

The Government's Review of the Balance of Competencies between the UK and the EU.

August 2013

Submission by the Committees on Arms Export Controls, House of Commons

The four House of Commons Select Committees that comprise the Committees on Arms Export Controls (CAEC) are: the Business, Innovation and Skills Committee, the Defence Committee, the Foreign Affairs Committee and the International Development Committee.

The CAEC's task is to scrutinize the UK Government's arms export control procedures and legislation, individual arms export licence decisions, arms export policies, and the UK's role in international arms control agreements.

UK Legislation and Policy

The key items of UK legislation (primary and secondary) and policy on arms exports are:

1. Primary legislation:

Export Control Act 2002. The Export Control Act 2002 was brought into force on 1 May 2004. The Act is the main UK legislation on export controls on military and dual-use goods. The Act replaced the export control powers contained within the Import, Export and Customs Powers (Defence) Act 1939 on strategic export controls and, amongst other things, provided for more transparency and increased Parliamentary accountability.¹

2. Secondary legislation:

The main Order is the ***Export Control Order 2008*** which came into force on 6 April 2009. The Export Control Order 2008 is the main Statutory Instrument secondary legislation, which controls the exports of military and dual-use goods. It consolidated and updated previous legislation in one legal document and provided details of how the legislation would be applied.²

The Export Control Order 2008 was amended in 2010 as follows:

¹ Department for Business, Innovations and Skills, Export Control Act 2002, <https://www.gov.uk/export-control-act-2002>

² Department for Business, Innovations and Skills, Export Control Order 2008, <https://www.gov.uk/export-control-order-2008>

- Export Control (Amendment) Order 2010
- Export Control (Amendment) (No.2) Order 2010
- Export Control (Amendment) (No. 3) Order 2010³

The Export Control Order was amended in 2011 as follows:

- Export Control (Amendment) Order 2011 (S.I. 2011/543)
- Export Control (Amendment) (No. 2) Order 2011 (S.I. 2011/580)
- Export Control (Amendment) (No. 3) order 2011 (S.I. 2011/1127)
- Export Control (Belarus and Syria Amendment) Order 2011 (S.I. 2011/2010)
- Export Control (Syria and Miscellaneous Amendments) Order 2011 (S.I. 2011/1304)
- Export Control (Iran) Order 2011 (S.I. 2011/1297)
- Export Control (Eritrea and Miscellaneous Amendment) Order 2011 (S.I. 2011/1296)
- Export Control (Libya) Order 2011 (S.I. 2011/825)
- Export Control (Somalia) Order 2011 (S.I. 2011/146)
- Export Control (Liberia) Order 2011 (S.I. 2011/145)
- Export Control (Sudan and South Sudan Sanctions) and (Miscellaneous Amendments) Regulations 2011 (S.I. 2011/2925)
- Export Control (Al-Qaida and Taliban Sanctions) Regulations 2011 (S.I. 2011/2649)⁴

The Export Control Order was amended in 2012 as follows:

- Export Control (Syria Sanctions) and (Miscellaneous Amendments) Order 2012 (S.I. 2012/810)
- Export Control (Iran Sanctions) Order 2012 (S.I. 2012/1243)
- Export Control (Syria and Burma Sanctions Amendment) and Miscellaneous revocations) Order 2012 (S.I. 2012/2125)⁵

The Export Control Order has been amended in 2013 so far as follows:

- Export Control (Amendment) Order 2013 (S.I. 2013/428)
- Export Control (Iran Sanctions) (Amendment) Order 2013 (S.I. 2013/340)

3. The UK's Consolidated Criteria

The Consolidated Criteria are the consolidation of the UK's national criteria and the 1998 EU Code of Conduct on Arms Exports. The UK's Consolidated Criteria are reproduced in full in Annex 8 of the Committees' 2013 Report (HC205).

³ United Kingdom Strategic Export Controls Annual Report 2010, HC 1402, pg 5

⁴ United Kingdom Strategic Export Controls Annual Report 2011, HC 337, pgs 5–6

⁵ United Kingdom Strategic Export Controls Annual Report 2012, HC 561, pg 3

4. The policy statement of the Foreign Secretary, William Hague, to the Committees on Arms Export Controls on 7 February 2012

In this statement the Foreign Secretary confirmed that it was still the Government's policy that: "The long-standing British position is clear: We will not issue licences where we judge there is a clear risk that the proposed export might provoke or prolong regional or internal conflicts, or which might be used to facilitate internal repression."

EU Legislation and Policy

The key items of EU legislation and policy on arms exports are:

1. Council Regulation (EC) 428/2009 – known as the Dual-use Regulation

Under the EU Regulation, controlled items may not leave the EU customs territory without an export authorisation. Additional controls are also in place concerning the provision of brokering services for dual-use items and the transit of such items through the EU.

The first EU Regulation for the control of dual-use items and technology was European Council Regulation (EC) 1334/2000, adopted in June 2000. The European Commission presented a proposal to Member States to amend this Regulation in December 2006. Discussions on the re-cast Regulation took place in the Council Dual-Use Working Group and were completed in the first quarter of 2009. Council Regulation (EC) 428/2009 was adopted by the Council of Ministers on 5 May 2009 and entered into force on 27 August 2009.⁶

2. EU Regulation (EU) No 1236/2005 and EU Regulation (EU) No 1352/2011 known together as the Torture Regulation

The EU Regulation on Products used for Capital Punishment and Torture (EC) No. 1236/2005 is the main legal basis for controls on 'torture' goods in the EU. This EU Regulation concerns trade in equipment and products that could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment. The Regulation came into force on 30 July 2006. This Regulation was subsequently amended by

⁶ United Kingdom Strategic Export Controls Annual Report 2009, HC 182, pg 5

Council Regulation (EU) No 1352/2011 on 20 December 2011 to introduce new controls on the export of drugs used for lethal injection purposes.

3. Regulation (EU) 961/2010 - Iran

- Regulation (EU) 961/2010 imposed exports controls on Iran and came into force in 2010.

4. The Intra-Community (ICT) Directive on arms transfers within the EU

The Directive's aims are to simplify the terms and conditions of Intra-Community transfers of defence-related products. The Directive seeks to facilitate significantly certain types of Intra-Community transfers of products listed in the Common Military List of the European Union.

5. The EU Council Common Position (2008/944/CFSP)

The EU Council Common Position defines the common rules applying to all EU Member States governing control of exports of military technology and equipment. The EU Council Common Position (2008/944/CFSP) was adopted in December 2008 and replaced and expanded the 1998 EU Code of Conduct on Arms Exports. The Common Position lays down common Criteria which Member States agree to apply when issuing arms export licences as well as mechanisms of information exchange and consultation. The EU Council Common Position is reproduced in full in Annex 7 of the Committees' 2013 Report (HC 205).

The Committees' answers to the Government's questions

The Committees' answers to each of the 7 questions to which the Government's secretariat have invited the Committees' response are as follows:

Q1. Whether EU action on arms controls is helpful or unhelpful, and what are the advantages and disadvantages of EU action compared to action at a UK national level.

Answer: The EU's Common Position, Directives and Regulations relating to arms export controls are set out above. None of these impose more restrictive controls or policies on UK arms exports than those national controls and policies put in place by successive UK Governments. Without such EU-wide controls and policies, UK arms exporters would be

placed at a competitive disadvantage to arms exporters from other EU Member States who had laxer national controls and policies than those of the UK Government.

Q2. Whether negotiating something like the ATT is better done at national level, or whether the EU could usefully play a bigger role.

Answer: Responsibility for negotiating the Arms Trade Treaty was vested in the UN. The UK played a significant role at official level in the drafting of the Treaty during the Preparatory Committee stage. It is unlikely that the UK could have played such a significant role if, within the EU, the negotiation of the Treaty had been an EU responsibility. So far as the Committees are aware, the EU did not seek to acquire this responsibility during the negotiation of the Arms Trade Treaty. The UK worked with the EU for the proposals it was pursuing. The European Union and its Member States were active throughout the negotiations of the ATT having significant input to the Treaty.

Q3. Whether EU legislation on arms controls generally raises the standard across the EU, or reduces things to the lowest common denominator.

Answer: In a number of EU member States, particularly those who have joined the EU more recently, compliance with the EU Common Position and EU legislation has necessitated the adoption of tighter arms export controls and policies than were previously in place. However, the EU's controls and policies represent a floor and not a ceiling. There is nothing to stop individual EU Member States adopting tighter controls and policies nationally if they so wish. This has indeed been done by successive UK Governments with regard to arms exports and internal repression as stated by the FCO Minister of State, Peter Hain in his Written Answer of 26 October 2000 (HC Deb, 26 October 2000, Cols 199-203W), and by the present Foreign Secretary in his statement to the Committees on 7 February 2012 in which he confirmed that the UK Government would not issue arms export licences "which might be used to facilitate internal repression." This wording is tighter than that in the EU Common Position.

Q4. Whether the UK could have better arms control if it was not bound by EU legislation.

Answer: As stated above there is nothing to stop the UK adopting tighter arms export controls and policies nationally than those prescribed by the EU, and both the previous UK Government and the present Government have done so with regard to arms exports and internal repression.

Q5. Whether it is sensible that UK military list goods are subject to licensing controls to other Members States (and therefore do not benefit from free movement within the single market like other trade goods) or whether it is unnecessary.

Answer: Goods on the Government's Military List and Dual-use List are fundamentally different from other traded goods. They are potentially lethal and are designed accordingly. For the UK Government to have no right to approve either the military goods or the military technology being exported from the UK to other EU Member States, or to approve the bodies or persons to whom they were being exported, would create a significant national security risk as well as making Parliamentary accountability ineffectual.

Q6. Whether the EU action on intra-community transfers (such as the Intra-Community Transfer Directive 2009/43/EC, (6 May 2009) simplifying terms and conditions of transfers of defence-related products within the Community) is helpful.

Answer: The evidence taken by the Committees on the Intra-Community Transfer (ICT) Directive in their most recent Inquiry is set out on pages 104–107 of Volume II of the Committees' 2013 Report (HC 205). It suggests that the ICT Directive is not yet living up to the expectations of UK arms exporters. In their 2013 report the Committees have asked the Government to state how satisfactorily or not the EU ICT Directive is working as far as British companies are concerned.

Q7. Whether the balance of competence between the EU and the UK is right in the area of arms controls, or whether the EU has too much or too little competence.

Answer: The present balance should ensure that the UK arms exporters are not put at a competitive disadvantage by other EU member States operating laxer arms exports controls and policies than those of the UK Government. Equally, the present balance does not prevent the UK Government from adopting tighter controls and policies where it considers it is right and responsible to do so as is the case with regard to arms exports and internal repression. These factors suggest that the present balance of competences is satisfactory for the UK Government and UK arms exporters at the present time.

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