DEPARTMENTS FOR DEFENCE, FOREIGN AND COMMONWEALTH AFFAIRS,
INTERNATIONAL DEVELOPMENT, AND TRADE AND INDUSTRY

Reports from the Defence,
Foreign Affairs,
International Development
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The Government's proposals for secondary legislation under the Export Control Act

Response of the Secretaries of State for
Defence, Foreign and Commonwealth Affairs,
International Development, and Trade and Industry

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REPORT FROM THE DEFENCE, FOREIGN AFFAIRS, INTERNATIONAL DEVELOPMENT, AND TRADE AND INDUSTRY COMMITTEES

SESSION 2002-2003

THE GOVERNMENT'S PROPOSALS FOR SECONDARY LEGISLATION UNDER THE EXPORT CONTROL ACT

RESPONSE OF THE SECRETARIES OF STATE FOR DEFENCE, FOREIGN AND COMMONWEALTH AFFAIRS, INTERNATIONAL DEVELOPMENT, AND TRADE AND INDUSTRY

Introduction

(1) We recommend that the Government should keep under close review the operation of the secondary legislation under the Export Control Act. We hope to have the opportunity to submit our views on any future proposals of substance under the Act. (Paragraph 10)

The Export Control Act 2002 has been the most comprehensive review of strategic export controls for over 60 years. The new controls introduced under the Act will be a significant challenge both for industry and Government, and it is therefore entirely appropriate to keep their operation under review. The Cabinet Office guide, 'Better Policy Making: A Guide to Regulatory Impact Assessment,' outlines the Government's commitment to "systematic post-implementation reviews of major pieces of legislation," and accordingly we will review the legislation within 3 years of the new controls coming into force. In line with the guidance, the review will monitor and evaluate the implementation of the new controls, and will examine "the effectiveness of the proposed enforcement regime", and "the extent to which the 'solutions' did actually solve the problem." Collecting reliable data on compliance levels will also be an important element of the review.

We agree with the Committee that it is possible to amend the secondary legislation swiftly, should that prove to be necessary. If any unforeseen problems were to arise before the planned review, we would consider taking corrective action at an earlier stage.

Any future proposals of substance to change the legislation will be subject to formal public consultation in the normal way. The Committee will be informed at the outset of the review and will have the opportunity to comment or conduct an enquiry.

General Considerations

(2) We conclude the effectiveness of the Government's proposals is to be judged by how well they are able in practice to discourage trade in military goods and technology where it is undesirable without also discouraging trade that the Government wishes to promote. An ability to do this depends in the first instance on having reliable methods of distinguishing between legitimate and illegitimate trade (paragraph 23).

The Government is putting in place a system of open general licences which will accommodate trade that can be safely controlled under a general, permissive licensing regime because of the nature of the goods and/or destinations involved. Beyond that, it is difficult to distinguish between legitimate and illegitimate trade in the abstract, and as is currently the case with physical exports from the UK, applications to trade in all items on the Military List will be considered on a case-by-case basis against the consolidated EU and national arms export licensing criteria.

(3) We conclude that a further test of the proposals will be how effectively they can be enforced against those who have no regard for the letter of the law. Only effective enforcement will dissuade such people from involvement in trade in military equipment and technology. (Paragraph 24)

The Government has made clear that it intends to introduce controls that address the perceived gaps in present controls but which are also practicable to administer and enforce. The Government agrees that it is important that enforcement of controls should be as effective as possible, and that penalties should be strong enough to act as a deterrent. Provided that controls can be shown to be capable of enforcement and that offences may attract strong penalties, this will deter prospective offenders.

As such, enforceability has been an important consideration in the framing of the secondary legislation. The maximum penalty for breaking export controls has been increased from 7 years (as it stands under existing legislation) to 10 years. Offences under the new controls relating to trade, technology transfers and technical assistance will carry the same maximum penalty. Most companies will fully intend to comply with the law and the new measures will provide clear direction on unlawful activity.

(4) We conclude that existing controls on exports of military goods from the United Kingdom are not obviously an appropriate template for all of the areas of activity that the Government intends to control through secondary legislation under the Export Control Act. We recommend that the Government should take care to recognise the essential differences between physical exports on the one hand and, on the other, electronic transfers, which are not physical and brokering activities, which are not exports. Different sorts of activity may require different sorts of control. (Paragraph 29)

The Government recognises that electronic transfers and trading activities are different from physical exports in that they do not pass through Customs clearance at a UK port of exit. However the objectives of controlling transfers of strategic technology and goods remain the same and the Government believes that it is better to build on the present export control regime framework, as provided for by the Export Control Act, rather than set up entirely new models of regulation, which themselves would raise a different set of issues. For example the Government does not consider it appropriate to regulate trafficking and brokering as if it were regulating access to a profession, which would require the creation of a wholly new framework of professional standards. The Government does however recognise that some refinements are necessary in respect of the new electronic transfer and trade controls, in particular to the record-keeping requirements, to the documentation submitted in support of licence applications, and to open licence compliance procedures. (See also answer to recommendations 17 and 18.)

Arguments for further control: trafficking and brokering

(5) We conclude that it would be a missed opportunity if the Government failed to regulate all UK citizens and companies who are involved in trafficking and brokering activities abroad which, if conducted in the UK, would not be granted a licence. (Paragraph 48)

The Government accepts that in some cases, extra-territorial controls are appropriate. Under the new controls, any UK person anywhere in the world will need to apply for a licence if they are involved in trafficking and brokering of "Restricted Goods" (equipment that is banned for export from the UK or whose export is very tightly regulated), and in arms to embargoed destinations.

Applications for such licences will be examined on a case-by-case basis, however, licences will not normally be granted for any trade in these types of equipment or to such destinations.

The brokering of WMD goods is already covered under the Anti-Terrorism and Crime and Security Act 2001.

(6) It would be thoroughly desirable to criminalise the activities of a British citizen supplying small arms to rebel forces in an area of conflict, or medium-range missiles to a rogue state. Such activities are precisely those that need to be controlled. Under current Government proposals, they will not be. We recommend that Government should seek to extend extraterritorial control to all trafficking and brokering which, if conducted in the UK, would not be granted a licence. (Paragraph 50)

The new controls will criminalise anyone trading, without a licence, in military equipment from the UK or a UK person anywhere trading in "Restricted Goods" and in arms to embargoed destinations. This latter control should capture many of the circumstances in which arms are transferred to areas of conflict or rogue States.

The extra-territorial controls will apply to all the trade that could be reasonably identified in advance as that which would not generally be granted a licence in the UK. We do not consider it practicable to apply additional large areas of the UK export control regime on an extraterritorial basis. This would be likely to criminalise legitimate business by UK defence companies overseas carried out according to the laws of the appropriate country. It would also be likely to lead to conflicts of jurisdiction where other countries take a different view to us on individual cases, and to enforcement difficulties and administrative overload.

(7) We conclude that there are a number of areas including the illicit trade in small arms and light weapons, in which enough international consensus exists to make extraterritorial jurisdiction in such cases both reasonable and enforceable. (Paragraph 52)

Where international consensus has resulted in embargoes, the Government is committed to extraterritorial controls on trade in small arms and light weapons to those embargoed destinations. The Government will also continue to push for the adoption of new UN or EU embargoes as appropriate when conflict occurs, as this sort of multilateral action is considered to be the most effective way of preventing the supply of arms to regions and conflict zones. The new trade controls that the Government is introducing will contribute to addressing the proliferation of small arms and light weapons.

The Government remains convinced that the most effective way of preventing the illicit trade in small arms is through multi-lateral action. We alone cannot realistically hope to control all exports of military goods arranged and undertaken wholly within other states. To attempt to do so would expose the futility of such a unilateral approach and undermine the credibility of our strategic export and trade control regime as a whole. In accordance with this, the Government is working to achieve agreement on the regulation of the activities of those engaged in brokering in accordance with the UN Programme of Action on Small Arms and Light Weapons agreed in July 2001. In December 2002 the UK was instrumental in securing Best Practice Guidelines in the Exports of SALW in the Wassenaar Arrangement, and in January 2003 the UK brought representatives of 49 arms exporting states and interested organisations to Lancaster House, London, to build consensus on the need for tougher international controls on small arms exports. This initiative was followed up at the Biennial Meeting of States in New York in July 2003 to seek

wider international support for such measures. In addition, the EU Common Position recently agreed (June 2003) on trafficking and brokering, has provided a basis for the framing of national legislation on trafficking and brokering across the EU which will broadly reflect the principles enshrined in our own legislation and help to extend controls multilaterally across the EU.

(8) We conclude that while extending extraterritorial jurisdiction over any aspects of the arms trade will pose practical difficulties, it is not clear that it will be substantially more difficult to enforce this jurisdiction more broadly over undesirable aspects of the arms trade than to enforce it only in those areas to which the Government is already committed. (Paragraph 52)

The Government recognises the great practical difficulties of extra-territorial jurisdiction which is why it has repeatedly stated its intention to focus resources on trade to embargoed destinations and trade in "Restricted Goods". These activities are generally considered to be reprehensible in most countries and this trade could be reasonably identified in advance as that which would not generally be granted a licence in the UK. Extending extra-territorial controls to goods that could receive a licence for export from the UK would spread our licensing and enforcement resources ever more thinly, distracting our efforts from enforcing controls on the activities of greatest concern and in doing so risking seriously undermining the effectiveness and credibility of the new strategic export and trade control regime as a whole.

(9) We recommend that the Government should ensure that transportation agents are brought within the ambit of the secondary legislation in all circumstances in which the undesirable transfer of arms may be involved. (Paragraph 56)

Transportation will be regulated in deals involving "Restricted Goods" for any UK person anywhere in the world, and also in deals involving controlled goods to embargoed destinations. To extend the controls further would mean regulating an overwhelming amount of legitimate freight traffic without adding any further control over the undesirable activity of illegitimate arms dealers.

Arguments for further control Licensed Production Overseas

(10) We recommend that, within two years of its introduction, the Government should assess the effectiveness of the secondary legislation in regulating licensed production facilities, and that it should take steps to introduce direct controls on such facilities if these prove to be warranted in the light of this assessment. (Paragraph 65)

The Government agrees that the effectiveness of the new controls is paramount, and as such will review the operation of the new controls in accordance with legislative best practice as recommended by the Cabinet Office.

The new controls on the electronic transfer of military technology and software to be introduced under the Export Control Act will strengthen our existing control over licensed production facilities. The effectiveness of the new legislation in strengthening control over licensed production overseas will form part of this review.

(11) We conclude that the Government may not have enough information about licensed production facilities abroad to assess the likely impact of these facilities on the proliferation of military equipment. We therefore recommend that the Government should consider requiring further information from British exporters about the licensed production facilities that they intend to establish abroad, and that this information should be used in the assessment of relevant licence applications. (Paragraph 66)

The Government accepts the Committee's recommendation. The Secretary of State for Trade & Industry made clear in her evidence before the Committee that the Government intends to seek additional information from exporters about whether the items to be exported are intended, wholly or in part, to be used in an overseas licensed production facility, and will use this information to assist in the assessment of relevant licence applications. This information will also be sought in connection with trade licence applications.

Minimising the burden on business

(12) We recommend that the Government, in cooperation with industry, should draw up clear guidelines on what transactions will and will not require a licence under the new controls. We further recommend that the Government should seek to ensure through these guidelines, and legislative refinement if necessary, that the number of additional individual licence applications received under the new controls remains within reasonable limits. (Paragraph 75)

The Government fully agrees that issuing clear user guidance on the practical operation of the new controls is essential for industry. The Government is proposing to issue user guidance for industry on the DTI's Export Control Organisation website (www.dti.gov.uk/export.control) at the same time as laying the Orders (currently expected to take place in October 2003). In developing clear user guidance, officials have been working closely with industry and have taken into consideration the responses to the public consultation to clarify the practical operation of the controls and to ensure that user guidance is as clear and helpful as possible. Amongst other things, the guidance will help users identify in principle which transactions are licensable, which licences will be appropriate and at what point applications should be made. It will not be possible to identify definitively every hypothetical situation where a licence may be required, but ECO will continue to offer its ratings advisory service to prospective exporters and traders.

The Government agrees that the number of additional individual licence applications received under the new controls should remain within reasonable limits. The user guidance will set out that existing licences covering physical exports of technology will be extended to cover electronic transfers of the same technology (Individual and Open Licences alike), and will also set out clearly the Government's intention of maximising the use of open licensing where appropriate to reduce any unnecessary burden on industry. The guidance will make clear which Open General Licences will be issued in relation to the new controls.

(13) We conclude that where trade is already subject to robust and principled regulation abroad, it would be superfluous, bureaucratic and potentially anti-competitive to subject UK citizens and companies to the requirements of a second regulatory system. The basis on which the Government proposes to introduce an Open General Trade Licence seems to us to be sound. (Paragraph 78)

The Government welcomes the Committee's support of the proposal to introduce the Open General Trade Control Licence.

(14) We recommend that the Government explain in its response to this Report why it might be appropriate to include a country as a permitted destination on the Open General Export Licence for technology, but not on the Open General Trade Licence, or vice versa. (Paragraph 79)

The permitted (or excluded) destinations found on an Open General Export Licence or Open General Trade Control Licence are determined by the specific activities or goods for which the Open General Export Licence or Open General Trade Control Licence in question is valid, and the risk associated with these activities or the export of these goods. Countries permitted as general destinations and sources under the Open General Trade Control Licence all have robust and long established export control regimes.

(15) We recommend that new EU member states should only be included in the Open General Trade Licence when their export control systems reach a state of robustness comparable to that of existing member states. (Paragraph 80)

The Government agrees that it is important that all countries included on the Open General Trade Control Licence (OGTCL) have robust export control systems. Before any Accession State is eligible to become a Member State, it is required, among other things, to demonstrate such robustness. In order to assist Accession States in achieving this, they now attend regular meetings within the EU, and have been provided with Member States' Code of Conduct denial notification data. This information will enable them to develop an understanding of how we regard specific arms exports.

A more general 'peer review' is currently being discussed in the EU as part of the EU's WMD action plan.

(16) We recommend that the Government should consider how open licensing might be best extended to minimise the regulatory burden on legitimate business, and in particular to ensure that new business is not lost.

The Government accepts this recommendation and has stated its intention to maximise the use of open licensing where appropriate and consistent with the consolidated EU and national arms export licensing criteria, in order to minimise the burden on legitimate industry and to enable it to focus on the areas of most concern. As such a number of new Open General Licences will be introduced under the new controls. For example, in the consultation document the Government proposed the introduction of an Open General Trade Control Licence (OGTCL) covering trade in low-risk equipment between EU countries and countries that have robust and long-developed export control systems that broadly follow the same core principles in the EU Code of Conduct.

In light of consultation responses, the Government is also proposing to introduce open licensing for companies permitting the transfer of specified technology where it is to be accessed from overseas by persons authorised by the exporter to access their intranet site in the UK, for their own personal use and on the condition that it will not be further disseminated. The Government is also proposing to introduce open licensing in support of MOD contracts and of UK armed forces on Operations. In addition, the existing Open General Export Licence (Technology for Military Goods) will be extended to cover electronic transfers of the same technology.

(17) We trust that industry and Government between them can devise a pragmatic system for record keeping which is both sufficient to show compliance and avoids imposing an unreasonable burden on industry. (Paragraph 87)
(18) We recommend that the Government should look again at the record-keeping requirements for intangible transfers and brokering, to ensure that they are relevant to the activities being recorded. (Paragraph 88)

The Government would like to respond to these recommendations together.

The Government has had informal discussions with industry representatives since the public consultation in order to address the strong concerns which had been raised about record-keeping requirements. The requirements are set out below. This will be incorporated into the user guidance which the Department is producing. The Government agrees that the record-keeping requirements should be relevant to the circumstances of intangible transfers and the trade controls, and not impose an unreasonable burden.

Concerning electronic transfers, the requirements for records made under an open general licence are in article 14 of the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order. This article also applies to all other exports under general licence which are subject to the controls in that Order, i.e. to physical goods, military and dual-use, as well as to intangible transfers. The Department decided it was easier to have one set of requirements in the Order rather than different ones depending on the nature of the transfer. The requirements are based on those set out in Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology which already apply in the case of the existing controls on electronic transfers of controlled dual-use technology. The article 14 requirements are sufficiently flexible to apply to intangible transfers because they apply "where appropriate". So for instance a record of "the quantity of goods" would not be appropriate in the case of an intangible transfer.

Specifically, the records which the Department considers it appropriate to keep in respect of intangible transfers made under an open general licence are:-

- a description of the technology sent (type, what it is to be used for)
- to whom it is sent (end user information as well as consignees, including countries involved where possible)
- the period of time the transaction takes place over (start and end dates of the whole transfer)
- any other records which the licence may specifically state

Record-keeping requirements for transfers made under individual licences will be stipulated on the licence but will be similar to the above.

It should be noted that while companies make heavy use of e-mail systems in the normal course of business, the record-keeping requirements relate only to technology that is controlled and therefore licensable, and to the actual transfer of the technology not to extraneous matters such as associated e-mails which may relate to the transfer but do not add to it. Companies will have to ensure they know what technology they are transferring electronically, to whom and what licences are required. In this respect, it is recognised that electronic transfers do not usually pass through the company's export manager who in many companies would arrange for the necessary

paperwork including export licences for physical exports. In this respect record-keeping and compliance is less straightforward. But transfers by e-mails will often be sent as part of a commercial deal or research programme, the contents of which will have been agreed in advance. Thus export control managers will have the opportunity at the time a contract or project is agreed to assess what technology will be transferred by e-mail, what licences are required and to advise employees accordingly.

Furthermore we are not requiring records to be kept of every e-mail to a particular end-user if a transfer takes place over a prolonged period. It is sufficient to identify the technology transferred, and the dates between which it was transferred, and the identity of the end-user.

Concerning record-keeping in respect of trade activities, the requirements in respect of general licences are set out in article 7 of the Trade in Controlled Goods (Control) Order (and similar requirements will be set out on the licence where it is an individual one). The draft of the Order which was attached to the public consultation document required a record of the date on which the controlled goods were supplied. The Government has accepted that this is not appropriate in that the control relates to the activity of trafficking and brokering, i.e. arranging the deal, not the actual transfer. The person carrying out the trading activity may not control the date of shipment. Therefore the Order has been amended to require a record to be kept, amongst other requirements, of the date or period of time over which the trading activity took place. So for example a project manager in the UK who authorises the movements of components between various third countries would have to record the nature of the goods to be transferred and the dates over which the activity took place, but not the precise dates of each shipment of components.

When an exporter receives a visit from a compliance officer, he/she will inspect the records as is done now for tangible exports under open licences. However, in recognition of the different circumstances of technology transfers compared with physical exports, the compliance officer will also advise on systems that the company should, as a matter of best practice, put in place to ensure that employees who may be in a position to make electronic transfers are aware of the licensing situation.

(19) We recommend that the Government should consider licensing transfers of technology by reference to the status of the recipient of the technology rather than merely by reference to their location. (Paragraph 92)

The Export Control Act provides for controls based on the location of the recipient rather than on the status of the recipient. The Government believes that this is a sound approach and that one based on the status of the recipient would in any case give rise to its own set of difficulties, in particular, the exchange of information with company colleagues of a different nationality might require a licence.

In their consultation responses companies also called for such an approach, concerned that under existing proposals they would be liable for inadvertent exports made by their employees, for example if a company employee was to unknowingly open an email containing controlled technology while overseas. The Government is proposing to introduce open licensing which should address this issue.

(20) We recommend that the Government should ensure foreign visitors to the United Kingdom are brought effectively within the scope of the new controls in respect of record keeping as much as this is possible. (Paragraph 96)

Overseas exhibitors and visitors who plan to conduct business that would constitute trade whilst in the UK will need a licence, and will therefore be subject to the same record keeping requirements as if the activity had been undertaken by a UK person.

Overseas visitors to the UK transferring military technology overseas electronically will be caught by the new electronic transfer controls, and will therefore need a licence and be required to keep records of the transaction in the same way as if the transaction had been conducted by a UK person.

An overseas visitor will also be required to apply for a licence before he can transfer, by any means, technology within or from the UK, which he knows or has been informed by Government, is or might be intended for a WMD end-use outside of the EC.

(21) We recognise the great importance of trade fairs to the British defence industry. We conclude that there is a danger that the new regulatory framework will make it difficult for participants at trade fairs in the UK to take advantage of spontaneous business opportunities, and therefore that the Government needs to ensure that its licensing system does not prevent such events from flourishing. We recommend the broadest appropriate use of open licensing for trade fairs, and we further recommend that the Government should consider having a procedure in place at major trade fairs to expedite licence applications made at short notice. (Paragraph 97)

The Government also recognises the importance of trade fairs to the British defence industry and that the new regulatory framework should not place any undue burden on participants at trade fairs. However, it is also concerned not to open up potential loopholes through weaker controls or requirements for attendees at UK trade fairs, and as such it considers it right that overseas exhibitors and visitors who plan to conduct business that would constitute trade whilst in the UK should require a licence to do so. It would be illogical to introduce new controls on trade only to immediately slacken them at precisely the point where trading activity might potentially take place.

Overseas visitors will be able to operate under the Open General Trade Control Licence (OGTCL) for activities covered by the terms of the licence. This OGTCL will facilitate activities between the most common destinations (otherwise foreign visitors would need to apply in advance for an Open Individual Export Licence or a Standard Individual Export Licence). It is important to bear in mind that the trade controls, other than those on Restricted Goods, will only apply to actual dealing and not to speculative marketing and advertising activities.

The Government appreciates that there will be some instances where exhibitors and visitors undertake licensable activities and are unable to use the Open General Trade Control Licence and for which they will not have been able to obtain Open Individual Trade Control Licences or Standard Individual Trade Control Licences in advance. The Export Control Organisation will therefore consider, in consultation with relevant other Government Departments, what special administrative procedures need be put in place to cope with any surge in demand associated with trade fairs. It should however be recognised that the activities taking place at trade fairs are not in themselves special.

(22) We expect to see prior to implementation of the controls a revised Regulatory Impact Assessment, agreed with industry if possible, which more accurately reflects the costs of compliance. (Paragraph 100)

The Government will issue a final RIA when it lays the secondary legislation before Parliament (currently expected to take place in October 2003). The final RIA will take into account industry estimates to the partial RIA (published with the consultation on the draft secondary legislation in January 2003), and also any further or revised estimates put forward by industry in the post-consultation period.

(23) We recommend that the Government should ensure that transitional periods for implementing secondary legislation under the Export Control Act are not unduly protracted, but that it should also consider representations from industry for a modest delay in implementation. (Paragraph 103)

The Government agrees that implementation of the new controls should not be unduly protracted. However these are substantial new controls that will affect every aspect of the modern defence business and as such the Government considers it essential to allow adequate time for industry to prepare for the new controls, to understand them, train staff, apply for licences and put in place new procedures and record keeping systems where necessary. The consultation document proposed implementation periods of 3 months for the new technology transfer controls and 6 months for the trade controls. Responses from industry raised concerns that the proposed 3-month implementation period would not be sufficient. In light of these responses, the Government has increased the implementation period for the technology transfer controls to 6 months, consistent with that proposed for trade.

However, in respect of the new controls on trade to embargoed destinations, the Government considers that the implementation periods should be minimal. These new controls will therefore come into effect in advance of the main Orders.

(24) We conclude that the efficient administration of the new controls will be crucial to their success. We recommend that the Government should ensure that it has sufficient surge capacity to deal with unexpected demand for licence applications and information, especially when the new controls are initially introduced. (Paragraph 106)

The Government agrees that efficient administration of the new controls will be crucial to their success.

Industry will be encouraged to submit licence applications under the new controls as early as possible within the implementation periods so that licence applications can be processed before the new controls come into force. The implementation periods will also be used to train existing staff about the new controls and how to process licence applications under them, and will allow for new staff to be recruited and trained. Furthermore, the Export Control Organisation is adapting its business processes, reorganising and, within resource constraints, recruiting staff to cope with the new controls.

Other concerns

(25) We recommend that the Government should ensure that the secondary legislation does not in any way impede the expeditious provision of support to the British armed forces, those equipping them and servicing that equipment, and their allies in combat and training operation. (Paragraph 110)

The Government agrees that the secondary legislation must not impede the expeditious provision of support to UK armed forces, those equipping them and servicing that equipment, and their allies in combat and training operation.

Under the Export Control Act 2002, and as is currently the case, the Crown will not be bound by the provisions of the Act and therefore, where the Crown owns the goods or technology to be exported/transferred, or has similar rights over their disposal, the company concerned has no requirement for a licence. Instead the company must obtain a letter of Crown immunity from the Directorate of Export Services Policy in MoD confirming the status of the goods. The Government will also be introducing Open General Licences to cover exports in support of UK Armed Forces on Operations in respect of specified destinations. Details of these Open General Licences will be contained in the industry user guidance the Government will publish at the same time the Orders are laid.

(26) We recommend that the Government should explain in its response to this Report whether the provisions as currently drafted on the use and disclosure of information would in any way legally inhibit the Government from providing information to Parliament or its Committees, in confidence or in public. If there is any doubt, the relevant provisions should be extended to include Parliament and its Committees. (Paragraph 112)

The Government understands that this recommendation refers to a provision common to all three draft Orders. In the draft Export of Goods, Transfer of Technology and Provision of Technical Assistance Order it is article 22. This article applies to information which is held by the Secretary of State (or the Commissioners) in connection with the operation of the controls imposed by the Order. Article 22(2) sets out certain circumstances in which the information may be used, provided that use is proportionate (Article 22(3)). Importantly Article 22(5) provides that "Nothing in this article shall be taken to affect any power to disclose information that exists apart from this article". In other words, the provision does not restrict existing powers of disclosure

Consequently the provisions do not in any way inhibit the Government from providing information to Parliament or its Committees.

(27) We conclude that the Government's decision to increase the maximum penalties for the most serious offences under the Export Control Act is welcome. This is fully warranted given the profound impact that the irresponsible proliferation of military equipment has on the lives of countless people. (Paragraph 113)

The Government welcomes the Quadripartite Committee's support that an increase in the maximum penalties for the most serious offences is appropriate.

(28) We recommend that the Government should ensure that it will be able to call companies and organisations to account, as well as individuals, where there is corporate responsibility for an offence. (Paragraph 114)

The offences in the draft Orders are drafted in terms of a 'person'. This includes a legal person as well as a natural person. The Interpretation Act 1978, section 5 and Schedule 1, provides that unless the contrary intention appears, 'person' includes a body of persons, corporate or unincorporated. A corporation is therefore in the same position in relation to criminal liability as a natural person and may be convicted of criminal offences, including those requiring mens rea. Criminal liability of a corporation arises where an offence is committed in the course of the corporation's business by a person in control of its affairs to such a degree that it may fairly be said to think and act through him so that his actions and intent are the actions and intent of the corporation. This person must be the "directing mind and will" of the corporation.

The Government will therefore, on the basis of the draft Orders, be able to call companies, organisations and individuals to account.

(29) We recommend that the Government should ensure that all secondary legislation under the Export Control Act is compliant with the European Convention on Human Rights. (Paragraph 116)

This recommendation states that the Government should ensure that all its secondary legislation under the Export Control Act is compliant with the ECHR. In particular, the Committee is concerned that the burden of proof specified for a number of offences risks being in breach of Article 6 of the Convention in that a reverse burden is created. The first offence quoted by the Committee is that created by Article 3(2) of the draft Embargoed Destination Sanctions Order. The second offence is created by Article 18(1) of the main draft order (Customs powers to require proof of destination).

The Government is grateful for the recommendations made by the Committee. The suggested amendments will be reflected in the orders concerned. The Government will further ensure that all the orders to be made to implement the Export Control Act 2002 are compliant with the Convention.

(30) We recommend that the Government should describe in its response to this Report the steps that it has taken to limit the vulnerability to judicial challenge of the administrative appeals system against licence application refusals. (Paragraph 118)

The Government is satisfied that the internal appeals system will provide an adequate forum for a person who has an application for a licence refused to challenge that decision. Taken together with an applicant's right to challenge a refusal of a licence application by way of an application for judicial review, the internal appeals system satisfies the requirements of Article 6 of the ECHR.

(31) We recommend that the Government should find time for a debate in a Standing Committee of the House of Commons on secondary legislation stemming from the consultation. We also reserve the right to look at the secondary legislation ourselves. (Paragraph 121)

There was extensive debate during the legislative passage of the Bill, and dummy Orders were provided to Parliament in October 2001 (the Act received Royal Assent on 24 July 2002) to assist in Parliament's scrutiny of scope of the powers contained in the Act and the Government was proposing to use those powers. The scope of the Orders has not changed from that time. Most recently, the Government held a full public consultation on the draft Orders to be made under the Act, providing any interested party, including Parliamentarians, with the opportunity to submit their views on the Government's secondary legislation proposals. The oral evidence session before the Committee on 3 April also provided the opportunity for debate on the draft Orders.

Given the extensive public and Parliamentary consultation the Government does therefore not consider it essential to have a debate when the Orders are laid before Parliament.

Conclusion

(32) The Government's proposals for secondary legislation under the Export Control Act are a welcome if overdue series of measures to set the existing licensing regime on a permanent statutory footing and to extend and modernise the strategic export control system.

But there is a loophole in the proposals as they stand. Their central purpose should be to ensure that those who are involved in the trade in arms can only do so legally where their activities are sanctioned by the state. The Government has chosen to regulate British arms traders and brokers located abroad, but only in an incomplete set of limited circumstances. The arm of the law should reach out to British subjects based overseas who are involved in all those aspects of the arms trade which any civilised nation would regard as reprehensible - including the proliferation of small arms. We acknowledge that there are real practical problems in attempting to extend national jurisdiction over actions carried out abroad. In our view they are worth attempting to solve. But it makes no sense to try to solve these problems, as the Government proposes, for oversized handcuffs, but not for small arms.

At the same time, the proposals risk enmeshing legitimate business in a web of unnecessary bureaucracy. To avoid this, open licensing should be widely applied, and record-keeping requirements should rely as much as possible on information that industry would hold regardless of the Government's regulations. The Government should ensure that open licences can easily be suspended or revoked it they are used as cover for reprehensible activities - and ensure that this fact is widely known.

If the Government is serious about making its legislation as effective as possible in preventing undesirable proliferation without putting a brake on legitimate industry, it may have to think outside the box of conventional export controls. The Government should think again about whether intangible technology is best controlled at the moment of export, or at the moment of transfer, and about whether brokering activities which may not involve export at all, might not be best controlled as in the USA, by licensing the people who carry out the activities, rather than the activities themselves. The new regime proposed by the Government looks much like the existing regime on physical exports, but it will regulate activities which are not exports and are not like exports. While the consultation document is a brave attempt to square this circle, perhaps what is needed is another shape altogether. (Paragraph 122-125)

The Government does not believe it appropriate to go back to the drawing board at this stage and devise "another shape altogether" for the controls. The Government accepts that it is inherently more difficult to control non-physical transfers from the UK, and that whatever control regime were adopted, there would be complex problems to solve. The Government also shares the Committee's desire to see undesirable trade eliminated through the new controls, and for as few additional burdens to be placed on industry as possible in the process. This is a difficult balance to strike but we shall strive to ensure the secondary legislation is introduced and operated as smoothly and efficiently as possible.

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