircraft and helicopters; vessels of war; armoured fighting vehicles; and any equipment that might be used for internal repression from EU member states to China. The *EU Common Position on "Common Rules Governing Control of Exports of Military Technology and Equipment"* is the EU's primary means of controlling arms sales to all destinations, including China, and covers the types of equipment and materials that fall outside the scope of the arms embargo.

Looking at the human rights situation in China we conclude that while there has been some progress on social and economic rights, there has been little improvement on civil and political rights. There is no sign that China intends in the near future to ratify the International Covenant on Civil and Political Rights (ICCPR), abolish its systems of administrative detention or provide transparent statistics on the use of the death penalty.

The Government continues to have a regular, structured dialogue with the Chinese on a range of human rights issues, with human rights featuring in political dialogue with the Chinese from the Prime Minister down. Most recently, FCO Minister of State Ivan Lewis visited Tibet to explore at first hand the political, economic, social and cultural situation of Tibetans. Following his visit, he expressed concern over;

culture, language and religious freedom, and voiced the UK's continued opposition to the death penalty. He also took the opportunity his visit afforded to present a case list to the Chinese authorities. To help create the conditions for improvement in human rights in China, the Government has allocated over £1million to human rights projects over the current CSR period (2009-2011).

21. We conclude that the Government is to be commended for its continuing commitment to an international Arms Trade Treaty (ATT). We recommend that the Government continue to seek an ATT that is as strong as possible. We conclude that a successful ATT should be clearly enforceable, have as wide a scope as is achievable, and underline the applicability of international human rights and humanitarian law. We concur with the recommendation of the Foreign Affairs Committee, that if in the future, the Government is forced to choose between giving priority to the strength of the treaty or achieving the widest possible ratification, it should give priority to securing the strongest possible treaty. (Paragraph 122)

We would like to thank the Committee's for their recognition of the UK's commitment to securing a robust international Arms Trade Treaty (ATT). We agree with the Committees' recommendations and conclusions and remain committed to those objectives. Together with our partners in civil society and industry, we will continue to motivate supporters of an ATT, and engage with those states that are sceptical of it, with a view to securing the strongest possible treaty. We will continue to strongly support the UN process towards an ATT, which we hope will result in wide international agreement not only to ratify a strong treaty but also, crucially, to implement it effectively.

22. We conclude that the policy of assessing licences to Sri Lanka on a case-by-case basis is, in our opinion, appropriate. However, we recommend that the Government should review all existing licences relating to Sri Lanka and provide in its Response an assessment of what implications the situation in Sri Lanka will have on how the Foreign and Commonwealth Office judges the possible future use of strategic exports by that country and the risk that the export licensing criteria might be breached. We further recommend that the Government provide in its Response an assessment of what UK supplied weapons, ammunition, parts and components were used by the Sri Lankan armed forces in the recent military actions against the Tamil Tigers. (Paragraph 126)

We note the Committees' conclusion that our policy of assessing licences to Sri Lanka on case-by-case basis is appropriate, and welcome this endorsement of our approach.

On the question of a review of exports to Sri Lanka, the Committees will have seen the letter of 14 October from Ivan Lewis, MP, Minister State at the Foreign and Commonwealth office which gave the Committees an update of our review of UK exports to Sri Lanka, and their possible use by the Sri Lankan armed forces during the recent conflict against the Tamil Tigers. The letter also covered the question of the implications for future exports to Sri Lanka.

23. We conclude that it is regrettable that components supplied by the UK were almost certainly used in a variety of ways by Israeli forces during the recent conflict in Gaza and that the Government should continue to do everything possible to ensure that this does not happen in the future. We conclude that the Government is correct to assess the granting of licences for export on a case-by-case basis and we endorse decisions not to grant a number of licences in relation to Israel. This includes the refusal of licences to supply a variety of components for end-use by Israel since the war in Lebanon in 2006. We further conclude that the Government's review of extant licences relating to Israel is to be welcomed, as is its stated intention of assessing the need to revoke any which should be reconsidered in light of the Gaza conflict. We recommend that the Government keep us informed of the progress of the review, of whether or not the Government chooses to revoke any licences and whether the Government believes that its eventual position has implications for the UK's defence relationships with either the USA or Israel itself, or for the operational capabilities of the UK's armed forces. (Paragraph 132)

The Government notes the Committees' conclusion that a case-by-case basis is the correct approach when assessing the granting of export licences.

Separately, the Government wrote to the Committees on 22 July 2009 with an update on our review of extant licences relating to Israel. There is no evidence to suggest that our decision to revoke certain licences to Israel in light of Operation Cast Lead has had any impact on the UK's defence relationship with either Israel or the United States.

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