

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

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Why Exercise Controls?

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, to wilfully or negligently allow further proliferation to an unintended end-user.

Expressed from the alternative perspective, the UK exercises export 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.

But the UK is just one of many states that can export these items. It is self-evident, therefore, that if the UK alone adheres to this policy and other states have a less stringent set of criteria, or they apply them to a much smaller range of products or concepts, the UK will lose in sales and not achieve its control objectives. This undermines the UK national security and its humanitarian, developmental and economic policies.

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. To take this approach would 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.

Strategic Trade Controls: 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 not reduce the standards of the provisions within the EU mandated assessment criteria.

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.

Strategic Trade Controls: 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, can be used for peaceful and legitimate purposes and for the production 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 competency 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.

Balance of competency UK/EU: Impact on UK ability independence

One criticism of being part of an EU wide strategic trade control 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 control regime* in which it has shared competency with the EU. The second is to distinguish this from restrictions on strategic trade controls that arise due to conditions that arise and decisions that are taken *outside the strategic trade control regime*. These are sometimes confused and tough negotiations in the latter are sometimes seen as reasons to be critical of the former.

Within the EU/UK Strategic Trade Control Regime

The UK has competency 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, which is also agreed at EU level.

The EU has competency 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.

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

Outside the EU/UK Strategic Trade Control Regime

An important distinction to make at this point is that of decisions taken on strategic trade control licensing *within* the EU/UK controls regime and those taken *outside* the framework of the strategic trade controls regimes. 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, ie 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 controls regime. Strategic trade controls are not applied to materials and technologies that are included in embargoes to an embargoed destination. 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 controls regimes.

For example, the recent case of arms to Syria. An EU wide embargo prevented all arms sales. This is a different condition from consideration of applications for the export of arms to Syria on a case by case basis against the criteria in the EU and UK arms control regimes. Now that the embargo has been lifted, any application to export arms to Syria should be considered within the criteria of the UK/EU arms export controls regime.

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 competency relating to the strategic trade control regimes. The negotiation on the embargo was not, therefore, constrained by these regimes (the military and non-military strategic trade controls). 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 criteria of the arms export control regime 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 control process may, therefore, arguably, contribute to the UK being able to influence greater flexibility of approach in terms of embargoes.

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. But the question of insufficiently stringent control is often not so much one of *harmonisation policy* but *implementation policy* (covered below). Another aspect is hindsight. Strategic trade control 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 controls as a framework to share information, 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.

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 is already a great deal of outreach and transparency in the system that addresses these issues, 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 competency: whether the UK or the EU have competence, the question of how effective and stringent controls are will exist. It therefore may be a mistake to consider stringency and effectiveness as a primary consideration within the competency consideration. These variables are functions of how well a particular system is implemented. Thus the issues within the competency review that reflect on stringency and effectiveness are what system the competency balance gives rise to and the way in which the competency balance affects implementation.

Balance of competences: system for strategic trade controls

The criteria that comprise the mandatory EU framework for strategic trade controls 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.

The question arises, if the UK were to not subscribe to the areas of EU competence on strategic trade controls what would it replace them with. Assuming that the UK wished to retain its reputation as a responsible strategic trade control partner, the criteria it would apply, to be consistent with its wider international obligations and commitments, would be very similar indeed to

those that are included within the areas of EU competence, for example within the Common Position on Arms Export Controls.

Can the UK operate higher/better standards alone?

The real question is whether the UK would really want to implement weaker or tougher controls as a matter of policy (as opposed to implementation - dealt with later). A weaker controls regime, based on fewer or less rigorously worded criteria, would run counter to wider policy (eg human rights, development, governance) and stronger language and wider scope could not only be detrimental to UK trade in arms but also ineffective to implement if attempted in isolation.

There is also the question of whether the UK could implement an effective strategic trade controls regime if it acted independently. As explained earlier in this paper, the UK would find it difficult to be able to implement effectively a complete package of more stringent strategic trade controls than its main trading partners across the EU. No state acting alone can do so because the arms industry is both international and trans-national, operating across and within many states. Even if a state introduces very restrictive controls, if other states do not follow suit, they will quickly become isolated and their restrictions circumvented by others.

Weaker controls would lead to the UK making decisions on arms exports that are not consistent with its high standards in other policy areas, such as developmental or human rights, and it would also lead third countries, with higher standards of control, being much more cautious of engaging in strategic trade with the UK.

The optimum situation, therefore, is to be a leading member of a wider process of strategic trade controls so as to influence the standards and breadth of controls that all member states apply in consideration of strategic trade controls.

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 controls themselves but which affect whether or not they should be applied.

As much as possible the UK implementation system 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 competencies are interpreted into national implementation.

With an expanding EU membership and wider, more immediate priorities of economies that need high levels of revenue and depend on traditional exports that could include items subject to control under EU regulations, there will be increasing pressures on standards of implementation. This is not cause for the UK to reconsider harmonisation of strategic trade control *policy*, but to ensure that it deepens 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*. There are extant EU programmes on Outreach that, at least in part, undertake this activity.

Implementation is an important area on which to focus. The UK arms industry could be disadvantaged if implementation of harmonised policies creates distortions in export licence application decisions across the EU. There could be pressure for the UK to follow-suit and take a more lenient interpretative position, but this would lead to a reduction in standards across the EU as other major arms exporting states would feel obliged to either follow suit or call foul, losing credibility for the UK. And if standards were to drop by this means, the UK would not be acting consistently with its wider policies (eg human rights, development, stability).

Short versus Long Term policy advantages

The short-term perspective of any perceived negative impact of harmonising strategic trade controls across the EU needs to be considered in terms of the longer term implications of not having harmonised strategic trade controls (as outlined earlier). This is particularly true for implementation, as described in the immediately preceding part of this paper. It is a point that could usefully be emphasised if necessary in outreach to new and potential partners.

It is also important to understand where what a perceived disadvantage actually resides. For example, is the perceived disadvantage correctly attributed to the policy of harmonisation of controls, or is it due to implementation variation at the national level?

But 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 controls as it is in other areas of mixed or shared competency activity. In terms of strategic trade controls, 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 control regimes* 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.

Another perspective: Strategic Trade within the EU

The EU has maintained pressure to extend its competency 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 competencies in this aspect of the UK's strategic trade controls are clearly in tension with, on the one hand, the EU's competency on free trade across the Union undisputed and the member state's competency over its defence and security policies acknowledged as sacrosanct. The situation that has evolved with both areas of competency acknowledged and observed 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 right and facility to maintain a strategic trade 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 but which retains national authority where it is necessary for the protection of state security interests.

Conclusion

There are 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 controls. The current balance of competency within the strategic trade control agenda reflects quite precisely the UK and EU wider agreed policy and competence balance. It also provides a resilient framework in the which the UK can integrate effectively its wider aims and policy stance (eg developmental, human rights) within its policies on strategic trade controls. The current balance of competencies provides a consistent framework 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 continuing outreach programmes that the EU runs for both military list items (via COARM) and the Dual Use programme.

Creeping competency 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 competency 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.

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The views expressed in this paper are those of the author based upon his knowledge of the strategic trade control systems in place on the date of this report in the EU and the UK and in the light of his top level analysis from the perspective of a review of the balance of UK/EU competency in this sector.