

REVIEW OF BALANCE OF COMPETENCES BETWEEN THE EU AND UK STRATEGIC TRADE MANAGEMENT (Military and non-Military)

**Malcolm Russell
Independent Consultant
MRCY Ltd**

1. Executive Summary

Balance of competence: system for Strategic Trade Management

The criteria that comprise the mandatory EU framework for Strategic Trade Management are the result of agreement and consensus across member states. They reflect, and are closely consistent with, the UK's (and other member states') wider international policies and moral outlook, for example on human rights, development, humanitarian issues, stability and security (including human security).

The UK enjoys the reputation of being a very responsible, arms exporting country because it maintains the high standards of control that a regime based on these criteria creates. The UK's position regarding these criteria is not just a government policy but also a perspective shared by Civil Society, including leading humanitarian NGOs and the arms industry, as can be evidenced by the way in which they worked together to promote these very same standards within a global Arms Trade Treaty in recent years. Similar arguments apply to the way in which the UK exercises its wider Strategic Trade Management of dual use items, which can be used for legitimate, peaceful purposes (and play a key role in trade and development) and for the development and delivery of WMD.

The question arises, if the UK were to not subscribe to the areas of EU competence on Strategic Trade Management what would it replace them with? Assuming the UK wished to retain its reputation as a responsible Strategic Trade Management partner and retain consistency with its wider international policies, the Strategic Trade Management criteria it would have to apply could not be much different to those it applies (and has promoted) within the current balance of competence with the EU.

2. Why Exercise Strategic Trade Management?

The UK exercises controls on the export of arms, ammunition, and equipment or technology (tangible and intangible) that can be used for the development of WMD for a range of specific reasons. This includes the self-evident protection of state security (directly and indirectly, for example considering regional and geo-strategic stability). It also includes humanitarian and developmental protection (to prevent repression and to ensure that the level of defence spending is commensurate with real need and overall budgetary resilience particularly in developing countries). In addition, the controls take account of the possibility of diversion: broadly speaking, the capacity, capability or intention of an end-user or transit/transshipment point, to wilfully or negligently allow further proliferation to an unintended end-user.

Expressed from the alternative perspective, the UK exercises Strategic Trade Management controls to ensure that certain items and concepts are only transferred

to end-users that are, following an assessment against specific criteria, deemed to maintain certain agreed standards.

Effective Strategic Trade Management, which includes controls over the transfer of sensitive items and technology, is also a vital part of a state's overall trade programme. Focussing controls effectively only where they are necessary allows better informed and more reliable 'light touch' risk management to be applied to the much larger bulk of a state's external trade on which speedier, less onerous, procedures should be able to be exercised. An effective Strategic Trade Management programme should therefore facilitate the free flow of trade as well as provide a reliable, transparent and comprehensive process to ensure that dual use items are not used for the production or delivery of WMD.

3. The case for harmonized international Strategic Trade Management

The UK is one of many states that produces and exports both military equipment/material and goods/technology that may have dual use. Increasingly, the supply chain for development and manufacture of these categories of material and its underlying technology is global. Interdependence of trade is now embedded within the national and international economic architecture. The common factor for all states is that this architecture needs to be free flowing (to promote trade) and secure (to ensure that military equipment and the material and know-how to develop and deliver WMD does not fall into the wrong hands).

States depend on each other for trade and for security, because all states need trading revenues and all states are vulnerable to the misuse of arms, ammunition and the proliferation of WMD to unauthorised or undesirable end-users. *Within* states it is the national government that decides how to exercise these controls, but *between* states there needs to be a harmonized process where standards are kept as closely aligned as possible to prevent the development of gaps or inconsistencies between control systems that can be exploited by those who seek to gain from diverting or selling this type of material without regard for the consequences.

It is self-evident, therefore, that there are advantages for the UK if it aligns its Strategic Trade Management systems with international standards, and even greater advantages if it is able to promote its own standards and criteria as part of the international norms on Strategic Trade Management controls.

Consider the alternatives. The UK could implement its own control regime without reference to any international criteria, for example by withdrawing from the EU integrated arrangements on Strategic Trade Management. There are two options: to develop a more stringent, wider, or less focussed Strategic Trade Management control system or to develop less stringent controls. This could apply to greater or lesser controls over goods, materials, technology and/or destination/end use. One fundamental point is that the UK would start to lose its influence on the scope and extent of Strategic Trade Management controls and, if the regime adopted were looser than the international standards, would start to lose credibility and trust in its overall trade management processes. This could lead to wider trade controls on exports from the UK due to mistrust of the UK system of controls being adequate to participate freely in the global supply chain market.

If UK controls were exercised without reference to, for example, the system used by its EU trading partners, and became more stringent the impact would be that the UK would find that its partner countries would fill the market gap that would be created. So the UK would end up not controlling the transfers that its stricter control regime

was designed to achieve (because others would provide the supply) but instead losing that aspect of its trade to another state. Under current arrangements with the EU, there is an agreement that one state will not undercut another in this way.

On the other hand, if the UK were to have less stringent controls than its trading partners, while there might be some immediate, short-term, trade successes in exporting materials and concepts that allies will not export, the medium to long term impact would be detrimental because other states would exercise greater controls against the UK due to proliferation concerns. To take this approach would also undermine the UK's wider international policies (eg on humanitarian issues), jeopardise its defence capability (by enhancing threat capability) and reduce its credibility in relation to its trading partners.

The optimum situation, therefore, is for the UK to encourage as many states as possible to adopt the same standards of controls, over the same range of materials as does the UK. This sustains a level playing field for the UK defence industry, creating a reliable supply and sales chain, and creates a robust framework of state to state cooperation that takes account of human rights, humanitarian issues, development, regional stability and a range of other considerations that the UK considers important, when making decisions on arms or strategic trade exports.

For the UK, therefore, it is important that its standards of controls and the range of materials covered by these controls are adopted as consistently and widely as possible.

4. Strategic Trade Management: Military List

The UK decides whether or not to export arms and ammunition but it does so in accordance with international law (for example UN or other arms embargoes) and within an assessment framework comprising criteria that are legally binding on all EU member states. The UK, like other EU member states, can apply additional restrictions on arms exports, but must apply the criteria mandated by the EU Common Position. These criteria, however, are fully compatible with the UK's wider international policies and not taking them into account in considering arms export controls would be inconsistent with these policies.

There are checks and balances within this framework that prevent one EU member state 'undercutting' (that is authorising an export when another state has refused the same export). In principle, this creates a level playing field for the arms exporting industry across Europe and it ensures that all EU member states uphold the same level of export controls over the same list of arms and ammunition, taking account of humanitarian, developmental, security and other considerations.

The UK government, with support from Civil Society and the Defence Industry, has pressed to extend the harmonisation of high levels of arms export controls globally, for example through the Arms Trade Treaty.

Fundamentally, the more states that adopt high standards of arms export controls, the more likely it is that arms will remain within a network of responsible trading. This is because where there are gaps or discrepancies in standards of arms export controls or in the scope of what is covered by arms export controls, there exists the possibility that by chance or design, arms and/or ammunition will leak out of the responsible trading network and into the hands of those who would sell them for profit without caring about the way in which they will be used, for example for repression, torture, crime, or regional destabilisation.

Arms export controls are, therefore, most effective when the same high standards are implemented on the same materials across as wide a range of states as possible.

Conceptually, arms export controls comprise co-operative rather than competitive relationships between states. This means that each state has a greater chance of being able to implement its policies on arms export controls (and therefore its underlying policies on national security and its international position on human rights, humanitarian issues, development and regional stability) if as many as possible other states share the same controls over the same items.

5. Strategic Trade Management: non-Military List

Controls on goods other than military goods, such as dual-use items, fall within the Common Commercial Policy. They are therefore exclusive EU competence and are implemented through directly applicable EU Regulations, which generally contain lists of items subject to control and set out the rules that Member States must apply to trade in those items. They typically contain export prohibitions or, where goods are licensable, provisions specifying when licenses can be granted, the types of licence that may be granted, and requirements for consultation and information exchange between the relevant authorities of the Member States.

The main concern in this category is that some equipment or, increasingly, non-tangible technology, that is necessary for peaceful and legitimate purposes can also be used for the production or delivery of WMD.

In this context, the wide adoption of a common control list (ie the list of items to be subject to control) becomes extremely important both for practical and operational reasons. For the same reasons as identified in the section of this paper dealing with military items, consistency of approach in determining the extent of control, often based in the case of non-military items on end-use, is also very important.

Even though the competence in this area is exclusively that of the EU, the implementation of the controls is carried out by the EU member state in accordance with the directly applicable EU Regulations and member states may add additional safeguards if they so wish.

6. Balance of competence UK/EU: Impact on UK ability independence

One criticism of being part of an EU wide Strategic Trade Management regime is that it prevents the UK acting independently. There are two distinct areas to consider in evaluating this criticism. The first is the degree of flexibility and independence the UK has in *operating within the Strategic Trade Management regime* in which it has shared competence with the EU. The second is to distinguish this from restrictions on strategic trade that are due to conditions that arise and decisions that are taken *outside the Strategic Trade Management control regime*. These are sometimes confused and tough negotiations in the latter are sometimes seen as reasons to be critical of the former.

The recent arms embargo on Syria was an example of the latter case: a decision not to supply arms rather than an assessment of which arms might be sent to which user in Syria. It was therefore a control exercised outside the Strategic Trade Management control system. The end of the arms embargo meant that the complete ban was ended but individual assessments within the Strategic Trade Management controls system would instead be applied.

Within the EU/UK Strategic Trade Management Regime

The UK has competence over arms export controls but operates within an EU wide mandatory and legally binding criteria framework in assessing applications for export licenses for materials and technologies that are included in a military list. This list is also agreed at EU level.

The EU has competence over the export of strategic trade materials and intangibles but the decisions on whether or not to export such material/technology etc remain with the UK. These decisions must be based on (but can also be supplemented by UK's additional requirements) criteria contained in the applicable EU Regulations.

In practice, this leaves the UK (and other European member states) with flexibility of implementation of its strategic trade (military and non-military) controls, and therefore provides a degree of independence for the UK to decide on which items/technologies to export where, and under what conditions within an export control regime.

It could be viewed that this independence is very limited, particularly given the mandatory checks and balances that require reporting of denials across EU members, the transparency of regular reporting of statistics to the EU and the continual close dialogue with other EU member states about export controls in which transparency is regarded as the norm. However, there is another perspective which is important and does in fact make UK controls more effective, both for the UK and for the UK's interests more widely.

Reporting helps prevent undercutting (purposeful and accidental export of an item by another EU member state in identical circumstances to that in which another member state has already denied an export). This helps sustain a level playing field for the UK arms industry with respect to other European arms exporters and helps retain the consistent high standards of controls across the EU that has caused one state (eg the UK) to deny a certain export. Thus UK industry benefits from having both the same high standards of control reliably applied across Europe in processing applications for export licences and from the controls exercised across Europe on undercutting in regard to sales. Responsible exporters find their position enhanced over the longer term while rogue traders find it increasingly difficult to operate as long as the standards and controls are applied as universally and consistently as possible.

The close dialogue that is part of the UK/EU practice in implementing the requirements under the Strategic Trade Management regimes also maintains the political expectation that standards will be kept high. For example, in keeping with each state's wider policies eg on human rights, global stability, and development. In addition, the transparency within the EU through reporting is completely consistent with the UK's general policies of transparency of government through public and Parliamentary reporting.

Controls exercised other than by Strategic Trade Management

The important distinction made at the start of this section of the paper is that controls are sometimes exercised over the trade in certain items and technologies to certain end users other than through Strategic Trade Management systems. This could, for example, include political or legal *embargoes which are in place to prohibit* certain types of strategic trade with certain destination countries. This is not a degree of control, but a prohibition on supply.

It may be considered at first sight that making this distinction is not relevant but the point of the control regime is to consider applications for licenses on a case by case basis as part of a trade in eg arms, with an expectation that a fairly significant percentage of the applications will be permitted. The point of an embargo is to prevent all transfers within the embargoed list to the embargoed location. Therefore if there is an embargo, there is no strategic trade control assessment of individual cases.

Embargoes are, therefore, not part of the Strategic Trade Management regime other than as triggers to prevent a transfer. There is no Strategic Trade Management assessment of materials and technologies that are included in embargoes to an embargoed destination, for example. There is a ban on export, therefore no export license application is considered and the criteria for decision are not applied on a case by case basis as they are for cases considered within the Strategic Trade Management systems.

This is an important distinction to keep in mind when considering the advantages and disadvantages of the current balance of competence in the EU Strategic Trade Management systems. Conflating a political decision, for example the recent debate on whether or not to end an arms embargo on Syria, with the concept of the EU balance of competence on Strategic Trade Management as applied to Syria, gives a false impression of the latter.

Taking this example, as a point in case, the embargo meant that no EU member state would export arms to Syria. Now that the embargo has been lifted, the Strategic Trade Management case by case assessment process will apply to all member states in considering whether or not to export arms to specific end users in Syria.

The UK's efforts to have the arms embargo on Syria lifted should not have been, in themselves, constrained by the UK/EU balance of competence relating to the Strategic Trade Management system. The negotiation on the embargo was not, therefore, constrained by the military and non-military Strategic Trade Management system that is in place. It could actually, in practice, have been the reverse. It may be that those EU member states who were wary of lifting the arms embargo on Syria felt, to some degree, reassured that the UK would, even if the embargo were lifted, apply the EU arms export control criteria robustly to ensure it retained its high reputation for responsible arms transfers. This may have contributed towards their flexibility in allowing the embargo to lapse.

Being part of the EU Strategic Trade Management process may, therefore, arguably, contribute to the UK being able to influence greater flexibility of approach in terms of embargoes.

7. Other Perceived Risks

Controls appear not stringent enough

The UK has flexibility to apply additional criteria or extent of control (and does this in some cases, for example brokering) than its European allies. So the UK should not be unduly concerned about being constrained in applying stringent controls. Being part of a European wide system also gives the opportunity to encourage wider adoption of different standards and extent of scope if the UK feels this is necessary.

However, the question of insufficiently stringent control is often not so much one of *harmonisation policy* but *implementation policy* (covered below).

Another aspect of this perception is the benefit of hindsight. Strategic Trade Management decisions can only be made on the basis of what is known at the time (and what can be reasonably deduced from this in the foreseeable future). New information, or unexpected actions by third parties can alter the situation considerably, sometimes in a short period. Criticism that controls have not, been stringent enough may be right for the wrong reasons. The correct reason may be that insufficient information was available - but this suggests greater sharing of information and wider harmonisation of a control framework, rather than the reverse. But there is always also a resource/time/effectiveness/certainty equation that needs to be considered: how many resources, over how long, should be expended to assess how effective and certainly accurate a strategic trade decision should be. Sharing this resource burden can help.

Controls appear too stringent and inflexible

Often also more to do with implementation than harmonisation as a policy but sometimes also confused with other constraints on the sale of arms. For example recently the arms embargo on Syria was not intrinsically an arms export control policy (which would have allowed consideration of applications for the export of arms on a case by case basis against the agreed criteria and may therefore allow a graded consideration of such exports) but an embargo that prevented all arms sales that fell within the scope of the embargo (which meant that no applications were considered).

Sometimes industry can perceive that controls are exercised too stringently when seen from a business perspective because the wider reasons for denial of export license either have not, or cannot, be made clearer to them. There may, for example, be intelligence or political assessment that a state is diverting material to an undeclared nuclear weapons programme but the source of this information cannot be publicly disclosed. There is already a great deal of outreach and transparency in the system that addresses some aspects of this problem, but individual cases may need more expansive feedback from time to time to supplement this.

The questions of too stringent or not stringent enough are not exclusive to the question of EU/UK balance of competence. Whether the UK or the EU have competence, the question will still of the perception and reality of level of stringency and effectiveness will continue to arise. This debate is not, therefore, directly applicable in assessing the balance of competence between the UK and EU in terms of Strategic Trade Management but may be a factor to consider in terms of its implementation. It is therefore worth assessing whether the balance of competence in Strategic Trade Management impacts on its implementation.

8. Fluctuating Standards of Implementation

Implementation of controls is subject to state interpretation for both military list and non-military list items and technology. Applications for export licences are considered on a case by case basis against the specific criteria mandated by the EU, as well as against UK national and wider international criteria. This includes wider decisions such as sanctions and embargoes that lie outside the Strategic Trade Management controls themselves but which affect whether they should be applied.

As much as possible the UK implementation system, in common with EU partners, is evidence based, but the decision on whether to allow or deny a license, in the end, is a qualitative assessment, a balance of views, based on the information known about the case as considered within the parameters of the mandatory EU criteria and any

national criteria that may also apply. There are checks and balances on outcomes of decisions (eg information sharing, reporting denials of export licensing, end of year reporting, transparency in operation, outreach to both industry and partner countries and so on) but there is still significant scope for the degree to which the EU member states can interpret the evidence and information relevant to each assessment within the criteria established and mandated by the EU as an institution. Thus, the structure of assessment process is mandatory and common to all EU member states, but the actual assessment itself within this framework is the responsibility and authority of each member state. There is, therefore scope for variations in outcomes that reflect national interpretation of information, or national access to information.

With an expanding EU membership and wider, more immediate priorities of economies that need high levels of revenue which could depend on traditional exports, possibly including items subject to control under EU regulations, there will be increasing pressures on standards of implementation. This is not a challenge to the concept of harmonisation of strategic trade control *policy*, but of ensuring continuing consistency of implementation of harmonised controls within a Strategic Trade Management process.

To help address this challenge there needs to be a continuous dialogue with new EU member states and those states which are candidate or aspiring candidate countries, to explain the importance of sustaining high levels of *implementation standards*.

In considering the advantages and disadvantages of the current balance of competence with the EU on Strategic Trade Management there needs to be consideration also of the UK's wider interests in ensuring high standards of Strategic Trade Management controls are exercised by its close neighbour states. If these standards appear to be falling in some areas, the UK can either act (with its EU allies or alone) to try to improve them (existing EU programmes on Outreach already provide some aspects of this) or seek to follow suit in revising the way in which it assesses controls.

The danger of actually introducing, or appearing to introduce, more lenient controls in response to reduced standards of implementation is that it could drive a general reduction in standards of control that would be against the UK's wider trade and security interests. Alternatively, the UK could start to become isolated within a trading community that, in the main, exercised higher control standards. This would have a negative political and trading impact.

Implementation is therefore an important area on which to focus in considering the balance of competence between the UK and EU on Strategic Trade Management. Keeping standards of implementation high would seem more attractive than following any trends for lower standards. To do this, the UK needs to be able to act with legitimacy and effectiveness that being a member of a trading group brings.

9. Another perspective: Strategic Trade within the EU

The EU has maintained pressure to extend its competence on the free market movement of goods between member states but has recognised the wider interests of states in relation to strategic trade items. Directive 2009/43/EC sought to simplify control procedures while retaining this balance. All military controlled items and some highly sensitive dual-use goods (ie those listed on Annex IV of the EU Dual-Use List) need a licence if they are being dispatched to another EU country but the EU encourages member states to use general and global, rather than individual, licences

for intra-Community transfers of defence-related products in an effort to streamline procedures.

The balance of competence in this aspect of the UK's Strategic Trade Management controls are clearly in tension with, on the one hand, the EU's undisputed competence on free trade across the Union and the member state's competence over its defence and security policies acknowledged as sacrosanct.

This could have resulted in continuous stalemate and stagnation but an accommodation has been found within the current balance in which both areas of competence are acknowledged and observed. This could be viewed as a real advantage for the UK because it provides unhindered wide market access for its defence industry to form strategic alliance across the EU, simplifies bureaucratic procedures on routine transfers to trusted partners, but retains the national level right and facility to maintain a Strategic Trade Management control policy in principle and practice within this otherwise free market, albeit within the same parameters as discussed above for non-EU strategic trade control.

The EU has exerted its authority over the export of dual use items to introduce a harmonized process (and licence) for the export of dual use items from any member state to any state outside the EU. Council Regulation (EU) No 1232/2011 introduced six categories of 'Union Licence' and specific criteria for their use. These criteria follow national practice in the main but they provide wide scope of operation, which at the moment is constrained by an additional layer of member state authority.

For example, a company established in one member state may export from that or any other Member State (including the UK) under the authority of an EU GEA providing they comply with its conditions. But it is an additional requirement that the company should also comply with conditions specified by the competent authorities in the member state where it is established and any additional requirements of the member state from whose territory the export takes place. As the balance of competence now stands it provides adequate recourse for the member state to exercise its national authority within the overall framework of a clearly defined area of EU competence.

This is an area in which EU competence has been expanding over recent years but with a robust outcome that provides efficiency of operation across the EU for member states while retaining national authority where it is necessary for the protection of state security interests.

10. Conclusion

Not all decisions made across the EU are favourable in the short-term to every member state. This is true in terms of Strategic Trade Management as it is in other areas of mixed or shared competence activity. In terms of Strategic Trade Management, however, any short-term disadvantage is also almost certain to have a long term advantage because the fundamental criteria that govern such decisions *within the Strategic Trade Management system* reflect so closely UK priorities in wider policy areas. It may be a different route, but the destination and the goal is consistent with, and supporting for, UK objectives.

There are therefore significant advantages for the UK as a state and as an exporter of strategic trade items in being part of a unified, codified and reliable framework of Strategic Trade Management controls. The current balance of competence within the Strategic Trade Management control agenda reflects quite precisely the UK and EU

wider agreed policy and competence balance. It also provides a resilient framework in which the UK can integrate effectively its wider aims and policy stance (eg developmental and human rights) within its policies on Strategic Trade Management. The current balance of competence also provides a consistent framework across Europe against which business can reliably establish complex supply and procurement chains.

The two areas that may need more consideration are those of fluctuating implementation standards across a broadening EU membership and creeping competence within the EU itself.

The former can be mistaken as a function of the *policy* of harmonisation and that too can be a problem. Consistency of implementation within the EU has been addressed to date by close cooperation at the working level and through expectation of high political standards, consistent with wider policy goals as well as by transparency, reporting and co-ordination within the EU by member states themselves as much as through the institutions of the EU. This could be seen as a priority alongside the outreach programmes that the EU runs for both military list items (via COARM) and the Dual Use programme.

Creeping competence claims by the EU institutionally and exercised as part of the internal market are a function of the wider political aspirations of the EU and can only be addressed at this level. But there are legitimate arguments for the freedom of movement of goods claims exercised by the EU claim to competence within the EU, and from the EU to third countries which the UK, as a member state, could find advantageous in competition with other large trading blocs or export markets. It is therefore worth looking at this wider picture before reacting too quickly to signs of creeping competence in this area, while at the same time ensuring protection of vital security interests.

Malcolm Russell
MRCY Ltd
mrc_mr@yahoo.com

London
4 July 2013

About the author:

Malcolm Russell took early retirement from the British Diplomatic Service in March 2010 after more than thirty years as a professional Diplomat focussing on international security issues. Since 2010 he has run an independent consultancy providing advice to government and international organisations on conflict management, governance, political reconciliation, state building and Strategic Trade Management. He undertakes academic research with leading UK Universities and has published work in these areas. Malcolm has been an accredited EU expert in arms export controls and Strategic Trade Management since 2010 and has undertaken numerous overseas Missions on behalf of the EU. Malcolm can be contacted via email: mrc_mr@yahoo.com